

ACT Government Response

Australian Capital Territory Economic, Social and Cultural Rights Research Project Report

The ACT Government has prepared a response to the independent research report, *Australian Capital Territory Economic, Social and Cultural Rights Research Project Report*.

The Report made 15 recommendations and supported including some economic, social and cultural rights into the *Human Rights Act 2004* (ACT). You can find a copy of the Report and the recommendations at <http://acthra.anu.edu.au/PESCR/Publications/>.

March 2012



ACT
Government

Justice and Community Safety

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Abbreviations List

Civil and political rights	CPR
Economic, social and cultural rights.....	ESCR
<i>Human Rights Act 2004</i>	HRA
Human Rights Commission.....	HRC
Human Rights Unit	HRU
International Covenant on Civil and Political Rights	ICCPR
International Covenant on Economic, Social and Cultural Rights.....	ICESCR
<i>Australian Capital Territory Economic, Social and Cultural Rights Research Project Report</i>	Report

Minister's Foreword

I am pleased to present the Government response to the *Australian Capital Territory Economic, Social and Cultural Rights Research Project Report* (the Report). The Report is the latest step in the ACT's human rights journey.

It is a journey that the ACT should be proud to take. It demonstrates the Government's commitment to human rights, when other States are considering the restricted application of human rights legislation, we are considering ways to further protect our community and advance human rights.

The Report considers the scope of economic, social and cultural rights, particularly the rights of education, housing, health, work and cultural life and the practical implications of including these within the *Human Rights Act 2004*. The Report provided the Government with the in-depth analysis it required to consider the range of options regarding the possible inclusion of economic, social and cultural rights in the ACT.



I tabled the Report in December 2010 and at the time highlighted that it was essential to get community feedback on the possibility of expanding the Human Rights Act. The community consultation ran through July and August 2011, and I am proud to say received a range of considered submissions. The feedback was clear – Canberrans as a whole value human rights and feel that economic, social and cultural rights should be protected and included in the Human Rights Act. I would like to thank all the individuals and organisations that provided feedback through the consultation.

I am delighted to announce that the Government has considered the Report and the community feedback, and have decided to incorporate the right to education in the *Human Rights Act 2004*. The operation of the right to education is well defined and will be considered in two years time as part of the review of the amended Human Rights Act. The review will also consider if it is appropriate to include further rights, or amend the operation of the right.

The decision to incorporate an economic, social and cultural right highlights the Government's ongoing commitment to strengthening the human rights culture in the ACT. It is also a reflection of the ideals that we as Canberrans value and believe need to be protected and enhanced.

I again extend my thanks to the members of the Research Team for the quality work that they have done in preparing this groundbreaking Report. I particularly acknowledge the leadership of Professors Hilary Charlesworth and Andrew Byrnes.

A handwritten signature in black ink, appearing to read 'S. Corbell'. The signature is stylized and fluid, with a long horizontal stroke extending to the right.

Simon Corbell
Attorney-General

Executive Summary

The *Australian Capital Territory Economic, Social and Cultural Rights Research Project Report* (Report) is the first in Australia to comprehensively canvass the available literature and jurisprudence about how best to codify economic, social and cultural rights (ESCR) in statute law and the likely impacts on governance in the ACT. A full extract of the Report and its Recommendations can be found at <http://acthra.anu.edu.au/PESCR/Publications/>.

The Report derives its conclusions and recommendations from academic scholarship and literature, United Nations commentary, policy and legislative experience of legal protection of ESCR in comparable overseas jurisdictions, roundtable discussions between human rights experts, senior ACT Government and community sector officers, and Members of the Legislative Assembly. The ACT Government Solicitor also provided advice on the model bill drafted by the Office of Parliamentary Counsel's Office. Both the model bill and legal advice were released with the Report.

The Report contains 15 recommendations that suggest the *Human Rights Act 2004* (HRA) be amended to include the rights to education, housing, health, work and to take part in cultural life. The Report recommends that these rights operate in the same way as the existing civil and political (CPR) in the HRA. The rights to self determination, intellectual property and protection of family and children are explicitly highlighted as not appropriate for inclusion.

The ACT Government is proud of its human rights record and welcomes the recommendations that aim to strengthen the operation of the HRA. The Government is committed to fostering the human rights culture that currently operates in the ACT.

The Government has decided that including the right to education in the HRA is the appropriate next step to take in the development of the Territory as a human rights jurisdiction. This right is well defined in scope and its correct application falls within the Territory's responsibilities.

An incremental inclusion approach that follows the initial process designed for the original implementation of the HRA will be used. Initially the immediate obligations aspects of the right will become an additional consideration for the Attorney-General when issuing statements of compatibility for bills presented to the Legislative Assembly and the scrutiny function of the Scrutiny of Bills Committee.

Section 30 of the HRA, the general interpretation provision, will extend the operation of the right to education to existing ACT legislation.

Part 5A, which imposes obligations on public authorities, and progressive realisation will not apply to the right to education at this stage.

The Government agrees with the Report findings that the rights to self determination, intellectual property and protection of family and children are not appropriate for inclusion due to a lack of clarity in relation to potential application and jurisdictional considerations.

A review of the amended HRA will be conducted after two years of operation of the HRA with the additional rights to assess the operational impact of the reforms and determine next steps forward to continue fostering the human rights culture within the Territory.

Background

In its 2003 *Towards an ACT Human Rights Act Report*, the ACT Bill of Rights Consultative Committee, chaired by Professor Hilary Charlesworth, recommended that an ACT bill of rights include civil and political rights (CPR) as well as economic, social and cultural rights (ESCR) in order to respect the indivisible nature of human rights. At that time the ACT decided to first introduce civil and political rights and reconsider inclusion of ESCR after assessments of the Act's operation after twelve months and 5 years.

At the time the original human rights bill was debated in November 2003, the then Chief Minister, Mr Jon Stanhope declared 'the object of this bill is to give recognition in legislation to basic rights and freedoms. It is a clear and unequivocal commitment by this Government and by this community about those values that bind us together as a democratic, multicultural and rights-respecting people'.

The *Human Rights Act 2004* (HRA) commenced operation on 1 July 2004 and included CPR such as freedom from discrimination, privacy and reputation and fair trial. In 2008, following the twelve month review of the HRA, the Act was amended to impose a direct obligation on public authorities to comply with human rights and to take human rights into account in decision making.

The Government response to the twelve month review reaffirmed the Government's commitment to consider expanding the HRA to include ESCR. Since that time the Government has worked towards fulfilling this commitment. One of the Government's 2008 election commitments was to 'examine the first 5 years of operation of the Act and consider the question of whether the Human Rights Act should be expanded to provide for the recognition and protection of economic, social and cultural rights.'

In 2009 the Government partnered with the ANU and UNSW to undertake a research project to examine whether the HRA should be amended to include ESCR and, if so, what impact this would have on governance in the ACT. The Project was funded by an Australian Research Council Linkage Grant. The then Department of Justice and Community Safety was an industry partner for the Grant.

The Report, was delivered to the Government in late 2010. The Report made 15 recommendations, the primary recommendation being that ESCR be included in the HRA.

On 9 December 2010 the Attorney-General, Mr Simon Corbell, tabled the Report in the Legislative Assembly, noting that "the question of whether to incorporate economic, social and cultural rights into ACT law is a complex one that raises many issues for all parts of our community, not just Government. These questions will need to be considered in detail by the Government, in consultation with the community."

This response has considered the extensive community feedback received as part of the consultation process. The Justice and Community Safety Directorate approached over 85 community groups and peak bodies from a wide range of sectors to seek submissions on if and how ESCR could be included. Staff members from the Legislation and Policy Branch in the Directorate also attended a number of forums and attended one on one meetings with community organisations that requested additional information on the possible application of ESCR. An online survey received 167 responses to questions surrounding the possible inclusion of ESCR and 32 extended written submissions were received throughout the consultation. A majority of submissions were supportive of the Report recommendations.

The Nature of Economic, Social and Cultural Rights

ESCR are individual human rights that include the rights to:

- self determination,
- non discrimination,
- work,
- social security,
- protection of family and children
- housing,
- health,
- education, and
- take part in cultural life.

These rights are found in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) to which Australia is a party.¹

The *Universal Declaration of Human Rights*, developed by the United Nations in 1948, recognises fundamental human rights that are held to be universal to all human beings and includes both CPR and ESCR. The Declaration affirmed that both sets of rights are interrelated and indivisible.² That is, a person's enjoyment of their CPR is dependent on whether they enjoy their ESCR and vice versa.

However, when human rights were voted and agreed on in the United Nations General Assembly they were divided into two separate categories due to the political sensitivities of the Cold War. CPR are protected in the *International Covenant on Civil and Political Rights 1966* (ICCPR) and ESCR were included in ICESCR.

As the Report explains, Article 2 of ICESCR creates two types of obligations, obligations with immediate effect and obligations that may be progressively realised. Obligations with immediate effect require a government to ensure that the satisfaction of, at least, minimum essential levels of each right is enjoyed without discrimination, and start to take steps towards the ensuring the full enjoyment of ICESCR rights.

Obligations that may be progressively realised with the use of available resources are subject to greater Governmental discretion, although action must still be taken as expeditiously and effectively as possible.

The United Nations High Commission on Human Rights and international jurisprudence have considered 'progress,' as part of progressive realisation, to include strengthening existing underlying policy positions. This includes acknowledging vulnerable groups and maintaining a decision-maker's ability to exercise discretion. It does not necessarily require additional financial resources to be allocated to ESCR policy areas. The doctrine of progressive realisation is not absolute, measures that are retrogressive can still be made, however they must be properly and publically justified.

All obligations are subject to the Government's available resources. Available resources include both financial and human resources, in addition to considerations such as general financial trends. An analysis of the available jurisprudence and literature highlights that both doctrines are subject to a test of reasonableness.

¹ www2.ohchr.org/english/law/cescr.htm

² <http://www.un.org/en/documents/udhr/index.shtml>

Article 4 of ICESCR provides that rights can be limited when necessary to promote the general welfare of a society. This would apply if ESCR were included in the HRA. This is reflected in s 28 of the HRA which sets out the criteria to determine proportionality in regards to human rights limitations.

Justiciability

Traditionally ESCR have been seen as difficult to include in binding pieces of legislation on the basis that courts may be able to influence and dictate the use of state resources when determining questions of Government compliance with such legislation.

The Report extensively considers justiciability and provides examples from countries who have applied ESCR, such as the United Kingdom,³ South Africa⁴ and India⁵. In these jurisdictions, the courts determine the interaction between progressive realisation, available resources and Government compliance using the legal test of reasonableness. The Report suggests that our courts are likely to consider our legislation in a similar way.

Advice received from the ACT Government Solicitor in response to the Report recommendations is that ESCR could be included in the HRA without raising issues of constitutionality in relation to justiciability.

Economic, Social and Cultural Rights in the ACT

Many elements of ESCR are already protected in the ACT and Australia by both Territory and Commonwealth laws.

Examples from the federal system include the right to form and join trade unions, the right to social security, the right of families to protection and assistance and the right to non-discrimination.

Examples from the ACT include the *Education Act 2006* which provides that children's education should be free, and the *Residential Tenancies Act 1997* which states that a person cannot be evicted without a prior hearing at the ACT Civil and Administrative Tribunal. The ACT Human Rights Commission can also accept complaints in relation to health services and services for children and young people (including education services), and complaints of unlawful discrimination in relation to areas of public life including education, housing and health care.

The *Canberra Social Plan* acknowledges ESCR and identifies the provision of housing, health and education services as priorities and goals of the ACT Government.⁶ There are a number of individual policies that support the *Canberra Social Plan* and protect rights in relation to housing, health and access to community services, for example the *Children and Young People with a Disability and their Families* policy.

Existing sections in the HRA have also been interpreted by ACAT and the courts in a way that imports elements of ESCR. For example the rights to equality,⁷ protection of family and children⁸ and fair trial⁹ have all been referred to in relation to housing matters.

³ *Human Rights Act 1998*, which includes the right to education.

⁴ *Constitution of the Republic of South Africa Act 1993*.

⁵ *Constitution of India Act 1950*.

⁶ <http://www.cmd.act.gov.au/policystrategic/socialplan>.

⁷ *Peters v ACT Housing* [2006]ACTRRT 6

⁸ *Commissioner for Housing for the ACT v Allan* [2007] ACTRRT 21

Community Consultation

To ensure an opportunity for ACT residents to provide feedback on the question of whether to include ESCR in the HRA the Government undertook a community consultation between 25 July and 19 August 2011.

To facilitate consultation the Justice and Safety Directorate prepared a background paper which provided information on the scope and potential application of those ESCR identified by the Report as suitable for inclusion in ACT law.¹⁰

The Government widely promoted the consultation by sending letters to all ACT Government Directorates, ACT Civil and Administrative Tribunal (ACAT), the courts, HRC, numerous peak community organisations and key community groups, advising them about the consultation and encouraging them to participate. Information about the consultation was also publicised through a range of media, including ACT Government websites, the *Canberra Times*, *City News*, community mail lists and community radio.

Feedback was collected in a number of ways including an online survey, the establishment of a specific review page on the Justice and Community Safety website and the establishment of an email address that could receive submissions and respond to questions seeking further information on the consultation.

The Government received 167 responses to the online survey and 32 written submissions. Approximately 30 community legal centres and community service organisations participated in the forums held. Discussions were had with community organisations and peak bodies, some conducted by telephone.

A majority of submissions supported the immediate inclusion of all ESCR identified by the Report in the HRA, with only one submission not supporting amending the HRA. Responses to the online survey were more mixed with approximately twenty per cent of respondents questioning the need to include ESCR.¹¹ A summary of feedback from the consultation is available on the Justice and Community Safety Directorate website www.justice.act.gov.au.

The Government appreciates the considered submissions received and thanks the individuals and organisations that contributed to the consultation.

⁹ *Commissioner for Housing in the ACT v Y* [2007]ACTSC 84 and *Canberra Fathers and Children Services Inc & Michael Watson (Residential Tenancies)* [2010] ACAT 74.

¹⁰ A copy of the background paper is available at http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/Background_paper_-_ESCR_community_consultation_-_25_July_2011.pdf.

¹¹ Note that the figure changes on the right in question. The survey asked if including a right in the HRA was a good idea.

Government Response to the Recommendations

Recommendation 1

The *Human Rights Act 2004* (HRA) should be amended to include economic, social and cultural rights (ESCR). A Model Bill, along with a draft Explanatory Statement and Question and Answer memorandum to give effect to these recommendations, can be found at the end of the Report.

The Government agrees with this recommendation in-part. The Government agrees to include the right to education in the HRA, subject to available resources.

The Report states 'it would be possible to select a number of ESCR for inclusion in the HRA, leaving open the possibility of expansion of the list of rights protected in subsequent reviews of the HRA.'¹²

The Government believes that an incremental approach, such as the one identified by the Report, is the best way forward. This approach will mirror the approach taken in 2004 with the introduction of the HRA which ensured that public authorities were fully engaged with the civil and political rights contained within the HRA and confident in their scope and application. The success of this approach provides a best practice model for the introduction of additional rights.

A number of submissions received during public consultation describe how a combination of CPR and ESCR are needed to provide comprehensive rights protection to the most vulnerable in our community. For example, many submissions commented on how the right to vote is severely limited by lack of an education. The Government acknowledges this inherent interaction between categories of rights and is committed to protecting the human rights of everyone within the Territory.

At this time the Government considers that protecting an individual's right to education is essential in order for that person to fully uphold their existing CPR.

The Government considers the right to education the most appropriate to include in the HRA. The right is clearly defined, and as detailed in response to recommendation 2, it is considered that the ACT currently meets its international law requirements and the primary responsibility for applying the right rests with the Territory.

Online survey results clearly show that the three most important rights to people in the ACT are health, education and housing with over 75 per cent of online survey respondents supporting the inclusion of the rights to education in the HRA. This reflects research done by the ACT Human Rights Commission in 2009 which asked respondents if ESCR should be included in the HRA. 82.6 per cent responded positively. 12 per cent were neutral and 5.4 per cent rejected the idea.¹³ This also corresponds with the feedback from the National Human Rights Consultation.¹⁴

¹² Page 128, *Australian Capital Territory Economic, Social and Cultural Rights Research Project Report* available at http://acthra.anu.edu.au/PESCR/Final%20report/Final%20Report%20of%20the%20ACT%20ESCR%20Research%20Project_9%20December%202010.pdf

¹³ [http://www.hrc.act.gov.au/res/ACTHRC%20survey%20-%20human%20rights%20and%20the%20ACT%20community\(1\).pdf](http://www.hrc.act.gov.au/res/ACTHRC%20survey%20-%20human%20rights%20and%20the%20ACT%20community(1).pdf)

¹⁴ National Human Rights Consultation, Commonwealth of Australia 2009. This report is available at <http://www.humanrightsconsultation.gov.au/>

The rights to housing, health, work and to take part in cultural life are not considered appropriate for inclusion at this time. Recommendation 2 provides detailed consideration of the scope and potential application of these rights.

No new resources are necessary for the inclusion of the right to education in the HRA. Additional resources to conduct training and produce tools that assist agencies to understand the scope and application of the new right better may be considered as part of the budget process. If not pursued, it is considered that expanded scrutiny activities are able to be completed within existing resources although it may affect timelines and approach to implementation.

Recommendation 2

The ESCR to be included in the HRA should be based on those rights protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR). These include the following rights:

- the right to housing;
- the right to health, including food, water, social security and a healthy environment;
- the right to education;
- the right to work, including the right to enjoy just and favourable work conditions and the right to form and join work-related organisations; and
- the right to take part in cultural life.

The Government agrees with this recommendation in-part. The Government agrees to include the right to education in the HRA subject to available resources. The Government does not agree to include the rights to housing, health, work or cultural life.

The right to education is well defined both in relation to scope and application within international law. The extensive academic literature and jurisprudence governing the right has allowed the Government to make a considered assessment of the effects of inclusion and a determination of its appropriateness for inclusion.

The Government considers that the Territory meets its international law obligations in regards to the right, and that the right is within the primary jurisdiction of the Territory in terms of service delivery and legislative responsibility.

The Government is proud of the policies and service delivery procedures currently facilitated by the Education Directorate in the Territory, and considers that it has the ability to adapt to the inclusion of ESCR in the HRA and consistently meet its immediate obligations in relation to ICESCR.

The right to education

The right to education is found within Article 13 of ICESCR. The scope of the right is well defined and when included in the HRA will require the Government to provide free, high quality, primary school education to all children living in the Territory. The effect of including this right in the HRA is that the Government has an immediate obligation to satisfy the elements of availability, accessibility, acceptability and quality of education.¹⁵

The Governments notes that inclusion does not mean it has to provide free education to every person in the ACT or provide free books, uniforms and excursions for every student in Government schools.

¹⁵ For information on these elements, please see the the background paper 'Economic, Social and Cultural Rights – A good idea for the ACT? available at http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/Background_paper_-_ESCR_community_consultation_-_25_July_2011.pdf.

Rather, inclusion means that the Government has to continue providing education for all people living in the Territory, and maintaining the high quality of education currently provided, whilst working towards greater accessibility for all levels and forms of education.

The Government currently meets these standards with the *Education Act 2004*. The Education Act provides that every child has the right to receive a high-quality education and that education in Government schools is free. In this respect the ACT does more than is required by ICESCR, as it provides free education for children in primary and high school. The Act also requires the Government to provide reasonable access to public education for every person. This includes all forms of education such as vocational training. Additionally schools must recognise the individual needs of children with disabilities and respond to those needs, unless it would impose unjustifiable hardship on the school.

Under ICESCR limits can be placed on the right to education if they can be justified as reasonable and proportionate. An example of this may be maintaining entry requirements to particular education facilities or expelling a child whose behaviour is a threat to the safety of other children.

Once the HRA is amended to include the right to education, the Government will need to ensure that any bills that engage or limit the right only do so in a manner that is reasonable and proportionate to the underlying policy justification for the limitation. The scrutiny committee will also consider this when commenting on bills. It is anticipated that such assessments will address all the criteria in s 28 of the current HRA. Section 28(1) parallels ICESCR requirements, whilst s 28(2) provides additional guidance by requiring that when deciding whether a limit is reasonable, all relevant factors must be considered, including the following:

- (a) the nature of the right affected;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relationship between the limitation and its purpose;
- (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

The rights to housing, health, work and to take part in cultural life

The Government does not agree that the rights to housing, health, work and to take part in cultural life are appropriate for inclusion in the HRA at this time.

Article 11(1) of the ICESCR requires governments to “recognise the right of everyone to an adequate standard of living for himself and his family including adequate food, clothing and housing, and to the continuous improvement of living conditions.”

Although the immediate obligations of this right have been well defined in General Comment from the United Nations High Commission for Human Rights and in international jurisprudence, the potential scope of this right makes it unsuitable for initial inclusion. While the primary element of the right to an adequate standard of living is considered to be a right to adequate housing, the right has a number of underlying elements that include access to food and clothing. Although the Government is confident that existing policies meet the extended scope of the right, there is considerable overlap between Commonwealth and Territory responsibility in relation to social welfare policies.

The right to health has a broad scope, extending to the underlying determinants of health. Potentially this could bind the Government to consider wide ranging factors such as air and soil quality levels.

Although the Government is confident that it meets international law requirements, the need to monitor and report against the various underlying determinants of health would impose a significant burden on the Territory.

There is considerable overlap between Territory and Commonwealth responsibility in relation to funding and service delivery. The Commonwealth operates Medicare, which is the cornerstone of general practitioner health provision in the Territory, though many general practitioners operate within ACT Health facilities as part of ACT Government supported programs. Further, while the Commonwealth funds services including diagnostic imaging, optometry and pathology, many of these programs are provided by ACT Health professionals.¹⁶ Determining who would be deemed a public authority for the purposes of part 5A of the HRA within a system where funding is provided by a different organisation to that which provides services also raises complex questions of law. There is no clarity in regards to how much funding a service needs to receive to order to qualify under part 5A, or even if this a consideration in cases where a different agency provides the service, as this question has not been considered in the ACT Supreme Court. This creates the potential for a limited scope for application in the ACT as many services receive Commonwealth funding but are operated by the Territory. An absence of clarity in this regard makes it prudent for the Government to avoid possible confusion and overlap of responsibilities.

The right to work is also severely limited by the extent of Commonwealth responsibility for industrial relations under the *Fair Work Act 2009*. This results in limited application of the right within the ACT. This was identified by the Report:

‘A further consideration that may be relevant in the choice of ESCR to include is the extent to which the ACT has the power or responsibility to ensure the protection of specific rights. As a matter of constitutional law and legislative preemption by the Commonwealth, or as a result of the way in which responsibilities are in fact exercised, the ACT may have little power to implement a right, or a relatively small or non-existent area in which to exercise that power. For example, the implementation of the right to social security is largely a matter governed by Commonwealth legislation and programs, and the rights of workers to organise and bargain collectively are also largely covered by Commonwealth law, much of which ‘covers the field’ and displaces State or Territory law. Indeed, the reason for the ACT Consultative Committee’s original exclusion of these rights from its 2003 proposals to include ESCR in the HRA was that these were essentially a matter for the Commonwealth.’¹⁷

The Government considers that the right to partake in cultural life is largely recognised in the current HRA. Section 27 protects the right of ‘anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language.’

Further the rights to work and to take part in cultural life were not identified as priority areas in the online survey responses. Over 30 per cent of respondents were not sure or explicitly did not want the right to take part in cultural life or the right to work included in the HRA.

16 Bagaric, Mirko. and Faris, Peter. and Alexander, Theo. and CCH Australia Limited. Australian human rights law / M Bagaric, Peter Faris and Theo Alexander CCH Australia, Sydney : 2011

17 Op cit, fn 8. Page 129.

Recommendation 3

The following ICESCR rights should not be included in the HRA:

- The right of peoples to self-determination because, as recommended by the ACT Bill of Rights Consultative Committee in 2003, this should await further consultation and discussion, preferably in the context of the five-year review of the HRA;
- The right to intellectual property because of a lack of consensus internationally on its precise scope and content; and
- The right to protection of the family and children because a similar right derived from the International Covenant on Civil and Political Rights (ICCPR) is already recognised in section 11 of the HRA.

The Government agrees with this recommendation.

The rights to self-determination and intellectual property are not appropriate to include within the HRA at present. Both rights are ambiguous in relation to their scope and application within international law. Further, the ACT may not have the jurisdiction to legislate in such matters.

The Government considers the right to protection of family and children adequately protected by s 12 of the current HRA and agrees with the majority of submissions received that there is no need to duplicate the right.

Recommendation 4

The HRA should be amended so that its provisions operate with respect to ESCR in a similar way to its current operation in relation to the civil and political rights (CPR) protected by the HRA. Hence, ESCR should be observed by the legislature and executive, and should be interpreted and enforced by courts. Appropriate drafting of ESCR can ensure that the judiciary's role in implementing ESCR is appropriate in a parliamentary democracy; and that the Government and the Legislative Assembly remain the primary decision-makers for setting economic and social policy priorities.

The Government agrees with this recommendation in-part. The Government agrees to include the right to education in the HRA subject to available resources. The Government does not support full inclusion initially.

The Government is committed to including the right to education in the HRA with the operation of existing scrutiny obligations and general interpretative provision in s 30. Section 28 in its current form will also operate in relation to the additional rights to determine if a proposed limitation in relation to an immediate obligation element is justified in a free and democratic society.

The Government believes that the incremental approach used following the introduction of the HRA in 2004 is the most appropriate way to introduce ESCR, thus the amended Act will exclude the application of part 5A to education at this time. This will not affect the operation of part 5A in relation to the existing CPR rights.

The anticipated operation and interactions between these sections are discussed in the following recommendations.

Recommendation 5

The HRA should recognise two types of obligations in relation to the ESCR. The first are obligations that must be immediately realised. The second are obligations that are subject to progressive realisation. The former broadly comprises obligations not to deprive individuals of their existing access to a relevant ESCR and to ensure that individuals enjoy ESCR without discrimination, while the latter involves obligations to adopt measures that are capable of facilitating the full realisation of the ESCR over time. Both obligations are relevant to the ACT legislature, executive and courts.

The Government agrees with this recommendation in-part. The Government acknowledges the two sets of international law obligations. However, the Government will not initially include the obligation of progressive realisation.

The Government acknowledges that the recognition of two different sets of obligations is endorsed by ICESCR and the UN Committee on Economic, Social and Cultural rights and has been utilised by courts in other jurisdictions that have ESCR enshrined in legislation. However, the Government considers the obligations associated with progressive realisation as correlating with the operation of part 5A. As part 5A will not apply to ESCR initially, the potential inclusion of progressive realisation will be reconsidered in the two year review.

Recommendation 6

The ESCR should apply, like the CPR of the HRA, to legislative procedures; in particular, the provisions of the HRA relating to pre-legislative scrutiny of Bills for consistency with human rights - including the requirement for compatibility statements for Government bills and for the Assembly's Scrutiny Committee to report on the consistency of all bills with human rights – should be expanded to include scrutiny for consistency with ESCR.

The Government agrees with this recommendation.

The Government anticipates that the right to education will operate in conjunction with existing scrutiny obligations in s 37. This will require the Attorney-General to consider when issuing a certificate of compatibility if Government bills engage the right to education. The Legislative Assembly Scrutiny of Bills Committee will also need to consider if bills engage or limit the right to education when undertaking their scrutiny function under s 38 of the HRA. Scrutiny activities will be completed within existing resources. The Government will consider the need for additional resources in light of other Government priorities.

Recommendation 7

ESCR should apply, like the CPR of the HRA, to public authorities under the Act; in particular, existing obligations on public authorities to act in a way that is compatible with human rights (section 40B(1)(a)), and to give proper consideration to a relevant human right when making decisions (section 40B(1)(b)) should be extended to include ESCR. There should also be a direct right of action against public authorities for failure to comply with ESCR. In keeping with this procedure, that the Supreme Court should be empowered to grant any relief it considers appropriate, except damages, for unlawful public authority conduct vis-à-vis ESCR.

The Government notes this recommendation.

The Government believes that an incremental approach is the most appropriate way to introduce ESCR.

Thus the amended Act will exclude the application of part 5A to the right of education. This will not affect the operation of part 5A in relation to the existing rights contained in the HRA.

This approach follows the implementation strategy adopted when the HRA was first introduced and was found to be appropriate in the one year review of the HRA.¹⁸ The direct duty and right of action were not included in the original Act as agencies required time to adapt policies and practices. A similar operational requirement exists in relation to ESCR.

An incremental approach is supported in the HRC submission which states that 'it may be appropriate to have a phased implementation of enforcement mechanisms, with the compatibility statement and legislative scrutiny mechanisms and the interpretive obligation coming into effect prior to the public authority obligations, to allow public authorities to prepare for the incorporation of ESCR into the HRA.'¹⁹ Many submissions supported this view.

Recommendation 8

ESCR should be included as a standard for statutory interpretation in the HRA, in section 30 of the HRA. Hence, the Supreme Court must interpret a provision in a manner that is compatible with ESCR so far as it is possible to do so consistently with the legislation's purpose.

The Government agrees with this recommendation.

The Government anticipates that the general interpretative provision of s 30 will operate in relation to the right to education. This will allow the ACT Supreme Court to consider the immediate obligations associated with ESCR when interpreting other Acts brought before it for consideration. It is anticipated that an analysis of considerations in s 28 will be conducted in relation to any bills that may engage the immediate obligation aspects of the right to education. This follows the incremental approach used in 2004.

The *Five Year Review of the Human Rights Act 2004 Report* acknowledged that 'one of the clearest effects of the HRA has been to improve the quality of law-making in the Territory, to ensure that human rights concerns are given due consideration in the framing of new legislation and policy' and its implementation so far has resulted in 'important advances in the endeavour to ensure the full enjoyment of human rights in the ACT'.²⁰

Recommendation 9

If it is not possible to interpret a legislative provision in a manner that is compatible with ESCR, then the Supreme Court should be empowered to make a declaration of incompatibility (section 32 HRA), which in turn triggers review by the Executive and Legislative Assembly.

The Government agrees with this recommendation.

The Government considers the application of s 32 as an essential component of the dialogue model.

If the Supreme Court is not satisfied under s 30, that the Territory law is consistent with the right to education, a s 32 declaration of incompatibility can be issued. This in turn triggers a review by both the Executive per s 33. This ensures that ESCR included within the HRA will operate in the same way as CPR, excluding the application of part 5A.

¹⁸ <http://acthra.anu.edu.au/publications/index.html>

¹⁹ Page 8, available at http://www.hrc.act.gov.au/res/file/ESCR%20submission_doc.pdf.

²⁰ At paragraph 6 and 7. Available at <http://justice.act.gov.au/publication/view/97>.

The Government considers this an important consideration in light of the community having a working understanding of the HRA and consistency between laws.

Allied to this, further consideration will be given to clarifying the interaction between the reasonable limitations provision in s 28, the interpretative provision in s 30 and the issuing of a declaration if the section in question is found to be incompatible with the HRA.

Recommendation 10

Those aspects of ESCR that are capable of immediate realisation should be subject to the same structures of protection as the CPR currently protected in the HRA. Hence, any limitation of such rights must be justified in terms of the requirements of section 28 of the HRA.

The Government agrees with this recommendation.

As discussed in response to recommendation 2, it is anticipated that s 28, in its current form, will be used when conducting scrutiny activities to determine if a proposed limitation in relation to an immediate obligation element is justified in a free and democratic society.

Recommendation 11

Any failure to meet the obligation to realise ESCR progressively must be justified by reference to (a) the Territory's duty 'to take reasonable measures' (b) 'within its available resources' (c) 'to progressively achieve the full realisation' of the right. This assessment should be assisted by judicial consideration of the following factors:
the availability of resources;
the latitude inherent in a duty to achieve the realisation of the ESCR progressively;
whether the measures are capable of facilitating the realisation of the ESCR;
whether the measures include emergency relief for those whose needs are urgent; and
whether the measures have been effectively made known to the public, including whether affected groups were consulted in their formulation.

The Government notes this recommendation and its relationship to recommendation 5.

As clarified in the response to recommendation 5, the Government does not intend for the doctrine of progressive realisation to operate initially given the incremental approach preferred. The Government considers the obligations associated with progressive realisation as correlating with the operation of part 5A. As part 5A will not apply to ESCR initially included the potential application of progressive realisation will be reconsidered in the two year review.

Recommendation 12

The ACT Supreme Court should be empowered to make a 'declaration of incompatibility by omission' if satisfied that the Territory has failed to take reasonable measures to progressively achieve the full realisation of an ESCR.

The Government notes this recommendation.

As stated in response to recommendations 5 and 11, it is considered the HRA should initially ensure that bills and legislation comply with the immediate obligations of the right to education and that compliance with the doctrine of progressive realisation is a matter to be considered in the two year review.

This incremental approach will allow the Government to adequately assess the practical implications of the amendments.

Recommendation 13

The current requirement for agencies to report on measures taken to respect, protect and promote human rights under the Annual Reports (Government Agencies) Act 2004 should be extended to ESCR. In addition, the Act should be amended to require agencies to report on measures taken to achieve the progressive realisation of ESCR.

The Government agrees with this recommendation in-part. The Government agrees that agencies should consider the right to education in their ongoing annual report obligations. However due to the incremental approach adopted, the Government will not initially require agencies to consider the progressive realisation aspects of the right to education initially.

As the Annual Report Directions refer to 'human rights' it is considered that once included in the HRA, the right to education will be considered within annual report processes.

The *Chief Minister's Annual Reports Directions – 2010-2011 (Annual Report Directions)* provide that agencies must report on implementation strategies and progress in incorporating human rights standards into their operations.

For example, reference must be made to the number and type of education and training sessions on human rights principles provided by agencies to staff, internal dissemination of information to agency staff in relation to human rights issues of concern to that agency, the human rights issues identified as part of the Cabinet submission process, the number of compatibility statements issued in relation to new legislative proposals developed by the agency and a description of any issues that had to be resolved after consultation with the HRU. Agencies are also required to report on human rights issues raised by the existing legislative framework in which they operate, including the process for identifying any necessary legislative amendments and, if no reviews have been undertaken, the reasons for not reviewing legislation.

Agencies are required to provide a timetable for future human rights review and identify any cases before courts or tribunals which have involved arguments concerning the HRA. These measures exist to provide a cross-Government indication of how well human rights standards have been incorporated into directorate operations, as stipulated by the annual report directions.²¹

The existing Annual Report Directions are broad in ambit and provide an adequate existing framework for each agency to develop internal procedures, policies and management practices which are human rights compliant, but adapted to the agencies' own organisational culture.

This recommendation will be implemented within existing resources. Additional resources for engaging agencies with the additional rights, their scope and application, will be considered in upcoming budget processes against Government priorities.

²¹ <http://www.legislation.act.gov.au/ni/2011-311/current/pdf/2011-311.pdf> at 41-43.

Recommendation 14

The Attorney-General should conduct a review of the operation of the proposed amendments and present a report of the review to the Legislative Assembly not later than five years after their commencement. The review should also consider whether other human rights should be included in the HRA.

The Government agrees with this recommendation in-part. The Government will conduct a review after two years of operation of the amended HRA.

The review will assess the initial measures adopted, including the operation of the scrutiny functions and interpretative role of the Court. It will also consider whether additional rights should be included and whether part 5A should be extended to incorporate any additional ESCR in the HRA.

The Government acknowledges that a five year review may be helpful in addition to the two year review, if following the earlier review, further amendments are made to the HRA.

Recommendation 15

Further consideration should be given to enabling the ACT Human Rights Commission to investigate and conciliate individual complaints regarding breaches of ESCR, as well as CPR, by a public authority.

The Government does not support this recommendation.

As extensively commented on in the Government Response to *The Human Rights Act 2004 (ACT): First Five Years of Operation*, the Government does not support conferring a human rights complaint handling function on the ACT Human Rights Commissioner and Discrimination Commissioner. There would be increased resourcing demands associated with extended functions and the risk of duplicating existing complaints handling roles across ACT agencies.²²

²² Please see the response to Recommendation 17 on page 26. The Response is available at www.justice.act.gov.au.