

2007

THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY

HUMAN RIGHTS AMENDMENT BILL 2007

EXPLANATORY STATEMENT

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Overview

The Human Rights Amendment Bill 2007 amends the *Human Rights Act 2004* to:

- clarify the interpretive rules so that a human rights consistent interpretation must prevail as far as is possible consistent with the purpose of underlying legislation;
- clarify the reasonable limits clause by setting out an inclusive list of factors to be considered in determining whether a limit on a right is reasonable;
- provide a direct right of action flowing from a duty on public authorities to comply with human rights; and
- expand the obligation to give notice to the Attorney General and the Human Rights Commission to all legal proceedings in the Supreme Court in which interpretation of the HRA is to be argued.

These amendments are in line with the recommendations of the 12-Month Review of the *Human Rights Act 2004*, which was tabled in the Legislative Assembly in August 2006, and aim to improve the operation of the Act and its accessibility to the ACT Community.

Detail

Clause 1 Name of Act

Clause 1 is a technical clause and sets out the name of the proposed Act as the *Human Rights Amendment Act 2007*.

Clause 2 Commencement

Clause 2 states that clauses 7, 8 and 9 of the Act commence on 1 January 2009. The reason for delayed commencement is to allow adequate time for all agencies to conduct audits and training in relation to the duty on public authorities and the direct right of action.

The other provisions of the Act commence on the day after the Act is notified on the Legislation Register.

Clause 3 Legislation amended

Clause 3 states the Act amends the *Human Rights Act 2004*.

Clause 4 Human rights may be limited New sub-section 28 (2)

New sub-section 28(2) provides specific guidance on the range of relevant factors that must be taken into account when assessing whether a limitation on a human right is reasonable and justified.

These factors include the nature of the right; the purpose, importance, nature and extent of the limitation; the rationality of the relationship between the limitation and

its purpose; and any less restrictive means that might reasonably be available to achieve the purpose of the limitation.

Section 28(2) is modelled on Section 7 of the Victorian *Charter of Human Rights and Responsibilities Act 2006* and section 36 of the Bill of Rights in the *Constitution of the Republic of South Africa 1996*. Its intention is to provide guidance in the application of the general limitation clause in section 28(1) and to reduce its uncertainty.

The general limitation clause in section 28(1) and the list of relevant factors in section 28(2) reflect what is known as the ‘proportionality test’. The concept of proportionality as the means of determining how and when human rights may be limited is a well accepted principle in international law and comparable human rights jurisdictions – see, for example, General Comment No 22 by the United Nations Human Rights Committee; in the context of the European Court of Human Rights, see *Handyside v United Kingdom* (1978-1979) 1 EHRR 737; under the United Kingdom *Human Rights Act 1998*, see *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491, *Brown v Stott* [2001] 2 WLR 817, *R v A (No.2)*; in Canada, see *R. v Oakes* [1986] 1 S.C.R. 103; and in New Zealand, see *Noort v MOT* [1992] 3 NZLR 260 (CA).

Clause 5 Interpretation of laws and human rights Sub-section 30(1) and (2)

Clause 5 replaces the existing interpretative provision in the *Human Rights Act 2004*. It clarifies the interaction between the interpretive rule and the purposive rule such that as far as it is possible a human rights consistent interpretation is to be taken to all provisions in Territory laws. This means that unless the law is intended to operate in a way that is inconsistent with the right in question, the interpretation that is most consistent with human rights must prevail. This is consistent with the Victorian approach contained in subsection 32(1) of the *Charter of Human Rights and Responsibilities Act 2006*. It also draws on jurisprudence from the United Kingdom such as the case of *Ghaidan v Godin-Mendoza* (2004) 2 AC 557 cited recently by the ACT Supreme Court in *Kingsley’s Chicken Pty Limited v Queensland Investment Corporation and Canberra Centre Investments Pty Limited* [2006] ACTCA 9.

Clause 6 Section 34

Clause 6 replaces the existing notice provision in the *Human Rights Act 2004*.

New section 34 extends the notice provision such that it matches with the Attorney General’s and the Human Rights Commissioner’s right to intervene.

Where the Territory is not a party, the Supreme Court is required to ensure that notice is given in relation to any question that arises in a proceeding that involves the application of the *Human Rights Act 2004*. The Supreme Court is required to stay the proceedings until it is satisfied that notice has been given to the Attorney and the Commission and a reasonable time has passed for both the Attorney and the

Commissioner to decide whether to intervene. The Supreme Court may direct a party to the proceeding to give notice to the Attorney and the Commission.

It is also a precondition to the exercise of the power to make a declaration of incompatibility that the Supreme Court is satisfied that notice of the issue has been given to the Attorney General and the Commission; and they have been given a reasonable amount of time to decide whether or not to intervene.

Despite the requirement to stay the proceedings the Court may continue to hear any part of the proceeding that is severable from those matters involving the application of the *Human Rights Act 2004*. The Court may also without delay hear and determine proceedings, so far as they relate to the grant of urgent relief of an interlocutory nature, where the Court thinks it necessary in the interests of justice to do so.

Clause 7 New part 5A

Section 40

Section 40 defines public authority for the purposes of the *Human Rights Act 2004*. The definition includes both core or pure public authorities and functional public authorities. Those entities that are core or pure public authorities are listed in paragraphs (a) to (g) and are administrative units, territory authorities, territory instrumentalities, Ministers, public employees, and police officers when they are exercising a power under Territory law.

Paragraph (g) describes functional public authorities which are those entities that exercise functions of a public nature when they are exercising those functions for the Territory or another public authority. Direction as to the meaning of ‘function of a public nature’ is provided in section 40A.

Paragraph 40(2)(a) provides that the Legislative Assembly is not a public authority, other than when they are acting in an administrative capacity. This is to ensure the Assembly retains the broadest possible power to make laws for the peace, order and good government of the Territory.

Paragraph 40(2)(b) provides that courts, other than when they are performing administrative functions, are not public authorities. This avoids conflict with High Court jurisprudence suggesting that Australia has one unified common law.

Section 40A

Section 40A provides an inclusive definition of function of a public nature. This definition is in two parts. These two parts provide guidance about two different aspects of the question of what makes a function a function of a public nature. The first part contained in subsection (1) focuses on the nature of the relationship between a function of an entity and the Territory. The second part contained in subsection (3) focuses on the kind of function an entity is performing.

Subsection (1) sets out a non-exhaustive list of factors that the court should consider in determining whether a function is a function of a public nature. These factors draw on those adopted by Victoria in their *Charter of Human Rights and Responsibilities Act 2006* and reflect jurisprudence and commentary in other human rights jurisdictions such as the United Kingdom. They are intended to provide guidance to courts and tribunals on the meaning of function of a public nature.

The factors that may be considered in deciding whether a function of an entity is a function of a public nature are:

- Whether the function is conferred on the entity under a Territory law;
- Whether the function is connected to or generally identified with functions of government;
- Whether the function is of a regulatory nature;
- Whether the entity is publicly funded to perform the function; and
- Whether the entity performing the function is a company (within the meaning of the *Corporations Act 2001*) the majority of the shares in which are held by or for the Territory

Subsection (3) provides a non-exhaustive list of functions that are taken to be functions of a public nature. Any entity that is performing any of these functions is a public authority when it is performing that function. Those functions that are taken to be functions of a public nature are:

- The operation of detention places and correctional centres
- The provision of any of the following services:
 - Water supply;
 - Gas;
 - Electricity;
 - Emergency services;
 - Public health services;
 - Public education;
 - Public transport; and
 - Public housing

Section 40B Public authorities must act consistently with human rights

Section 40B creates a duty on public authorities to act consistently with human rights.

Sub-section 40B(1) makes it unlawful for public authorities to act in a way that is incompatible with human rights. It also makes it unlawful for public authorities to fail to give proper consideration to relevant human rights when making a decision.

The Dictionary defines ‘act’ to include a failure to act and a proposal to act.

Sub-section 40B(1) is modelled on section 38 of the Victorian *Charter of Human Rights and Responsibilities Act 2006* and section 6 of the United Kingdom *Human Rights Act 1998*. It is intended to ensure that public authorities act and make decisions compatibly with human rights. An action that affects a protected right will be compatible with human rights where the extent to which that right is affected is justifiable in accordance with section 28 of the *Human Rights Act 2004*.

Sub-section 40B(2) sets out the circumstances in which the duty to act consistently with human rights does not apply. It is not unlawful for public authorities to act in a way that is incompatible with human rights, if:

- as the result of one or more provisions of a Territory law or a Commonwealth law in force in the Territory, the public authority could not have acted differently or made a different decision. In other words, the public authority was expressly directed in legislation to act in a particular way; or
- The public authority was acting so as to give effect to or enforce one or more provisions of a Territory law that cannot be read or given effect in a way that is compatible with human rights. In other words, the public authority was acting in accordance with a Territory law that was incapable of being interpreted consistently with human rights. There is no obligation on public authorities to interpret Commonwealth laws consistently with human rights.

Sub-section 40B(2) is intended to exonerate public authorities who act to give effect to a Territory law which requires the public authority to act incompatibly with human rights or where a Territory law cannot be read or given effect in a way which is compatible with human rights. It also is intended to exonerate public authorities who are obliged to act in accordance with a Commonwealth law.

Sub-section 40B(3) confirms that a public authority includes entities not otherwise covered by the duty on public authorities but who have chosen to voluntarily adopt the duty to act consistently with human rights in accordance with section 40D.

Section 40C Legal proceedings in relation to public authority actions

Section 40C provides guidance regarding legal proceedings that may be available in relation to an unlawful act or decision of a public authority.

The Dictionary defines ‘act’ to include a failure to act and a proposal to act.

Paragraph 40C(2)(a) creates a direct right of action in the Supreme Court. A victim of an unlawful act by a public authority may institute proceedings against the public authority in the Supreme Court.

Paragraph 40C(2)(b) provides that a victim of an unlawful act by a public authority may also rely on human rights as part of any other legal proceeding in a court or tribunal. This may include, for example, in an action brought against a public authority under the *Administrative Decisions (Judicial Review) Act 1989*, or an order in a civil or criminal proceeding, a stay of proceedings or exclusion of evidence.

Sub-section 40C(2) is modeled on section 7 of the United Kingdom *Human Rights Act 1998*. It is intended to enable victims of unlawful acts by public authorities to rely on human rights in legal proceedings in courts and tribunals or to institute an independent cause of action in the Supreme Court.

For the purposes of the Act, a victim is a person who is directly affected or who is at risk of being directly affected by the act in question. A victim must be a natural person. It may also be relatives of the victim where a complaint is made about his/her death, see for example: *Guillermo Ignacio Dermit Barbato et al. V. Uruguay*, Communication No. 84/1981, U.N. Doc. CCPR/C/OP/2 at 112 (1990); *Moriana Hernandez Valentini de Bazzano v. Uruguay*, Communication No. 5/1977 (15 August 1979), U.N. Doc. CCPR/C/OP/1 at 40 (1984); *Lucia Sala de Touron v. Uruguay*, Communication No. 32/1978 (31 March 1981), U.N. Doc. CCPR/C/OP/1 at 61 (1984). A corporation or a public authority cannot be a victim.

Sub-section 40C(3) provides that a proceeding which is brought under paragraph 40C(2)(a) must be brought within one year (or less) of the date on which the act complained of took place. That period can be extended by the Court if it considers it is fair to do so in the circumstances.

Sub-section 40C(4) provides that the Court may grant such relief it considers appropriate in relation to the unlawful act, except for damages. However, sub-section 40C(5) makes clear that if the same conduct is independently unlawful and compensable, this section does not take away that right to damages.

Paragraph 40C(5)(a) makes clear that nothing in this section restricts any existing rights that a person might have to seek a remedy in respect of an act or decision of a public authority.

Paragraph 40C(5)(b) confirms that nothing in this section affects any right a person may have to damages apart from the operation of this section. The note explains that nothing in this section restricts the right to compensation that arises under section 18(7) and section 23 of the *Human Rights Act 2004*.

Sub-section 40C(6) confirms that a public authority includes entities not otherwise covered by the duty on public authorities but who have chosen to voluntarily adopt the duty to act consistently with human rights in accordance with section 40D.

Section 40D

Section 40D provides an opportunity for entities, not otherwise covered by the duty on public authorities, to 'opt in' to the duty to act in compliance with human rights. Entities that choose to will be able to write to the Minister who must then make a declaration that the entity is a public authority for the purposes of the duty on public authorities and the right of action against public authorities. Such a declaration is a notifiable instrument. Entities subject of a declaration may request that it be revoked. The Minister must comply with such a request.

The option to 'opt in' is aimed at promoting a meaningful dialogue within the community about human rights. It is intended to promote cultural change by developing a 'rights consciousness' within the Territory in line with the preamble to the *Human Rights Act 2004*:

This Act encourages individuals to see themselves, and each other, as the holders of rights, and as responsible for upholding the human rights of others.

The option to ‘opt in’ recognises that the private sector can and does make important contributions to the well-being of society. The private sector is already required to act lawfully in regard to occupational health and safety, equal opportunity and similar obligations. Encouraging broader, voluntary compliance with human rights standards is a natural progression in the process of ensuring the best possible outcomes for Canberrans.

This provision will be unique to the ACT, however, it draws on the increasing international recognition and acceptance that the private sector should be encouraged to respect and promote human rights. There are many international examples of this increasing recognition and acceptance:

- *The UN Global Compact* is a voluntary programme, which seeks to engage businesses on issues of international human rights, labour rights and environmental standards. The Global Compact comprises ten principles all derived from UN instruments. The first principle asks businesses ‘to support and respect the protection of international human rights within their sphere of influence’. The second is to ‘make sure that they are not complicit in human rights abuses’. Businesses are asked to enact the ten principles in their individual corporate practices and by supporting appropriate public policies. As at January 2007, there were over 3,800 participants, including 30 participants in Australia.
- *The OECD Guidelines for Multinational Enterprises* are voluntary recommendations to businesses, which adhering States, including Australia, are committed to promoting. The Guidelines recommend that businesses ‘respect the human rights of those affected by their activities, consistent with the host government’s international obligations and commitments’.
- *The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* is endorsed by States as well as by employers’ and workers’ organisations. The Declaration states that all parties, including businesses, ‘should respect the Universal Declaration of Human Rights and the corresponding international Covenants’.
- *UN Sub-Commission Norms on the Responsibilities of Transnational Corporations and other Business Enterprises*: The Norms are a comprehensive statement of human rights standards applicable to businesses from the Universal Declaration of Human Rights and the principal human rights treaties.

Clause 8 Dictionary, note 2, new dot point

Clause 8 inserts a reference in note 2 to the definition of emergency service which is contained in part 1 of the dictionary in the *Legislation Act 2001*.

Clause 9 Dictionary, new definitions

Clause 9 inserts a definition of act for the purposes of part 5A the obligation on public authorities. It also inserts references to the definition of function of a public nature contained in section 40A and public authority contained in section 40.