

2003

**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

HUMAN RIGHTS BILL 2003

EXPLANATORY STATEMENT

Circulated by authority of the
Attorney General
Mr Jon Stanhope MLA

HUMAN RIGHTS BILL 2003

This explanatory statement relates to the Human Rights Bill 2003 as introduced into the Legislative Assembly.

Overview of Bill

The main purpose of this Bill is to recognise fundamental civil and political rights in Territory law. In particular, the Bill ensures that, to the maximum extent possible, all Territory statutes and statutory instruments are interpreted in a way that respects and protects the human rights set out in Part 3 of the Bill.

The Bill also promotes respect for and protection of human rights in the development of new law and increases transparency about the consideration of human rights in parliamentary procedures.

The Bill amends the *Annual Reports (Government Agencies) Act 1995*, the *Discrimination Act 1991* and the *Legislation Act 2001*.

Notes on Clauses

PREAMBLE

The Preamble explains the broader objects that the Bill seeks to achieve and the context in which the Bill is to be interpreted.

PART 1 PRELIMINARY

Clause 1 Name of Act

The Bill, once enacted, will be known as the Human Rights Act 2003.

Clause 2 Commencement

The Act will commence on 1 July 2004.

Clause 3 Dictionary

The dictionary at the end of Act is part of the Act.

Clause 4 Notes

This clause explains that notes included in the Act are for an explanatory purpose only and do not form part of the Act.

PART 2 HUMAN RIGHTS

Part 2 sets out important concepts concerning human rights in the Act.

Clause 5 What are human rights?

Clause 5 provides that for the purposes of this Act human rights means the civil and political rights set out in Part 3.

Clause 6 Who has human rights?

Clause 6 provides that only individuals have human rights. It clarifies that only natural persons and not other legal entities are entitled to the enjoyment of civil and political rights. This provision applies regardless of whether an individual is an Australian citizen or not.

This clause does not preclude a group of individuals from having a question of law relating to the human rights set out in the Act dealt with in any proceedings before a court or tribunal. Whether an individual or group of individuals has a cause of action or otherwise has standing before a court or tribunal is not affected by this Act.

Clause 7 Rights apart from this Act

Clause 7 recognises that the Bill does not give recognition to all of the rights that an individual may have under domestic or international law. The purpose of this clause is to ensure the Act is not misused for the purpose of limiting a right a person may have on the basis that the right is not recognised in this Bill or is recognised to a lesser extent.

For example, if a right under an international treaty is a relevant consideration for the purpose of administrative decision-making, this Act does not operate to make that right irrelevant because it is not expressed in this Act.

PART 3 CIVIL AND POLITICAL RIGHTS

Part 3 sets out the civil and political rights recognised by the Act and provides that rights may be subject to certain limitations.

Clauses 8 to 27 Civil and political rights

Clauses 8 to 27 give express recognition to certain civil and political rights enshrined in international human rights law. The primary source of these rights is the International Covenant on Civil and Political Rights (the Covenant). Schedule 1 provides a cross reference of Part 3 rights to the relevant article of the Covenant.

In some cases the rights appear in a different order to that of the Covenant. This is to provide a more logical sequence to the order in which the rights appear.

The rights are generally expressed in the same terms as the Covenant except where some adjustments to language were necessary to improve the drafting or to clarify the application of a right in the context of the Territory. For example, the right to life is expressed to apply only to a person from the time of birth. This is expressed in clear terms to avoid doubt about how the right to life applies in the Territory.

In some instances a right has been omitted because it is not appropriate to the ACT as a territory under the authority of the Commonwealth. For example, the right to self-determination is not recognised by this Bill. This is because under international law the right to self-determination is a collective right of peoples. It is not an individual human right and is not ‘justiciable’ before the UN Human Rights Committee. Also, self-determination has both external and internal aspects and is still evolving in international law.

The Bill does not incorporate Article 2 of the Covenant because the Bill is not intended to create a new right to a new remedy for an alleged violation of a Part 3 right.

This Bill recognises that civil and political rights have been expressed in the core human rights treaties and customary international law. These sources are relevant for the purpose of interpreting the scope and application of a Part 3 right. For example, the International Covenant on Civil and Political Rights and the European Convention on Human Rights and Fundamental Freedoms were drafted to elaborate and implement the principles of the 1948 Universal Declaration of Human Rights. See Part 4 below.

Clause 28 Human rights may be limited

The purpose of clause 28 is to recognise that few rights are absolute and limits may be placed on rights and freedoms. It provides one standard against which to measure justifications for limits on human rights. However, it is not intended that clause 28 will operate in a uniform way in relation to all the rights expressed in Part 3. Some rights are absolute and distinguishable from non-absolute rights. The right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment (clause 10 (1)) is an example of a right that is not subject to any limitation.

The intention is to achieve coherence between the rights recognised in Part 3 and civil and political rights recognised in international human rights law. It is not intended that a Part 3 right will be subject to any greater limitation beyond those expressed in the Covenant. Whether a limitation is reasonable in respect of a person(s) in a special legal position will fall for determination in each individual case.

Clause 28 requires that the limit must be authorised by a Territory statute or statutory instrument. The limitation must also be reasonable and one that can be demonstrably justified in a free and democratic society. Whether a limit is reasonable depends upon whether it is proportionate to achieve a legitimate aim. Proportionality requires that the limitation be:

- necessary and rationally connected to the objective;
- the least restrictive in order to accomplish the object; and
- not have a disproportionately severe effect on the person to whom it applies.

PART 4 APPLICATION OF HUMAN RIGHTS TO TERRITORY LAWS

Part 4 deals with how the human rights set out in Part 3 are to be applied to Territory statutes and statutory instruments. It also contains provisions concerning the power of the Supreme Court to issue a Declaration of Incompatibility and rights of intervention of the Attorney General and the Human Rights Commissioner.

Clause 29 Application of part 4

Clause 29 applies the provisions of Part 4 to all Territory laws. Territory laws are defined to mean all Territory statutes and statutory instruments. This Bill does not

expressly apply to the common law although it may influence the development of the common law.

Clause 30 Interpretation of laws and human rights

Clause 30 (1) introduces a new rule of statutory construction. The purpose of clause 30 (1) is to recognise, to the maximum extent possible, the human rights set out in Part 3 in all other Territory statutes and statutory instruments. This rule requires that when working out the meaning of a Territory statute or statutory instrument an interpretation that is consistent with human rights must be applied in preference to any other interpretation.

Clause 30(1) is subject to the purposive rule of construction set out in subclause 139 (1) of the *Legislation Act 2001*. Subclause 139(1) requires that Territory laws must be interpreted in a way that best achieves the purpose of the Act. Consequently, the interpretation most beneficial to human rights will best achieve the purpose of the Bill.

Where there is a choice between two interpretations and both interpretations best achieve the purpose of the statute or statutory instrument, the interpretation that is consistent with human rights must prevail.

Clause 30 (2) clarifies that if an interpretation that is consistent with human rights would have the affect of defeating the obvious purpose of the statute or statutory instrument the interpretation that is consistent with human rights will not prevail.

The effect of clause 30 is that the courts, tribunals, decision makers and others authorised to act by a Territory statute or statutory instrument must take account of human rights when interpreting the law. A statutory discretion must be exercised consistently with human rights unless legislation intends to authorise administrative action regardless of the human right

Clause 31 Interpretation of human rights

Clause 31 enables the court, tribunal or person interpreting a Territory law to have regard to international law and jurisprudence relevant to a human right.

The civil and political rights set out in Part 3 are universal and fundamental in nature. These rights are expressed in numerous international and regional human rights instruments. They have been incorporated in national Bills of Rights and been subject to extensive interpretation at the international, regional and national level.

International law is defined in Article 38(1) of the Statute of the International Court of Justice to include international conventions; international custom as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; and judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law. The opinions, decisions, views and judgments of the UN Human Rights Committee and European Court of Human Rights are particularly relevant.

Clause 31 does not bind those interpreting the law to have recourse to these materials or make the interpretations of international or foreign courts or tribunals binding.

However, it is the clear intention of the Bill that the interpretation of human rights is to be as coherent with internationally accepted standards as possible.

Clause 32 Declaration of incompatibility

Clause 32 (1) provides the Supreme Court with the power to issue a declaration of incompatibility if the Court is satisfied that a Territory law is not consistent with a human right. The power is only exercisable if the issue is raised for consideration during a proceeding being heard by the court.

The purpose of the declaration is to draw to the attention of the Government and the Assembly a finding of incompatibility by the Court. This is an essential element in the interpretive and dialogue model upon which the Bill is based. To achieve this purpose clause 32 (2) requires that if the court makes a declaration of incompatibility the registrar of the court must promptly give a copy of the declaration to the Attorney General.

Clause 32(3) provides that a declaration of incompatibility does not affect the validity, operation or enforcement of the law or the rights or obligations of anyone.

Clause 33 Attorney General's action on receiving declaration of incompatibility

Clause 33 applies if the Attorney General receives a copy of a declaration of incompatibility. Clause 33 (2) imposes an obligation upon the Attorney General to present a copy of the declaration to the Legislative Assembly within six sitting days after the day the Attorney General receives the copy. Clause 33 (3) requires the Attorney General to prepare a written response to the declaration and present it to the Legislative Assembly within six months of the day the declaration is presented. This clause does not bind the Government or the Assembly to amend the law in question.

Clause 34 Notice to Attorney General

Clause 34 only applies if the Supreme Court is considering making a declaration of incompatibility. The effect of this clause is to make it a precondition to the exercise of the power to make a declaration of incompatibility that the Supreme Court is satisfied that:

- (a) notice of the issue has been given to the Attorney General; and
- (b) he or she has a reasonable amount of time to decide whether or not to intervene.

The provision only applies where the Territory is not already a party to the proceeding. The Supreme Court may direct a party to give notice of the issue to the Attorney General.

Clause 34 is modelled on Clause 78B of *Judiciary Act 1903* (Cth).

Clause 35 Attorney General's right to intervene on human rights

Clause 35 provides the Attorney General with an unqualified right to intervene in proceedings before a court and certain tribunals that involve the application of the

Human Rights Act. Whether the Attorney General exercises the right to intervene is a matter for his or her discretion.

Clause 36 Human Rights Commissioner’s right to intervene on human rights

Clause 36 provides the Human Rights Commissioner with a qualified right to intervene in proceedings before a court and certain tribunals that involve the application of the Human Rights Act.

This right is exercisable subject to the leave of the court or tribunal. The court or tribunal has the discretion to grant leave to intervene subject to conditions. Whether the Human Rights Commissioner exercises the right to apply to a court or tribunal for leave to intervene is a matter for his or her discretion.

The purpose of clause 36 is to ensure that there is independent advocacy in relation to the interpretation and application of the Human Rights Act.

PART 5 SCRUTINY OF PROPOSED TERRITORY LAWS

Clause 37 Attorney General’s statement on government bills

The main purpose of clause 37 is to create a statutory requirement that the Attorney General form an opinion on the compatibility of Government Bills with Part 3 rights.

Clause 37 (1) limits the application of clause 37 to each Government Bill. Clause 37 has no application to Government amendments to a Bill once the Bill is presented. Nor does it apply to non-government Bills or non-government amendments.

The effect of clauses 37 (2) and (3) is to make it a statutory requirement that the Attorney General prepare a written statement of his opinion on whether the Bill is consistent with Part 3 rights. If the Bill is not consistent with human rights the statement must explain how it is not consistent with human rights. The statement is to be known as the compatibility statement and it must be presented to the Assembly. The manner in which the statement is presented is a matter for the Government to determine.

Clause 38 Consideration of bills by standing committee of Assembly

Clause 38 provides that a standing committee, appointed by the Speaker or the standing committee responsible for consideration of legal issues, is to report to the Legislative Assembly about human rights issues raised by Bills presented to the Assembly.

Clause 39 Non compliance with s 37 and s 38

The effect of clause 39 is to ensure that the validity, operation or enforcement of a Territory law is not affected if clauses 38 or 39 are not complied with.

PART 6 HUMAN RIGHTS COMMISSIONER

Clause 40 Human rights commissioner

Clause 40 establishes the office of the Human Rights Commissioner and declares that the Discrimination Commissioner is to be the Human Rights Commissioner.

Clause 41 Human rights commissioner's functions

Clause 41 (1) sets out the functions of the Human Rights Commissioner. The functions are to:

- (a) review the effect of Territory laws, including the common law, on human rights, and report to the Attorney General on the results of the review;
- (b) to provide education about human rights and the Human Rights Act; and
- (c) to advise the Attorney General on anything relevant to the operation of the Human Rights Act.

Clause 41(2) provides that the human rights commissioner has any other function given to him or her under any other Territory law.

PART 7 MISCELLANEOUS

Clause 42 Regulation making power

Clause 42 provides that the Executive has the power to make regulations for the Act. For example, it might be necessary to widen the definition of court in relation to the Attorney General's right of intervention.

Clause 43 Review of Act

Clause 43 imposes an obligation on the Attorney General to review the operation of the Act and present a report to the Assembly by 1 July 2009. This does not preclude any review or proposals for amendment that might be made before that date.

Clause 44 Legislation amendment –sch 2

Clause 44 provides that the Bill makes consequential amendments to a number of related Acts. The amendments are set out in Schedule 2.

SCHEDULE 2 CONSEQUENTIAL AMENDMENTS

Part 2.1 Annual Reports (Government Agencies) Act 1995

Part 2.1 amends the *Annual Reports (Government Agencies) Act 1995* in the following way:

[2.1] inserts new section 7 (2A) to require each administrative unit to report on measures, if any, taken to protect and promote human rights.

[2.2] requires that the subsections to section 7 be renumbered when the Act is republished.

[2.3] inserts new section 8(2A) to require each public authority to report on measures, if any, taken to protect and promote human rights. This section does not apply to a statutory office holder declared to be a public authority under section 4A.

[2.4] requires that the subsection to section 8 be renumbered when the Act is republished.

Part 2.2 Discrimination Act 1991

[2.5] amends section 112 (f) of the *Discrimination Act 1991* to extend the functions of the Discrimination Commissioner to functions conferred by the *Human Rights Act 2003* or another Territory law.

Part 2.3 Legislation Act 2001

[2.6] amends section 19 (4) (f) and inserts new subsection 19 (4)(g) to the *Legislation Act 2001* to include materials relevant to interpreting the rights set out in the Human Rights Act including the documents mentioned in that Act, dictionary, definition of international law.

[2.7] inserts a new note at the end of section 139(2) of the *Legislation Act 2001* to clarify that clause 30 (1) is also relevant to interpreting Territory laws.