



HUMAN RIGHTS &
DISCRIMINATION COMMISSIONER

ACT Human Rights Commission

Introduction to the *Human Rights Act 2004*

E-learning Background

Human Rights under the Human Rights Act 2004 (ACT)

- Recognition & equality before the law (s 8)
- Right to Life (from birth onwards) (s 9)
- Protection from torture & cruel, inhuman or degrading treatment or punishment (s 10)
- Protection of family and children (s 11)
- Privacy and reputation (s 12)
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Rights in Detail

Extracted from the ACT Justice and Community Safety Publication – ‘Human Rights Act 2004: A Plain English Guide’ available at <http://www.justice.act.gov.au/publication/view/94>

- **Recognition and equality before the law and equal protection of the law**

Section 8 of the HRA brings together a number of equality provisions which are intended to ensure that everyone in the Territory is given equal respect, recognition and protection by the law, regardless of such factors as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability, sexual orientation or other status. Section 8 imports the international law concept of equality, which requires equality in fact as well as formal equality in law - substantive rather than just formal equality.

Equality before the law refers to the requirement for equal treatment by decision makers and courts and tribunals. Equal protection of the law requires that when the government decides to legislate in a particular area that it does so without discrimination.

Not all differential treatment constitutes unlawful discrimination. The standard in section 8 is not infringed by such treatment provided it is based on objective and rational criteria and is intended to achieve a legitimate outcome. For example, a programme to meet the particular needs of a group of people may be necessary to ensure those people enjoy the same benefits or life chances as others. This would be an example where different treatment is not unlawful discrimination because it is aimed at achieving equality in substance. The notion of substantive equality is different to a ‘special measure’, which is generally limited in time. Substantive equality recognises that some people have characteristics, which are permanent and can only be addressed by recognising those fundamental differences.

- **Right to life**

The right to life is primarily concerned with preventing arbitrary deprivations of life of those already born. An action or decision that is taken to end someone’s life must be clearly established by law, and subject to proper legal process. The criminal law protects the right to life by making murder a serious criminal offence but also recognises that the taking of life may be excused in some circumstances such as self-defence.

The right to life has also been interpreted to include an obligation to protect a person’s life where it is known or ought to be known that the person is at risk of harm. This obligation applies where, for example, a person is in care of the state in a prison or mental health facility. It also requires effective investigations of deaths in custody and is relevant to coronial inquiries.

The HRA clarifies that the right to life applies from the time of birth. This does not prevent the criminal law from treating the death of a foetus as an aggravating factor in a serious criminal

offence. Nor does it limit any entitlements to adequate prenatal care or measures to prevent stillbirths.

- **Prohibition on torture, cruel, inhuman or degrading treatment or punishment**

The prohibition on torture, cruel, inhuman or degrading treatment or punishment is absolute and no derogation is permitted even in times of public emergency. There is no strict dividing line between torture, cruel, inhuman or degrading treatment or punishment. It depends on the circumstances of the case and the degree of the severity of suffering as to which category the conduct might fall.

The international community has elaborated the obligations of governments in the UN Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). The UNCAT defines torture as the deliberate infliction of severe pain or suffering, mental or physical, by a public official for a specific purpose such as to force a confession or punish a person. Other actions or omissions of lesser severity, whether intended or not, may be considered cruel, inhuman or degrading treatment or punishment. Some of the factors to take into account are the nature and context of the treatment, its duration and physical or mental effects and in some cases the sex, age and state of health of the individual. Section 10 is particularly relevant to the treatment of people held in police cells, prisons, mental health facilities, other detention centres and hospitals. It is also relevant to the use of corporal punishment. The Convention on the Rights of the Child also prohibits the use of torture, and cruel, inhuman or degrading treatment or punishment of children.

- **No medical or scientific experimentation or treatment without free consent**

Consent to treatment or experimentation must be free, that is, it must not be coerced, or gained through undue influence, lack of adequate information or trickery. Respect for the inherent dignity of the person requires that the autonomy of the individual take priority where medical treatment or scientific experimentation is concerned. It extends to all forms of health care and medical intervention, and means that a person can refuse treatment even though the decision may be considered by objective standards to be medically unsound or contrary to the person's best interests. Traditional, historical, religious or cultural attitudes do not justify a violation of this right by, for example, enforced treatment, genital mutilation, abortion and sterilisation. Limitations on this right may be acceptable in certain circumstances such as lack of capacity due to mental illness, but exceptions must clearly be expressed in law and meet the proportionality test.

- **Protection of the family**

The ICCPR and the HRA recognise the family as the basic unit of society. The meaning of 'family' is to be interpreted broadly to take account of different cultures and changing social attitudes. Section 11 of the HRA is intended primarily to protect family relationships and is closely related to the right to found a family. It deals with aspects of family life that are touched on by

Territory law. Protection of the family is also closely related to the right to be free from arbitrary interference in the family, which is covered, by the right to privacy (see below).

- **Protection of the child**

This right ensures that minors are entitled to special protection in recognition of their vulnerability because of their status as a child. The rights of the child are elaborated in the Convention on the Rights of the Child, which deals with the civil, political, social, economic and cultural rights of children in more detail.

While recognising the importance of the family unit and the primary responsibility of parents for the development and welfare of the child, it is recognised that in certain circumstances the best interests of the child may require state intervention. The HRA also recognises that children may be protected by:

ensuring their segregation from adults in detention; and

by not publicising their involvement in court proceedings if the court rules it is in their best interests not to do so.

- **Privacy and reputation**

Section 12 of the HRA gives effect to article 17 of the ICCPR and protects individuals from unlawful and arbitrary interference with privacy, family, home or correspondence. An interference that is lawful may still be arbitrary if it is unreasonable or unjustified in all the circumstances of the case. The right to privacy applies in the workplace as well as at home and is relevant to a broad range of situations. The conduct of house searches, body searches, the collection of personal information, the use of surveillance, interception of telecommunications, wire-tapping and recording of conversations are all examples of situations that engage the right to privacy. The right to privacy might also be infringed by the publication of personal information in the mass media. Freedom of expression and the right to privacy often need to be balanced against each other.

- **Freedom of movement**

The right to freedom of movement protects the right of everyone to move freely across borders and within the Territory and to choose where they wish to live without unlawful exclusion or unreasonable restrictions. The right to freedom of movement does not permit access to private property or require that transport be subsidised. Access to public parks and traffic control measures or measures that restrict freedom of movement for public safety are acceptable provided they are done according to law and meet the proportionality test. A permissible restriction on freedom of movement is not a breach of the right to liberty.

- **Freedom of thought, conscience, religion and belief**

The right to freedom of thought, conscience, religion and belief is absolute. The government cannot interfere with what a person may believe or think or require someone to follow a particular religious or other belief or practice, or to promote or support it. Freedom of religion has been held to apply to atheists, agnostics, sceptics as well as those belonging to a particular religion. This right also protects the right to practice religion, or manifest thoughts or beliefs either in public or in private, individually or as part of a community. It is closely associated with the rights to freedom of assembly, association and expression. The right to privacy also protects the private practice of religion. Generally, the freedom to live according to one's personal beliefs and conscience is protected absolutely until it affects the rights of others, when it becomes subject to the test of proportionality.

- **Peaceful assembly and freedom of association**

The right to peaceful assembly ensures that people can join together in private or public for any peaceful or lawful activity, whether it is for the purpose of protesting against the state, expressing their beliefs or culture, or otherwise. People also have the right *not* to participate in any lawful assembly or association. The right to peaceful assembly is closely related to freedom of association. This right is most often associated with membership or non-membership of unions, but applies to any association or gathering.

- **Freedom of opinion and expression**

Freedom of opinion and expression is of paramount importance in the preservation of individual liberty and the proper function of society in a liberal democracy. It is on the one hand a right to privately hold and give expression to one's beliefs and opinions and on the other a right to do this publicly.

Freedom of expression covers a wide range of activities such as industrial action, artistic expression, political demonstrations, publications and whistle blowing. One can express views in ways that others may not like, disagree with or find upsetting. However, because of the nature of the right its scope is limited by the responsibility to respect the rights of others, such as the right to privacy and reputation. Freedom of expression may also be limited to protect the interests of a vulnerable party in judicial proceedings or to prevent disclosure of information received in confidence.

- **The right to vote and to take part in public life**

Section 17 recognises the right and opportunity of every Australian citizen to vote in free and genuine periodic elections for Territory governments, to participate generally in public affairs, and to stand for public office. It is widely accepted that countries are entitled to set a minimum age to be eligible vote, provided it is a reasonable age limit. Section 17 guarantees the right to vote as a minimum standard based on citizenship but does not prevent the right to vote being extended and granted based on, for example, residency.

It is the responsibility of the government to remove barriers to people exercising this right effectively, such as providing information in different languages, enabling those who have a visual impairment or hearing loss access to information, and ensuring all people have access to voting facilities. The government is obliged to ensure that the administration of elections minimises the risk of corruption and undue influence by public officials.

- **Right to liberty and security of the person and prohibition on arbitrary detention**

Everyone is entitled to carry out any lawful activity free of actual or anticipated interference, and safe from personal harm from government officials or other members of the public. In particular, no one may be arrested, detained or otherwise deprived of liberty except on the grounds established by law and in accordance with legal procedures. Detention based on law may still be arbitrary and violate the right to liberty if it is not reasonable in all the circumstances of the case.

Section 18 of the HRA applies to everyone and to all deprivations of liberty whatever the purpose, whether for criminal justice or other forms of administrative detention such as for the treatment of mental illness. Any person who is arrested or detained, whether on a criminal charge or any other basis, is entitled to be informed of the reasons for the arrest or detention. They are entitled, without delay, to have the lawfulness of their detention reviewed by an independent and impartial court. If the court decides that the detention is unlawful, it must order the person's release and that person is entitled to be compensated.

In addition to these general provisions, anyone taken into custody in relation to a criminal charge must be promptly brought before a judge or magistrate either to be released on bail or held on remand and brought to trial within a reasonable time. Pre-trial detention should not be the general rule but release on bail may be subject to conditions to ensure that the accused appears for trial.

- **Humane treatment of those deprived of liberty**

Anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

This right is related to the general right to be free from cruel or inhumane treatment. It applies to all those deprived of their liberty in prison, hospital, health care institutions, correctional facilities or other forms of detention. It includes all individuals, including citizens, illegal immigrants and alleged or convicted offenders. No person in detention may be subjected to treatment that is inhumane, including unwanted medical treatment or scientific experimentation. They may not be subjected to any hardship or constraint other than that resulting from being lawfully deprived of their liberty. Everyone deprived of their liberty is entitled to respect for their dignity and their rights under the same conditions as for that of free persons subject to the restrictions that are unavoidable in a closed environment. Inhumane treatment cannot be justified on the ground of lack of resources.

- **Segregation of accused from convicted prisoners**

A person held on remand is entitled to be presumed innocent unless convicted and sentenced by the court. The principle of segregation is aimed at ensuring the safety of unconvicted detainees and that their treatment is appropriate to their status. Generally, this means that people on remand are subject to fewer restrictions than those who are convicted. Human rights law recognises that in some circumstances segregation will not always be possible or desirable and permits the mixing of different types of inmates in 'exceptional circumstances'. For example, where the person may otherwise be isolated for a prolonged period and can safely mix with convicted inmates for a specific purpose such as education and training or eating in common areas.

- **Children in the criminal process**

Section 20 applies to everyone under the age of 18 years who is held in detention in a corrections facility in the ACT. An accused minor must be detained separately from accused adults and be treated in a way that is appropriate to their age and status as an unconvicted minor. They must be brought to trial as quickly as possible rather than within a 'reasonable time'.

Similarly, a minor who is convicted of a criminal offence must be treated in a way that is appropriate to their age and status. The Convention on the Rights of the Child elaborates the rights of children who are deprived of their liberty in more detail, including the principle that detention should be a measure of last resort.

- **Fair trial**

Section 21 requires that everyone has the right to a fair trial in both criminal and civil proceedings. The right to a fair trial is based on the liberal principle of separation of powers and independence of the judiciary from the executive government. It is intended to guarantee the institutional separation of powers. Judges and courts must be free from political or other improper influence or conflicts of interest and have the competence to hear and decide matters in a way that is fair to both parties. The right to a fair trial is not simply an individual right but reflects public interest in the proper administration of justice.

The right to a fair trial requires that everyone has reasonable access to the courts and that court procedures create the right conditions to ensure fairness. For example, court rules should ensure adequate notice of the matters being heard, that each side has a fair opportunity to present their case, there is sufficient time and facilities for proper consideration of each party's case and the reasons for the decision are published.

As a rule, hearings must be held in public. The publicity of hearings is important to safeguard the interest of the individual and instil public confidence that 'justice is being done'. However, judges are entitled to exercise their discretion to exclude the media and the public from all or

part of a trial in certain circumstances. For example, this might occur where a public trial would be contrary to the best interests of a child, the private lives of the parties, or where it could adversely prejudice national security.

- **Rights in criminal proceedings**

All governments have a responsibility to bring to justice those who are responsible for crimes but justice is not served by permitting unfair trials. The right to a fair trial in criminal proceedings is fundamental because it is in this context that the individual is subject to the resources and machinery of the state. It is for this reason that the ICCPR and the HRA spell out a series of minimum guarantees for all accused in criminal proceedings. The importance of a fair trial in criminal proceedings also recognises the seriousness with which our society treats possible deprivation of liberty. The judiciary bears the primary responsibility for ensuring an accused has a fair trial while accommodating the legitimate interests of the prosecution and of victims.

To ensure a fair trial a person must be told promptly and in detail, and in a language they understand, the nature and reason for the charge and are given adequate time and facilities to prepare their defence. An accused has a right to be tried without unreasonable delay, to be present at their trial, and be entitled to an effective defence either by representing themselves or through a legal representative of their choice. If an accused does not have sufficient funds to pay for legal representation the right to fair trial may require that he or she have publicly funded representation.

Whether the “interests of justice” require that a person be represented will depend upon the nature and complexity of the proceedings and the capacity of individuals to defend their case effectively. Generally, an accused is entitled to a lawyer of their choice although this right does not apply to those who are represented by legal aid. The right to an interpreter is of basic importance if difficulty in understanding is likely to be a major obstacle to the right of an effective defence. Anyone convicted of a criminal offence has the right to have the conviction and sentence reviewed by a higher court.

- **Prohibition on self-incrimination**

The right not to be compelled to incriminate oneself is based on the principle that in a democratic society the prosecution bears the burden of proving their case beyond reasonable doubt without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the ‘person charged’. Protection from self-incrimination is linked to the right to be free from torture and cruel inhuman or degrading treatment, and humane treatment of those in custody. Prohibiting the authorities from compelling a person to confess or testify against him or herself recognises the imbalance of power between an accused and the investigating and prosecuting authority. Evidence that is coerced is unacceptable and often unreliable.

- **Children’s rights in criminal proceedings.**

Section 22(3) gives effect to article 14(4) of the ICCPR, which specifically recognises the needs and interests of minors in the criminal justice system. Procedures designed to deal with child and youth offenders must account for the child’s right to a fair trial, bearing in mind such matters as their age and capacity to understand the nature and gravity of the alleged offence(s) and the legal and practical consequences of the proceedings. It is also a specific restatement of the general rule that the goal of the penal system is social rehabilitation of the offender. The rights of children deprived of their liberty are elaborated in more detail in the Convention on the Rights of the Child.

- **Compensation for wrongful conviction**

Section 23 recognises the principle that a person who is a victim of a miscarriage of justice is entitled to be compensated. Section 23 gives effect to article 14 (6) of the ICCPR and only applies where the person has been finally convicted after all appeals and has actually been punished for the crime. The right to compensation for miscarriage of justice will apply if either the conviction has been reversed or the person has been pardoned because new or newly discovered facts showed that there had been a miscarriage of justice. It does not apply where it is proved that the person is in some way (either fully or partially) responsible for the evidence not being disclosed at the trial, or where a charge has been dismissed or the person is acquitted by a trial court or by a higher court on appeal.

- **Right not to be tried or punished more than once for the same offence**

The rule of double jeopardy prevents a person being tried for the same offence more than once. The rule only applies in relation to an offence for which a person has been tried and acquitted or convicted, after any appeal right has been exhausted. It is generally accepted that cases can be reopened (including new trials) when there has been a miscarriage of justice. New trials may be held, for example, when evidence emerges following conviction, of serious procedural flaws or in the event of new or newly discovered facts.

- **Prohibition on retrospective criminal law**

The prohibition on retrospective criminal laws ensures that no-one can be charged with an offence for conduct that was not an offence under Territory law at the time it was carried out. If the penalty for an offence is increased after the offence but before conviction the original lower penalty applies. If the penalty is decreased, the accused is entitled to the benefit of the lower penalty.

- **Freedom from forced work**

The right not to be held in slavery or servitude protects the individual from an attack on their human dignity. Modern forms of slavery and servitude include the trafficking of women and children for sexual services, and men and children for other forms of labour. The right to be free from forced work applies to all forms of work, both physical and intellectual, and ‘force’

includes a direct threat of force or some form of penalty. The prohibition of forced or compulsory labour is set out in more detail in ILO Convention No. 129 of 1930. The ICCPR, reflecting the ILO Convention, does not prohibit authorities from requiring a person serving a custodial sentence to perform work in a prison as part of the normal functioning of the facility, or a court from requiring a convicted person to perform community service.

- **Rights of ethnic, religious and linguistic minorities**

The UN Human Rights Committee has identified this right as being distinct from, and in addition to, other human rights. Section 27 of the HRA is aimed at the long-term survival of the group and recognises the diversity of humanity. It is the right of those belonging to a minority group who share a common culture, religion or language to enjoy their own culture, to practise their religion, and speak their language. This right applies to everyone including those who are not citizens or permanent residents and includes an obligation to ensure effective participation of members of minority communities in decisions that affect them. However, such activities are subject to the law of the Territory and may be subject to reasonable limitations that meet the test of section 28.

- **Right to Education**

The Human Rights Act expressly limits this right to two immediately implementable aspects of the right to education: (a) access to certain levels of education (identified as free pre-school, primary and secondary education and further education and continuing training) without discrimination and (b) the ability of parents or guardians to choose schooling that provides religious and moral education in conformity with the convictions of those parents and guardians, subject to the minimum educational standards. Unlike all the other rights included in the *Human Rights Act* public authorities are *not* required to act consistently with s27A of the Human Rights Act.

Other key sections

28 Human rights may be limited

- (1) Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.
- (2) In 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.

30 Interpretation of laws and human rights

So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.

40 Meaning of *public authority*

- (1) Each of the following is a ***public authority***:
 - (a) an administrative unit;
 - (b) a territory authority;
 - (c) a territory instrumentality;
 - (d) a Minister;
 - (e) a police officer, when exercising a function under a Territory law;
 - (f) a public employee;
 - (g) an entity whose functions are or include functions of a public nature, when it is exercising those functions for the Territory or a public authority (whether under contract or otherwise).

Note A reference to an entity includes a reference to a person exercising a function of the entity, whether under a delegation, subdelegation or otherwise (see Legislation Act, s 184A (1)).

- (2) However, ***public authority*** does not include—
 - (a) the Legislative Assembly, except when acting in an administrative capacity; or
 - (b) a court, except when acting in an administrative capacity.

40A Meaning of function of a public nature

- (1) In deciding whether a function of an entity is a *function of a public nature*, the following matters may be considered:
 - (a) whether the function is conferred on the entity under a territory law;
 - (b) whether the function is connected to or generally identified with functions of government;
 - (c) whether the function is of a regulatory nature;
 - (d) whether the entity is publicly funded to perform the function;
 - (e) whether the entity performing the function is a company (within the meaning of the Corporations Act) the majority of the shares in which are held by or for the Territory.
- (2) Subsection (1) does not limit the matters that may be considered in deciding whether a function is of a public nature.
- (3) Without limiting subsection (1) or (2), the following functions are taken to be of a public nature:
 - (a) the operation of detention places and correctional centres;
 - (b) the provision of any of the following services:
 - (i) gas, electricity and water supply;
 - (ii) emergency services;
 - (iii) public health services;
 - (iv) public education;
 - (v) public transport;
 - (vi) public housing.

40B Public authorities must act consistently with human rights

- (1) It is unlawful for a public authority—
 - (a) to act in a way that is incompatible with a human right; or
 - (b) in making a decision, to fail to give proper consideration to a relevant human right.
- (2) Subsection (1) does not apply if the act is done or decision made under a law in force in the Territory and—
 - (a) the law expressly requires the act to be done or decision made in a particular way and that way is inconsistent with a human right; or
 - (b) the law cannot be interpreted in a way that is consistent with a human right.