



Declaration of Incompatibility (s.32)

Section 32 of the *Human Rights Act 2004* says that:

- (1) This section applies if—
 - (a) A proceeding is being heard by the Supreme Court; and
 - (b) An issue arises in the proceeding about whether a Territory law is consistent with a human right.
- (2) If the Supreme Court is satisfied that the Territory law is not consistent with the human right, the court may declare that the law is not consistent with the human right (the **declaration of incompatibility**).
- (3) The declaration of incompatibility does not affect—
 - (a) The validity, operation or enforcement of the law; or
 - (b) The rights or obligations of anyone.
- (4) The registrar of the Supreme Court must promptly give a copy of the declaration of incompatibility to the Attorney-General.

This factsheet is not intended to be a substitute for legal advice.

Understanding section 32

Where a matter comes before a court or tribunal and involves a human rights issue, section 30 of the *HR Act* requires that the court or tribunal adopt a “human rights consistent” interpretation within the “purpose” of the provision.

If the legislation cannot be interpreted in a rights-consistent manner, the Courts are not able to strike down the legislation. Section 32 provides that the Supreme Court can issue a “declaration of incompatibility”.

As section 32(3) makes clear, a declaration of incompatibility does not effect the validity of the law.

If a declaration of incompatibility is made, under section 33 of the *HR Act*, the Attorney-General must present a copy of the declaration to the Legislative Assembly within 6 sitting days and must prepare a written response within 6 months after its presentation. Significantly, there is no requirement for the Legislative Assembly to amend the law, and it can remain in its original form.

This is a key feature of the dialogue model of human rights protection. The Legislative Assembly, and not the Courts, has the final say on laws in the ACT.

The Dialogue Model

The dialogue model of human rights protection seeks to inculcate a culture of human rights awareness within and between the three branches of government. In particular, it aims to ensure that human

rights are taken into account when developing, interpreting and applying ACT law and policy.

Rather than grant courts and tribunals the power to strike down legislation inconsistent with human rights, the declaration of incompatibility is designed to draw attention to a violation of human rights and to require the government to address it.

The table below illustrates the roles played by each branch of government under the dialogue model.

The executive branch is responsible for building human rights into proposed legislation and policies and public servants are required to act and make decisions in accordance with human rights. The legislature is responsible for passing legislation that has been assessed for compliance with human rights. Under section 30 of the HR Act, the judiciary is required to interpret laws to be compatible with the HR Act, if possible. If it is not possible, they can issue a declaration of incompatibility. The legislature then decides whether to amend the law or not.

	ACT Government	Legislative Assembly	Courts and Tribunals
Functions	Human rights built into laws and policies	Passes laws after assessing them for compliance	Interprets laws to be compatible with the <i>HR Act</i> (if possible)
	Assess laws for compliance with human rights & reports to Parliament	Has the final say on all laws	Can issue a declaration of incompatibility: s 32 <i>HR Act</i>
	Required to act and make decisions in accordance with human rights		

Examples

Since 2004, the ACT Supreme Court has only issued one declaration of incompatibility.

In the matter of an application for Bail by Isa Islam [2010] ACTSC 146 (19 November 2010)

In this case, the ACT Supreme Court declared that section 9C of the Bail Act 1992 is inconsistent with the right to liberty under section 18 of the HR Act. Section 9C of the Bail Act requires those accused of murder, certain drug offences and ancillary offences, to show “exceptional circumstances” before having a normal assessment for bail undertaken. The Court found that this requirement was inconsistent with section 18 of the HR Act which requires that a person awaiting trial not be detained in custody as a “general rule”.

Consistent with the dialogue model of the HR Act, the law declared incompatible continues to operate in its original form, and power rests in the Legislative Assembly alone to amend it.

As of April 2014, the Legislative Assembly has not amended section 9C of the Bail Act.

ACT Human Rights Commission

Ph: (02) 6205 2222

TTY: (02) 6205 1666

www.hrc.act.gov.au

human.rights@act.gov.au