

Achieving the Rights Outcome

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A Toolkit for using the ACT Human Rights Act in achieving better outcomes for you and your clients



**HUMAN RIGHTS &
DISCRIMINATION COMMISSIONER**
ACT Human Rights Commission

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1. About the ACT Human Rights Commission

The ACT Human Rights Commission is an independent statutory agency established by the *Human Rights Commission Act 2005*. The HRC Act establishes five members of the Commission:

- The Children & Young People Commissioner
- The Disability & Community Services Commissioner
- The Discrimination Commissioner
- The Health Services Commissioner (who also handles complaints regarding services for older people)
- The Human Rights Commissioner

The Commission operates from a model of collegiality, and does not have an administrative head. All three Commissioners have equal seniority and decision making authority within the Commission.

Each of the three Commissioners has statutory responsibilities in accordance with their titles, and the Health Services Commissioner also has responsibility in relation to services for older people. At this time, the HRC Act does not prescribe any functions for the Community Services Commissioner.

This guide has been prepared by the ACT Human Rights and Discrimination Commissioner.

2. Introduction

This guide has been developed to assist residents of the ACT advocate for themselves, and others, using the Territory's unique human rights framework. The ACT was the first jurisdiction in Australia to enshrine through legislation certain basic human rights that all citizens could rely on when engaging with ACT Government agencies.

This guide includes real life case studies where human rights has been used to:

- Ensure Young families have not been evicted from their home;
- Protect the rights of a married couple of over fifty years was not separated when they transitioned into aged care;
- Improve the youth justice system for children, young people, parents, carers, victims, staff and the broader community;
- Ensure those held in closed environments like prison, psychiatric units and aged care are treated with dignity; and
- Maintain the decision-making rights of people with disability.

3. Why Human Rights?

We all enjoy universal, fundamental human rights and freedoms. The ACT was the first Australian jurisdiction to enact legislation covering civil and political rights. In comparison, other Western

democracies such as the United Kingdom, Canada, New Zealand, South Africa, most European countries and the United States all have some form of human rights legislation.

These Acts are based on sixty years of international human rights treaty development, beginning in 1948 with the United Nations Universal Declaration of Human Rights, with several Australians playing a pivotal role. Further specific treaties include the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as well as more recent ones covering vulnerable populations such as women, children, people with disabilities and indigenous peoples. The ACT Human Rights Act benefits from decades of human rights jurisprudence. Already the Human Rights Act has improved the actions and decisions of ACT Government and enhanced protections in ACT laws.

4. Who has obligations?

ACT Public Authorities, which are ACT Government Agencies and those doing outsourced Government work, must:

- **Act** consistently with human rights; and
- **Make decisions** consistently with human rights, which may include **documenting** how such consideration occurred.

Some example of organisations that are and are not public authorities:



ACT Health?

Yes, but only ACT Government provided health services like the hospital. GPs are not included.



Supermarkets

No, Food may be essential, but selling it doesn't count as a public service.



The Police

Yes



ACTION Buses

Yes, as part of the Territory and Municipal Services Directorate.



Banks

No, all banks in Canberra are privately run and funded organisations.



State Schools

Yes, ACT Government schools, along with the Education and Training Directorate.



Newspapers & TV News

No, media outlets are generally privately run and funded.



You?

Do you perform a public service on behalf of the ACT Government?

If you answered yes then you have duties under the *Human Rights Act 2004*. You can obtain more information about whether you are a Public Authority, and your obligations, from our Public Authorities Factsheet

5. What are Human Rights?

Human rights are inherent to all of us as human beings, regardless of who we are, where we live or any other characteristic. They are intended to provide an interrelated safety net of protections that ensure we can reach our potential and be treated fairly by our Government. The human rights protected in the ACT Human Rights Act are drawn from internationally agreed documents about what rights must be protected by Governments.

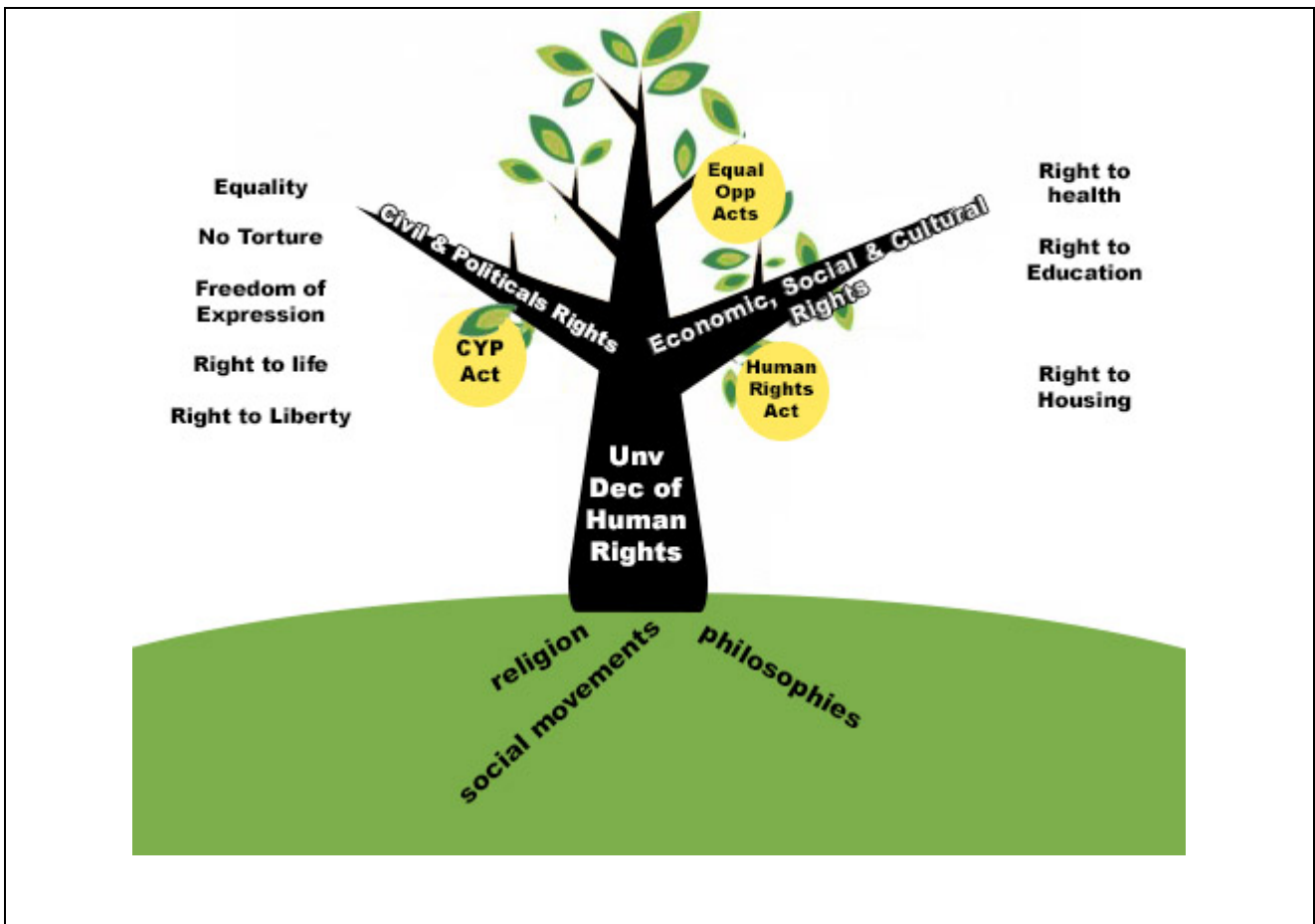


Figure 1: History of Human Rights

The **foundations and roots** of human rights are philosophy, religion, history of conflicts, social movements, etc.

The **trunk** is the establishment of the modern human rights movement, particularly the Universal Declaration of Human Rights in 1948 by the United Nations.

Those initial principles were divided into two main **limbs** of individual civil and political rights and collective economic, social and cultural rights.

The final step is the **fruit** of the tree, when local Governments adopt these international obligations into law. The most relevant being the ACT *Human Rights Act 2004*.¹

6. Human Rights in the ACT

The rights protected in the ACT HRA are as follows. In the electronic version of this publication, you can click on the below links to learn more about each of these rights. Printed fact sheets on each right are also available from the Human Rights Commission.

Right to Freedom of Movement (s.13)

Right to move freely around the Australian Capital Territory. Case studies are included below in Part 6 relation to [institutional care](#)

Right to Freedom of Thought, Conscience, Religion and Belief (s.14)

People have the freedom to think and believe what they want, for example, religion. They can do this in public or private, as part of a group or alone.

Right to Freedom of Association (s.15)

People have the right to join groups or unions and to meet peacefully

Right to Freedom of Expression (s.16)

They have the right to find, receive and share information and ideas. In general, this right might be limited to respect the rights and reputation of other people, or for the protection of public safety and order.

Freedom from Forced Work (s.26)

Protection from slavery and servitude, but does not apply to those in prison.

Right to equality (s.8)

Everyone is entitled to equal and effective protection against discrimination, and to enjoy their human rights without discrimination. Case studies are included in Part 6 below on application to [care and protection](#), [translation services](#) and [education](#).

¹ Adapted from the British Institute of Human Rights' publication 'A Voluntary and Community Sector Guide to Using Human Rights'

Right to Life (s.9)

Every person has the right to life and to not have their life taken. The right to life includes a duty on government to take appropriate steps to protect the right to life, particularly in relation to [institutional care](#) (see case studies in Part 6 below).

Right to Protection from Torture (s.10(1))

People must not be tortured. People must also not be treated or punished in a cruel, inhuman or degrading way. This includes protection from treatment that humiliates a person. See case studies in Part 6 below in relation to [institutional care](#).

Right to Protection from Experimentation and Medication Treatment without Consent (s.10(2))

People must not be subjected to medical treatment or experiments without their full and informed consent.

Right to Protection of the Family (s.11(1))

Families are the natural and basic group unit of society and are entitled to protection. Relevant areas of application include [accommodation, care and protection issues](#) and [institutional care](#). More information including case studies is in Part 6 below.

Rights of Children (s.11(2))

Children have the same rights as everyone else, with added protections. Relevant areas of application include how [children are accommodated](#), and how children are treated in [criminal and court proceedings](#) and [education](#). See Part 7 below for case studies.

Right to Privacy and reputation (s.12)

Everyone has the right to keep their lives private. Your family, home or personal information cannot be interfered with, unless the law allows it. See relevant case studies in Part 7 below including in relation to [accommodation](#).

Right to Take Part in Public Life (s.17)

Every person has the right to take part in public life, such as the right to vote or run for public office.

Right to Liberty and Security (s.18)

Everyone has the right to freedom and safety. The right to liberty includes the right to not be arrested or detained except in accordance with the law. The right to security means that reasonable steps must be taken to ensure the physical safety of people who are in danger of physical harm. See case studies in Part 7 below in relation to [institutional care](#).

Right to Humane Treatment when Deprived of Liberty (s.19)

People have the right to be treated with humanity if they are accused of breaking the law and are detained.

Rights of Minorities (s.27)

People can have different family, religious or cultural backgrounds. They can enjoy their culture, declare and practice their religion and use their languages

Rights of Children in the Criminal Process (s.20)

A child charged with committing a crime or who has been detained without charge must not be held with adults. They must also be brought to trial as quickly as possible and treated in a way that is appropriate for their age. Children are entitled to opportunities for education and rehabilitation in detention

Right to Fair Trial (s.21)

A person has a right to a fair hearing. This means the right to have criminal charges or civil proceedings decided by a competent, independent and impartial court or tribunal after a fair and public hearing

Rights in Criminal Proceedings (s.22)

There are a number of minimum guarantees that you have when you have been charged with a criminal offence. These include the right to be told the charges against you in a language you understand; the right to an interpreter if you need one; the right to have time and the facilities to prepare your own case or to talk to your lawyer; the right to have your trial heard without too much delay; the right to be told about Legal Aid if you don't already have a lawyer; you are presumed innocent until proven guilty; and you don't have to testify against yourself or confess your guilt unless you choose to do so.

Right to Compensation for Wrongful Conviction (s.23)

This right covers those convicted of a crime whose conviction is later reversed, they are pardoned or a miscarriage of justice has occurred.

Right not to be tried or punished more than once (s.24)

A person will only go to court and be tried once for a crime. This means if the person is found guilty they will only be punished once. If they are found to be innocent they will not be punished.

Right against Retrospective Criminal Laws (s.25)

A person has the right not to be prosecuted or punished for things that were not criminal offences at the time they were committed.

Narrow Right

Right to Education (s.27A)

The right to pre-school, primary and secondary education, and further education and continuing training without discrimination. Unlike all other rights included in the Human Rights Act which require "public authorities" such as public servants to act consistently with them, public authorities are not required to act consistently with s 27A.

7. Application to Specific Areas

Generally, whenever you are engaging with a Public Authority, pointing out the human rights implications will enhance your advocacy. This shouldn't stop you utilising any other legislation or policy you would otherwise use to advocate. More information on the basics of advocacy are in Attachment A. Human Rights arguments may be made in many areas of service provision. Below are some examples in various subject areas.

Accommodation, Housing and Entering Someone's Home or Room

Issue	Human Right(s)
Separation of families e.g. child protection, care home placements	Right to Family Rights of Children
Personal and sexual relationships in a community-based facility	Right to Privacy Right to Equality
Private and personal information collected by housing provider	Right to Privacy
Restrictions on making personal choices and decisions in a community-based facility	Right to Privacy Right to Equality
Access to social and recreational activities	Freedom of Association Freedom of Movement
Participation in community life	Freedom of Association Freedom of Movement
Independent living	Right to Privacy Right to Equality
Monitoring and surveillance of community-based facility	Right to Privacy
Closures and evictions involving community-based facilities	Right to Privacy Right to Equality
Eviction without reason	Right to Fair Hearing Right to Privacy
Protection from abuse and neglect (including domestic violence)	Right to Equality Freedom from inhuman treatment

The Right to Family in Accommodation

Family life covers close and personal ties of a family kind. It does not just cover blood ties or formal relationships and goes beyond the so-called 'nuclear family'.. It includes a right to develop normal family relationships and the right to ongoing contact if a family is split up

This right is a qualified right. It can be limited or restricted in certain circumstances to protect the rights of others or the interests of the wider community. For example, a child may be separated from their parents if there is evidence of child abuse. Any interference with this right must be lawful, necessary and proportionate.

Rights of Children in Accommodation

This protection extends to any person aged under 18 years of age. Although it is not specifically recognised in the HRA, the right to protection of children and young people could be interpreted to include a broader range of children's rights recognised in the Convention on the Rights of the Child, including the right to participation. Public Authorities must adopt special measures to protect children and young people, and the best interests of the child must be taken into account in all actions affecting a child.

Case example (rights of children and right to family life)

Here in the ACT, a woman who lived in public housing with her mother and children was threatened with eviction when her mother (the children's grandmother) died, as the property was held in the grandmother's name. Using human rights arguments centred on the rights of the family, she successfully argued that she should remain in the house because her children were settled in the community and local school.

Right to Privacy in Accommodation

This right includes not to have one's privacy, family, home or correspondence interfered with unlawfully or arbitrarily. Private life includes privacy, personal choices, relationships, physical and mental well-being, access to personal information and in some circumstances, participation in decision making. Home can include institutions if a person has lived there for a significant period of time. However, it does not extend to a right to new housing, rather regarding the home a person already has. Correspondence covers all forms of communication including phone calls, letters, faxes and emails.

Case example (rights of children, privacy and family life)

A local non-government organisation provided crisis accommodation for fathers and their children. The father had applied, with the support of the provider, to apply for public housing but was over the income threshold to be eligible for priority housing. He was facing a 12 month wait to obtain housing. Nonetheless, the organisation felt they had to evict him because the premises were needed for other families experiencing housing difficulties. The organisation applied to the ACT Civil and Administrative Tribunal to evict him. The Tribunal concluded that the non-government organisation serving a notice to vacate on the man constituted an interference with the family unit and arbitrary interference with a home which was not subject to appropriate limitations, and was therefore unlawful. As a result of this unlawful act, ACAT had no jurisdiction to consider the application for a termination and possession order.

Case example (right to fair trial, privacy and family life)

The Director of Housing applied for a possession order to evict a family living in public housing. The application was based upon alleged breaches of a compliance order. Eviction would have had serious negative effects on the family, including risk of homelessness. His legal service requested evidence of the breaches from the Department of Housing (DOH) but they refused, stating that it would be provided at the hearing. Consequently, Homeless Persons Legal Clinic (HPLC) submitted at the hearing that the DOH had breached the right to a fair hearing under the Charter by failing to provide the requisite evidence. Further, they argued that the DOH had not considered the family's right to privacy and reputation and the protection of families and children under the Charter when applying for the order. The Tribunal adjourned the hearing until the evidence was produced. DOH withdrew the application for possession and agreed to negotiate with the family to determine a more appropriate solution.

Source: Homeless Persons Legal Clinic: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

Right to Equality in Accommodation

Everyone has the same rights and deserves the same level of respect. This means that laws, policies and programs should not be discriminatory and also that public authorities should not apply or enforce laws, policies and programs in a discriminatory way. The section includes some examples of discrimination. These include, discrimination because of race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.

Case example (right to equality, privacy)

Action for More Independence and Dignity in Accommodation (AMIDA), along with Tenants Union Victoria (TUV) used the Charter in a Victorian dispute to protect the rights of a tenant with an intellectual disability who had been given a notice to vacate based upon his behaviour at a rooming house. The tenant's behaviour had been as a consequence of his disability. Use of the Victorian Charter of Rights enabled AMIDA and TUV to open up discussion with the landlord as to his/her obligations as a Public Authority. Consequently, the landlord was able to consider the Charter and agree to an alternative course of action, which upheld the obligations contained within it. The final agreement meant that the tenant could occupy the premises for a period of 6 months while looking for alternative accommodation, so long as his behaviour was appropriate during this time. At the end of the 6 months, the tenant had not been in breach of any house rules and the landlord allowed for him to remain in the premises.

Source: Action for More Independence and Dignity in Accommodation: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

Case example (right to equality, freedom from inhuman treatment)

A tenant of the Office of Housing was expected to report maintenance items, however was unable to do so because of his vision impairment, limited mobility and physical disability. The contractors who were engaged to complete the works requested that the tenant sign a worksheet to state that the work had been completed in accordance with the Office of Housing's requirements. The man was unable to verify that this was the case, due to his vision impairment. The advocate invoked the right of freedom from torture and cruel, inhuman and degrading treatment to in order to successfully reverse the policy that requires persons with vision impairment to sign a works order.

Source: Disability Justice Advocacy: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006

Case example (right to equality)

A man living with cerebral palsy and vision impairment was suffering great anxiety with regards to security in the housing commission where he lived. He requested the addition of a mesh screen to his door, offering to pay for it. This was rejected by the Community Housing Authority without reason. The advocate contested the decision on his behalf raising rights under the Charter. In particular, it was stated that the screen would not only assist with security but would also give him more privacy in his home. In response the community housing authority decided to arrange for the screen within two weeks.

Source: Leadership Plus: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

Closed Institutions Operated by Public Authorities including Hospitals, Mental Health Facilities, Etc

When a person is in some form of formal, closed-door state care, whether a detention centre, health facility, or community-based, a number of scenarios can raise human rights issues including:

Issue	Human Right(s)
Euthanasia	Right to Life
Do Not Resuscitate orders (DNR)	Right to Life
Provision of life prolonging/saving treatment	Right to Life
Advance Directives/living wills	Right to Equality
Deaths through negligence	Right to Life
Inquests	Right to Life
Access to news and connection with community, particularly for those in detention	Right Humane Treatment in detention Freedom of Expression
Separation of family within an institution	Right to Family
Washing or dressing without regard to dignity	Freedom from inhuman treatment

Issue	Human Right(s)
Excessive force used to restrain people	Right to Humane Treatment in Detention Freedom from inhuman treatment
Unsanitary conditions/lack of access to sanitary facilities	Right to Humane Treatment in Detention Freedom from inhuman treatment
Inability to move around, and to leave a facility	Right to Liberty Freedom of Movement

Right to Family in Institutions

This can be relevant where two members of the same family are separated in institutional care.

Case example (right to family life)

A husband and wife had lived together for over 65 years in the United Kingdom. He was unable to walk unaided and relied on his wife to help him move around. She was blind and used her husband as her eyes. They were separated after he fell ill and was moved into a residential care home. She asked to come with him, but was told by the local authority that she did not fit the criteria. A public campaign launched by the family argued that the local authority had breached the couple's right to respect for family life. The authority agreed to reverse its decision and offered the wife a subsidised place so that she could join her husband in the care home.

Source: The Human Rights Act – Changing Lives (British Institute for Human Rights, 2008)

Right to life in Institutions

The right to life is one of the most fundamental human rights, and has two main aspects. Public authorities must:

- not take away anyone's life, except in a very few limited circumstances. These are to defend someone from unlawful violence; to arrest someone or stop them escaping; or to suppress a riot.
- take reasonable steps to protect life. This includes taking steps to protect someone whose life is at risk from another person, where the authorities know or should know of this risk.

The positive steps to protect the right to life include:

- to establish a framework of laws, precautions and procedures that will protect life;
- to warn people about life-threatening hazards that the government knows or should know about (such as fires or chemical spills);
- to take steps to protect the life of people within its care and control (in places such as prisons, detention centres, medical facilities or state care);
- to investigate deaths which may have involved an arbitrary deprivation of life involving a public authority; and
- to account for resource allocation, particularly public health authorities.

Case example (right to life)

A woman was discharged from a mental health hospital in London before she felt ready. She had suicidal tendencies and was anxious about a delay in arranging a follow-up care review meeting. Her advocate used the right to life to argue that her care and treatment team was under a positive obligation to protect her life by ensuring she had the support she needed. She was initially supplied with a support worker once a fortnight, but as a result of these arguments, it was agreed to increase this to once a week.

Source: Cambridge House Advocacy in 'The Human Rights Act – Changing Lives' (British Institute for Human Rights 2008)

Prohibition of torture, inhuman or degrading treatment

Torture generally refers to the deliberate infliction of very severe pain or suffering. This can include acts that cause both physical pain and mental suffering. It is also often interpreted to require the act or authorisation of a public official for purposes such as interrogation, threat, punishment or some other purpose.

Cruel, inhuman or degrading treatment or punishment, is a broader concept than torture. This generally refers to treatment that is less severe or does not meet the technical requirements of the torture definition, but that still involve abuse or humiliation. Examples of cruel, inhuman or degrading treatment include acts carried out by police using excessive force or unduly prolonged detention that causes mental harm. The assessment of whether something falls within this category will depend on the circumstances, including the duration and nature of the treatment and its impact on the victim.

The scope of degrading treatment can include forcing people to perform acts which humiliate them or gravely offend their sensibilities – especially in public – as form of punishment.

The United Nations Committee on the Rights of the Child has also criticized Australia for continuing to provide a defence of 'reasonable chastisement of children' to charges of assault arising from corporal punishment by parents. The UN Convention on the Rights of the Child obliges governments to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence.

Case example (freedom from torture, inhuman treatment)

In *Davies v State of Victoria* [2012] VSC 343 (15 August 2012), the Supreme Court of Victoria found that the treatment of a resident with disabilities, who was dragged naked along a hallway in a Community Residential Unit, was cruel and degrading and contrary to section 10(b) of Victoria's *Charter of Human Rights and Responsibilities* – the equivalent to the *Human Rights Act 2004* (ACT)

Case example (freedom from torture, inhuman treatment)

A larger woman in a residential care home had not showered or bathed for many weeks. The care home had been providing her instead with a 'strip' wash so that staff did not have to lift her. The woman was very upset about the situation. After receiving BIHR training, her advocate wrote to the care home and the local authority, challenging this as a breach of her right not to be treated in an inhuman or degrading way. Within days a new occupational therapist was brought in to explore options and it was quickly agreed that a hoist could be used. From this point onwards the woman was able to take a bath or shower according to her wishes.

Source: Human Rights in Action: A Toolkit for Change, British Institute for Human Rights (BIHR)

Right to liberty

The right to liberty means that persons must not be subject to arrest and detention, except as provided for by law. Their arrest and the detention must also not be arbitrary. This right applies to all forms of detention where people are deprived of their liberty, not just criminal justice processes. This can be relevant any time a person is not free to leave a place by his or her own choice.

Case example (right to liberty)

A man in a mental health hospital was repeatedly told by nurses that he could not leave the ward, even though as an informal patient he was entitled to do so. He was not detained under the Mental Health Act, so should be free to leave at any time. His advocate made a written complaint on his behalf arguing that his right to liberty had been breached. Subsequently his treatment by the nurses greatly improved and he was permitted to leave when he wanted to. He was discharged from hospital soon afterwards.

Source: The Human Rights Act – Changing Lives' (BIHR 2008)

Freedom of Movement

This rights means that people have the right to move freely within the Australian Capital Territory, to enter and leave the ACT, and have the freedom to choose where to live. In the ACT today, this right is relevant in circumstances involving people's access to public spaces, laws relating to trespass, and court orders (such as restricted bail orders) and powers to direct people's movements in times of emergency.

Case example (right of movement, right to liberty)

A man living in an ACT residential aged care facility uses a wheelchair to move around. The facility were very concerned that he was a danger to himself and others when he used the chair so they removed the battery from his chair so that it would not work. The advocate argued that this was a breach of his right to freedom of movement and the battery was returned to him. The advocate worked with the facility and the man to find other, less restrictive, ways to ensure that he was able to move about freely but safely, this included some support around safe use of footpaths so that he could go from his home to the local shops when he wanted to.

Protection of Particular Groups

Special protections are also provided for particularly vulnerable groups including People With Disability, Children and Young People, those from a Culturally and Linguistically Diverse background and People with Disability.

Case example (right of children and young people)

Fitzroy Legal Service (FLS) has protected a young girl from having to testify against her alleged perpetrators in a criminal trial. The young girl and her family believed that testifying and being cross examined would cause her serious harm. FLS advocated in favour of her choice not to testify and was successful in doing so. They achieved this by raising section 17 of the Charter, which enshrines the protection of families and children. They argued that protection of her rights as a child and protection of the family should be given due regard when determining whether or not the young girl would be required to provide witness testimony. The Tribunal agreed that she should not testify and consequently provided her with financial assistance in recognition of the trauma suffered by her.

Source: Fitzroy Legal Service: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

Case example (right to equality, rights to family)

A single mother living with cerebral palsy was at risk of having her daughter taken from her by Child Protection. She needed to demonstrate that with the appropriate assistance she would be competent, both emotionally and physically, to care for her daughter. The advocate in this case used the Charter principles to communicate the woman's rights to Child Protection through mediation in the Children's Court. These rights included recognition and equality before the law and protection of families and children. Consequently, the woman was able to demonstrate her capability of mothering her child and Child Protection are no longer involved.

Source: Leadership Plus: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

Case example (right to equality, rights of children and young people)

A male student with a learning disability was threatened expulsion by his school due to his behavioural issues. The advocate outlined to both the school itself and to the Department of Education and Early Childhood Development the student's relevant human rights. As a result of the communication, the boy was provided with the supports, which reduced his behavioural issues and consequently, he was allowed to stay on at the school.

Source: Youth Affairs, Council of Victoria: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

Case example (right to equality)

A recipient of Home and Community Care services was unable to speak or understand English and was provided with a support worker who was unable to communicate with him in his own language. The council would also not pay for an interpreter to assist with the care services. During negotiations with the council, the advocate raised the Charter. As a consequence, a support worker from the same cultural and lingual background was appointed by the council.

Source: Disability Justice Advocacy: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

More information on Rights

More information is provided on these rights throughout this guide, and on the ACT [Human Rights Commissioner's website](#). They are drawn from the:

- Universal Declaration of Human Rights;

- International Covenant on Civil and Political Rights; and
- International Covenant on Economic, Social and Cultural Rights.

8. Responsibilities

Who?

The Act places obligations on three types of ‘Public Authorities:

‘Core’ public authorities:

These authorities are bound by the duty to comply with human rights in all their activities. The Legislative Assembly and ACT courts are specifically excluded from the definition of ‘public authority’, except when acting in an administrative capacity. These are generally ACT Government bodies, such as:

- *Administrative units* — ACT Government Departments.
- *Territory authorities* — ACT statutory authorities and agencies.
- *Territory instrumentalities* — Including public sector corporate bodies and agencies that are subject to Ministerial control.
- *Ministers*— The Chief Minister and the four Ministers who form the Executive.
- *Police officers when they are exercising powers under ACT law* — Members of the Australian Federal Police when acting in their capacity as ACT Policing, which is the community policing arm of the AFP operating under ACT legislation.
- *Public employees* — Public servants, statutory office-holders and their employees, and employees of territory instrumentalities.

‘Functional’ public authorities:

These are private bodies or community organisations with some public functions. ‘Functional’ public authorities will be bound by the duty only when they are exercising functions of a public nature, such as when these functions have been outsourced to them under contract. Whether an organisation is such a Public Authority will depend on factors such as whether the functions are identified with functions of government, whether they are regulatory in nature and whether the entity is funded by Government to perform the function. See our Factsheet on Public Authorities for more information

An example of a ‘functional’ public authority could include a non-government social housing provider, who is funded by government to essentially provide public housing.

‘Optional’ public authorities:

Section 40D of the HRA provides that private bodies performing private functions that would not otherwise be bound by the HRA can ‘opt in’ to the obligation to comply with human rights.

How?

The Human Rights Act places two obligations on Public Authorities: to **act** in accordance with human rights, and **make decisions** in consideration with human rights.

Must act consistently

'Act' means positive conduct, a failure to act or a proposal to act. If an action is found by the courts to be incompatible with a human right, it will be unlawful.

Must consider human rights in decision making

Section 40B(1)(b) of the HRA requires public authorities to give proper consideration to human rights when making decisions. A failure to do so will amount to unlawfulness. This is a procedural obligation in the sense that it directs public authorities to make decisions in a particular manner. Public authorities must actively and properly incorporate human rights into decision-making processes where relevant, and should be able to provide documentary evidence of having done so.

Are human rights absolute?

Nearly all the human rights protected are able to be subject to reasonable and proportionate limitation by Public Authorities. The only exceptions are generally the right to life (s.9) and freedom from torture (s.10). The Human Rights Act allows reasonable limits on rights, set by Territory law, provided they are demonstrably justified in a free and democratic society. This requires a consideration of:

1. the nature of the **right** affected
2. the importance of the **purpose** of the limitation;
3. the nature and extent of the **limitation**
4. the **relationship** between the limitation and its purpose;
5. any **less restrictive means** reasonably available to achieve the purpose the limitation seeks to achieve.'

The Commission suggests this means asking a Public Authority:

- What is the objective of their action or decision?
- Is the limitation going to achieve that objective?
- Is there another way to do it that limits rights less?



Or to put it simply, a Public Authority should not use a '**sledgehammer to crack a nut**'. If the action or decision is not reasonable and proportionate, it may be unlawful, unless the Public Authority can rely on the defence of having no discretion in law to act in a different way.

Defence

Section 40B(2)(a) of the HRA, provides a defence where a public authority could not have acted differently, or made a different decision because it was required under another Territory or Federal law to act that (non-human rights compliant) way.

Figure 2: Summary of the Public Authority Obligation

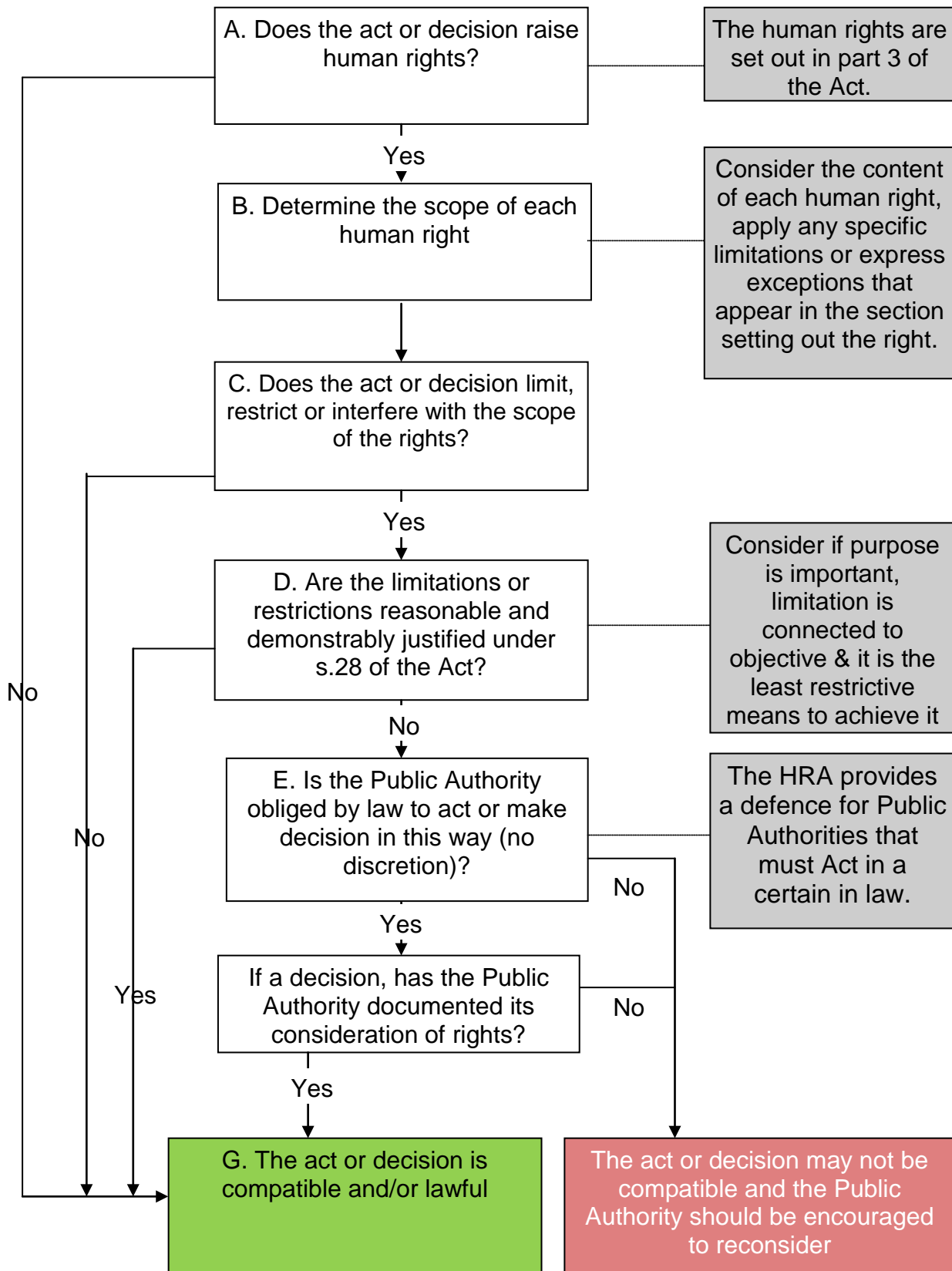


Figure 3: Example of Assessing Compliance for Eviction

Example: Government proposes to evict a mother and her school-aged children from public housing because the lease is in her mother (the children’s grandmother’s name), and the grandmother has passed away.

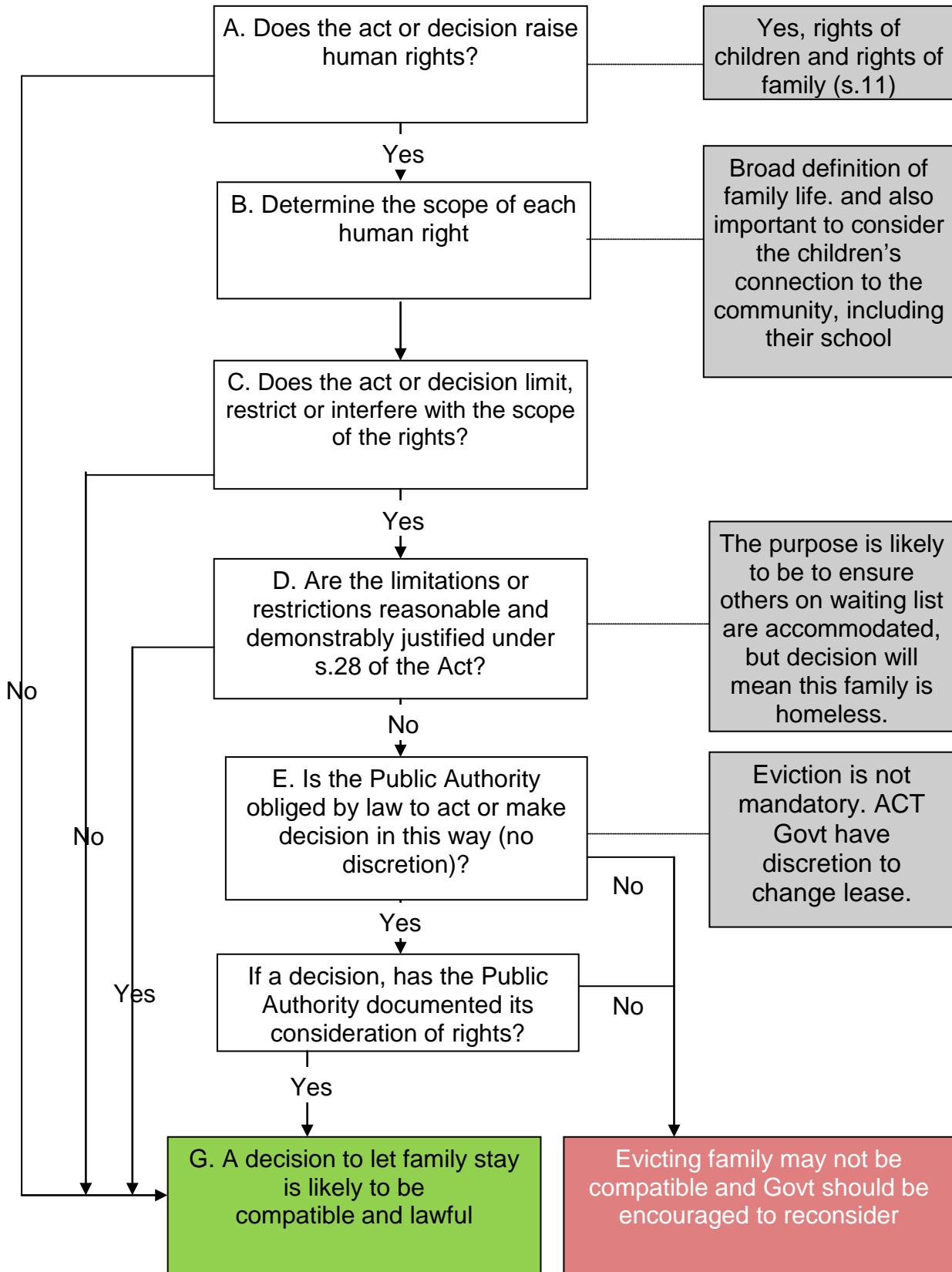
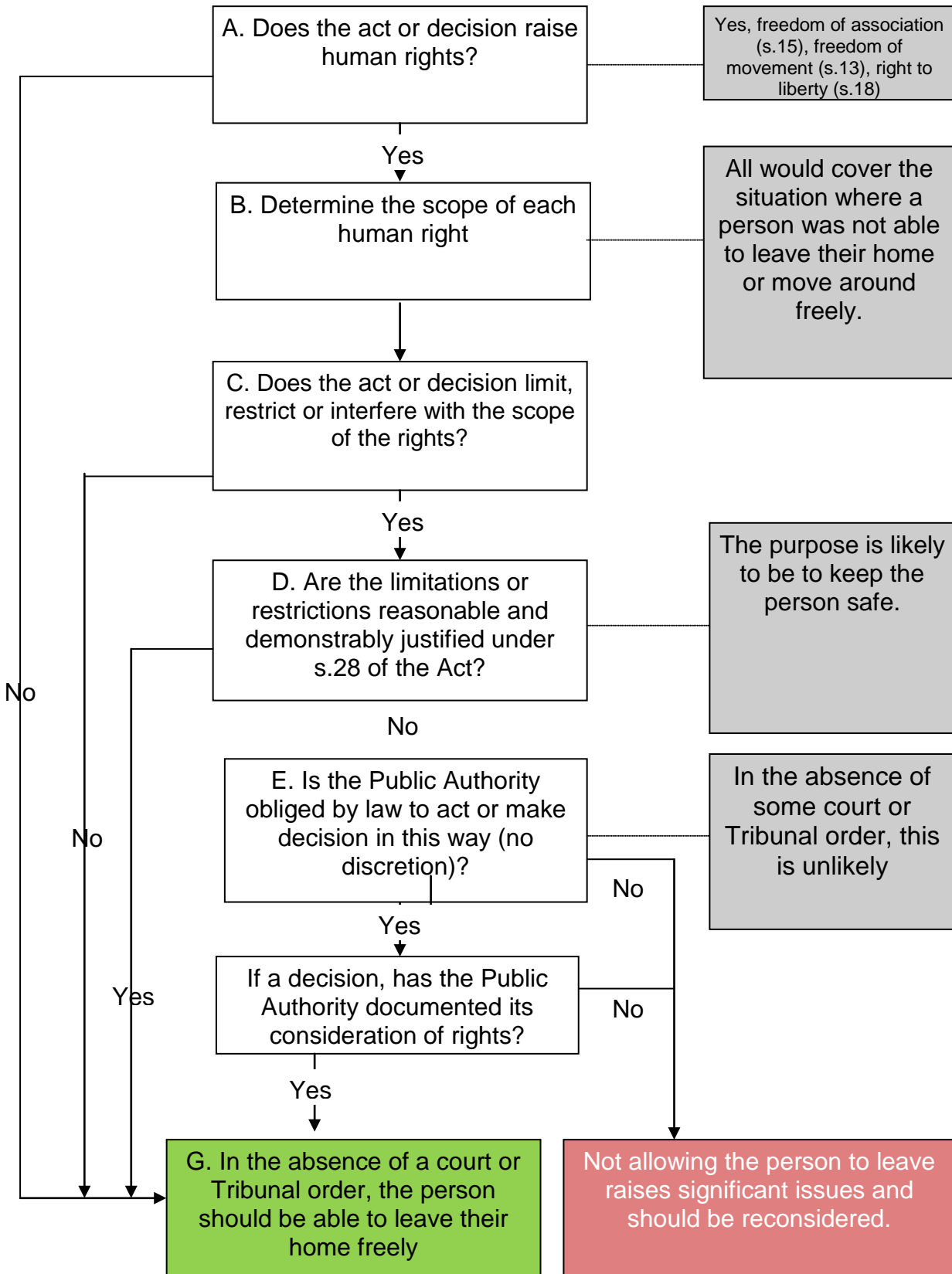


Figure 3: Example of Assessing Compliance for Disability Accommodation

Example: A person with a disability is accommodated in a group home from which they cannot leave without permission. The door is locked at all times. There is no relevant court or tribunal order in place for their accommodation.



9. Human Rights in the Courts

If your advocacy fails, or you are wishing to discuss with a Public Authority what the consequences of a human rights breach may be, considering legal action is an option. An individual may bring a human rights action against an ACT Public Authority in the ACT Supreme Court.

Standing

Only an individual who alleges they are or would be the 'victim' of a breach by a public authority of its obligation can bring proceedings. The term 'victim' is not defined in the HRA, but is intended to be interpreted consistently with its meaning in international human rights law, that is, of the person experiencing a breach of human rights. Only individuals can be a 'victim', as legal entities such as corporations do not have rights under the HRA. Relatives of a victim may also have standing in certain circumstances, for example, where a complaint is made about the victim's death, or where the victim is a child.²

Remedies

Section 40C(4) of the HRA provides that the Supreme Court may grant 'the relief it considers appropriate' except for damages, where a public authority has been found in breach of its obligations under the HRA. Remedies ordered by the Court might include an injunction to stop or prevent conduct from occurring, or a declaration that the decision was unlawful, requiring the original decision to be reconsidered in a human rights consistent manner.

Any right to damages under other legislation or the common law for the same conduct remains undisturbed. So, while there is no separate right to damages for a breach of human rights *per se*, human rights arguments may be raised to strengthen a pre-existing claim for damages, such as in negligence.

Limitation

A proceeding against a public authority for a breach of a human right must be brought within one year of the date on which the alleged unlawful conduct took place. However, the Supreme Court can extend that period if it considers it is fair to do so in the circumstances.

Advice

Information on obtaining legal advice, including for free, is available at the end of this guide under [Links to More information](#).

10. Role of the Commission

The Commission plays an important role to help advocates and local communities in the ACT understand and assert their rights.

² See, for example, Explanatory Statement, Human Rights Amendment Bill 2007 (ACT) 6, where reference is made to a number of relevant communications of the United Nations Human Rights Committee.

The Commission also acts as a strong advocate for human rights.

As part of our role under the HRA, we [intervene](#) in court and tribunal proceedings that raise questions about human rights.

Training

Please contact the Commission to discuss your training needs. We also have free e-learning software available on [our website](#) on the ACT Human Rights Act.

11. Links to More information

Obtaining Legal Advice

A list of private firms is available from the ACT Law Society: <https://www.actlawsociety.asn.au/>

In addition, a number of free legal services are available including:

- Legal Aid
- Community Legal Centres

Information on both are available on the ACTLAF website: <http://www.actlaf.org.au/legal-information/legal-help-directory/>

External and Independent Agencies

- The ACT Human Rights Commission provides processes for dealing with complaints about discrimination, health services, and services for people with a disability and their carers, for older people and for children and young people and their carers. <http://www.hrc.act.gov.au/>
- The ACT Ombudsman can handle complaints against ACT Government organisations also: www.ombudsman.act.gov.au
- The ACT Public Advocate provides a professional, quality, responsive and proactive service to people who, because they are suffering from a condition, they are not able to pursue or protect their own interests. <http://www.publicadvocate.act.gov.au/>

Factsheets on individual rights and further information on HR Advocacy

ACT Human Rights Commission: <http://www.hrc.act.gov.au/humanrights/>

British Institute for Human Rights: <http://www.bihhr.org.uk>

Victorian Equal Opportunity and Human Rights Commission: <http://www.humanrights.vic.gov.au/>

Australian Human Rights Commission: <http://www.humanrights.gov.au>

Attachment A: Preparing to Advocate

Advocacy is about improving an individual, or group of people's circumstances, using human rights arguments. Advocates can be lawyers, professionals working for an organisation or individual citizens, like friends, relatives and co-workers.

The ACT Human Rights Act makes it possible for anyone to challenge public services and policies to improve them for one person, or everyone in our community. This can include:

- self-advocacy – standing up for yourself
- individual advocacy – standing up for someone else's rights
- systemic advocacy – if you are trying to change a system to address the structural causes of inequality.

The core values of human rights, such as equality, dignity, autonomy and respect are also central to principles of advocacy and advocates.

Utilising human rights arguments in advocating for someone else will usually involve:³

Engagement

1. If you are advocating on behalf of someone else, you should respect their autonomy and confirm they are comfortable with your proposed advocacy. You should consult with them about whether they would prefer to be supported to take action directly themselves. Have this conversation with them several times as the advocacy progresses – so that you can be sure that the advocacy steps you are taking are the ones that they want you to take and that you are representing them in the way they want to be represented
2. What human rights issues are there in relation to issue? Can you identify specific human rights that might be engaged by the decision or action? Detail information on every right under the HR Act is available at <http://www.hrc.act.gov.au/>
3. Has the public authority considered human rights before an action or decision?
4. If you are advocating on behalf of someone else, have you discussed the human rights issues with them? What is the best way for you to communicate with this person?
5. Is the Public Authority making assumptions about how best to communicate with you or the person you are advocating for?
6. Are there further supports you need? See the below list of organisations that can assist

Planning

1. What expectations do you, or the person you are advocating for, have for a reasonable outcome from speaking to the Public Authority about this issue?

³ This adapted from a number of sources, including the UK Equality and Human Rights Commission's 'Action of Advocacy' document available at <http://www.equalityhumanrights.com>

2. How does the action or decision relate to the law? If a human right is limited, the first question to ask is whether the organisation can identify an ACT law that permits such action.
3. If there is a law that permits a human right to be limited, is the Public Authority obliged to act in a particular manner, or do they have some discretion?
4. Is the organisation interpreting the legislation in a way consistently with human rights (which is also a requirement of the HR Act).
5. If there is discretion, does the organisation have policies or procedures that cover this? Ask to see documentary basis for the decision and then assess if the decision or action is consistent with this policy. If it is not, you can point this out, and if this fails, could consider making a complaint to an external body, like the Ombudsman, if the agency refuses your request to comply with that policy.
6. If the policy or procedure is inconsistent with human rights, or one doesn't exist, ask the organisation to demonstrate how the action or decision is a proportionate limitation on that right.
7. What resources do you have to take this issue on? How far are you willing to progress? Have you considered the costs of any subsequent legal advice or action, to determine if offers made by the Public Authority along the way may be a reasonable compromise?
8. You might consider drawing up an action plan for how you will approach these issues.

Communicating

9. If you are advocating on behalf of someone else, have you discussed with them the best way for you to communicate with one another?
10. What is the best way for you to communicate with the Public Authority?
11. A useful hierarchy of communication might be:
 - Speaking verbally over the phone or in person with the person who has made the decision or action you are challenging;
 - Raising the issue verbally with their manager/supervisor;
 - Emailing or writing to the head of the Public Authority;
 - Consider any external complaint mechanisms. While a human rights breach must commence in the ACT Supreme Court, other bodies like the Ombudsman may be able to take a free complaint about the actions or decisions of a Public Authority. Complaints about discrimination can be made to the ACT Human Rights Commission for free also. See below for a list of other external complaints agencies.
 - Raising the issue with the relevant ACT Government minister or another elected representative. A list is available at <http://www.parliament.act.gov.au>

- Seeking legal advice (you can do this earlier) about progressing the matter through courts or the ACT Civil and Administrative Tribunal. See below for a list of free and paid legal advice options. The courts can grant any remedy for a human rights breach *except* financial damages. You should remember that there are likely to be financial and emotional/stress from commencing formal legal action.
- If you are advocating for someone else, make sure that you communicate clearing the progress or outcomes of each step in your advocacy and also when the advocacy issue ends make sure that they understand the outcome and that the issue is now closed.

Review

12. What were the outcomes of the actions you employed?
13. Was the issue resolved? If the issue was not resolved, what can you, and your organisation, learn for next time?
14. Are there gaps in knowledge for you or your organisation? Is training required to further understand the HR Act (online and face to face training is available through the ACT Human Rights Commission).