

Collation of Factsheets on each right under the *ACT Human Rights Act 2004*

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**HUMAN RIGHTS &
DISCRIMINATION COMMISSIONER**

ACT Human Rights Commission

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Right to Equality (s.8)

Section 8 of the *Human Rights Act 2004* says that:

- 1) Everyone has the right to recognition as a person before the law.
- 2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.
- 3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

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

Scope of the Right

Section 8 of the Act protects three different but related rights.

The right to recognition as a person before the law

The first is the right to recognition as a person before the law. This is an absolute right which, under international law, cannot be limited under any circumstances.

The essence of this right is equality of legal capacity, for example the capacity to enter into contracts or access Government services. In some countries, such capacity is denied to certain groups (such as women or particular ethnic groups).

The right to enjoy other human rights free from discrimination

The second right in section 8 of the Act is the right to enjoy other human rights without 'distinction or discrimination of any kind'. 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.

The right to the protection of the law without discrimination

Section 8 of the Act also provides that everyone is entitled to equal protection of the law without discrimination. This right refers to the enforcement and administration of the law.

Example: *Parks Victoria (Anti-Discrimination Exemption) [2011] VCAT 2238 (28 November 2011)*

In this case, Parks Victoria wanted to advertise for and employ Indigenous people to care for Wurundjeri country. The Tribunal found that the purpose of the activity was to provide employment opportunities to Indigenous people, to increase the number of Indigenous people employed by Parks Victoria, to provide opportunities for connection and care for the Wurundjeri country by its traditional owners and also for the maintenance of the culture associated with the country. The Tribunal was satisfied that the measure was proportionate because at the time the application was made only 7.6 per cent of Parks Victoria's workforce was Indigenous. This measure of limiting the employment opportunity to Aboriginal people was found to be a reasonable limitation on the right to equality of other groups.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 8 could be engaged by activities that:

- Provide for the delivery of an entitlement or service to some groups but not others;
- Assist or recognise the interests of Aboriginal persons or members of other ethnic groups;
- Are stated in neutral terms but have a disproportionate impact on a sector of the community whose members have one or more protected attributes under the Discrimination Act 1991 (for example, sex, race, age or disability);
- Deal with any of the human rights set out in the HRA in a discriminatory way: for example, if the legislation curtails freedom of expression or if a person has engaged in industrial activity;
- Set age brackets that are expressed as protective measures, graduated entitlements (for example, driver licensing), or statements of legal capacity (for example, voting);
- Establish eligibility requirements for access to services or assistance (such as legal aid);
- Contain measures that aim to assist people who are socially, culturally or economically disadvantaged;
- Take steps to diminish or eliminate conditions that have resulted in specific groups within society being disadvantaged (positive discrimination);
- Regulate access to infrastructure and public facilities including building, roads, transport, schools, housing and hospitals;
- Affect information and communications services including electronic services;
- Regulate access to public services including education, healthcare, the justice system and voting;
- Provide for mobility aids, assistive devices and technologies designed for people with disabilities;
- Set standards or guidelines for access to facilities and services to ensure businesses that provide public services take into account access for people with disabilities.



Right to Life (s.9)

Section 9 of the *Human Rights Act 2004* says that:

- 1) Everyone has the right to life. In particular, no-one may be arbitrarily deprived of life.
- 2) This section applies to a person from birth.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

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Scope of the Right

The right to life is primarily concerned with preventing the arbitrary deprivation of life. It is relevant to:

- The use of force by public authorities;
- The delivery of medical treatment;
- The investigation of the conduct of public authorities, particularly when a person dies while in the care of public authorities.
- The right to life imposes both positive and negative duties on public authorities – negative duties to refrain from taking someone’s life, and positive duties to take reasonable steps to protect people.
- The right to life recognises that in some limited circumstances government authorities may have to take life, such as in law enforcement or military activities. This can only be done in accordance with the law and when absolutely necessary.

Negative duties

The negative duties imposed by the right to life mean that public authorities must refrain from arbitrarily or intentionally depriving someone of life. The use of force by government officials that has resulted in a deprivation of life must have been ‘absolutely necessary’ and ‘strictly proportionate’ to the achievement of the permitted purpose. For example, this might occur when the police have to use lethal force to protect the lives of other people in imminent danger.

The European Court of Human Rights has found violations of the right to life because of deficient operational planning and control. For example, in *Gulec v Turkey* the Court found that the right to life had been violated when police fired guns to disperse demonstrators and that the unavailability of less lethal means of crowd control was ‘unacceptable’.

Positive duties

The right to life also requires public authorities to take positive steps to protect the right to life. This includes imposing a duty on government:

- 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.

Example: Coronial Investigation of 29 Level Crossing Deaths, 25 June 2010

In this case, the Victorian Coroners Court considered its ability to 'address systemic and prevention issues' in the investigation of 29 deaths that occurred on level crossings in Victoria. The Coroner held that the interpretive mandate in section 32(1) of the Victorian equivalent of the Human Rights Act obliges the Coroners Court to interpret all legislation compatibly with human rights. The Court found that the right to life 'requires the Coroner to conduct an inquest that investigates not only the immediate circumstances of the death but also the possibility of systemic failure on the part of the authorities to protect life'.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 9 could be engaged by activities that:

- impact on the way that essential services are provided, or how and whether these services can be accessed in a way that impacts on the welfare or safety of persons (such as medical or welfare services)
- impact on the delivery of medical resources for patients
- impact on procedures for the management of those held in care
- create or amend law, policy or practices permitting law enforcement officers to use force, including the use of weapons in the course of their duties
- create or amend the law withholding or requiring medical treatment, or coronial inquests
- relate to investigation into the conduct of public authorities, especially when people die while in the care of public authorities, for example, deaths in custody or of children in the child protection system.



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

Section 10(1) of the *Human Rights Act 2004* says that:

- 1) No-one may be—
 - (a) Tortured; or
 - (b) Treated or punished in a cruel, inhuman or degrading way.

Note: The prohibition on torture and cruel, inhuman or degrading treatment under international law applies at all times and under all circumstances.

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Scope of the Right

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.

All government authorities and agents (including contractors) have a duty to refrain from inflicting torture or other cruel, inhuman or degrading treatment on individuals. Governments also have a duty to prohibit such acts in the law and to prevent them through effective legislative, administrative, judicial and other measures.

Application of the Right in the ACT

Conduct covered by this right will often be a criminal offence. Torture is a crime anywhere in Australia under the *Commonwealth Criminal Code Act 1995* (Division 274). Most other acts of cruel, inhuman or degrading treatment would be covered by laws such as those dealing with assault or causing serious injury (see eg *Crimes Act 1900* (ACT), sections 19-36).

Public authorities can play a role in promoting, respecting and protecting this right through their laws, policies and programs, and services. They can also support people in our community who have been victims of torture overseas. Cruel, inhuman or degrading treatment comes up more frequently in our domestic context and can be relevant in the situations noted below.

Note: The *Human Rights Act* does not apply to the Commonwealth Government. So for example, it does not apply to federal officials running immigration detention centres. Australia's obligations under international human rights law, the *Australian Human Rights Commission Act 1986*, and relevant criminal laws and procedures apply to the Commonwealth Government.

Examples:

The following two examples illustrate the scope of the right to protection from cruel and degrading 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).
- In *R v Porritt* [2008] ACTSC 71 (7 August 2008), the Supreme Court of the ACT held that when punishing any person bearing criminal responsibility, the Court is required to take into account the interest of the community in the rehabilitation and humane treatment of offenders. In *Portitt* this meant that the defendant should be released on a good behaviour bond.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 10 could be engaged by activities that:

- Affect the physical or mental well-being of a person in a manner that may: cause serious physical or mental pain or suffering, or humiliate or debase a person;
- Create new powers, modifying or increasing existing powers of police, inspectors or authorised officers or other persons;
- Remove or restrict the right to complain about service delivery, or mistreatment by a public authority;
- Affect the operation of detention facilities and conditions attached to all forms of State care and detention (including access to goods and services, such as medical treatment, while in detention);
- Authorise changes to rules of evidence or procedure that would allow for evidence obtained as a result of torture, inhuman or degrading treatment, to be used in courts or tribunals;
- Authorise a person to be searched or puts in place procedures for conducting searches;
- Regulate the treatment of persons located at any site for which a public authority is responsible, including: a public hospital, an approved mental health service, a prison, a government school, a disability or aged care service, and supported residential service;
- Allow for prolonged periods of segregation or other particularly harsh prison regimes;
- Involve crisis intervention strategies or behavioural management plans that include the use of seclusion, chemical restraint or physical restraint;
- Define and regulate procedures for obtaining consent to medical treatment and experiments;
- Regulate medical treatment of persons without their consent;
- Regulate the conduct of medical or scientific research.



Right to Protection from Medical or Scientific Experimentation (s.10(2))

Section 10(2) of the *Human Rights Act 2004* says that:

No-one may be subjected to medical or scientific experimentation or treatment without his or her free consent.

Note: The prohibition on torture and cruel, inhuman or degrading treatment under international law applies at all times and under all circumstances.

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Scope of the Right

Section 10(2) of the Human Rights Act specifically prohibits involuntary medical or scientific experimentation – a prohibition which stems from Nazi experimentation in the Second World War, but remains relevant today.

However, the protection is broader than medical or scientific experimentation. Section 10(2) provides that no medical treatment can be administered on a person without that person's free and informed consent. This issue comes up frequently for people with disabilities in our community, and often arises in end-of-life situations.

What is lawful consent?

A recent Victorian Law Reform Commission Review of Guardianship Law described the concept of capacity to consent as follows: 'Capacity is a legal concept that describes the level of intellectual functioning a person requires to make and accept responsibility for important decisions that often have legal consequences'.

Under the common law, all adults are presumed to have capacity and the burden of disproving capacity is placed upon any person who seeks to challenge capacity. In *Re T (An adult: Consent to Medical Treatment)* [1992] 4 All ER 649 Butler-Sloss LJ held:

A man or woman of full age and sound understanding may choose to reject medical advice and medical or surgical treatment either partially or in its entirety. A decision to refuse medical treatment by a patient capable of making the decision does not have to be sensible, rational or well considered.

This statement has been cited with approval in Australian courts: see *Hunter and New England Area Health Service v A* [2009] NSWSC 761.

Fluctuating capacity and advanced consent

There is a growing acceptance of advanced directions. That is, the ability of an individual with capacity to pre-determine how they will be treated in future if they lose capacity.

In *Re T*, the Court suggested that advanced directions were permissible, if:

1. The person had capacity at the time;
2. Their directions were clearly established;
3. Applicable to the current circumstances; and
4. Made without undue pressure.

However, advanced directions can be disregarded in emergency situations.

Example: Consent to medical treatment – *Australian Capital Territory v JT* [2009] ACTSC 105 (28 August 2008)

This case concerned an application for a declaration that it is lawful for medical practitioners employed by the Territory to desist from affording other than palliative care to a man, JT. The Supreme Court heard that JT was chronically psychotic and suffered from paranoid schizophrenia characterised by religious obsessions. This condition led to him to refuse to eat. Artificial feeding through naso-gastric intubation, though necessary to sustain JT's life, caused distress both to him and staff carrying out the procedure. The Canberra Hospital Clinical Ethics Committee and Psychiatric opinion argued that 'as JT was accepting of death, his mental state indicating capacity to consent should be ignored and his "wishes" respected'. The Supreme Court disagreed, holding that JT was not of sound mind nor capable of informed consent, as such, the declaration was application was dismissed.

The Court's decision accords with the general position that a human rights consistent framework for the withdrawal of medical treatment must operate from the presumption in favour of life-sustaining treatment. This presumption can only be overturned where it would conflict with the competent patient's right to refuse treatment.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 10 could be engaged by activities that:

- Remove or restrict the right to complain about service delivery, or mistreatment by a public authority;
- Regulate the treatment of persons located at any site for which a public authority is responsible, including: a public hospital, an approved mental health service, a prison, a government school, a disability or aged care service, and supported residential service;
- Involve crisis intervention strategies or behavioural management plans that include the use of seclusion, chemical restraint or physical restraint;
- Define and regulate procedures for obtaining consent to medical treatment and experiments;
- Regulate medical treatment of persons without their consent, for example under mental health or guardianship law;
- Regulate the conduct of medical or scientific research.



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

Section 11(1) of the *Human Rights Act 2004* says that:

The family is the natural and basic ground unit of society and is entitled to be protected by society.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

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Scope of the Right

An explanatory note under section 11 of the *Human Rights Act* says that the term ‘family’ has a broad meaning that recognises the many different types of families that live in the Australian Capital Territory, all of whom are entitled to protection.

The term ‘family’ should be given a broad interpretation to include all people who make up a family unit, reflecting the meaning of ‘family’ in Australian society. For example, a ‘family’ could include a situation where children are living with their grandparents rather than their parents, or with a legal guardian, or a foster family. The term ‘family’ could also include extended family in some circumstances: for example, where there are kinship ties to extended family, or where someone’s culture or ethnicity gives their extended family unit particular significance for them.

Protection of families

The *HRA* says that families must be protected by society and the State.

This right is also supported by the right to privacy in section 12 of the Act which prohibits a public authority from unlawfully or arbitrarily interfering with a person’s family or home.

Legislative provisions that allow a child to be removed from a family unit need to be considered in light of sections 11(1), 11(2) and 12 of the *HRA*. While family unity is an important part of human rights, different rights may need to be taken into account. For example, subsection 11(1) may be qualified by the right to protection of children in subsection 11(2), if a child needs to be removed from a situation of family violence.

Examples:

Promoting flexible decision-making for the elderly and vulnerable (Victoria)

A woman who was the sole carer for her elderly parents (one of whom had recently suffered a stroke and the other had dementia) was issued with a notice from the local council that the accommodation she had arranged for her parents was contrary to planning approvals. The woman’s legal representative wrote to the council asking them to consider the right to privacy and family life. The council granted the woman extra time to make alternative arrangements for her parents.

A number of European Cases have further elucidated the scope of the right to protection of the family:

- In *Hoffmann v Austria* (23 June 1993) the European Court of Human Rights held that the withdrawal of parental rights from the applicant after she divorced the father of their two children, because she was a Jehovah's Witness violated the right to the protection of family life and the prohibition of discrimination.
- In *Keegan v Ireland* (26 May 1994) the European Court of Human Rights found that placing a child up for adoption without the knowledge or consent of the father was a violation of the right to the protection of the family. Further, the Court held that as Irish law did not afford the applicant a right to be appointed guardian or permit him access to a court in respect of proceedings before the Adoption Board, his right to a fair trial had been violated.
- In *Konstantin Markin v Russia* (22 March 2012) the European Court of Human Rights held that refusal by Russian authorities to grant the applicant, a divorced radio intelligence operator in the armed forces, parental leave, violated the right to protection of the family and the prohibition of discrimination.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 11 could be engaged by activities that:

- Affect the law regarding close or enduring personal relationships or fail to give legal recognition to these relationships;
- Affect any aspect of care of children, including children cared for by parents, guardians, informal carers, children in out-of-home care, children with a disability, parents or carers with a disability;
- Relate to treatment of children in the criminal process;
- Relate to family violence;
- Affect adoption or surrogacy;
- Regulate the obligations of family members towards each other, including parents and guardians towards children;
- Provide for the separation and removal of children from parents or guardians or other adults responsible for their care;
- Regulate family contact for those in the care of public authorities or enables intervention orders to be granted between family members;
- Affect the welfare of children within the family or state care;
- Regulate family contact of prisoners or others in involuntary state care;
- Create a regime for giving children access to information about biological parents when the child has been adopted or born using assisted reproductive technology;
- Deal with the division of estates on intestacy.



Right to Protection of Children and Young People (s.11(2))

Section 11(2) of the *Human Rights Act 2004* says that:

Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

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Scope of the right

The right under s 11(2) of the HRA uses the international law definition of a 'child' being a person under 18 years of age. This means that the right applies to both 'children' and 'young people' as defined in the *Children and Young People Act 2008* (ACT) - where a child is any person under 12 years of age, and a young person as a person who is 12 years old or older, but not yet an adult (that is, under 18 years old).

Section 11(2) of the HRA expressly guarantees that every child and young person has the right to the protection they need without any distinction or discrimination. In addition, children and young people are also entitled to all the other rights guaranteed under the HRA. Human rights law recognises children and young people as rights-bearers able to express their own views and with evolving capacity to determine their own best interests. The weight to be placed on a child or young person's views will depend on their developmental capacity and the full context of the decision.

Limitations

The right in s 11(2) focuses on protection of children and young people, rather than expressly articulating the broader scope of rights that have been developed in the Convention on the Rights of the Child. The rights of children and young people at international law have developed from a 'protectionist' model, which focuses on vulnerability and incapacity, towards a 'participatory' model which recognises the evolving capacities of children and young people, and their right to express their views and to participate in decisions that affect them. The Commission has recommended that the HRA be amended to incorporate a broader expression of the rights of children and young people to better reflect this modern participatory model.

Broader interpretation

Although the wording of the right in s 11(2) focuses only on protection, s 11(2) may be interpreted more broadly in light of the developing scope of the rights of children and young people at international law. Under s 31 of the HRA international law may be used to interpret the meaning of rights in the HRA, and thus the Convention on the Rights of the Child would be relevant to determine the scope of this right. Under a broader interpretation, the 'protection' needed because of being a child or young person would require meeting all of the particular needs of children and young people, including their need to be heard and to be supported to participate in decisions that affect them.

Use of the rights

The right of children and young people under s 11(2) will be relevant in a wide range of situations and must be taken into account by public authorities in making decisions or developing laws or policies that affect children and young people.

The Children & Young People Commissioner (CYPC) applies the right in s 11(2) in considering complaints against public authorities in relation to services for children and young people in the ACT, and advocates for Government agencies to consult with children and young people about issues that affect them.

The right under s 11(2) together with other human rights informed the analysis of the Human Rights & Discrimination Commissioner's (HRDC) 2005 Audit of the Quamby Youth Detention Centre. The HRDC and CYPC also applied the right in their 2011 Review of the ACT Youth Justice System, which made many of recommendations to ensure that children's rights were respected, including the need for evidence-based rehabilitation programs, use of detention as a last resort and greater safeguards in the use of strip searching and segregation.

The right was also relevant in assessing issues such as arrangements for visits and the program for women and children in the HRDC's 2014 audit of the conditions of detention of women at the Alexander Maconochie Centre.

The following are some case law examples from the ACT, Victoria and Europe:

- In *R v YL* [2004] ACTSC 115 the Court refused to exercise coercive powers to compel a seven-year old child to enter court and give evidence against his will in an assault case, citing the right of the child to protection.
- In *A & B v Children's Court of Victoria* [2012] VSC 589 (5 December 2012) the Court held that a child who is mature enough to give instructions to a legal representative is entitled to give direct instructions; 'maturity' does not involve assumption based on age alone.
- In *A v the United Kingdom* 95599/94 (23 September 1998), the European Court of Human Rights held that the State has a positive duty to protect people (particularly those who are young and vulnerable) from physical harm when such harm amounts to torture and cruel, inhuman or degrading treatment in section 10 of the HRA. The Court clarified that the severity of an act (and therefore whether it reached the Article 3 threshold) was in part based on the age of the victim.
- In *E v the United Kingdom*, 33218/96 (26 November 2002), the Court held that 'a failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State'. In *ES v Slovakia*, 8227/04 (15 September 2009) the Court extended this liability to cover not just inaction by individual social workers, but also procedures within the system that lead to inadequate protection.

Examples of when this right could be relevant in practice

The rights of children and young people under s11(2) should be considered whenever a public authority makes a decision or develops a law or policy that will affect children and young people. It is important in these situations for public authorities to consider how children and young people will be affected, and to ensure that they have an opportunity to be heard and for their views to be taken into account.

This will include decisions, laws or policies:

- about services and programs for children and young people;
- about where, and with who children and young people live, and who they can have contact with;
- about public space, developments or infrastructure that will be used by children and young people now and in the future;
- about offences and penalties that may affect children and young people (see related factsheet on s 22 of the HRA);
- about addressing risks to children and young people and protecting them from harm, including family violence.



Right to Privacy and Reputation (s.12)

Section 12 of the *Human Rights Act 2004* says that:

Everyone has the right—

- (a) Not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
- (b) Not to have his or her reputation unlawfully attacked.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

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

Scope of the Right

The right to privacy under section 12 of the *HRA* protects people in the ACT from ‘unlawful’ interference with their privacy – this means that no interference can take place except in cases authorised by law. Under international law, the right to privacy has been interpreted as applying in a variety of different circumstances. It has been defined widely as ‘the right to be left alone’ (the right to live free from interference), and so includes the right to autonomy.

The term ‘arbitrary interference’ in the right to privacy can extend to lawful interference. Arbitrary interference in someone’s private or family life is interference that may be lawful, but is unreasonable, unnecessary and the degree of interference is not proportionate to the need. The inclusion of the concept of arbitrariness in the right to privacy ensures that even lawful interference should be in accordance with the provisions, aims and objectives of the *HRA* and should be reasonable in the particular circumstances.

The term ‘family’ in the right to privacy should be given a broad interpretation to include all people who make up a family unit, reflecting the meaning of ‘family’ in Australian society. For example, a ‘family’ could include a situation where children are living with their grandparents rather than their parents, or with a legal guardian, or a foster family. The term ‘family’ could also include extended family in some circumstances: for example, where there are kinship ties to extended family, or where someone’s culture or ethnicity gives their extended family unit particular significance for them. See the ACT HRC Factsheet on the “Right to Protection of the Family and Children (s.11)” for more information.

Examples

The diversity of international cases about privacy, family life and reputation demonstrates the breadth of these rights. Examples include:

- *Toonen v Australia*, a prominent case in which the UN Human Rights Committee held that the criminalisation of homosexuality under Tasmanian law was an unlawful incursion on a person’s right to privacy under the ICCPR (UN Doc CCPR/C/50/D/488/1992)
- *Sayadi & Vinck v Belgium*, in which the UN Human Rights Committee found that Belgium’s listing of two innocent people on the Security Council terrorist watch list constituted an unjustified attack on their

honour and/or reputation (CCPR/C/94/D/1472/2006).

However, as always the right to privacy is subject to reasonable limits. In *R v Cringle* [2013] ACTSC 34 (5 March 2013), the ACT Supreme Court held that legislation providing for search and seizure of materials found in a person's cell at a Correctional Centre do not violate s 12. The Court held that prisoners or remandees form a discrete sub-set of the population for whom it is necessary to make particular rules. The rules were not arbitrary but were designed to maintain safety and discipline within correction centres.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 12 could be engaged by activities that:

- Involve surveillance of persons for any purpose (such as closed-circuit television, CCTV);
- Involve collection, storage, use or publication of personal information and how that information is accessed, used or disclosed;
- Regulate information held on a public register;
- Restrict access by people to their own personal information;
- Provide for sharing of personal information across or within agencies;
- Involve powers of entry, search, seizure, confiscation or forfeiture;
- Allow publication of personal information (for example, results of surveillance, medical tests, electoral roll);
- Provide for a compulsory physical intervention on a person such as a DNA, blood, breath or urine test; forced gynaecological or other medical examination; or corporal punishment;
- Provide for treatment or testing of a patient without his or her consent;
- Involve a professional duty of confidentiality;
- Change or create any confidentiality or secrecy provisions relating to personal information;
- Provide for mandatory disclosure or reporting of information (including disclosure of convictions, injury or illness), or by professionals reporting abuse, for example, doctors regarding patients or teachers regarding students;
- Regulate a person's name, private sexual behaviour, sexual orientation or gender identification;
- Involve the interception, censorship, monitoring or other regulation of postal articles and all other communications;
- Relate to handling personal information for research or statistics;
- Recognise or fail to give legal recognition to close or enduring personal relationships;
- Provide for the removal of children from a family unit or a family intervention order;
- Regulate tenancy or eviction;
- Regulate a state-run care facility or mental health service;
- Regulate standards, consultation and procedures operating in respect of public housing;
- Authorise compulsory acquisition of a home or regulate planning or environmental matters that may affect a person's home.



Right to Freedom of Movement (s.13)

Section 13 of the *Human Rights Act 2004* says that:

Everyone has the right to move freely within the ACT and to enter and leave it, and the freedom to choose his or her residence in the ACT.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

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

Scope of the Right

This right 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.

The right to freedom of movement developed because of the forced displacement of people in Europe and elsewhere in the early part of the twentieth century, where 'unwanted' people were moved out. This has led to the important rule that governments have to act within the law if they restrict people's freedom of movement.

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.

The right to freedom of movement applies only to persons who are lawfully within the ACT. People will not be lawfully in the ACT if they are classified as 'unlawful non-citizens' under the *Migration Act 1958* (Cth) – for example if they have overstayed their visitor's visa, or if they have entered the ACT in defiance of legal restrictions in another jurisdiction (for example a court order not to leave NSW).

Right to move freely with the ACT

The right to move freely within the ACT means that a person cannot be arbitrarily forced to remain in, or move to or from, a particular location. The right includes freedom from physical and procedural impediments, such as the requirement for prior authorisation before entering a public park or participating in a public demonstration in a public place. The right may be engaged where a public authority actively curtails a person's freedom of movement (for example through 'move on' police powers, orders excluding adolescents from a licensed premises, orders made under the *Mental Health (Treatment and Care) Act 1994* (ACT) or orders that subject a person to strict surveillance or reporting obligations before or when moving.

Right to enter and leave the ACT

The right to be free to enter and leave the Territory is also protected by section 92 of the Australian Constitution, which guarantees freedom of 'interstate intercourse', including the movement of both goods and people. This was confirmed by the High Court in *Nationwide News P/L v Wills* (1992) 177 CLR 1. Restrictions on the right to enter and leave the ACT must be proportionate to a legitimate and sufficiently important government aim under both the *Human Rights Act* and the Constitution.

Right to choose where to live

The right to choose where to live may be engaged by laws relating to trespass or protected areas such as national parks. It may also be affected by court orders or orders under statutory regimes such as the *Mental Health (Treatment and Care) Act* to direct where people on bail or under supervision may reside.

When can freedom of movement be limited?

International case law provides examples of reasonable restrictions on freedom of movement, including lawful detention, guardianship orders, involuntary treatment orders, Parole Board orders, family violence intervention orders, residence conditions on persons suspected of terrorist activities, and restrictions on leaving the country where judicial proceedings are pending.

Examples

The following two examples come from Victoria:

- A supervision order placed on a convicted person who had already served his term of imprisonment was found to be a reasonable limitation on his freedom of movement because of the risk of him committing another offence: see *Secretary, Department of Justice v AB* [2009] VCC 1132 (28 August 2009).
- A man with a mild intellectual disability was subject to an order which only allowed him to leave his psychiatric facility if accompanied by staff members. The Tribunal concluded that the only less restrictive option – voluntary treatment – was not appropriate given his history of violent outbursts, and so upheld the order: see *AC (Guardianship)* [2009] VCAT 1186 (8 July 2009).

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 13 could be engaged by activities that:

- Limit the ability of a person to choose where to live in the ACT;
- Restrict the movement of people as part of the criminal process, for example, the imposition of bail conditions;
- Allow for an intervention order against a person, or enables their detention;
- Propose surveillance of an individual;
- Empower public authorities to restrict people's movement based on national security considerations;
- Compel someone to provide information (for example, a subpoena);
- Regulate access to land based on quarantine considerations, or eligibility requirements permitting exclusion from public land or premises;
- Affect the conduct of public protests.



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

Section 14 of the *Human Rights Act 2004* says that:

- 1) Everyone has the right to freedom of thought, conscience and religion. This right includes—
 - (a) The freedom to have or to adopt a religion or belief of his or her choice; and
 - (b) The freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in public or private.
- 2) No-one may be coerced in a way that would limit his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

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Scope of the Right

This right is divided into a freedom of personal autonomy (a freedom to think and believe whatever you choose) and a freedom of manifestation (to demonstrate your thoughts or beliefs publicly).

The first kind of freedom has been held to be absolute at international law and can not be limited in any circumstances (see UN Human Rights Committee, General Comment 22). However, it is accepted that the freedom to manifest your beliefs externally may be limited – especially where it has the potential to have a negative impact on others.

The kinds of manifestations which would be protected by section 14(1)(b) include things like:

- Organised religious rituals and ceremonies;
- Building places of worship or religious teaching;
- Publishing and disseminating religious tracts and texts;
- Displaying symbols or wearing particular kinds of clothing;
- Observing holidays and days of rest;
- Observing a particular diet or avoiding certain food products.

Examples

In order to be recognised, a belief, whether religious or conscientious, must satisfy a number of conditions. It must: (1) Be genuinely held; (2) Be a belief and not an opinion or viewpoint based on the present state of information available; (3) Be a belief as to a weighty and substantial aspect of human life and behaviour; (4) Attain a certain level of cogency, seriousness, cohesion and importance; and (5) Be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with fundamental rights of others: see *R v AM* [2010] ACTSC 149 (15 November 2010).

In international cases considering similar provisions, the right has been found to protect:

- Religious education that provides a pluralistic view of religion and does not proselytise;
- A right to a certain diet in State-run institutions (for example, vegetarian, Halal or Kosher); and
- A student's right to wear a Sikh kirpan (ceremonial dagger) under his clothes at school.

On the other hand, the right has been found not to protect:

- A Canadian Sikh railway worker's preference to refuse to wear protective headgear due to its incompatibility with his turban (it was found to be a reasonable safety measure);
- A tax evader who claimed that he shouldn't have to pay tax if it went to funding the military (since he was a conscientious objector);
- Another conscientious objector who was charged with the criminal offence of insubordination because he objected to the loss of autonomy experienced during military service;
- Private schools in South Africa which claimed it was consistent with their Christian beliefs to impose physical discipline on students; and
- Fox-hunters in England whose 'belief' in the sport did not go beyond a desire to hunt for recreation.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 14 could be engaged by activities that:

- Promote, restrict or interfere with a particular religion or set of beliefs;
- Require a person to disclose his or her religion or belief;
- Affect an individual's ability to adhere to his or her religion or belief;
- Impinge upon or disadvantage a person because of the person's opinions, thoughts or beliefs;
- Attempt to regulate conduct that will affect some aspect of a person's worship, observance, practice or teaching of his or her religion or belief;
- Subject conduct that is required or encouraged by an individual's religion or beliefs to criminal penalties or fines;
- Restrict the capacity for those under state control (for example, prisoners) to comply with the requirements of their religion;
- Compel certain acts that may be inconsistent with a religion or set of beliefs;
- Restrict the capacity for those in the care or control of a public authority to comply with the requirements of their religion;
- Set dress codes (possibly for safety or hygiene reasons) that do not accommodate religious dress;
- Impose requirements as a condition of receiving a benefit that prevents a person from adhering to his or her religion or belief;
- Require students to learn about particular religions or beliefs or to be taught materials that might have the effect of undermining their religious beliefs;
- Regulate planning or land use that may make it difficult to use or establish places of worship.



Right to Peaceful Assembly and Freedom of Association (s.15)

Section 15 of the *Human Rights Act 2004* says that:

- 1) Everyone has the right of peaceful assembly.
- 2) Everyone has the right to freedom of association.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

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

Scope of the Right

The right to peaceful assembly

The right to peaceful assembly is the right of individuals to gather for a common purpose or to pursue common goals, such as protesting or meeting. The right to peaceful assembly includes gatherings in both public or in private, but does not include 'assemblies' of just one person.

Although the primary or original purpose of the right to peaceful assembly was the protection of peaceful demonstration and participation in democratic processes, it has been recognised that this right may extend to assemblies that are of a social, cultural, religious, charitable or professional nature. For example, in *Countryside Alliance v the UK* [2009] ECHR 2068, the European Court of Human Rights stated that to confine the right to peaceful assembly only to the political sphere would be an 'unacceptably narrow interpretation' of the right.

The right to peaceful assembly does not guarantee the use of a particular forum. For example, when considering a similar provision in *Appleby v United Kingdom* [2003] ECHR 222, the European Court of Human Rights found that not permitting an environmental group to petition in a privately owned shopping centre did not infringe on their right to peaceful assembly as they had the option of petitioning elsewhere. The Court stated that the right to peaceful assembly 'does not bestow any freedom of forum for the exercise of that right'.

In addition, the need to apply for authorisation to assemble 'does not normally encroach on the essence of the right', especially if it allows authorities to ensure the peaceful nature of the meeting (*Rassemblement Jurassien and Unite Jurassienne v Switzerland* (1979) 17 Eur Comm HR 108 [3]). Any such restrictions, however, need to be proportionate. For example, in *Bukta v Hungary* [2007] ECHR 25691/04, the organisers were unable to comply with the three-day notice requirement because the demonstration was organised in response to the Prime Minister's announcement that he would be attending a particular function the following day. The Court held that dispersing the peaceful assembly solely based on the inability to provide sufficient notice was a disproportionate restriction on the right to peaceful assembly.

The right to freedom of association

The right to freedom of association is the right to associate with others for the purpose of protecting common interests. These interests may be economic, professional, political, cultural or recreational.

The right to freedom of association also includes the right not to join an association. In *Young, James and Webster v The UK* [1981] ECHR 4, the European Court of Human Rights stated that the notion of 'freedom' implies the exercise of choice and that this 'negative freedom of association' was to protect individuals from being forced to associate with groups with whom she or he does not agree.

The right to freedom of association does not give the right to join any association. Associations have the right to administer their own affairs, to set their rules of membership, and to decide upon admission and expulsion from their association: *Cheall v United Kingdom* (1985) 42 Eur Comm HR 178.

In addition, not all organisations constitute 'associations' and the right to freedom of association will not be engaged where there is no 'association'. For example, professional organisations which require compulsory membership in order for an individual to practice within the profession are not considered 'associations'. In *Le Compte v Belgium* [1981] ECHR 3, the Court held that the *Ordre des médecins* (a body regulating the medical profession) was not an 'association' because it was founded by the legislature (and not individuals) and served a public function to safeguard the health of the population by keeping a register of all medical practitioners. The Court differentiated this body from several associations that had been formed to protect the interests of medical practitioners and to which the right to freedom of association did apply.

Example: Reasonable limitations – Victorian Electoral Commission (Anti-discrimination Exemption) [2009] VCAT 2191 (30 September 2009)

In this matter, the Victorian Electoral Commission (VEC) was granted an exemption from complying with the *Equal Opportunity Act 1995* (Vic). The purpose of the exemption was to enable the VEC to consider, amongst other things, information about political party or lobby group membership of potential employees.

Rights to equality; privacy; participation in public life; freedom of expression; freedom of association; freedom of thought, conscience, religion and belief were relevant to the application by the VEC. It was held that the exemption's purpose was an important public purpose, as it is vital to conducting elections in an impartial and unbiased manner. The exemption was granted as a reasonable limitation on these rights.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 15 could be engaged by activities that:

- Regulate membership of groups or associations;
- Limit the ability of a person or group of people to exercise their right to peacefully protest or to come together for a common purpose;
- Treat people differently on the basis of their membership of a group or association, for example, trade unions;
- Create disincentives or confers preferences for membership in a group or association (including a disclosure requirement);
- Prohibit membership in a group or association, for example a motorcycle gang;
- Regulations designed to ensure safety and security of prison facilities.



Right to Freedom of Expression (s.16)

Section 16 of the *Human Rights Act 2004* says that:

- 1) Everyone has the right to hold opinions without interference.
- 2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

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Scope of the Right

The right to freedom of expression protects the right of people to hold an opinion and to seek, receive and impart information and ideas. The right to freedom of expression comes with responsibilities. The Government can lawfully restrict this right if the restriction is necessary to protect the rights of others or to protect public order, public health, public morality or national security.

The right to hold an opinion

Section 16 of the *Human Rights Act* says that every person has a right to hold an opinion without interference. The UN Human Rights Committee has clarified that this means that no person should be subject to discrimination or victimisation because of any actual or perceived opinions that she or he holds.

In addition, no one should be coerced into holding or abandoning an opinion. The Committee has also declared that under international law, the right to hold an opinion is a non-derogable right. This means that the government cannot suspend this right for any reason, including in public emergencies.

Under international law, the right to hold an opinion is an absolute right, not subject to any limitations.

The right to freedom of expression

Every person has the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside the ACT.

Expression is a broad concept that has been held by courts to encompass 'every form of subjective idea and opinion capable of transmission to others' and 'any act which is capable of conveying some kind of meaning'. This includes political, cultural and artistic expression; news and information; commercial expression and advertising; audio-visual, electronic and internet-based modes of expression, as well as spoken, written and sign language. Examples include news, posters, pamphlets, banners, books, dress, legal submissions, teaching, religious discourse and human rights discussion.

The right to freedom of expression protects almost all mediums of expression, provided the expression conveys or attempts to convey a meaning. Whether an act conveys a meaning is judged by its impact on reasonable members of the public who are exposed to it, without reference to the purpose of the person who expressed it. However not all forms of expression are protected.

Expressive conduct delivered in the form of criminal damage to third party's property is not protected expression. Violence is also not a protected expression. This means that while the concept of expression is a very broad one, the way people can exercise the freedom of expression can be limited.

Hate speech and pornography may constitute expression, as even 'repugnant' expression is still expression. However, such expression may not be protected under the *HRA* because under section 12(b) the right to freedom of expression may be limited if it is necessary to protect the rights and reputation of others.

Communication of a commercial nature may be considered 'expression', although the right is conferred on human beings and not corporations. Commercial expression has been found to be less important than social or political expression, and limitations on it have been more easily justified.

The right to seek and receive information

The right to freedom of expression also incorporates a right to freedom of information. In particular, it includes a positive right to access government-held information. However, the right to receive information is not absolute, and may be subject to objective, proportionate and reasonable limitations.

Example: Restrictions on hate speech and vilification – *Daniel Emlyn-Jones and Federal Capital Press* [2009] ACTDT 2 (31 July 2009)

This appeal concerned a complaint about comments posted by individuals on the Canberra Times website under an article on the proposed Civil Unions Bill. The comments denigrated gays and lesbians, including linking homosexuality and pedophilia and suggesting that gays and lesbians should be treated in mental health institutions. The President of the Discrimination Tribunal held that the Canberra Times had unlawfully vilified homosexuals as a group (but not the complainant in particular) but that it was not liable as the publications were made reasonably and honestly for purposes in the public interest.

The President held that the right to freedom of expression places restrictions on the right to reputation. The particular statutory provisions enlivened created a defence allowing publication for purposes of public interest and 'discussion or debate about and presentations of any matter'. Significantly, however, if the Canberra Times had vilified the complainant in particular the defence would have failed.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 16 could be engaged by activities that:

- Regulate the manner, content and format of any public expression (for example, the contents of a speech, publication, broadcast, display or promotion). Examples could include requiring prior approval for public protest or restricting where protest activity can take place;
- Censor materials or require that they be reviewed or approved before being published;
- Compel someone to provide information (for example, a subpoena);
- Impose a dress code;
- Regulate or restrict an individual's access to information (including access to material on the internet);
- Attach criminal or civil liability to publications of opinions or information.



Right to take part in Public Life (s.17)

Section 17 of the *Human Rights Act 2004* says that:

Every citizen has the right, and is to have the opportunity, to—

- (a) Take part in the conduct of public affairs, directly or through freely chosen representatives; and
- (b) Vote and be elected at periodic elections, that guarantee the free expression of the will of the electors; and
- (c) Have access, on general terms of equality, for appointment to the public service and public office.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

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Scope of the Right

Section 17 specifies three different but overlapping rights.

Every citizen in the ACT has the right to participate in the conduct of public affairs; to vote and be elected at elections; and to access the public service and public office. However, the right to vote and the right to be eligible to stand as a Member of the Legislative Assembly is limited by the *Electoral Act 1992* (ACT) to persons 18 years old and older (see ss 103 and 128). This is an example of a reasonable limitation on the rights of the child under s 11(2) of the *HRA*.

The UN Human Rights Committee has commented that any limitations placed on the right to take part in public life must be based on 'objective and reasonable criteria'. The High Court of Australia recently supported this approach when it struck down a piece of legislation that prohibited all prisoners from voting. In *Roach v Electoral Commissioner* (2007) 233 CLR 162, the Court found that the blanket prohibition on prisoner voting was not 'proportionate,' and that disqualification must be based on 'substantial' reasons, such as conviction of a serious criminal offence.

What does 'take part in the conduct of public affairs' cover?

Section 17(a) outlines the right of every person in the ACT to take part in the conduct of public affairs. This clause aims to ensure that every person has the opportunity to participate in public life and that every person is able to participate without discrimination.

Participation in public affairs may be direct or indirect. 'Public affairs' is not defined in the *HRA*, but the UN Human Rights Committee has described public affairs as a 'broad concept which relates to the exercise of political power...[and] covers all aspects of public administration, and the formulation and implementation of policy.'

Examples of participating in public life may include:

- Being a member of a legislative body or holding executive office;
- Deciding on public issues through referendum or other electoral processes;
- Taking part in popular assemblies to make decisions about local issues;
- Being part of a community consultation with government;
- Being able to attend and ask questions at a local council meeting;
- Participating in public debate and dialogue with representatives (either as an individual or as part of an organisation).

Note: Participation in 'public life' means participation in the political affairs and public administration of the Territory. The word 'public' life in this context does not mean 'community' life or 'social' life.

Participation in one's community may engage other rights under the Charter such as the right to freedom of movement (section 13) or equality rights (section 8). The right to take part in public life does not mean the right to access public space through the use of public transport.

Example: No right of access to information or documents – *Law Society of the ACT & Treasury Directorate and NRMA Insurance (Appeal)* [2013] ACAT 36 (21 May 2013)

In this matter, the Law Society of the ACT made a request to the Treasury Directorate under the *Freedom of Information Act 1989* (ACT) for information to enable them to respond to an exposure draft document proposing changes to compulsory third party motor vehicle insurance. Ten documents were not released on the grounds that they were exempt. At first instance ACAT held that five of these documents should have been released, but that the other five should remain exempt. The Law Society appealed that decision.

The Tribunal dismissed the appeal holding that s 17 generally, and s 17(a) in particular, does not necessarily contemplate a right to access information or documents.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 17 could be engaged by activities that:

- Limit the ability to take part in municipal and parliamentary elections;
- Require individuals to meet certain conditions in order to be eligible to participate in municipal and parliamentary elections;
- Regulate how individuals vote in elections (for example, the method of voting);
- Regulate eligibility and access to employment in the public service or appointment to public office;
- Establish requirements for membership of public bodies;
- Regulate the conduct of elections and the electoral process;
- Regulate the suspension and conduct of local government;
- Regulate the suspension and removal of statutory office holders;
- Regulate electoral processes including funding of and expenditure by political parties and the drawing of electoral boundaries;
- Affect communication of information and ideas about public and political issues.



Right to Liberty and Security of Person (s.18)

Section 18 of the *Human Rights Act 2004* says that:

- 1) Everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained.
- 2) No-one may be deprived of liberty, except on the grounds and in accordance with the procedure established by law.
- 3) Anyone who is arrested must be told, at the time of arrest, of the reasons for the arrest and must be promptly told about any charges against him or her.
- 4) Anyone who is arrested or detained on a criminal charge—
 - (a) Must be promptly brought before a judge or magistrate; and
 - (b) Has the right to be tried within a reasonable time or released.
- 5) Anyone who is awaiting trial must not be detained in custody as a general rule, but his or her release may be subject to guarantees to appear for trial, at any other stage of the judicial proceeding, and, if appropriate, for execution of judgment.
- 6) Anyone who is deprived of liberty by arrest or detention is entitled to apply to a court so that the court can decide, without delay, the lawfulness of the detention and order the person's release if the detention is not lawful.
- 7) Anyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention.
- 8) No-one may be imprisoned only because of the inability to carry out a contractual obligation.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

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

Scope of the Right

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.

The right to security requires the Territory to provide reasonable measures to protect a person's physical security. The Government does this, for example, through the work of the police and emergency services. This right differs from the freedom of movement in section 13 of the Act, because a person must be 'detained' to suffer a deprivation of liberty.

The rights in subsections 18(4)–(7) are relevant after a person has been arrested or detained. Some of these rights are also reflected in the criminal law of the ACT, such as the *Crimes Act 1900* and the *Bail Act 1992*.

In practice, these guarantees mean that when arresting a person the police must immediately inform him or her of the reason for the arrest and arrange for them to be brought before a court for a preliminary hearing (usually to determine bail). Even if someone is detained without charges being laid, this should not take more than 24 hours. This helps to ensure that no one is detained on an unfounded suspicion or for an improper purpose.

Section 18(4), which provides that a person who has been charged with an offence must be brought to trial without unreasonable delay, overlaps with section 22(2)(c) of the *Human Rights Act*, because it is also an essential element of a fair trial.

Examples

The following examples have been found to violate the right to liberty and security:

- In *R v Rubino* [2012] ACTSC 157 the Supreme Court considered a sixth request for bail by a man charged with aggravated burglary, theft and criminal damage. Justice Refshauge granted bail. His Honour found that the previous bail applications were approached in a manner that assumed Mr Rubino would commit further offences and that he had to disprove this. This approach 'offended against the presumption of liberty in s 18 of the *HRA*'.
- A trial which was delayed to the extent that the accused's maximum potential sentence was less than time already served was said by the Victorian Supreme Court to be likely to breach the right to liberty (*Gray v DPP* [2008] VSC 4)

On the other hand, no violation was found in the following international case:

- The UK House of Lords has found 'stop and search' powers under anti-terror legislation to be reasonable because the search stopped people only for a brief period and did not involve restraining them with handcuffs or taking them away (*R (Gillan) v Commissioner of Police* [2006] UKHL 12).

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 18 could be engaged by activities that:

- Authorise a person with a mental illness to be detained for treatment in a mental health facility and facilitates review of their detention;
- Provide for the interim detention of a person whether or not he or she is suspected of committing an offence (for example, to prevent the spread of a contagious disease, or enable a person to 'sober up');
- Provide for special powers of detention of people for purposes including national security;
- Make provision for granting of bail;
- Relate to the management of security of anyone in the care of public authorities, particularly those in involuntary care;
- Make it an offence for a person to fail to remain at a place (for example, for further questioning or to conduct a search or test by a police officer or other official);
- Allow a public authority to cordon an area and control movement within that area;
- Grant a power of arrest.



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

Section 19 of the *Human Rights Act 2004* says that:

- 1) Anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.
- 2) An accused person must be segregated from convicted people, except in exceptional circumstances.
- 3) An accused person must be treated in a way that is appropriate for a person who has not been convicted.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

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

Scope of the Right

Section 19 requires all Public Authorities (including police and correctional staff) to treat persons in detention with humanity and dignity. It also requires the segregation of persons accused of offences from persons who have already been convicted of offences. Additionally, an explanatory note under section 19(2) provides that under section 20(1) an accused child must also be segregated from accused adults.

The purpose of the right to humane treatment when deprived of liberty is to recognise the particular vulnerability of persons in detention and to ensure that they are treated with consideration of their rights and dignity as human beings. This right complements the right to be free from torture and cruel, inhumane and degrading treatment under section 10 of the *HR Act*. However, it is engaged by less serious mistreatment or punishment than under section 10.

In the context of international human rights law, the UN Human Rights Committee has observed that this right applies not just to persons detained under the criminal law, but also to persons detained elsewhere (for example, in an approved mental health service) under the laws and authority of the government (see the Committee's General Comment 21). The Committee has made it clear that this right applies to all detention facilities within a state's jurisdiction.

The right to humane treatment means that individuals who are detained should not be subject to any hardship or constraint in addition to that resulting from the deprivation of liberty. The Human Rights Committee has emphasised that persons who are detained retain all their rights, subject only to the restrictions that are unavoidable in a closed environment.

Some rights are unavoidably restricted in a closed environment, for example: a person's freedom of movement; elements of freedom of expression and some elements of privacy; and interference with family life are inevitably affected.

The *UN Standard Minimum Rules for the Treatment of Prisoners* establish minimum standards on a range of matters, including conditions of: accommodation; food of adequate quality; facilities for personal hygiene; standard of clothing and bedding; opportunities for exercise and availability of medical services; contacts with the outside world; access to books and regulation of methods and procedures for discipline

and punishment (including the prohibition of certain forms of punishment). These are adopted into ACT Law through other legislation also, such as the *Corrections Management Act 2007*.

Section 10 grants additional rights to 'an accused person'. These rights follow from the principle of the presumption of innocence in criminal law: a detainee who has not yet been tried is entitled to a different treatment regime than convicted detainees. In particular, accused persons are entitled to be segregated from those serving their sentences. Section 10(2) provides, however, that the right applies 'except in exceptional circumstances' – for example where separate facilities are unavailable.

Note: The *HR Act* does not apply to the Commonwealth Government. For example, it does not apply to federal officials running immigration detention centres. Australia's obligations under international human rights law, the *Australian Human Rights Commission Act 1986*, and relevant criminal laws and procedures apply to the Commonwealth Government.

Examples

In *Eastman v Chief Executive Officer of the Department of Justice and Community Safety* [2010] ACTSC 4, the ACT Supreme Court held that section 19 requires that a prisoner be given the opportunity of "useful" work (judged by community standards, not the prisoner's own) and rehabilitative measures are necessary.

A detainee's right to be treated humanely has been held to be violated in cases before the UN Human Rights Committee where detainees were:

- Held in 'incommunicado' detention for any length of time (*Caldas v Uruguay*);
- Refused medical attention or there was a failure to address deteriorating mental health (*Mpandanjila v Zaire*);
- Subjected to ridicule (*Francis v Jamaica*);
- Denied reading facilities and not allowed to listen to the radio (*Nieto v Uruguay*);
- Confined to a cell for an unreasonably long period of time (*Cabreira v Uruguay*);
- Required to prepare prison food in unsanitary conditions (*Matthews v Trinidad and Tobago*);
- Subject to restricted correspondence with family (*Espinoza de Polay v Peru*);
- Prevented from being present at the birth of a child (*Madafferi v Australia*);
- Held in a small cage awaiting court appearance (*Cabal & Passini v Australia*);

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 19 could be engaged by activities that:

- Enable a public authority to detain individuals or relates to the conditions under which a person may be detained for example, in prisons, mental health services, prison transportation facilities;
- Concern standards and procedures for treatment of those who are detained (for example, use of force, dietary choice, access to private shower and toilet facilities);
- Authorise a person to be held in a place with limited facilities or services for the care and safety of detainees;
- Enable enforcement officers to undertake personal searches of those individuals detained in custody or detainee visitors.



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

Section 20 of the *Human Rights Act 2004* says that:

- 1) An accused child must be segregated from accused adults.
- 2) An accused child must be treated in a way that is appropriate for a person of the child's age who has not been convicted.
- 3) A child must be brought to trial as quickly as possible.
- 4) A convicted child must be treated in a way that is appropriate for a person of the child's age who has been convicted.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

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

Scope of the Right

The *Children and Young People Act 2008* (ACT) defines a child as any person under 12 years of age, and a young person as a person who is 12 years old or older, but not yet an adult. However, under the *Legislation Act 2001* (ACT), a child is defined as a person under 18 years of age. Section 20 of the *HR Act* protects all people under 18 years of age. The *Children and Young People Act 2008* in some circumstances permits a young person aged over 18 years of age to continue to be detained in the Bimberin Youth Justice Centre rather than being transferred to adult prison.

Right to be segregated from all detained adults

Any child who is deprived of his or her liberty must be segregated from adults, preferably in a separate juvenile facility. As with adults, accused children on remand must also be segregated from convicted prisoners serving their sentences (section 19(2)).

The law recognises that children, because of their age, are more vulnerable. When housed in adult prisons, or other adult facilities, children's basic safety and well-being may be compromised, along with their ability to reintegrate into society and avoid becoming involved in further criminal activity. That is why there must be separate facilities for children – including distinct, child-centred staff, personnel, policies and practices – to cater for the developmental needs of children.

The only permitted exception to the separation of children from adults is where it is not in the child's best interests. This would only be in exceptional circumstances. For example, the child's best interest may require greater priority for family contact than for separation which may lead to the child being detained with a parent or close to home, even if detention is in a facility shared with adults

Right to be treated in a way that is appropriate for a person of the child's age

This right must be applied, observed and respected throughout the entire process, from the first contact with the child by law enforcement agencies through to the implementation of any sentence.

Article 40(1) of the Convention on the Rights of the Child provides guidance in this area, stating that all criminal processes involving children must promote their rehabilitation and their ability to take on a constructive role in society.

Right to be brought to trial as quickly as possible

Every child arrested and charged must be brought before a court as quickly as possible. This requirement is similar to that applying to all people (recognised in sections 18(4) and 22(2)(c) of the Charter), but is more onerous, reinforcing the critical nature of timing when a child is kept in detention.

It is not sufficient to cite the absence of proper resources as reason for any delay. A prosecuting authority has a responsibility to ensure that all agencies are adequately supported and that proper consideration is given to the expedition of criminal charges involving children.

The European Court of Human Rights has held that the moment at which the “clock starts running” ‘may precede the trial and could be the “date of arrest”, the date when the person concerned [is] officially notified that he would be prosecuted or the date when preliminary investigations were opened’ (*Eckle v Germany* 5 EHRR 1). ACT Courts have held that ‘the time must begin to run as soon as the Young Person becomes aware that he is the subject of a police investigation’ (*Perovic v CW*).

Examples – Delay in Trial – *Perovic v CW*, ACT Children’s Court, unreported (1 June 2006)

In this case, the Children’s Court held that under section 20(3), a delay of 16 months between the alleged offence and trial for a child was too long, especially for a case that was not very complex. Lack of investigative resources was held to be no excuse, and the Young Person had not been responsible for the delay. The Magistrate ordered a permanent stay of proceedings, ending the prosecution.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 20 could be engaged by activities that:

- Enable children to be detained for any length of time;
- Authorise the holding of children in amenities that have limited facilities or services for the care and safety of children;
- Enable people to undertake personal searches of a detained child;
- Impacts on the environmental design of detention centres or conditions under which children are detained;
- Establish or alter programs in prisons, youth training centres or residential centres;
- Affects the speed at which a child may be brought to trial;
- Create or amend procedures and the law of evidence applicable to children charged with criminal offences, including the investigation and prosecution of offences;
- Amend the law relating to children in criminal proceedings, including bail, adjournments and sentencing.



Right to a Fair Trial (s.21)

Section 21 of the *Human Rights Act 2004* says that:

- 1) Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
- 2) However, the press and public may be excluded from all or part of a trial—
 - (a) To protect morals, public order or national security in a democratic society; or.
 - (b) If the interest of the private lives of the parties require the exclusion; or.
 - (c) If, and to the extent that, the exclusion is strictly necessary, in special circumstances of the case, because publicity would otherwise prejudice the interests of justice.
- 3) But each judgment in a criminal or civil proceeding must be made public unless the interests of a child requires that the judgment not be made public.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

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Scope of the Right

The right to a fair trial under section 21 of the *HR Act* is not confined to criminal cases. Whether a person is a defendant in a criminal case or a party to civil proceedings, they have the right to a fair trial before a competent, independent and impartial court or tribunal established by law.

Section 21 provides that judgments and hearings must be public unless other laws (for example for child protection) provide otherwise.

Section 22 sets out more specific minimum guarantees in criminal trials.

This right can be relevant in areas such as:

- The creation of courts and tribunals, and the appointment of judges
- Review jurisdiction
- Rules of evidence
- Whether a court is closed for the hearing of a particular matter
- Media reporting.

Examples

No right to a judge alone trial – *R v Girvan* [2012] ACTSC 142

In this case, the ACT Supreme Court confirmed that ‘the right to elect for a trial by judge alone is not part of, nor any aspect of, the right to a fair trial within section 21 of the [*HR Act*]’.

However, Refshague J held that ‘the constitution of the tribunal which hears and determines a criminal charge is a matter of significance and importance’. Thus, a jury which has an appearance of bias will not provide a human rights compliant trial.

Delay – *Foote v Somes* [2012] ACTSC 63

In this case the appellant doctor was the subject of two separate complaints. The Medical Board of the ACT notified the appellant that a Professional Standards Panel would be established to inquire into the complaints. The investigations were however, delayed. The appellant sought a stay of proceedings, arguing that the delay breached his right to a fair trial. The Supreme Court dismissed the application, holding that some delay in bringing proceedings is inevitable. In this case the delay was not unreasonable owing to the complexity of the issues, and the fact that the appellant bore some responsibility for the delay.

The Court held further that the test for the appropriate remedy for a breach of the right to a trial without unreasonable delay is one of proportionality. That is: (1) whether any proposed hearing would be unfair; and (2) whether there would be any relevant prejudice suffered by the appellant.

Production of evidence to an accused – *Ragg v Magistrates’ Court of Victoria and Corcoris* [2008] VSC 1

In this case, the Victorian Supreme Court considered whether a police officer should have to produce certain documents relevant to the defendant’s trial for tax evasion. The Court discussed the principle of ‘equality of arms,’ which requires that the defendant must not be at a significant disadvantage compared with the prosecution in terms of access to evidence or resources if there is to be a fair hearing.

While the right to disclosure of relevant evidence is not an absolute right, and may be balanced against competing interests such as national security or the need to protect witnesses, the rights of the accused in the present case prevailed. The Court decided that the police officer had to produce the evidence requested by the defendant to ensure a fair trial.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 21 could be engaged by activities that:

- Create or restrict review of administrative decision-making and appeals processes;
- Reverse the onus of proof;
- Regulate the rules of evidence in courts and tribunals or amends the way in which evidence is collected and presented;
- Regulate the procedures for challenging the impartiality and independence of courts and tribunals;
- Affect the way witnesses give evidence;
- Regulate the way the media may report on proceedings.



Rights in Criminal Proceedings (s.22)

Section 22 of the *Human Rights Act 2004* says that:

- 1) Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.
- 2) Anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with everyone else:
 - (a) To be told promptly and in detail, in a language that he or she understands, about the nature and reason for the charge;
 - (b) To have adequate time and facilities to prepare his or her defence and to communicate with lawyers or advisors chosen by him or her;
 - (c) To be tried without unreasonable delay;
 - (d) To be tried in person, and to defend himself or herself personally, or through legal assistance chosen by him or her;
 - (e) To be told, if he or she does not have legal assistance, about the right to legal assistance chosen by him or her;
 - (f) To have legal assistance provided to him or her, if the interests of justice require that the assistance be provided, and to have the legal assistance provided without payment if he or she cannot afford to pay for the assistance;
 - (g) To examine prosecution witnesses, or have them examined, and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as prosecution witness;
 - (h) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in court;
 - (i) Not to be compelled to testify against himself or herself or to confess guilt.
- 3) A child who is charged with a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation.
- 4) Anyone convicted of a criminal offence has the right to have the conviction and sentence reviewed by a higher court in accordance with law.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

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Scope of the Right

Many of these guarantees are self-explanatory, however, one important consideration is at what stage of the process they operate. Section 22 says anyone 'charged with a criminal offence' can benefit from the rights it contains, which has been interpreted to mean that it applies from the time the police first indicate that charges will be laid.

The rights in criminal proceedings can apply in a number of circumstances, including:

- If a person is charged with an offence but his or her trial is delayed for far longer than usual through no fault of their own, the guarantee against 'unreasonable delay' might stop the trial going ahead
- If the police or other investigatory bodies have powers to compel testimony, they must exercise the powers (if possible) compatibly with the right not to be compelled to incriminate oneself
- A person has the right to choose a lawyer under s 22(2)(d), but this is not an absolute right, and it will be balanced against considerations such as potential delays and availability of reasonable alternatives if the person's first choice of lawyer is unavailable. Additionally, it will not give someone the right to Legal Aid funding for an expensive private lawyer.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 22 could be engaged by activities that:

- Impact on the right to be presumed innocent (including amendments to the law relating to self-incrimination);
- Impact on the bringing of disciplinary actions;
- Impact on the treatment of children in complaint and disciplinary proceedings;
- Regulate aspects of criminal trial procedure for investigation and prosecution of offences, for example, establishing time limits on the lodging of complaints or appeals, or affects access of an accused to witnesses, information and evidence, filing and service charges;
- Establish guidelines or procedures for the provision of assistants, translators and interpreters;
- Amend any guidelines or procedures enabling the accused to represent him/herself personally or restricts the right of an accused to choose a support person or advisor of his/her choice;
- Regulate how an accused person may appear in court, for example, security measures associated with their appearance;
- Limit requirements on courts or tribunals to accord fair hearing rights for example, in relation to disclosure of evidence to an accused;
- Restrict access to information and material to be used as evidence;
- Affect the law of evidence governing examination of witnesses;
- Allow special procedures for examination of witnesses, for example, the manner in which they give evidence;
- Create or amend an offence that contains a presumption of fact or law and puts the legal or evidential burden on the accused to rebut the presumption;
- Alter the criteria or conditions under which a person may apply for or be released on bail;
- Amend or alter procedures under which a person is able to appeal against or review a decision
- Amend the eligibility criteria for legal aid;
- Affect the law regarding double jeopardy;



Right to Compensation for Wrongful Conviction (s.23)

Section 23 of the *Human Rights Act 2004* says that:

- 1) This section applies if—
 - (a) Anyone is convicted by a final decision of a criminal offence; and
 - (b) The person suffers punishment because of the conviction; and
 - (c) The conviction is reversed, or he or she is pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.
- 2) If this section applies, the person has the right to be compensated according to law.
- 3) However, subsection (2) does not apply if it is proved that the nondisclosure of the unknown fact in time is completely or partly the person's own doing.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

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Scope of the Right

This right is drawn from article 14(6) of the International Covenant on Civil and Political Rights (ICCPR). Although the right to compensation under section 23 of the *HR Act* is limited to individuals who are convicted of an offence, it does not appear that an individual must have been imprisoned. A lesser sanction, such a community service order, may suffice, as long as the person suffers “punishment” because of the conviction.

Subsection (1)(c) confirms, however, that the right to compensation is conditional upon the conviction being reversed or the individual being pardoned, on the *sole* ground that a new or newly discovered fact conclusively establishes that there has been a miscarriage of justice. International jurisprudence indicates that this provision might be constructed restrictively. See the examples over page for more information. Additionally, subsection (3) further limits the right to compensation for wrongful conviction by expressly removing from its scope situations where the wrongfully convicted individual fails to disclose a fact known to them that would lead to their release.

In *Morro, N & Ahadizad v ACT* [2009] ACTSC 118 (10 September 2009), the Supreme Court of the ACT confirmed that s 23 provides an independent statutory right to compensation, notwithstanding that there is no general enforcement provision. It is unclear how the *Human Rights Amendment Act 2007*, which expressly precludes the Supreme Court from awarding damages under s 40C, will affect this right.

Ex gratia payments

The *HR Act* is the only Human Rights Act in Australia that expressly provides for a right to compensation.

Neither the *Australian Human Rights Commission Act 1986* (Cth) nor the Victorian *Charter of Human Rights and Responsibilities Act 2006* confer on individuals' a right to compensation. In other jurisdictions, individuals must seek an *ex gratia* payment.

An *ex gratia* payment is a "payment of money made or given as a concession, without legal compulsion" (Butterworths Legal Dictionary). State and Territory governments are not obliged to make *ex gratia* payments for wrongful conviction and a refusal to do so is not reviewable by the courts.

One well-known example of an *ex gratia* payment for wrongful conviction is the Lindy Chamberlain case. After the discovery of new evidence, Lindy and Michael Chamberlain had their conviction overturned and were awarded \$1.3million in compensation.

Examples – new or newly discovered fact

That the right to compensation for wrongful conviction is limited to circumstances where a new or newly discovered fact shows conclusively that there has been a miscarriage of justice is a significant limitation.

Error – *R v Secretary of State for the Home Department; ex parte Bateman* (1994) 7 AdminLR 175

In this case, the United Kingdom Court of Appeal examined section 133 of the *Criminal Justice Act* (UK) which is in materially the same terms as section 23(1)(c) of the *HR Act*, and held that not all miscarriages of justice would satisfy this restrictive provision. The Court found that judicial error, through the admission of inadmissible evidence at trial, did not amount to the emergence of a "new or newly discovered fact", with the result that the wrongfully convicted Bateman would not be eligible for compensation, even though the Court suggested that he had suffered a miscarriage of justice.

Ultra vires laws – *R v Secretary of State for the Home Department; ex parte Howse* [1993] COD 494 DC

The applicant was convicted of trespass on a number of occasions under by-laws later declared ultra vires by the House of Lords. However, the United Kingdom Courts found that this did not satisfy the "new or newly discovered fact" test, and she was not eligible for compensation.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 23 could be engaged by activities that:

- Increase plea bargains and incentives for an innocent accused to plead guilty;
- Over or underestimate the evidential value of expert testimony;
- Reduce the skill and effectiveness of defence counsel, particularly in relation to reducing funds available to Legal Aid;
- Weaken the laws of evidence;
- Increase prejudice towards the class of people to which the defendant belongs;
- Weaken substantive and procedural protections afforded to the accused in police interview rooms.



Right Not to be Tried or Punished More than Once (s.24)

Section 24 of the *Human Rights Act 2004* says that:

No-one may be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with law.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

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Scope of the Right

This right, known as the rule against double jeopardy, prevents a person from being prosecuted more than once for an offence of which he or she has been previously finally acquitted or convicted. The right will generally apply where proceedings are brought against a person for exactly, or substantially and practically, the same offence as before. The purpose of the right is to ensure fairness to the accused and to provide certainty in the criminal justice system by upholding the principle that there should be finality in criminal proceedings, and that a judgment which can no longer be appealed should be taken to be authoritative.

The rule against 'double jeopardy', applies to all criminal offences, regardless of their seriousness. It may also apply to penalties and proceedings that are described as civil or administrative in ACT legislation, but which, because of their nature or severity, may be considered to be of a criminal character for the purposes of human rights law.

With the exception of the ACT and NT, all other Australian jurisdictions have recently introduced legislative changes to narrow the scope of the rule against double jeopardy. In circumstances where 'fresh and compelling' evidence is found, a second prosecution of an acquitted individual on the same facts for serious offences can be initiated. In some states, such as Victoria, a retrial can also be initiated where an acquittal is found to have been 'tainted' by perjury, corruption or perversion of the course of justice. Safeguards incorporated in these exceptions to the double jeopardy rule include that the retrial must be in the interests of justice; there must be a strong case for retrial and police may not start investigating an acquitted person without the permission of relevant authorities. It is important to note that these changes are not applicable in the ACT.

Examples

- **Charged twice on same facts – *R v O’Neill* [2004] ACTSC 64 (30 July 2004)**

The rule against double jeopardy encompasses situations where an accused is charged with two criminal offences arising from precisely the same facts. In *R v O’Neill* [2004] ACTSC 64, in response to a Police Officer directing the accused to stop his vehicle, the accused reversed his car over a police officer’s motorcycle and injured the officer.

The accused was charged with two counts; first with using an offensive weapon (his car) against the officer, likely to endanger the officer’s life, for the purpose of preventing or hindering his lawful apprehension; and second, with assaulting the officer occasioning actual bodily harm. The accused was found guilty on the first count, and Justice Connolly did not proceed to the second count.

- **Prosecution appeals against acquittals – *King v Fricker* [2007] ACTSC 101 (21 December 2007)**

In this case, the ACT Supreme Court held that the right not to be tried or punished more than once does not preclude the Prosecution from appealing against an acquittal in the Magistrates Court on the ground that “the decision...should not in law have been made”. This reasoning is consistent with international human rights standards. In General Comment 13 and 32, the United Nations Human Rights Committee drew a distinction between the resumption of a trial where a person has not been *finally* acquitted, which is permitted under Article 14 of the International Covenant of Civil and Political Rights (the international equivalent of section 24 of the *HR Act*), and a retrial, which, in general, is not.

- **Disciplinary proceedings against inmates**

Disciplinary proceedings against inmates that occur within a correctional facility may raise some complex issues. The Canadian Supreme Court in *R v Shubley* [1990] 1 SCR 3 held 3:2 that prison disciplinary proceedings aim to secure order within the prison and therefore do not constitute a criminal offence for the purpose of the double jeopardy rule. The European Court of Human Rights ruled similarly in *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165, finding that some disciplinary ‘offences’ are solely concerned with maintaining order in the prison and are therefore purely disciplinary, whereas other disciplinary offences may come within the scope of the double jeopardy rule because their nature or severity makes them criminal in substance. In the ACT, the *Corrections Management Act 2007* (s 155) provides that a detainee cannot be prosecuted for a criminal offence if an administrative penalty has been imposed because of the disciplinary breach, and vice versa.



Right to Protection from Retrospective Criminal Laws (s.25)

Section 25 of the *Human Rights Act 2004* says that:

- 1) No-one may be held guilty of a criminal offence because of conduct that was not a criminal offence under Territory law when it was engaged in.
- 2) A penalty may not be imposed on anyone for a criminal offence that is heavier than the penalty that applied to the offence when it was committed. If the penalty for an offence is reduced after anyone commits the offence, he or she benefits from the reduced penalty.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

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

Scope of the Right

The protection from retrospective criminal laws is a fundamental principle of our legal system and means that a person should be in a position to know in advance whether their conduct would be criminal or not. Section 25 of the *HR Act* prohibits both the creation of retroactive offences by legislation, and the retrospective application of criminal offences as developed by the common law, so as to encompass conduct not previously regarded as a crime.

The European Court of Human Rights has held that the protection from retrospective criminal laws “embodies, more generally, the principle that only the law can define a crime and prescribe a penalty...and the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy”: *Kokkinakis v Greece* (1993) 17 EHRR 397.

Section 25(1) of the *HR Act* does not prohibit the retrospective application of changes to criminal procedure, such as changes in the law of evidence or to the hearing of charges relating to events that occurred prior to the changes.

Section 25(2) is concerned with penalties that may be imposed for criminal offences. This section only applies where the ‘penalty’ imposed has a punitive objective (for example as opposed to a community safety objective).

Examples – No heavier penalty

The right to protection from retrospective criminal laws has been particularly difficult to interpret in relation to retrospective penalties. For instance, laws that have the effect of restricting a prisoner’s access to parole beyond the right to parole available at the time of the offence may not engage this right, although there is conflicting international jurisprudence. In New Zealand under comparable (but not identical) legislation (section 25(g) of the *New Zealand Bill of Rights Act 1990*) parole is considered not part of the penalty but simply a matter of the administration of the court’s sentence: *Palmer v Superintendent Auckland Prison* [1991] 3 NZLR 315.

This approach has been adopted by the ACT Supreme Court in *R v P M* [2009] ACTSC 24. Significantly though, the Court remains “bound to ensure that, not only should the sentence be the shortest appropriate but it should allow for rehabilitation to play a significant part in the administration of the sentence”. In this case, Justice Refshauge held that the Court could be satisfied this requirement by partly suspending the sentence.

This issue has also arisen under laws creating a register of sex offenders if pre-existing offences are required to be registered. The Queensland Court of Appeal in *R v C* [2002] QCA 156 held that an order under Queensland law was not intended to impose a form of punishment but rather its purpose was protective of a vulnerable part of the community. In *Smith v Doe* 538 US 84 (2003), the United States Supreme Court has approached this issue by establishing a two-part test. The first part involves establishing if the intention of the legislature was to impose a punishment. If it was, that ends the inquiry. If however, the intention of the law is to enact a regulatory scheme that is civil and non-punitive, the court must further examine whether the scheme is so punitive either in purpose or effect so as to negate the legislature’s intention to deem it civil.

When can the right be limited?

Under international law, the protection from retrospective criminal laws is a non-derogable right. This means that the government cannot suspend this right, even in a time of emergency.

The nature of the right is one factor that must be considered when determining if a limitation is justified. The fact that the right is non-derogable under international law is relevant, and suggests that it would be unlikely that the right could be reasonably limited under the *HR Act*.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 25 could be engaged by activities that:

- Seek to sanction a person for conduct that was not contrary to law at the time the conduct was undertaken;
- Apply more severe penalties for conduct by a person than those that existed at the time the conduct was undertaken;
- Fail to apply less severe penalties for conduct by a person if penalties have decreased since the conduct was undertaken;
- Expand the range of activities that are covered by an existing criminal offence;
- Amend criminal law procedure that applies to trials for acts done before the legislation commences or introduces new sentencing options to apply to acts done before the legislation was operative;
- Change parole conditions that apply to sentences of imprisonment imposed before the legislation commences.



Right to Freedom from Forced Work (s.26)

Section 26 of the *Human Rights Act 2004* says that:

- 1) No-one may be held in slavery or servitude.
- 2) No-one may be made to perform forced or compulsory labour.
- 3) In subsection (2):
forced or compulsory labour does not include—
 - 4) Work or service normally required of an individual who is under detention because of a lawful court order, or who has been conditionally released from detention under a court order; or
 - 5) Work or service required because of an emergency or calamity threatening the life or wellbeing of the community; or
 - 6) Work or service that forms part of normal civil obligations.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

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

Scope of the Right

Section 26 of the *HR Act* combines an absolute prohibition on slavery and servitude, which cannot be derogated from, with a more limited prohibition on forced or compulsory labour. The prohibition on forced or compulsory labour is limited by parts (a) – (c), which exclude various forms of labour which the state may permissibly compel individuals to perform.

Slavery or servitude

Although slavery and servitude have been against the law across the world for many decades, contemporary forms of slavery and servitude still happen every day. Under international law, the protection from slavery is an absolute right and may not be limited in any circumstances.

Contemporary forms of slavery and servitude include child soldiers, debt bondage, forced labour and forced marriage. There are people in the ACT who either experience these things or live with the consequences of them every day.

Slavery is when someone exercises ownership rights over another person, as if the person were a piece of property.

Someone in servitude may be directed where to live and may be unable to leave.

Forced labour

Forced labour is when someone is compelled to do work. It brings with it a sense of physical or mental constraint. It may involve the threat of punishment if the person does not perform the work. 'Work' has a broad meaning and can cover all kinds of work or service, not just physical work.

The *HR Act* makes clear that forced labour does not include work a person might be required to do by a court as part of a community service order, work required because of an emergency or work that forms part of normal civil obligations, such as jury duty, compulsory fire service or community labour under social welfare programs like 'work for the dole' schemes

Examples

We are fortunate in the ACT that our public authorities are not generally engaging in slavery or forced labour, but the HR Act is there to say that government agencies still have a role to play in promoting, respecting and protecting this right – through laws, policies and programs, services and law enforcement activity. This includes things like:

- Following up on allegations of human trafficking, slavery and forced marriages;
- Implementing measures to prevent and protect people from becoming victims;
- Regulating and overseeing brothels and other areas of the sex industry;
- Programs to support former child soldiers who have come as refugees to Australia;
- Working with communities to address the practice of forcing women to marry against their will.

Sex slavery: *R v Wei Tang* [2008] HCA 39

In 2008, the High Court of Australia upheld convictions of Melbourne brothel owner, Wei Tang, for slavery. The *Commonwealth Criminal Code 1995* expressly prohibits slavery in section 270. This provision was considered by the High Court in this case, where it was alleged that the accused kept as slaves five women who came to Australia from Thailand to work as prostitutes. Each woman entered into an agreement whereby they incurred a debt of approximately \$40,000, which was to be paid off by having sex with men in Australia. On arrival, the women had their passports and return tickets confiscated.

The High Court adopted a relatively broad view of slavery, and noted that a strict definition, which involved the legal ownership of a person, is not tenable given that under Australian law there is no legal basis for owning another person. The Court noted that the notion of extent of control over another person is an important consideration and the control that is necessary is akin to what would occur if a right of ownership of a person is legally possible. Further, consent does not necessarily rule out a state of slavery, and it is possible for slavery to result from a contract.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 26 could be engaged by activities that:

- Compel the provision of any labour or the performance of any service under threat of a penalty;
- Give a minister or public authority the power to employ or direct people to perform work in a vital industry or during a state of emergency;
- Relate to people trafficking or forced marriage.



Rights of Minorities (s.27)

Section 27 of the *Human Rights Act 2004* says that:

Anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

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

Scope of the Right

This section is based on Article 27 of the International Covenant on Civil and Political Rights, a treaty to which Australia became a party in 1980.

The rights of minorities provides for people to practise and maintain shared traditions and activities. It allows for those belonging to minority groups to enjoy their own culture, to profess and practise their own religion and to use their own language (in private and in public), as well as to participate effectively in cultural life.

This right puts an onus on Public Authorities to adopt measures for the protection and promotion of cultural diversity, enabling people from diverse communities to engage freely and without discrimination in their own cultural practices and take appropriate measures or develop programs to support minorities or other communities, including migrant communities, in their efforts to preserve their culture.

Examples

There have been no cases in ACT courts which have examined in detail the rights of minorities under section 27 of the *HR Act*.

The Victorian *Charter of Human Rights and Responsibilities Act 2006* includes a similar protection for minority groups. This right led a local council to consider the cultural rights of minority groups when making a decision about the use of community facilities for religious worship. After consideration, they decided to extend the hours of availability to accommodate a range of different faith-groups.

Some examples of where cultural rights have been raised in international cases include:

- A Sikh man being asked to bare his head for an ID photo (Singh v France, UN Doc CCPR/C/D/102/18767/2009);
- A man from a Russian-speaking minority in Latvia was forced to spell his name a certain way on official documents (Raihman v Latvia, UN Doc CCPR/C/100/D/1621/2007);

- A Peruvian alpaca farmer whose traditional way of life was threatened by government waterway diversions (*Poma v Peru*, CCPR/C/95/D/1457/2006);
- Where traditional reindeer husbandry in Finland was threatened by logging permission (*Länsman v Finland*, CCPR/C/83/D/1023/2001);
- When a Canadian of indigenous background was denied the right to live on a reservation (*Lovelace v Canada*, CCPR/C/13/D/24/1977).

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 26 could be engaged by activities that:

- Limit the observance of any religious practices;
- Address discrimination based on attributes including race or religion;
- Restrict the capacity for persons to declare or make public their affiliation to a particular racial, religious or cultural group;
- Limit or prohibit communication in languages other than English, including through the provision of information;
- Prevent people using their language in community with others;
- Limit the ability of Aboriginal persons or members of an ethnic group to take part in a cultural practice, or otherwise interferes with their distinct cultural practices;
- Regulate the conduct of commercial activities on the traditional lands of Aboriginal persons;
- Restrict the provision of services or trade on religious holidays;
- Regulate access to public spaces including libraries, museums, sports facilities;
- Regulate cultural or religious practices around the provision of secular public education;
- May interfere with the relationship between Aboriginal people and land, water and resources;
- Impose or coerce individuals to do something that interferes with their distinct cultural practices, for example, wear clothes that differ from their traditional cultural attire;
- Regulate traditional medical practices;
- License or provide a restriction on the preparation and serving of food.



Right to Education (s.27A)

Section 27A of the *Human Rights Act 2004* says that:

- 1) Every child has the right to have access to free, school education appropriate to his or her needs.
- 2) Everyone has the right to have access to further education and vocational and continuing training.
- 3) These rights are limited to the following immediately realisable aspects:
 - (a) Everyone is entitled to enjoy these rights without discrimination;
 - (b) To ensure the religious and moral education of a child in conformity with the convictions of the child's parent or guardian, the parent or guardian may choose schooling for the child (other than schooling provided by the government) that conforms to the minimum educational standards required under law.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

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Scope of the Right

The *Human Rights Act* expressly limits the right to education 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 required under law.

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. This means that any court or tribunal case concerning s27A must be brought on the basis of an existing avenue for litigation.

Examples of existing avenues include s 145A of the *Education Act 2004* (ACT) and ss 18 and 20 of the *Discrimination Act 1991* (ACT). Under s 18 of the *Discrimination Act*, for example, an educational authority must not discriminate against a person with respect to admission to educational institutions and, once admitted, it must not deny them benefits, subject them to detriments or expel them on a discriminatory basis.

Content of the right to education

Article 13(1) of the International Covenant on Economic, Social and Cultural Rights describes the goals of education, namely:

The full development of the human personality and the sense of its dignity, and [to] strengthen the respect for human rights and fundamental freedoms. ... Education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

The goals of education are expanded in Article 29 of the Convention on the Rights of the Child, which adds equality between the sexes and respect for the environment to the goals set out in the Covenant. Access to something called “education” that does not further these goals, might not satisfy the right of access to education at all. As the Committee on the Rights of the Child has said, ‘the child’s right to education is not only a matter of access but also of content’.

Principles of equality and non-discrimination are also interrelated with four general qualities which apply to the right to education. In its General Comment on Article 13 of the Covenant, the Committee on Economic, Social and Cultural Rights has said that all levels of education must be *available, accessible, acceptable and adaptable*. Section 27A of the Human Rights Act explicitly uses the word “access”. However, the Committee notes that availability, accessibility, acceptability and adaptability are ‘interrelated and essential’. The use of the word “access” in s27A does not mean that the other three requirements of availability, acceptability and adaptability are irrelevant.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 27A could be engaged by activities that:

- Limit access to schools by children or young people with disabilities, such as failure to provide wheelchair access;
- Introduce fees for education that, while applying to everyone, discriminate against people on low incomes;
- Favour sharp disparities in spending policies resulting in differing qualities of education for persons residing in different geographic locations, including for example school closures;
- Provide inferior educative materials to children of diverse cultural backgrounds;
- Fail to tailor education and its mode of delivery for students such as migrants, refugees, working students, students with children, students in detention, homeless students and students with disabilities.



Limits on Human Rights (s.28)

Section 28 of the *Human Rights Act 2004* says that:

- 1) Human rights may be subject only to reasonable limits set by 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 reasonable available to achieved the purpose the limitation seeks to achieve.

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Proportionality

The rights guaranteed under the HR Act can be limited, but the limitation must be in accordance with section 28. This requires undertaking a proportionality test where the relevant human rights are balanced against each other.

The onus of justifying a limitation imposed on a human right, rests with the party or parties seeking to uphold the limitation.

Applying the proportionality test

In *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147 (19 November 2010), the ACT Supreme Court held that the ordinary processes of statutory interpretation, including that under section 30 of the *HR Act*, should be applied when interpreting Territory legislation, with the aim of finding a provision that is both human rights-compatible and consistent with purpose, before any attempt is made under section 28 to justify a meaning for the provision that is incompatible with human rights. The Court then set out a four-part test for section 28.

In determining whether a limitation is reasonable, the Court will ask these four questions:

- (a) Is the purpose of the limitation of sufficient importance to warrant overriding the recognised human right (see sections 28(2)(a) and (b) of the Human Rights Act)?
- (b) Is the challenged provision rationally connected to its purpose (see sections 28(2)(c) and (d))? That is, does it achieve the relevant purpose without having an arbitrary or unfair operation and without relying on irrational considerations?

(c) Does the challenged provision limit the human right concerned no more than is reasonably necessary (see section 28(2)(e))?

(d) Is the limit imposed on the human right proportional to the importance of the purpose?

If each of the four questions can be answered “yes”, then the limitation may be found to be justified. However, if any of the questions is answered “no”, then the limitation would generally not be justified.

Examples

Bail Conditions – *R v Wayne Michael Connors* [2012] ACTSC 80

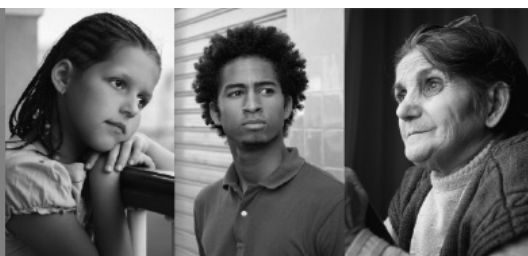
In this case, Mr Connors alleged that the requirement to submit to urinalysis as part of his bail conditions breached his right to privacy under section 12 of the *HR Act*.

The ACT Supreme Court agreed that there is a danger that the imposition of a requirement to submit to urinalysis would limit Mr Connors’ right to privacy, particularly if enforced aggressively. However, the Court held that the condition was reasonable given its purpose was to facilitate compliance with the law and the primary condition of bail – abstinence from the consumption of illicit drugs: “provided the occasion for potential testing is reasonable and well defined, the fact that it is random is not a valid reason to find such a condition outside the legitimate purpose of supporting a primary condition”. Nevertheless the Court did find that the requirement could be abused. Chief Justice Higgins therefore imposed an ancillary condition, “if so directed in the course of supervision by an officer so authorised by the Director-General”.

Freedom of information laws – *Allat & ACT Government Health Directorate (Administrative Review)* [2012] ACAT 67

In this case, the applicant sought documents held by a Mental Health Clinical Review Committee investigating the death of the applicant’s wife while under the psychiatric care of the Woden Mental Health Team, under Freedom of Information laws. The Tribunal noted that the right to freedom of expression under s 16(2) of the *HR Act* includes a right to seek, receive and impart information. As such, the restriction of documents restrained the applicant’s human rights.

Applying section 28 of the *HR Act*, the Tribunal held that documents identifying the names of the members of the Committee should be released. Although the public release of the names of members of the Committee might cause some detriment to the effectiveness of the quality review process in the ACT Public Health system, any such detriment was outweighed by the substantial public interest in ensuring transparency, accountability and public confidence in those review processes.



Interpretation of Laws and Human Rights (s.30)

Section 30 of the *Human Rights Act 2004* says that:

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.

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Ordinary process of Statutory Interpretation

Section 30 of the *HR Act* requires a Court or Tribunal to adopt a “human rights consistent” interpretation within the “purpose” of the statute.

In *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147 (19 November 2010), the ACT Supreme Court held that the ordinary processes of statutory interpretation, including that under section 30 of the *HR Act*, should be applied when interpreting Territory legislation, with the aim of finding a provision that is both human rights-compatible and consistent with purpose, before any attempt is made under section 28 to justify a meaning for the provision that is incompatible with human rights.

This approach was affirmed by the High Court in *Momcilovic v The Queen* (2011) 245 CLR 1 in holding that section 32(1) of the Victorian *Charter of Human Rights and Responsibilities*—a provision substantially similar to section 30 of the *Human Rights Act*—is to be understood as simply an ordinary interpretive rule.

The Section 30 Test

In *Bail by Isa Islam*, Justice Penfold set out a four-step process by which the Courts or Tribunals are to follow section 30 of the *HR Act*, and interpret Territory laws, so far as it is possible, in a way that is compatible with human rights.

1. Identify all meanings of the provision that are available under ordinary principles of statutory interpretation and consistent with legislative purpose (the available meanings), including meanings generated by applying section 30 of the *Human Rights Act* but also meanings that would be available apart from section 30.
2. Set aside for the time being any available meaning that is not human rights-compatible under s 30.
3. Examine the remaining available meanings (that is, those that are human rights-compatible).
 - a. If there are one or more available meanings that are human rights-compatible, then that meaning, or the one of those meanings required by s 139 of the *Legislation Act* to be preferred, is adopted.
 - b. If there are no available meanings left (that is, there were no available meanings that were also human rights-compatible), re-instate the non-compatible available meanings set aside at Step 2.

4. Undertake an inquiry under section 28 of the *Human Rights Act* into whether any of those re-instated available meanings can be justified.
 - a. If only one meaning can be justified, it is adopted.
 - b. If two or more available meanings can be justified, then a choice must be made between them; in the ACT that choice would seem to be directed by section 139 in favour of the available meaning that best achieves the legislative purpose. In the absence of such a provision the choice would be less constrained and might, for instance, include a consideration of which meaning had the least impact on relevant human rights.
 - c. If none of the available meanings can be justified, then the available meaning or one of the multiple available meanings (in the ACT chosen as required by section 139) is adopted, and a declaration of incompatibility may be considered.

Examples

Freedom of information laws – Allat & ACT Government Health Directorate (Administrative Review) [2012] ACAT 67

In this case, the applicant sought documents held by a Mental Health Clinical Review Committee investigating the death of the applicant's wife while under the psychiatric care of the Woden Mental Health Team, under Freedom of Information laws. The Tribunal was required to consider the application of section 38 of the *FOI Act* and the interpretation of the secrecy provision in section 125 of the *Health Act*.

The Tribunal found that restrictions on the access to documents and information engage and potentially limit the right to freedom of expression under section 16(2) of the *HR Act*, as this includes a right to seek, receive and impart information. In discerning the possible meanings of section 125, the Tribunal found an ambiguity in the definition of "health service provider", which was relevant to the scope of "sensitive information" for the purposes of section 125. The Tribunal identified an interpretation of this term which was consistent with the objects of the *Health Act* and would have a less restrictive effect on the right to freedom of expression. As the Tribunal was able to identify an interpretation of the relevant provision which was consistent with the *Legislation Act 2001* (ACT) and the *HR Act*, it adopted this interpretation and did not proceed beyond step 3A of the *Islam* methodology.

The Tribunal went on to find that the secrecy provision in section 125 of the *Health Act* was not enlivened in these circumstances, since the information was not "sensitive information" and disclosure would not be "reckless" as it is authorised by the *FOI Act*. Accordingly, it concluded that the exemption in section 38 of the *FOI Act* did not apply to the information sought.

The Tribunal rejected the application of the exemption in the *FOI Act* for certain agency documents, although it did uphold some claims of legal professional privilege in relation to other documents.



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.

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