



# Public Authorities

From 1 January 2009, the *Human Rights Act 2004* (ACT) expressly requires public authorities to:

- act consistently with human rights; and
- when making decisions, give proper consideration to relevant human rights.

Individuals have a direct right of action to apply to the Supreme Court to seek a remedy for an alleged contravention of this obligation.

This factsheet looks at how the new duty to comply with human rights will affect public authorities and outlines measures that public authorities can take to comply with this obligation. It is not intended to be a substitute for legal advice or an exhaustive explanation of human rights law in the ACT: always obtain proper legal advice if you have a specific issue to deal with.

Further references are provided at the end of the factsheet that may be of some further assistance in understanding the *Human Rights Act 2004* (ACT).

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## 1. BACKGROUND

The *Human Rights Act 2004* (ACT) (HRA) came into force on 1 July 2004 and requires that as far as possible, ACT laws must be interpreted and applied in a way that is compatible with the human rights guaranteed in the HRA.

## 2. WHY A DUTY ON PUBLIC AUTHORITIES?

The HRA required the Attorney-General to review and report on the operation of the first year operation of the HRA and report to the Legislative Assembly.<sup>1</sup> The review and a number of submissions made to it (including by the Human Rights Commissioner) recommended that the HRA be amended to create a positive duty on public authorities to comply with human rights.

This recommendation was adopted by the ACT government and the *Human Rights Amendment Act 2008* was passed by the ACT Legislative Assembly on 4 March 2008. The new duty requires public authorities to not only interpret and apply legislation consistently with the human rights, but also to comply with rights in their decisions and conduct. The new duty and related provisions are contained in new Part 5A that will commence on 1 January 2009.

## 3. WHAT IS THE SCOPE OF THE DUTY?

### **HRA s.40B Public authorities must act consistently with human rights**

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

The duty on public authorities to comply with human rights is set out in a new s.40B(1) of the HRA. It was modeled on provisions in the *Charter of Human Rights and Responsibilities Act 2006* (VIC) (**Victorian Charter**) and the *Human Rights Act 1998* (UK) (**UK HRA**)<sup>2</sup>. However, the definition of ‘public authority’ in the ACT HRA is broader than the UK HRA (which does not list the types of bodies that are public authorities).<sup>3</sup> Further, unlike the Victorian Charter, the HRA includes a list of

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<sup>1</sup> Section 43(1) of the HRA (now repealed). The Department of Justice and Community Safety, *Human Rights Act 2004, Twelve Month Review – Report* (2006) is available online at [http://www.jcs.act.gov.au/humanrightsact/Publications/twelve\\_month\\_review.pdf](http://www.jcs.act.gov.au/humanrightsact/Publications/twelve_month_review.pdf).

<sup>2</sup> Section 38(1) of the Victorian Charter, and s.6 of the UK HRA.

<sup>3</sup> See UKHRA s.6.

functions and services, the provision of which comes within the obligation in s.40B(1).<sup>4</sup>

The duty in the ACT HRA comprises of obligations that are both substantive and procedural:

**Substantive obligation:** Public authorities must act consistently with human rights.<sup>5</sup> ‘Act’ means positive conduct, a failure to act or a proposal to act.<sup>6</sup> If an action is found by the courts to be incompatible with a human right, it will be unlawful.

**Procedural obligation:** Section 40B(1)(b) of the HRA requires public authorities to give proper consideration to human rights when making decisions. A failure to do so will amount to unlawfulness.<sup>7</sup> This is a procedural obligation in the sense that it directs public authorities to make decisions in a particular manner. Public authorities must actively and properly incorporate human rights into decision-making processes where relevant.

### 3.1 EXCEPTIONS TO THE DUTY

The obligation in ss.40B(1) has two exceptions to the duty to comply with human rights.

**Expressly directed by a law to act in a manner inconsistent with the HRA:**

The first exception is set out in ss.40B(2)(a) of the HRA, and relates to circumstances where a public authority could not have acted differently, or made a different decision because it was expressly required under another Territory or Federal law to act that way.

**Rights-compatible interpretation impossible:**

The second exception set out in s.40B(2)(b) relates to circumstances where a law is incapable of being interpreted in a human rights consistent manner.

Under s.30 of the HRA, as far as possible, a human rights consistent interpretation must be adopted for all ACT laws unless the law is clearly intended to operate in a way that is inconsistent with human rights. If a legislative provision could be interpreted in two different ways that both achieved the purpose of the law, the interpretation that is most human rights consistent must be adopted. However, when it is clear that the law in question was intended to operate in a human rights inconsistent manner, the public authority is not bound by the obligation in s.40B(1).

Note that the interpretive rule in s.30 only applies to ACT Acts and statutory instruments, and there is no obligation on public authorities to interpret Commonwealth laws or the common law consistently with human rights.

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<sup>4</sup> HRA s.40A(3).

<sup>5</sup> HRA s.40B(1)(a).

<sup>6</sup> See HRA Dictionary.

<sup>7</sup> It is a deficient reasoning process, rather than a breach of rights *per se*, that gives rise to the unlawfulness.

#### 4. WHAT ARE THE CONSEQUENCES OF BREACHING THE DUTY?

##### **HRA s.40C Legal proceedings in relation to public authority actions**

- (1) This section applies if a person—
  - (a) claims that a public authority has acted in contravention of section 40B; and
  - (b) alleges that the person is or would be a victim of the contravention.
- (2) The person may—
  - (a) start a proceeding in the Supreme Court against the public authority; or
  - (b) rely on the person's rights under this Act in other legal proceedings.
- (3) A proceeding under subsection (2) (a) must be started not later than 1 year after the day (or last day) the act complained of happens, unless the court orders otherwise.
- (4) The Supreme Court may, in a proceeding under subsection (2), grant the relief it considers appropriate except damages.
- (5) This section does not affect—
  - (a) a right a person has (otherwise than because of this Act) to seek relief in relation to an act or decision of a public authority; or
  - (b) a right a person has to damages (apart from this section).

Section 40C of the HRA was modeled on s.7(1) of the UK HRA, and sets out the legal consequences for public authorities of breaching obligations in s.40B.

**Direct right of action:** Section 40C creates a direct right of action, whereby a person who alleges that a public authority has breached a human right can apply to the ACT Supreme Court for relief. An application can be made to the Court at any time, and other available remedies need not have been exhausted.

**Limitation period:** A proceeding against a public authority for a breach of a human right must be brought within one year of the date on which the alleged unlawful conduct took place.<sup>8</sup> However, the Supreme Court can extend that period if it considers it is fair to do so in the circumstances.<sup>9</sup>

**As part of other legal proceedings:** A person may also rely on the unlawfulness of the conduct of the public authority in other legal proceedings in ACT courts and tribunals.<sup>10</sup> For example, an applicant may rely on human rights grounds in an administrative action against a public authority under the *Administrative Decisions (Judicial Review) Act 1989* (ACT). Human rights arguments could also be relied upon, for example, as arguments as part of a defence to criminal prosecution, a stay of proceedings or a hearing regarding exclusion of evidence. Reliance on a right in the

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<sup>8</sup> HRA s.40C(3).

<sup>9</sup> See Explanatory Statement, Human Rights Amendment Bill 2007 (ACT) 6.

<sup>10</sup> HRA s.40C(2)(b).

HRA will not however, extend the limitation period that applies for the substantive principle action available under s.40C(2)(a).

**Standing:** Only an individual who alleges they are or would be the 'victim' of a breach by a public authority of its obligation can bring proceedings.<sup>11</sup> The term 'victim' is not defined in the HRA, but is intended to be interpreted consistently with its meaning in international human rights law, that is, of the person experiencing a breach of human rights.<sup>12</sup> Only individuals can be a 'victim', as legal entities such as corporations do not have rights under the HRA.<sup>13</sup> Relatives of a victim may also have standing in certain circumstances, for example, where a complaint is made about the victim's death, or where the victim is a child.<sup>14</sup>

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

Any right to damages under other legislation or the common law for the same conduct remains undisturbed.<sup>15</sup> So, while there is no separate right to damages for a breach of human rights *per se*, human rights arguments may be raised to strengthen a pre-existing claim for damages, such as in negligence.

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<sup>11</sup> HRA s.40C(1).

<sup>12</sup> For example, only 'victims' of human rights violations have standing to submit communications to the United Nations Human Rights Committee under the Optional Protocol to the *International Covenant on Civil and Political Rights*; see also Article 34 of the *European Convention on Human Rights*.

<sup>13</sup> HRA s.6.

<sup>14</sup> See, for example, Explanatory Statement, Human Rights Amendment Bill 2007 (ACT) 6, where reference is made to a number of relevant communications of the United Nations Human Rights Committee.

<sup>15</sup> HRA s.40C(5).

## 5. WHAT IS MEANT BY 'PUBLIC AUTHORITY'?

### **HRA s.40** Meaning of *public authority*

- (1) Each of the following is a *public authority*:
  - (a) an administrative unit;
  - (b) a territory authority;
  - (c) a territory instrumentality;
  - (d) a Minister;
  - (e) a police officer, when exercising a function under a Territory law;
  - (f) a public employee;
  - (g) an entity whose functions are or include functions of a public nature, when it is exercising those functions for the Territory or a public authority (whether under contract or otherwise).
- (2) However, *public authority* does not include—
  - (a) the Legislative Assembly, except when acting in an administrative capacity; or
  - (b) a court, except when acting in an administrative capacity.

Section 40 of the HRA defines 'public authority'. Under this section, there are seven classes of body that are 'public authorities'.

Public authorities that are bound by the obligations in HRA can be classified into one of three categories:

**'Core' public authorities:** These authorities are bound by the duty to comply with human rights in all their activities. The Legislative Assembly and ACT courts are specifically excluded from the definition of 'public authority', except when acting in an administrative capacity.

**'Functional' public authorities:** These are private bodies or community organisations with some public functions. 'Functional' public authorities will be bound by the duty only when they are exercising functions of a public nature, such as when these functions have been outsourced to them under contract.

**'Optional' public authorities:** Section 40D of the HRA provides that private bodies performing private functions that would not otherwise be bound by the HRA can 'opt in' to the obligation to comply with human rights.

### 5.1 'Core' public authorities

Subsection 40(1)(a)-(f) lists 'core' public authorities:

- *Administrative units* — ACT Government Departments.<sup>16</sup>
- *Territory authorities* — ACT statutory authorities and agencies.<sup>17</sup>

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<sup>16</sup> The *Legislation Act 2001* (ACT) defines 'administrative units' as units established under s.13(1) of the *Public Sector Management Act 1994* (ACT).

- *Territory instrumentalities* — Including public sector corporate bodies and agencies that are subject to Ministerial control.<sup>18</sup>
- *Ministers*— The Chief Minister and the four Ministers who form the Executive.<sup>19</sup>
- *Police officers when they are exercising powers under ACT law* — Members of the Australian Federal Police when acting in their capacity as ACT Policing, which is the community policing arm of the AFP operating under ACT legislation.<sup>20</sup>
- *Public employees* — Public servants, statutory office-holders and their employees, and employees of territory instrumentalities.<sup>21</sup>

Essentially, this means that all ACT public sector agencies and instrumentalities, including ACT Policing, will be considered ‘core’ public authorities for the purposes of the HRA.

These ‘core’ public authorities are bound by the duty to act consistently with human rights, and consider human rights in their decision making. This includes external public activities, as well as internal activities such as employment and commercial contracting practices, including for example, building maintenance services.

### 5.1.2 Exclusions

There are two specific exclusions to the definition of ‘public authority’, which are set out in s.40(2) of the HRA. These exclusions emanate from the separation of powers doctrine<sup>22</sup> – of the executive, legislature and judiciary, only the executive is caught by the public authority obligation.

**Legislative Assembly:** The Legislative Assembly is excluded from the definition of ‘public authority’, except when it is acting in an administrative capacity.<sup>23</sup> The purpose of this exclusion is to ensure that, consistent with parliamentary sovereignty, the Assembly retains its broadest power to make laws for the ACT without the risk of acting unlawfully.

This exclusion does not apply administrative actions not connected with formal Assembly proceedings, for example, employment of staff and corporate contracting.

**Courts:** Courts are excluded from the definition of ‘public authority’, except when they are acting in an administrative capacity.<sup>24</sup> High Court jurisprudence on Australia’s one unified common law suggests that it may be unconstitutional for the HRA to bind judges when developing the common law.<sup>25</sup>

<sup>17</sup> The meaning of ‘territory authority’ is set out in the *Legislation Act 2001*, Dictionary.

<sup>18</sup> The meaning of ‘territory instrumentality’ is set out in the *Legislation Act 2001*, Dictionary.

<sup>19</sup> See s.162(1) of the *Legislation Act 2001*(ACT).

<sup>20</sup> The meaning of ‘police officer’ is set out in the *Legislation Act 2001*, Dictionary.

<sup>21</sup> The meaning of ‘public employee’ is set out in the *Legislation Act 2001*, Dictionary.

<sup>22</sup> *R v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

<sup>23</sup> HRA s.40(2)(a).

<sup>24</sup> HRA s.40(2)(b).

<sup>25</sup> Explanatory Statement, Human Rights Amendment Bill 2007 (ACT) 7. See *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125. See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 653-64.



ACT Courts include the Supreme Court and Magistrates Court. They are bound by the duty to act consistently with human rights only when acting in their administrative capacity. 'Administrative capacity' of a Court relates to non-judicial functions, and may include committal proceedings, issuing warrants, listing cases, adopting practices and procedures, as well as internal activities such as employment practices.<sup>26</sup>

Although the exemption in s.40(2) of the HRA does not specifically mention tribunals, the Dictionary of the HRA defines 'courts' to include the main ACT tribunals (soon to be amalgamated),<sup>27</sup> and thus Tribunals will be excluded from the obligation, except in their administrative capacity.

Proceedings in respect of a judge, magistrate or Tribunal member's action or decision, alleging a breach of human rights, cannot therefore be brought as an action on the basis of human rights arguments alone.<sup>28</sup> A legal challenge may only be brought where there is an existing right of appeal, an application for judicial review, or in any other forum allowed by the relevant rules.<sup>29</sup>

## 5.2 Functions of a public nature

Under at s.40(1)(g) of the HRA a 'public authority' includes:

*(a) an entity whose functions are or include **functions of a public nature**, when it is exercising those functions for the Territory or a public authority (whether under contract or otherwise). (emphasis added)*

This raises two issues that require further consideration: what are 'functions of a public nature'; and what does it mean to say that the functions are being exercised 'for the Territory of a public authority'?

### *'Function of a public nature'*

Categorising functions into 'public' and 'private' is 'notoriously difficult in human rights and other areas of law'.<sup>30</sup> Section 40A of the HRA provides guidance on the meaning of 'function of a public nature'.

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<sup>26</sup> There is no guidance on this section of the HRA in the Explanatory Statement to the Human Rights Amendment Bill 2007 (ACT). The Victorian Charter may be of some guidance in this regard, as a note to s.4(1)(j) of the Victorian Charter identifies 'committal proceedings, the issuing of warrants, listing cases or adopting practices and procedures' as examples of courts operating in an administrative capacity. However Carolyn Evans and Simon Evans, in *Australian Bills of Rights* (2008) at 20 note that some of these administrative functions 'are not trivial and can have a significant impact on rights', in the context of Justice King's statement in *R v Williams* [2007] VSC 2 (15 January 2007) at 50.

<sup>27</sup> See HRA Dictionary. The amalgamated tribunals will be governed by the *ACT Civil and Administrative Tribunal Bill 2008* (not yet enacted at the time of drafting this factsheet).

<sup>28</sup> Under HRA s.40C(2)(a).

<sup>29</sup> Under HRA s.40C(2)(b).

<sup>30</sup> Carolyn Evans and Simon Evans, *Australian Bills of Rights* (2008) 24.



#### **HRA s.40A Meaning of *function of a public nature***

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

This definition of ‘function of a public nature’ is in two parts in s.40A of the HRA:

Subsection (1) sets out factors that **may be** considered in determining whether an entity is performing public functions, and includes the:

- source of the function conferred on the entity (s.40A(1)(a));
- nature of the function and the entity (s.40A(1)(b), (c) and (e)); and
- basis on which the entity discharges its function (s.40A(1)(d)).

The list of considerations in this subsection is not mandatory or exhaustive. They are based on those adopted in the Victorian Charter, and reflect jurisprudence in relation to the UK HRA.

Some of the relevant factors that may be considered are set out below.

#### **(a) whether the function is conferred on the entity under a territory law**

The explanatory memorandum to the HRA provides little guidance on how this factor should be interpreted. However, just because an entity is required by territory

law to perform a function, does not mean that it will be a public authority.

A statute may, for example, require an entity to perform a function of a purely private or commercial purpose, in which case it is unlikely to be a functional public authority.

If an entity performs functions under a written or implied contract rather than a 'territory law', it may still be considered a functional public authority. This situation is provided for expressly in s.40(1)(g) of the HRA.

**(b) whether the function is connected to or generally identified with functions of government**

Assessing this question is assisted by referring to s.40A(3) which sets out a non-exclusive list of 'government functions' that are caught by the HRA. These include, functions that involve the state exercising coercion or use of force (the operation of detention places and correctional centres) and second, state provision of economic and social services (eg, provision of public health, education, housing and transport).<sup>31</sup>

A contested situation may arise in relation to work generally performed by government, but contracted to a private company. Although the nature of the work performed does not change just because it is outsourced, if the contractor is not performing a public function, a contractor may not be bound by the obligation to act in accordance with human rights.<sup>32</sup>

**(c) whether the function is of a regulatory nature**

Regulatory functions are often, but not always performed by government. Regulatory functions of private bodies, particularly when the function is conferred by statute and serves a public interest, are likely to be considered public functions. This may include, for example, organisations set up to regulate professions such as lawyers or accountants.

**(d) whether the entity is publicly funded to perform the function**

This factor is likely to be very relevant to many organisations. However, the existence of public funding, of itself is unlikely to be enough to establish that a body is performing a 'function of a public nature'.<sup>33</sup>

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<sup>31</sup> It has been noted that '*the appropriate line between the public and private performance of ... functions is (and likely will always remain) a contested question, including in the domain of politics*'. Carolyn Evans and Simon Evans, *Australian Bills of Rights* (2008) 26.

<sup>32</sup> Carolyn Evans and Simon Evans, *Australian Bills of Rights* (2008) 26.

<sup>33</sup> HRA s.40A(1) provides that the list of factors 'may' be considered (that is, they are not mandatory considerations). Section 40A(2) provides that the list is not exhaustive.

## Case law on ‘functions of a public nature’

There is a growing body of jurisprudence on the question of what amounts to an entity performing ‘functions of a public nature’, primarily from the UK. However, developing Victorian caselaw is likely to be highly relevant to the ACT.

### UK cases

It is important to note drafting differences between the UK legislative provisions and the HRA. Whereas s.40A of the HRA explicitly lists factors relevant to assessing whether a function is a ‘function of a public nature’, the UK HRA contains no such list of factors. Instead, s.6(3)(b) of the UKHRA provides that a ‘public authority includes any person certain of whose functions are functions of a public nature’. Section 6(5) of the UK HRA provides that ‘a person is not a public authority by virtue only of (3)(b) if the nature of the act is private’. However, the drafting differences may not prove significant in practice, given the significant role UK jurisprudence played in informing the development of the list of factors in the s.40A of the HRA.<sup>34</sup>

Unlike the UK HRA, s.40.A(3)(vi) of the HRA specifically states that provision of public housing is a function of a public nature. However difficult issues can still arise in determining what exactly ‘public housing’ is.

### ***Poplar Housing and Regeneration Community Association v Donoghue***<sup>35</sup>

An association set up to discharge a public authority’s statutory duty to provide or arrange housing for homeless people **was** found to be a ‘functional public authority’. Whilst the UK Court of Appeal noted it was a ‘borderline’ case, the close relationship between the entity and the authority (primarily through board membership and influence over decision making) was important.

### ***R (Heather) v Leonard Cheshire Foundation***<sup>36</sup>

A Foundation providing residential accommodation to disabled people under a contract using public funds with a local authority was **not** found to be a ‘functional public authority’ notwithstanding it was discharging a statutory duty for the local authority. The Court of Appeal held that the extent of public funding was relevant, but not determinative. The statutory requirement on the authority was to provide accommodation, but the Foundation did not have any statutory powers. The Court noted concerns about the public policy implications that would arise if the Foundation was held to be a functional public authority, as many lodging houses and small hotels would be captured by the obligation.

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<sup>34</sup> The Explanatory Statement, Human Rights Amendment Bill 2007 (ACT) at 4 refers to the UKHRA. See also Julie Debeljak, ‘Human Rights Responsibilities of Public Authorities Under the Charter of Rights’, paper presented at *The Law Institute of Victoria Charter of Rights Conference*, Melbourne, 18 May 2007 5. Available online at the Human Rights Law Resource Centre website: [www.hrlrc.org.au](http://www.hrlrc.org.au), accessed 17 November 2008.

<sup>35</sup> [2001] EWCA Civ 595.

<sup>36</sup> [2002] EWCA Civ 366.

***R (Beer, trading as Hammer Trout Farm) v Hampshire Farmers Markets Ltd***<sup>37</sup>

A not for profit incorporated entity responsible for managing the operation of a farmers market on publically owned land **was** held to be a 'functional public authority'. Although there was no government oversight of functions carried out by the entity, the Court held that the entity did perform functions that furthered the public interest by providing public access (a right under common law) to markets on public land. The Court considered the entity had 'stepped into the shoes' of the local authority.

***YL (by her litigation friend the Official Solicitor) v Birmingham City Council & Ors***<sup>38</sup>

The House of Lords narrowly defined the term 'functional public authority' in finding that a private healthcare company was **not** performing functions of a public nature when providing accommodation and aged care to YL on behalf of the Council. The Council had determined that YL was eligible for assistance under national health care legislation. Relevant factors in determining that functions were not of a public nature included that: the company was run for profit; it provided the service for a commercial fee; and it was motivated by 'private and commercial' considerations in a competitive market. Although the Council had partially funded YL's place with the health care provider, the care home itself was not publically funded. It found that the company did not itself exercise a statutory function with respect to providing services for YL. The Court commented that the claim should have been brought against the Council as it was a public authority, rather than the company. The restrictive approach adopted by the majority of the House of Lords in this case has been criticised as undermining human rights protection in the UK.<sup>39</sup>

***R (Weaver) v London and Quadrant Housing Trust***<sup>40</sup>

The UK High Court of Justice found that the Housing Trust **was** a functional public authority, as it was responsible for providing affordable housing to people whose needs were not met by the market. The Court noted several factors that could lead to the opposite conclusion: the structure and operation was of a private nature, as the Trust was a privately formed body; it was governed by its own rules; managed its own housing stock; shared no common board members with the relevant Council or government body; and had limited statutory powers. Notwithstanding, the Court found the following factors meant that the Trust was a public authority: it was a not-for-profit organisation; the social rented housing sector was 'permeated by state control and influence with a view to meeting government aims for affordable housing'; it received substantial public subsidy; and it had a statutory duty to cooperate with local authorities in the way it rented houses.

It is difficult to draw clear guiding principles from UK jurisprudence as to what amounts to functions of a public nature, as the outcome in each case appears to turn on its own facts. An entity can be characterised as performing functions of a

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<sup>37</sup> [2003] EWCA Civ 1056.

<sup>38</sup> [2007] UKHL 27 (27 June 2007).

<sup>39</sup> See for example: United Kingdom Parliament, Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act*, Ninth Report of Session 2006-07 (2007), 7. Available online at the UK Parliament website: <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/jtrights.htm>, accessed 17 November 2008.

<sup>40</sup> [2008] EWHC 1377.

public nature when there are features that 'impose a public character or stamp on the acts of the person/body'.<sup>41</sup>

### **Cases from Victoria**

The obligation on public authorities under the Victorian Charter took effect from 1 January 2008. There are a number of cases considering this issue, and Victorian cases are likely to be the source of relevant jurisprudence in the future.

#### ***Sabet v Medical Practitioners Board***<sup>42</sup>

The Supreme Court held that the Medical Practitioners Board was a functional public authority, as the Board was established by statute, publically funded, and its functions of regulating and supervising medical practitioners was inherently public. The Court also considered that the Board was a 'Tribunal' as defined in the Charter, but found it was acting in an 'administrative capacity', so did not fall within the exclusion from the obligation to act in accordance with human rights.

#### ***09-003***<sup>43</sup>

The Victorian Mental Health Review Board concluded that the Board's staff clearly came within the definition of 'public official' in the Charter. Further, the Board closely examined its functions and activities, determining that it was a 'Tribunal' for the purposes of the Charter, and thus bound by the public authority obligations when acting in an administrative capacity.

#### ***Guneser v Magistrates' Court of Victoria & Anor***<sup>44</sup>

This case concerned whether the acts and decisions of specific magistrates: in refusing applications for adjournments; making determinations about the accused in refusing to consent to summary jurisdiction; and committing the accused for trial; and the actions of the police informant and the Office of Public Prosecutions in laying an additional charge, were acts or decisions of public authorities. The court held that a magistrate conducting a committal is acting in an administrative capacity, but found that the police informant and the Office of Public Prosecutions were public authorities for the purposes of the Victorian Charter.

### **5.2.2 'For the Territory or a public authority'**

To establish that a body performs 'functions of a public nature' under s.40(1)(g), it must be shown that the entity, whether under contract or otherwise, is performing the relevant public function for the Territory or another public authority. The Victorian Charter, which defines 'functional' public authorities in similar terms to the HRA<sup>45</sup> clarifies that an entity may be 'acting on behalf of the State or a public authority' even if no agency relationship exists.<sup>46</sup> It is likely that ACT courts would similarly construe the ACT provision.

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<sup>41</sup> Debeljak, Julie, 'Human Rights Responsibilities of Public Authorities Under the Charter of Rights', paper presented at *The Law Institute of Victoria Charter of Rights Conference*, Melbourne, 18 May 2007, 5. Available online at the Human Rights Law Resource Centre website: [www.hrlrc.org.au](http://www.hrlrc.org.au), accessed 17 November 2008.

<sup>42</sup> [2008] VSC 346 (12 September 2008).

<sup>43</sup> [2008] VMHRB 1 (8 July 2008).

<sup>44</sup> [2008] VSC 57 (5 March 2008).

<sup>45</sup> Victorian Charter s.4(1)(c).

<sup>46</sup> Victorian Charter s.4(4).

### 5.2.3 Entities performing both public and private functions

Entities may perform both public and private functions – for example, a food services company might provide food for patients in a public hospital and detainees in prison, but also cater for private functions. An entity that performs both private and public functions will be bound by the duty to act consistently with human rights only when it is exercising its public functions. When acting in a private capacity, the entity will be exempt from the obligations under the HRA to act and make decision in accordance with human rights.

### 5.3 'OPTIONAL' PUBLIC AUTHORITIES

#### **HRA s.40D Other entities may choose to be subject to obligations of public authorities**

- (1) An entity that is not a public authority under section 40 may ask the Minister, in writing, to declare that the entity is subject to the obligations of a public authority under this part.
- (2) On request under subsection (1), the Minister must make the declaration.
- (3) The Minister may revoke the declaration only if the entity asks the Minister, in writing, to revoke it.
- (4) A declaration under this section is a notifiable instrument.

'Optional' public authorities are included in the definition of 'public authority' via the voluntary 'opt-in' mechanism set out in s.40D. Private bodies, such as corporations, associations and partnerships that would not otherwise be bound by the HRA can elect to be bound by the duty to comply with human rights contained in s.40B of the HRA.

A private body that wishes to 'opt in' must write to the Attorney-General, who must then declare that the body is a public authority for the purposes of the HRA. The declaration can be revoked at any time on request by the private body.

While the declaration is in force, the private body will be subject to exactly the same obligations and consequences as any other public authority.

The 'opt-in' mechanism is unique to domestic human rights legislation: the Victorian Charter, UK HRA and other bills and charters of rights have no similar provisions. However, the 'opt-in' mechanism is consistent with the corporate social responsibility movement operating at global and multi-national levels.<sup>47</sup> In his

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<sup>47</sup> The concept that the private sector should be encouraged to respect and promote human rights is not new. See, for example, the UN Sub-Commission Norms on the Responsibilities of Transnational Corporations and other Business Enterprises; UN Global Compact; OECD Guidelines for Multinational Enterprises; and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

introduction speech for the Human Rights Amendment Bill 2007, the Attorney-General said:

*Such a provision will be unique among human rights jurisdictions and will promote a meaningful dialogue within the community about human rights, in line with the overall aims of the Human Rights Act and the growing interest among public and private bodies for triple-bottom-line reporting or reporting against the three major dimensions of sustainability: economic, social and environmental.<sup>48</sup>*

The private sector is already required to act lawfully in regard to discrimination, occupational health and safety and equal opportunity obligations in the employment sector. Encouraging broader, voluntary compliance with human rights standards is a natural progression in the process of ensuring the best possible outcomes for Canberrans in all spheres of life.

## **6. COMPLYING WITH THE NEW DUTY**

To comply with their obligations under the HRA, public authorities should:

### **REVIEW EXISTING POLICIES**

Public authorities (that have not already done so) should identify which of their existing powers, discretions, policies and practices impact on the human rights set out in Part 3 of the HRA, and develop strategies to ensure compliance with human rights to the greatest extent possible.

### **EXPRESSLY INCLUDE HUMAN RIGHTS IN NEW POLICIES**

Public authorities should ensure the human rights in Part 3 of the HRA are factored into the development, and drafting implementation and evaluation of new policies and procedures.

### **DEVELOP PRACTICAL GUIDANCE**

Public authorities should consider developing practical guidance to assist managers and staff understand the implications of the new duty on decision-making and how to integrate the HRA into their work. The focus in the short-term should be on those areas which are likely to be more immediately and significantly affected by these changes.

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<sup>48</sup> Accessible at: <http://www.hansard.act.gov.au/hansard/2007/week13/4027.htm>.



### **CONDUCT HUMAN RIGHTS TRAINING**

Public authorities should consider holding workshops and training sessions to educate staff about the new obligations, and how it will affect them day to day. The Human Rights Commission runs regular training and tailored workshops – please contact the Commission for more information. Whilst these are free for the community, given the high demand, public authority training will be conducted on a user pays basis.

### **DEVELOP A RIGHTS FRAMEWORK TO MANAGE COMPLAINTS**

Public authorities should consider developing internal mechanisms for managing complaints that make clear reference to the HRA. Procedures should be put in place to document and follow up, any human rights concerns raised by members of the public. Wherever possible, staff responsible for handling formal complaints should have a working knowledge of the HRA and understand how to apply human rights considerations to resolving complaints.

### **DEVELOP A RIGHTS STRATEGY FOR CONTRACTS**

The definition of public authority in the HRA is far-reaching: extending to private entities when they are performing public functions on behalf of another public authority. It may be appropriate to consider incorporating an obligation to comply with s.40B as a clause in government contracting. This approach would help ensure client's rights are protected, regardless of the particular entity delivering the service. Further, such a preventative approach works to ensure service delivery is human rights compliant, rather than later dealing with expensive litigation.

A proactive approach by service providers will also benefit from having their human rights obligations spelled out upfront.

## CHECKLIST FOR HUMAN RIGHTS COMPLIANCE<sup>49</sup>

This checklist may assist in ensuring decisions and actions are human rights compliant. If appropriate, you should document these considerations on the relevant file.

### Step 1: What is your decision or action?

1.1 What is the objective of the decision or action?

*Think about what the decision or action seeks to achieve. Why is the decision or action being taken? What is its purpose?*

1.2 Who will be affected by the decision or action?

*Look at the objective you are trying to achieve and think about the individuals or groups of people that are most likely to be affected by the decision or action.*

1.3 Has there been consultation with groups or individuals likely to be affected?

*It may be appropriate to consult with those that are likely to be affected by the decision or action. Any consultation should be documented on the file.*

### Step 2: Does the decision or action engage human rights?

2.1 Look at the list of human rights in this factsheet (or in Part 3 of the HRA). Does your decision or action fall into any of the areas covered by the rights in the HRA?

*If you decide that there are no rights in the HRA engaged, there is no need to continue on this checklist. However, if you have doubts, it may be necessary to obtain legal advice.*

2.2 Will the decision or action limit any of the human rights it engages?

*If it does limit rights, you should keep a record on file of the details of how the human right is interfered with or limited.*

*Remember that failure to take action may be a breach of a right if there is a positive obligation on the public authority to take action to preserve a right.*

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<sup>49</sup> Adapted from checklist in United Kingdom Department for Constitutional Affairs *Human rights: human lives: a handbook for public authorities* (2006). Available online at <http://www.justice.gov.uk/docs/hr-handbook-public-authorities.pdf>.

### **Step 3: Is the limitation on rights reasonable?**

*For most of the rights in the HRA, the fact that a decision or action restricts the right does not necessarily mean that it will be incompatible with the HRA. If a restriction has a legitimate aim (such as public safety) and does not go further than absolutely necessary to protect this aim, then it is likely that it will be compatible the HRA.*

#### **3.1 Is there a legal basis for the restriction?**

*Any restriction on human rights must have a legal basis. It must be set out in legislation or subordinate legislation.*

#### **3.2 Does the restriction have a legitimate aim?**

*If you are restricting rights, you need to identify a legitimate aim for doing this. This might include public safety, protecting public order, or protecting the rights or freedoms of others.*

*It is good practice to keep a record on file of the reasoning process behind your decision about limitation on rights.*

#### **3.3 Is the restriction necessary in a democratic society?**

*For a restriction to be necessary in a democratic society there must be a rational connection between the legitimate aim to be achieved and the decision or action that restricts a person's rights. That is, the aim might be legitimate but unless the decision or action will actually achieve that aim, the restriction on rights is unlikely to be a reasonable one.*

#### **3.4 Is your response proportionate, or have you tipped the scales too far?**

*A decision or action must be the least restrictive possible to achieve its objective.*

*Look at the objective that you identified at 1.1 of this flowchart and see if there are any less restrictive ways to achieve that goal. For example, a least restrictive way might be one that is tailored to individual circumstances rather than a blanket policy that applies to everyone.*

## WHAT ARE THE RIGHTS PROTECTED IN THE *HUMAN RIGHTS ACT 2004*?

- Section 8** Recognition and equality before the law
- Section 9** Right to life
- Section 10(1)** Prohibition against torture and cruel, inhuman or degrading treatment
- Section 10(2)** Right to consent to medical treatment
- Section 11** Protection of the family and children
- Section 12** Protection of privacy and reputation
- Section 13** Freedom of movement
- Section 14** Freedom of thought, conscience, religion and belief
- Section 15** Freedom of peaceful assembly and association
- Section 16** Freedom of expression
- Section 17** Right to participate in public life
- Section 18** Right to liberty and security of the person
- Section 19** Right to humane treatment when deprived of liberty
- Section 20** Rights of children in the criminal process
- Section 21** Right to a fair trial
- Section 22** Rights in criminal proceedings
- Section 23** Right to compensation for wrongful conviction
- Section 24** Protection against double jeopardy
- Section 25** Protection against retrospective criminal laws
- Section 26** Freedom from forced work
- Section 27** Rights of minorities

## WHERE TO GO FOR FURTHER INFORMATION

### HUMAN RIGHTS COMMISSION

(02) 6205 2222  
TTY: (02) 6205 1666  
4th floor, 12 Moore Street, Civic  
GPO Box 158  
Canberra ACT 2601

www.hrc.act.gov.au  
human.rights@act.gov.au

### Legislation and Policy Branch

ACT Department of Justice and Community Safety  
12 Moore Street  
GPO Box 158  
Canberra  
ACT 2601  
Tel: 6205 3310

## USEFUL WEBSITES

- ◆ [ACT Human Rights Commission](http://www.hrc.act.gov.au)  
www.hrc.act.gov.au
- ◆ [ACT Government's human rights website](http://www.jcs.act.gov.au/humanrightsact/indexbor.html)  
http://www.jcs.act.gov.au/humanrightsact/indexbor.html
- ◆ [ACT Human Rights Act Research Project](http://acthra.anu.edu.au/)  
http://acthra.anu.edu.au/
- ◆ [ACT Legislation Register](http://www.legislation.act.gov.au/)  
http://www.legislation.act.gov.au/

## USEFUL PUBLICATIONS

- ◆ **The Human Rights Act: A Plain English Guide**  
<http://www.jcs.act.gov.au/HumanRightsAct/publicationsbor.htm>
- ◆ **The Human Rights Act 2004 - Guidelines for ACT Departments: Developing Legislation and Policy**  
<http://www.jcs.act.gov.au/HumanRightsAct/publicationsbor.htm>
- ◆ **Human rights: human lives – a handbook for public authorities (United Kingdom)**  
<http://www.justice.gov.uk/guidance/humanrights.htm>