
Human Rights - a New Priority in Public Sector Compliance

Introduction

The evolution of a human rights culture in Australia has gathered momentum in the last ten years with the enactment of human rights acts in the Australian Capital Territory (ACT) and Victoria. At a national level, in October 2009, the National Human Rights Consultative Taskforce reported back to the Federal Government recommending the adoption of an ACT style human rights act for Commonwealth departments and agencies. The federal Government is yet to formally respond. As a result of these jurisdictional developments, human rights are becoming a new priority for compliance in the public sector.

This article will consider the example of the ACT with respect to human rights legislation and provide some effective initiatives for compliance with this new obligation.

ISSUE

WHY A DUTY ON PUBLIC AUTHORITIES?

The ACT *Human Rights Act 2004* (HRA) required the Attorney-General to review and report on the operation of the first year of the HRA to the Legislative Assembly.¹ 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 and commenced on 1 January 2009.

¹ Section 43(1) of the HRA (now repealed).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/humanrightsaact/Publications/twelve_month_review.pdf.

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. 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.² ‘Act’ means positive conduct, a failure to act or a proposal to act.³ 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.⁴ 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.

² HRA s.40B(1)(a).

³ See HRA Dictionary.

⁴ It is a deficient reasoning process, rather than a breach of rights *per se*, that gives rise to the unlawfulness.

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.

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 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.⁵ However, the Supreme Court can extend that period if it considers it is fair to do so in the circumstances.⁶

⁵ HRA s.40C(3).

⁶ See Explanatory Statement, Human Rights Amendment Bill 2007 (ACT) 6.

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.⁷ 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 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.⁸ 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.⁹ Only individuals can be a ‘victim’, as legal entities such as corporations do not have rights under the HRA.¹⁰ 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.¹¹

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.¹² 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.

⁷ HRA s.40C(2)(b).

⁸ HRA s.40C(1).

⁹ 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*.

¹⁰ HRA s.6.

¹¹ 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.

¹² HRA s.40C(5).

AS 3806-2006 AND IT'S APPLICATION TO THE DUTY UNDER S40B

Australian Standard (AS) 3806 Compliance Programs¹³ provides the mechanisms for government departments and agencies to construct, implement and monitor effective compliance programs for legislative obligations such as under s40 B of the HRA.

The twelve principles of AS 3806 define what is required for an effective compliance program. The application of each to a compliance program for s40B is considered below:

Principle 1: Commitment by the governing body and top management to effective compliance that permeates the whole organisation

S40B of the HRA defines that public authorities are legally obligated to comply with the duty. As a result, Chief Executive performance contracts should have compliance with S40B added to their mandatory responsibilities thus fulfilling a key tenant of the principle by each departmental CEO taking contractual responsibility for compliance with the duty.

Principle 2: The compliance policy is aligned to the organisations strategy and business objectives and is endorsed by the governing body.

Each departmental executive group should sign off on the compliance policy thus giving leadership endorsement to the policy.

Principle 3: Appropriate resources are allocated to develop, implement, maintain and improve the compliance program.

Step 5 under the Implementation Strategy provides for each agency to create a designated Human Rights Officer position which would be a dedicated resource to ensure compliance with the duty under s40B thus meeting the intent of this principle.

Principle 4: The objectives and strategy of the compliance program are endorsed by the governing body and top management.

Each departmental executive group should also sign off on the generic compliance program which has been prepared for application across the departments and agencies.

Principle 5: Compliance obligations are identified and assessed.

Identification of the breath of the obligations under s40B is highlighted under What is the scope of the duty?

¹³ AS 3806 Compliance Programs 2006, Standards Australia.

Principle 6: Responsibility for compliant outcomes is clearly articulated and assigned.

The responsibility has been assigned through to the Chief Executive through inclusion in the performance contract.

Principle 7: Competence and training needs are identified and addressed to enable employees to fulfil their compliance obligations:

Step 4 of the Implementation Strategy places the onus on each department or agency to utilise a suitably experienced training provider to provide training to staff with respect to their obligations under s40B of the HRA.

Principle 8: Behaviours that create and support compliance are encouraged and behaviours that compromise compliance are not tolerated.

In relation to establishing a compliance culture with respect to s40B under Continuous Improvement, all new staff will be trained through induction programs on their obligations under s40B.

Principle 9: Controls are in place to manage the identified compliance obligations and achieve desired behaviours.

The program proposes the following control mechanisms: Implementation 1, every department or agency should audit their existing suites of policies to ensure they are compliant; Continuous Improvement – the Human Rights Officer will undertake further sampling of existing policies to ensure they are compliant and a Human Rights Compliance Checklist has been created to assist and finally every new policy developed will be with a “Guide for Policy Writers” developed as part of the Implementation Strategy.

Principle 10: Performance of compliance program is monitored, measured and reviewed:

The program proposes that under Continuous Improvement every policy will be reviewed every four years and the Human Rights Officer (HRO) will prepare a report on human rights compliance for each respective department or agency’s annual report.

Principle 11: The organisation is able to demonstrate its compliance program through both documentation and practice:

Each department or agency will be able to demonstrate their commitment through: records of the number of staff attending s40B training provided by a suitably experienced training provider and the number of new staff attending induction training. The HRO will also have to prepare an agency specific report on human rights compliance for their respective annual report. Thus their compliance will be demonstrated in a public document.

With respect to practices human rights compliance should be made a mandatory condition of CEO performance contracts. Each department will also fund a specific position, the HRO to coordinate the function.

Principle 12: The compliance program is regularly reviewed and continually monitored;

The sections on Continuous Improvement and Review and Monitoring highlight the mechanisms proposed to fulfil this principle.

RISKS:

Regulatory Risk

The key risk which gives rise to this compliance plan is the regulatory risk of not complying with s40B of the *HRA*. Those affected by those non-compliant decisions have a right of action in the ACT Supreme Court against the respective department or agency for breach of the Act.

Reputational Risk

There is an associated reputational risk from the potential for court action. A department or agency would not want to be publicly associated with a breach of human rights law. This risk may have broader implications as a reputational risk for the government of the day being in breach of human rights law vicariously through a department or agency which it administers.

AN IMPLEMENTATION STRATEGY:

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

1. REVIEW EXISTING POLICIES

Public authorities 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.

Each department or agency should conduct an audit of all existing policies and practices against the HRA compliance checklist to determine whether they comply with the duty under s 40B. If there is some doubt then legal advice should be obtained from the Government Solicitor or relevant agency. If the policy or practice is found to be non-compliant then it must be altered to be compliant.

2. 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.

Each department or agency will develop a Guide for Policy Writers

3. 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.

Each department or agency will develop Guidelines for Managers and a HRA Compliance Checklist. An example of a HRA Compliance Checklist has been provided at the end of this article.

4. 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.

Departments or agencies should engage a relevantly skilled training provider.

5. DEVELOP A RIGHTS FRAMEWORK TO MANAGE COMPLAINTS

Public authorities should develop 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.

Each department or agency should revise their respective complaints policy and create a designated Human Rights Officer (HRO) role to coordinate the function across a department or agency.

REVIEW AND MONITORING:

Task		Deliverables	Comments	Year
1	Review Existing Policies.	Audit of Policies. Legal Advice from GS.	Immediately.	As pre relevant jurisdictional roll out of HRA legislation.
2	Expressly include in New Policies	A Guide for Policy Writers	Each Agency to Develop	As above.
3	Develop Practical Guidance	Guidelines for Managers and a HRA Compliance Checklist	Each Agency to develop guidelines and a checklist as per example.	As above.
4	Human Rights Training	Relevant and skilled HRA training provider	Each agency to source	As above.
5	Develop a Rights Framework	Establish a Human Rights Officer position and Revise Complaints Policy	Each Agency to resource	As above.

CONTINUOUS IMPROVEMENT

- Each department or agency will establish a designated Human Rights Officer position. Part of the duties of that position will be to regularly review a sample of the suite of policies and practices to ensure that they remain human rights compliant.
- Each policy will also have an in-built default review mechanism of every four years if not included in a sample review.
- In accordance with a “Guide to Policy Writers”, which each department or agency will develop, every new policy will be examined against s40B of the HRA with the “Human Rights Compliance Checklist”.
- New staff should be trained as part of induction processes in the requirements under s40 B of the HRA.
- The HRO should complete a human rights compliance report for inclusion in the relevant departmental or agency’s annual report.

CONCLUSION

ACT Government departments and agencies are required to comply with s40B of the HRA. The risks of not doing so have been clearly identified as regulatory and reputational.

In summary, the generic lessons from the ACT experience for a compliance plan for human rights obligations suggest it could benefit from several new key features:

- A new dedicated HRO position within a department or agency to internally co-ordinate the compliance with the human rights obligation;
- Human rights compliance becoming an essential performance measure for departmental or agency executive performance contracts;
- An audit of all existing policies, discretions, practices and powers to ensure they comply with the human rights obligation against a human rights checklist. An example of a checklist is provided; and
- Training of all staff in human rights and including human rights training in all ongoing induction training provided by a relevantly skilled training provider.

A SAMPLE CHECKLIST FOR HUMAN RIGHTS COMPLIANCE ¹⁴

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 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.

¹⁴ Compliance Checklist adapted from the 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 checklist 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.