

# Human Rights Act 2004

## FACT SHEET

### Addressing human rights in explanatory statements of bills

In accordance with section 6.2 of the *Legislation Handbook*<sup>1</sup>, every bill that is presented to the ACT Legislative Assembly must be accompanied by an explanatory statement prepared by the area responsible for the bill.

In the case of bills presented to the Legislative Assembly by a minister, the agency responsible is required to ensure that the explanatory statement addresses the issue of compatibility with the [Human Rights Act 2004](#) (HRA). (See [Legislation Handbook](#), section 4.8)

The explanatory statement must include information about whether the bill 'engages' any rights that are protected under the HRA (*Legislation Handbook* para 5.9.5). This information must be included whether or not the bill promotes or limits any protected rights.

As part of this requirement, the explanatory statement must include the following information:

- i) which protected rights are engaged by the bill;
- ii) which clauses engage those rights;
- iii) whether the bill promotes or limits those rights; and
- iv) a detailed analysis of whether any limits are reasonable and demonstrably justifiable in a free and democratic society, taking into account the factors set out in section 28 of the HRA.

If a bill does not engage any protected rights, the explanatory statement needs to state that this is the case.

There is no set format in which to present this information - it is up to the responsible area to determine the best format for their purpose. This will depend on factors such as the complexity of the information, the number of rights engaged and the number of provisions involved.

#### 1. Does the bill engage any human rights?

The [HRA](#) sets out a range of civil and political rights that are protected in the ACT. These rights attach to all individuals in the ACT.

The [HRA](#) itself is a good source of information about the scope of a right. Further information about the rights covered in the HRA can be found on the Justice and Community Safety Directorate's website at <http://www.justice.act.gov.au/publication/view/94>.

Bills may engage human rights in two ways – by supporting a right or by limiting it. The explanatory statement must identify the rights that may be 'engaged' or impacted by the provisions in the bill. You may also wish to include information about provisions that will promote or support a protected right.

#### Example 1

Legislation that prohibits a person with a criminal record from working in an area such as child care would engage the right to recognition and equality before the law, without discrimination of any kind (s8). It may also infringe on a person's right to privacy and reputation (s12). However, the same provision may support the protection of family and children (s11).

<sup>1</sup> [http://www.cmd.act.gov.au/\\_data/assets/pdf\\_file/0017/113624/actgov-legislation-handbook.pdf](http://www.cmd.act.gov.au/_data/assets/pdf_file/0017/113624/actgov-legislation-handbook.pdf)

### *Example 2*

Any bill that reverses the onus of proof (that is the burden of proof shifts from the prosecution to the defendant) will engage the right to presumption of innocence (s22). Strict liability offences will, by definition, limit the presumption of innocence by reversing the onus of proof. Strict liability offences are commonly used in regulatory schemes – see for example the [Security Industry Act 2003](#).

Further information about strict liability offences, including as part of regulatory schemes, can be found in the [Guide for Framing Offences](#)<sup>2</sup>.

## **2. Which specific clauses engage human rights?**

When drafting your explanatory statement, you are required to identify the specific clauses that engage rights. You may want to do this generally at the beginning of the explanatory statement as well as in the explanation of the specific clause.

### *Example 3*

In 2011, the Government amended the *Security Industries Act 2003* to improve probity checking in the private security industry. The amendments included a number of provisions that limited the right to privacy and reputation: the new part 2A relating to use of criminal intelligence; s 17(3A) providing for mandatory fingerprinting; and s 18(1A) allowing the Commissioner to request further information about an applicant's criminal history in certain circumstances.

## **3. Does the bill limit any rights?**

[Section 28\(1\)](#) of the HRA provides that “Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.”

Using example 1 above, imposing a condition that people with a criminal record may be excluded from working in child care is a limit on the right to recognition and equality before the law, without discrimination of any kind because it discriminates against an individual with a criminal record.

The explanatory statement will need to identify why that is a reasonable limit that can be justified in a free and democratic society.

## **4. Are any limitations on rights reasonable and demonstrably justifiable in the circumstances?**

If provisions in a bill limit (or are likely to limit) any right protected under the HRA, the explanatory statement must contain an analysis about whether the limit is reasonable, taking into account all relevant factors ([s 28\(2\)](#)). This is known as a ‘s28 analysis’.

Section [28\(2\)](#) of the HRA sets out the following factors to be considered in deciding whether any limit on a right is reasonable:

- (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 reasonably available to achieve the purpose the limitation seeks to achieve.

---

<sup>2</sup> [http://www.justice.act.gov.au/resources/attachments/report\\_GuideforFramingOffences\\_LPB\\_2010.pdf](http://www.justice.act.gov.au/resources/attachments/report_GuideforFramingOffences_LPB_2010.pdf)

Whether a limitation is reasonable and demonstrably justifiable will depend on the purpose of the legislation and the limitation itself. For example, the purpose of compulsory seatbelts is to reduce the incidence of loss of life and injury through motor accidents.

In your explanatory statement, it is important to link the purpose of the limitation with the nature and extent of the limitation. You need to show that any limitation is relevant to achieving the purpose and that it is the least restrictive option available to achieve the purpose. In addition to explaining the policy rationale for the provisions, it may be useful to include information such as statistics, research findings and examples of alternative approaches, detailing why they may be less effective or more restrictive than the approach proposed.

There may be current case law that would provide guidance about whether or not a limitation is reasonable. The Human Rights Unit can assist you to identify any relevant case law (ext 70595 or [JACSScrutinyTeam@act.gov.au](mailto:JACSScrutinyTeam@act.gov.au)).

#### *Example 4*

The [Road Transport \(Safety and Traffic Management\) Amendment Bill 2011](#) amended the *Road Transport (Safety and Traffic Management) Act 1999* to establish a legislative basis for the use of average speed detection systems in the ACT (point-to-point speed cameras).

The explanatory statement identifies that the provisions of this bill may limit the right to privacy ([s 12](#) of the HRA). The [explanatory statement](#) sets out the purpose of the bill, ways in which the right to privacy may be limited, the possible impacts of the system on the right to privacy, the extent of any limitation and the relationship between the purpose and the limitation.

In justifying the limitation on human rights, the explanatory statement draws a connection between measures to encourage compliance with road safety measures and speeding as a major road safety risk. It includes data from other jurisdictions to demonstrate, for example, the effectiveness of the system in reducing road fatalities and serious injury.

#### *Example 5*

As discussed in example 3 above, the [Security Industry Amendment Bill 2011](#) included a number of provisions that may limit the right to privacy and reputation.

The [explanatory statement](#) looks at the extent of the limitation, making reference to some case law and relating the collection of information to the policy explanation for allowing such information to be collected. In this case, the explanatory statement highlights the importance of the industry to the safety of our community and draws on information from the Australian Crimes Commission about the vulnerability of the industry to criminal infiltration.

The explanatory statement also clearly identifies the safeguards contained in the bill to minimise the limitations on privacy, such as limiting the circumstances in which criminal intelligence can be provided and limiting disclosure of the information. The explanatory statement also clearly identifies the appeal rights available under the bill.

## Useful resources

### **Human Rights Unit**

The Human Rights Unit, Justice and Community Safety Directorate, can assist with information about the Human Rights Act and possible human rights implications of your bill.

The unit encourages agencies to contact them early on in policy and legislation development to ensure that human rights issues are considered from the beginning of that process.

The Human Rights Unit can be contacted on 6027 0595 or at [JACSScrutinyTeam@act.gov.au](mailto:JACSScrutinyTeam@act.gov.au).

### **ACT Human Rights Commission**

The [ACT Human Rights Commission](#) offers training on the Human Rights Act for ACT Government agencies. The workshop aims to provide agencies with:

- an understanding of the purpose and operation of the *Human Rights Act 2004*;
- an understanding of the way the *Human Rights Act 2004* allows the reasonable limitation of rights;
- an overview of the work of the ACT Human Rights Commission in the area of human rights; and
- an understanding of the effect of amendments to the Act that require public authorities to act and make decisions in accordance with human rights.

The ACT Human Rights Commission can be contacted on 6205 2222 or at [human.rights@act.gov.au](mailto:human.rights@act.gov.au).

### **Online resources**

#### ACT resources

Further information about the ACT Human Rights Act, including the scope of the rights protected, can be found at [http://www.justice.act.gov.au/protection\\_of\\_rights/human\\_rights\\_act](http://www.justice.act.gov.au/protection_of_rights/human_rights_act). Please note this information is currently being updated.

A range of useful resources about both ACT human rights law and human-rights information can be found at the ANU's ACT Human Rights Act website:

<http://acthra.anu.edu.au/index.php>

A *Guide to writing an explanatory statement* (2011) by the Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills & Subordinate Legislation Committee) can be found at:

<http://www.parliament.act.gov.au/downloads/committee-business/Guide-to-writing.pdf>.

#### Australian Attorney-General's Department

The Australian Attorney-General's Department publishes information on human rights and anti-discrimination, including a number of human rights guidance sheets:

<http://www.ag.gov.au/Humanrightsandantidiscrimination/Humanrightsandthepublicsector/Humanrightsguidancesheets/Pages/default.aspx>

#### Victorian resources

The Victorian [Charter of Human Rights and Responsibilities 2006](#) includes similar rights to those protected in the ACT Human Rights Act. The *Guidelines for Legislation and Policy Officers in Victoria* can be found at:

<http://www.justice.vic.gov.au/home/your+rights/human+rights/human+rights+charter/charter+act+guidelines+-+pdf>

The [Human Rights Law Centre](#) provides a range of resources on human rights, both in Australia and internationally:

<http://www.hrlc.org.au/>