

The logo for actlaw society, featuring the word 'act' in orange, 'law' in white, and 'society' in grey, all in a sans-serif font, set against a dark blue rounded rectangular background.

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ACT BAR ASSOCIATION

Essentials Series: Winter Edition

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ACT LAW SOCIETY

Proceedings under the Human Rights Act 2004: A View from the Bench

Justice Mossop

Appropriately commencing proceedings

- Proceedings *must* be started by OC—
 - if required by law (r 33(1)); or
 - unless a law permits or requires commencement by OA (r 33(2)).
- Proceedings *must* be started by OA if required by law (r 34(1)).
- Proceedings *may* be started by OA if a law permits a person to apply for relief and is silent as to the kind of originating process (r 34(2)).

Appropriately commencing proceedings

- An OA may be used if (r 35(1)(a))—
 - the main or only issue is an issue of law; and
 - a substantial dispute of fact is unlikely.

Contents of pleadings or originating process (r 6022(2))

- The relevant content of the right (sub-r (2)(a)(i)).
- The particular aspect of the right the party relies on (sub-r (2)(a)(ii)).
- The facts relied upon to assert that the *HRA* applies (sub-r (2)(b)).
- If s 40C of the HRA applies—
 - the right the party alleged was breached in contravention of s 40B (sub-r (2)(c)(i)); and
 - details of the alleged breach (sub-r (2)(c)(ii)).
- Relief sought (sub-r (2)(d)).

Sections 40B and 40C

- It is unlawful for public authorities to—
 - act incompatibly with a human right (s 40B(1)(a)); or
 - fail to give proper consideration to a relevant right (s 40B(1)(b)).
- A person that is/would be a victim of a contravention of s 40B may—
 - start a proceeding in the ACTSC (s 40C(2)(a)); or
 - rely on their rights under the HRA in other legal proceedings (s 40C(2)(b)).
- The proper respondent is—
 - The relevant public authority (s 40C(5)(a)); or
 - The relevant statutory office-holder (s 40C(5)(b)); or
 - *For any other public employee*— the Territory (s 40C(5)(c)).

Available relief

- The ACTSC may grant any appropriate relief except damages (s 40C(6)).
- This does not affect other rights to seek relief or any other right to seek damages (s 40C(7)).
- Section 40C does not apply if the respondent acted incompatibly, or failed to consider, the right in s 27C (right to a healthy environment) (s 40C(8)).

Extensions of time

McIver v ACT [2024] ACTSC 112 at [426]–[431] says you should read *Hunter Valley Developments v Cohen* (1984) 3 FCR 344 at 348-349:

- An application needs to be made. Special circumstances need not be shown. The court must be positively satisfied that it is appropriate.
- Other action taken by the applicant is relevant as to whether there is an acceptable explanation for the delay.
- Any prejudice to the respondent is material.
- Mere absence of prejudice is not enough.
- The merits of the substantive application should be taken into account.
- Considerations of fairness as between the applicant and other persons in a like position are relevant.

Use in criminal proceedings

- DPP has acted unlawfully.
- Police officers have acted unlawfully justifying a stay of proceedings.
- Police officers have acted unlawfully or improperly justifying exclusion of evidence.
- Breach of human rights relevant to a bail application.
- statutory provision is incompatible with human rights act leading to declaration of incompatibility or exercise of statutory power.
- Human rights relevant to interpretation of statutory provision.
- Breach of human rights relevant to sentence.
- Breach of human rights by the Legal Aid Commission.

Interpreting statutes

30 Interpretation of laws and human rights

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.

International law and interpretation

- Section 31:
 - International law, and the judgments of foreign and international courts and tribunals may be considered.
- A cautionary note.

Notice and intervention

- If a question arises, or a declaration is sought, under the HRA, the Court must not allow a proceeding to continue, or make a declaration, unless—
 - notice has been given to the HRC and, if the Territory is not a party, the Attorney-General (ss 34(1)–(2)(a)); and
 - a reasonable period has passed to permit consideration of whether to intervene (s 34(2)(b)).
- The Court may direct a party to give notice, and continue to hear any severable aspect of the claim (s 32(3)).
- Despite the above, the Court may decide urgent matters if it considers it to be in the interests of justice (s 32(4)).

Notice and intervention

- If the HRA applies to a proceeding (or a declaration of incompatibility is sought)—
 - Within 7 days, a party must file a notice stating that fact (rr 6031(1)–(2)).
 - As soon as practicable thereafter, the notice must be served on the Attorney-General and each active party (r 6031(3)).
- The court may direct that notice to the Attorney-General be given, and may state the notice's content (r 6032).
- An affidavit of service must be filed before the hearing starts or continues (r 6031(4) or r 6032(2)).

Contents of a notice

- The content of the right (r 6033(a)(i)).
- Any particular aspect of the right relied on (r 6033(a)(ii)).
- The facts relied on to assert the application of the HRA (r 6033(b)).
- If a declaration of incompatibility is sought—
 - That fact (r 6033(c)(i)).
 - The law allegedly inconsistent with the right (r 6033(c)(ii)).
 - The way in which the law is inconsistent with the right (r 6033(c)(iii)).
- If a notice is filed, the court must set a date for directions not later than 14 days after service of the notice (r 6034).

Leave to intervene

- The HRC may intervene, with leave, in a proceeding involving the application of the HRA (s 36).
- An application for leave must be supported by an affidavit setting out why leave should be given (rr 6040(2)–(3)).
- The application and affidavit must be served on the Attorney-General and each active party (r 6040(4)).
- If leave is given, the HRC must file a notice of intervention and serve it on the Attorney-General and each active party (r 6040(5)).

Pleadings

- Read a book.
- Plead the elements required for the statute to apply.
- Make sure that you are clear about which words of the relevant right you are relying upon.
- Identify the relief that you want.
- If you need to reply, then do so.
- If your pleading is confusing, then you should not be doing it.
- Do not be afraid to dump your human rights claim if it adds nothing.



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