

Remedies under the *Human Rights Act* 2004 (ACT)

By Max Spry

The ACT's *Human Rights Act* 2004 (the Act) – the first specific human rights statute in Australia – did not create a cause of action permitting a person to seek a remedy for a breach of his or her human rights.

The *Human Rights Amendment Act* 2008 (the Amendment Act), passed by the ACT Legislative Assembly on 4 March 2008, seeks to address this omission. It came into effect on 1 January 2009.

ACTING CONSISTENTLY WITH HUMAN RIGHTS

The new s40B of the Act will impose positive obligations on public authorities with respect to human rights.

Subsection 40B(1) makes it unlawful for a public authority 'to act in a way that is incompatible with a human right' or 'in making a decision, to fail to give proper consideration to a relevant human right'.

'Human rights' are set out in part 3 of the Act. They are not absolute and may be limited.

A public authority is broadly defined, and includes an administrative unit, a territory authority, a territory instrumentality, a minister, a police officer, a public employee and an entity whose functions include those of a public nature. Functions of a public nature are also broadly defined. They include the operation of correctional centres and the provision of a wide range of services including gas, electricity and water, public education, health services and housing.

LEGAL PROCEEDINGS AVAILABLE

A person who alleges that a public authority has contravened s40B and that s/he 'is, or would be, a victim of the contravention' may start a proceeding in the Supreme Court against the authority: s40C(2)(a). They may also rely on their rights under the Act in other legal proceedings: s40C(2)(b).

A proceeding against a public authority in the Supreme Court under s40C(2)(a) must be commenced within one year of the act complained of, although the Supreme Court may extend this time.

The Explanatory Memorandum to the Human Rights Amendment Bill 2007 states that s40C(2) is 'modelled on s7 of the UK *Human Rights Act* 1998', allowing a proceeding to be brought for a breach of s6 – the provision equivalent to s40B of the Act – in 'the appropriate court or tribunal'.

But the new s40C(2) of the Act permits proceedings only in the Supreme Court, an unfortunate limitation, which may lead to unnecessarily increasing the costs of human rights litigation and taxing the Court's already limited resources.

Section 40C(2) is, however, more permissive than s39 of the *Victorian Charter of Human Rights and Responsibilities Act* 2006, which is in similar terms but does not make a contravention of rights a cause of action. It states only that: 'If, otherwise than because of the Charter, a person may seek any relief or remedy in respect of an act or decision of

a public authority on the ground that that threat or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.'

REMEDY

Importantly, a person who successfully establishes that a public authority has acted in contravention of s40B may not be awarded damages.

Section 40C(4) states that, in a proceeding under subsection 40C(2) for a contravention of s40B, the Supreme Court may 'grant the relief it considers appropriate except damages'.

Section 40C(4) makes the relief available under the Act much more limited than that permitted by s8 of the UK statute, which allows the court or tribunal to 'grant such relief or remedy, or make such order, within its powers as it considers just and appropriate'. This includes the award of damages, although limitations are placed on any such award.

CONCLUSION

The failure to allow the Supreme Court to award damages in an appropriate case, as well as the prospect of paying the public authority's legal costs if unsuccessful, may discourage litigants from testing the limits of this new cause of action.

However, if litigants view the remedy as one more akin to an application for judicial review under the *Administrative Decisions (Judicial Review) Act* 1989, it may well be that cases testing government decision-making for failure to properly consider human rights or, indeed, for contravention of these, will come before the Supreme Court.

The Act contains many frustrating limitations. However, it may serve to plug gaps in existing 'rights-based' legislation. For example, those public sector employees who believe that they are being bullied or harassed but cannot link such conduct to any attribute protected by anti-discrimination legislation may be able to take advantage of this new cause of action. The Act defines a human right as including a right not to be subjected to cruel, inhuman or degrading treatment, which might include workplace bullying: s10(1)(b).

But the legislation's generality means that there are many questions about its operation in practice that will be resolved only through further reform or judicial interpretation. For example, would any bullying constitute degrading treatment, or would it first have to reach a certain level of seriousness? Given the new cause of action available in the Act, might an injunction be available to restrain such treatment? ■

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