

2023

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

HUMAN RIGHTS (COMPLAINTS) LEGISLATION AMENDMENT BILL 2023

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004, s 37*)**

**Presented by
Tara Cheyne MLA
Minister for Human Rights**

HUMAN RIGHTS (COMPLAINTS) LEGISLATION AMENDMENT BILL 2023

The Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

OVERVIEW OF THE BILL

The Human Rights (Complaints) Legislation Amendment Bill 2023 will establish an accessible complaints mechanism, enabling community members to make complaints about alleged breaches of human rights obligations of public authorities under the *Human Rights Act 2004* to the ACT Human Rights Commission for confidential conciliation.

The establishment of the new complaints mechanism is part of the Government's commitment to building and strengthening the ACT's culture of human rights across government and the broader community.

Section 40B of the Human Rights Act creates a specific obligation for public authorities to act consistently with human rights and to give proper consideration to relevant rights in decision making. The Human Rights Act was the first – and remains the only – human rights statute in Australia to include a stand-alone cause of action for a breach of human rights obligations by a public authority (s 40C), which allows matters to be brought to the ACT Supreme Court.

This Bill expands the avenues available for seeking redress for a breach of human rights by enabling community members who believe that a public authority has acted in contravention of s 40B of the Human Rights Act to make a complaint to the Human Rights Commission.

Before doing so, the complainant will need to make a complaint to the relevant public authority, Director-General or statutory office-holder. If the person does not receive a response to the complaint within 45 calendar days, or receives a response that they consider to be inadequate, they can then make a complaint to the Human Rights Commission. The intention of this requirement is to provide agencies and other public authorities an opportunity to resolve issues at a local level, and strengthen existing complaints handling processes, while providing an avenue for complaints to be escalated to the Commission where they are not able to be resolved or the response is unduly delayed.

In exceptional circumstances, or where the person makes a concurrent complaint under the *Human Rights Commission Act 2005* in relation to the same act, or the same circumstances or subject matter, the Commission will be able accept a complaint that doesn't meet this requirement. The exceptional circumstances provision is intended to capture time sensitive and other circumstances where it would disadvantage the complainant or render the complaint ineffective, for example

where the conduct being complained about may have occurred or caused harm by the time the 45-day period had elapsed.

The existing powers that the Commission has in relation to its complaints-handling jurisdictions, as set out in the Human Rights Commission Act, will apply to the new human rights complaints jurisdiction. This includes powers to compel production of information to enable it to consider the complaint, in the same way as for other complaints, and the same protections will apply.

The Human Rights Commission will be able to offer confidential conciliation to attempt to resolve the complaint prior to finalisation.

Human rights complaints will be closed in the same way that other complaints are closed by the Commission, in accordance with s 80 of the Human Rights Commission Act. In circumstances when the Commission considers the conciliation is unlikely to succeed (s 78 (1) (f), Human Rights Commission Act), complaints will be closed in accordance with proposed new section 82D. The final report in relation to a human rights complaint may include the substance of the complaint, include actions taken to try to resolve the complaint, and recommend any action the Commission considers the person complained about should take to ensure their acts and decisions are compatible with human rights.

This differs from the existing service complaints model which only enlivens powers to make recommendations where the Commission has made a finding that there has been a breach of an applicable standard. Rather than determining whether a breach of human rights has occurred, the Commission's recommendations in human rights complaints final reports will focus on assisting agencies to improve human rights compliance in future and may make recommendations to that end. The other requirements under the Act for a final report will apply, including that the Commission must not include an adverse comment in relation to a person in the final report unless the Commission has given the person a reasonable opportunity to respond to the proposed comment (s 80 (2)) and that if a recommendation recommends that action be taken, it must state the reasonable time within which the action should be taken (s 81(3)).

Community members who make a human rights complaint to the Human Rights Commission will not be precluded from initiating a proceeding in the Supreme Court if resolution cannot be reached through conciliation. S 40C (3) of the Human Rights Act provides that legal proceedings in relation to public authority actions must be started not later than 1 year after the day (or last day) the act complained about happens unless the court orders otherwise. The Bill proposes adding a new subsection to s 40C to make it clear that the court's discretion to permit the commencement of proceedings after the 1-year limitation period has expired includes circumstances when a person has made a complaint to the Human Rights Commission about the act within a year and it is unreasonable in the circumstances for the period to apply to the proceeding.

This is intended to capture circumstances where a person has sought, in good faith, to resolve their concerns by first making a complaint to the Human Rights Commission, and the limitation period has expired due to their good faith participation in the progression of the complaint under the relevant provisions of the Human Rights Commission Act. However, it would not be unreasonable for the court to apply the limitation period to an individual's claim in the Supreme Court if the complainant has unnecessarily delayed commencing the proceedings, not engaged constructively in conciliation, or otherwise acted vexatiously.

The Bill also makes additional amendments to the Human Rights Act to:

- Require that the relevant Assembly committee must report to the Legislative Assembly about human rights issues raised by subordinate legislation. Currently this requirement only applies to bills presented to the Assembly. Broadening the Scrutiny Committee's mandate to consider the human rights implications of subordinate legislation will improve transparency of human rights considerations in the Territory. Equivalent committees in other human rights jurisdictions (Victoria and Queensland) have a formal scrutiny mandate of this kind.
- Remove references to gendered language, such as 'his or her', in the Human Rights Act and replace with gender neutral language. These amendments will bring the ACT legislation in line with the relevant legislation in Queensland and Victoria and modern legislative drafting practice. The changes are not intended to change the content or nature of the rights in the Act.
- Require notice to be given to the Human Rights Commission in all Supreme Court matters involving the application of the Human Rights Act, whether or not the Territory is a party of the proceeding. Currently, notice is only required to be given to the Commission if the Territory is not a party.
- Insert a new sub-section to section 40C to specify that in a proceeding started under s 40C (2) (a) where the public authority is a public employee, the respondent to the proceeding is the Territory, or where the public employee is a statutory office holder, the statutory office holder. This change is intended to ensure that individual public servants who are acting in the course of their employment are not named as respondents in litigation and subjected to unnecessary distress and public scrutiny where they are implementing government policy and are subject to direction, and that responsibility and legal liability for any breach by a public employee is directed appropriately. The amendment is not intended to affect the public authority obligations of individual public servants under s 40B, or the ability for people to take action (under 40C) in relation to a breach of those obligations by an individual officer.

CONSULTATION ON THE PROPOSED APPROACH

In October 2022, the Government agreed to enable a complaint about a breach of the *Human Rights Act* to be made to the ACT Human Rights Commission for confidential conciliation, in response to the Standing Committee on Justice and Community Safety report into the Inquiry into Petition 32-21 (No Rights Without Remedy).

Petition 32-21 (No Rights Without Remedy), raised concerns about a lack of an accessible mechanism for ACT residents to enforce their rights under the *Human Rights Act 2004*, was signed by over 500 signatories and lodged in the Legislative Assembly in November 2021. The 2022 Standing Committee on Justice and Community Safety inquiry into the petition received 27 submissions including from community and legal organisations.

In 2023, the Justice and Community Safety Directorate engaged further with key stakeholders who made submissions to the inquiry to inform the development of this Bill.

CONSISTENCY WITH HUMAN RIGHTS

Rights engaged

The Human Rights (Complaints) Legislation Amendment Bill 2023 promotes all of the rights in the Human Rights Act by providing a more accessible mechanism for resolution of breaches of those rights by public authorities.

The Bill specifically engages the following rights:

- Right to equality (promoted)
- Right to privacy and reputation (promoted and limited)

Rights Promoted

The Human Rights (Complaints) Legislation Amendment Bill 2023 promotes the rights in the *Human Rights Act 2004* by establishing an accessible pathway to resolve complaints and access an effective remedy for human rights breaches by public authorities.

Article 2 (3) of the International Covenant on Civil and Political Rights requires State Parties to ensure that any person whose rights or freedoms are violated has an effective remedy,

Currently, the only direct cause of action for alleged breaches of human rights by public authorities in the ACT is through the Supreme Court under section 40C of the Human Rights Act, although human rights breaches can be raised in the context of other proceedings. While the Supreme Court is an important and appropriate jurisdiction for the formal determination of human rights claims against public

authorities, it is not a pathway that is easily accessible for most Canberrans who have concerns about breaches of their human rights.

The Bill will enable complaints to be considered and conciliated by the ACT Human Rights Commission, which will create a more accessible pathway for people affected by breaches of their human rights by public authorities, allowing them to raise their concerns and have these issues resolved in a timely and effective way.

Community members who make a human rights complaint to the Human Rights Commission will not be precluded from initiating a proceeding in the Supreme Court if resolution cannot be reached through conciliation, subject to the limitation period in s 40C (3) of the Human Rights Act.

The Bill also promotes:

- The right to equality – by removing gendered language from the *Human Rights Act* in line with modern drafting practice, while not changing the content or nature of the rights in the Act.
- The right to privacy and reputation – by amending s 40C of the Human Rights Act to specify that in Supreme Court proceedings under that provision, if the public authority who is claimed to have acted in contravention of their obligations under the Act is a public employee, the respondent to a proceeding will be the Territory or in the case of statutory office-holders, the statutory office-holder. This amendment will prevent the naming of individual public servants as parties in human rights litigation which can cause distress. It will not affect the ability for proceedings to be brought in relation to the actions of individual public employees.

Rights Limited

Right to privacy and reputation

1. Nature of the right and the limitation (ss 28(2)(a) and (c))

Section 12 of the Human Rights Act protects individuals from unlawful and arbitrary interference with privacy, family, home or correspondence. Limitations on the right to privacy must be lawful and must not be arbitrary.

The Human Rights Commission currently has functions and powers under the *Human Rights Commission Act 2005* in relation to complaints made by community members about a broad range of services, including health services, services for children and young people, services for older people and services for people with disability.

The Human Rights (Complaints) Legislation Amendment Bill 2023 will create a new complaints jurisdiction extending the Commission's existing complaints handling functions and powers to the new complaints jurisdiction, some of which may limit the right to privacy. This includes the power to ask for information,

documents and other things (s 73, Human Rights Commission Act) and requiring attendance (s 74, Human Rights Commission Act).

2. *Legitimate purpose (s 28(2)(b))*

The legitimate purpose is to establish an accessible complaints mechanism for people affected by breaches of their human rights by public authorities and have these issues resolved in a timely and effective way.

3. *Rational connection between the limitation and the purpose (s 28(2)(d))*

The Human Rights Commission plays an important role in promoting and upholding human rights in the ACT through community education, advice to government, and their complaints-handling jurisdiction. Currently, human rights issues may be raised indirectly via the Commission's existing complaints handling jurisdiction which covers a wide range of services.

Because of its expertise and role in the ACT, it is appropriate for the Human Rights Commission to have an expanded complaints handling function in relation to complaints about alleged breaches of s 40B of the Human Rights Act, and for the Commission's existing powers to extend to the new complaints jurisdiction.

4. *Proportionality (s 28(2)(e))*

Expanding the complaints jurisdiction of the Human Rights Commission to consider complaints about a breach of the Human Rights Act by a public authority and facilitate confidential conciliation has considerable community support, is an identified need, and will provide benefit to the ACT community.

The limitations on the right to privacy in sections 73 and 74 of the Human Rights Commission Act, which will be expanded to apply to the new human rights complaints jurisdiction, are restricted to circumstances that the Commission believes, on reasonable grounds, someone can provide information relevant to a consideration in relation to a complaint. This is reasonable to ensure the Commission can undertake its statutory duty to encourage the resolution of complaints made under the Act, and assisting in their resolution, by providing an independent, fair and accessible process for resolving the complaints (section 14 (1) (a), Human Rights Commission Act).

Further, the existing protections in the Human Rights Commission Act will apply to the new complaints jurisdiction, including the s 75 privileges against self-incrimination and exposure to civil penalty and the s 100A protection from liability for honestly and without recklessness making a complaint, making of a statement, or the giving of a document or information as required under the law. These are important safeguards for any limitations on the right to privacy.

HUMAN RIGHTS (COMPLAINTS) LEGISLATION AMENDMENT BILL 2023

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Human Rights (Complaints) Legislation Amendment Bill 2023**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly **is** consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA
Attorney-General

CLAUSE NOTES

Part 1 Preliminary

Part 1 comprises clause 1 to 3 dealing with formal matters including name of the Act, commencement and outlining the legislation amended.

Clause 1 Name of Act

This clause provides that the name of the Act is the *Human Rights (Complaints) Legislation Amendment Act 2023*.

Clause 2 Commencement

This clause provides for the commencement of sections 3 to 7, 9 and schedule 1 on the day after this Act's notification day. The remaining provisions of the Act commence on a day fixed by the Minister by written notice.

Clause 3 Legislation amended

This clause provides that the Bill amends the *Human Rights Act 2004* and the *Human Rights Commission Act 2005*.

Part 2 Human Rights Act 2004

Part 2 comprises clauses 4 to 10 dealing with amendments to the *Human Rights Act 2004*.

Clause 4 Notice to Attorney-General and commission Section 34 (1) and (2)

This section sets out requirements for notice to the Attorney-General and Human Rights Commission in circumstances where a question arises in a proceeding in the Supreme Court that involves the application of the *Human Rights Act*, or the Supreme Court is considering making a declaration of incompatibility in a proceeding.

Clause 5 Section 34 (3) (a)

This clause amends section 34 (3) (a) of the Act to provide that the Supreme Court may direct a party to give notice to the proceeding to the commission and, if required, the Attorney-General.

Clause 6 Section 38 heading

This clause amends the heading of section 38 of the Act to read 'Consideration of legislation by relevant Assembly committee'.

Clause 7 Section 38 (1)

This clause amends section 38 of the Act to require the relevant Assembly committee to report to the Legislative Assembly about human rights issues raised by subordinate laws, in addition to bills, presented to the Assembly.

Clause 8 Public authorities must act consistently with human rights Section 40B (1), new note

This clause inserts a new note to section 40B (1), stating that a person who is or would be aggrieved by an act by a public authority they believe to be in contravention of this section may make a human rights complaint about the public authority to the commission under the *Human Rights Commission Act 2005*, section 41D.

Clause 9 Legal proceedings in relation to public authority actions New section 40C (3A)

This clause inserts a new subsection to s 40C specifying who the respondent to a proceeding started under section 40C (2) (a) is. Where the public authority is a public authority mentioned in section 40 (1) (a) to (e) or (g), the respondent to a proceeding is a public authority; if the public authority is a public employee who is a statutory office-holder, the respondent is the statutory office-holder; if the public authority is any other public employee, the respondent is the Territory; and if the public authority is an entity for whom a declaration is in force under section 40D, the respondent is the entity.

Clause 10 New section 40C (3A)

This clause inserts a new subsection to s 40C outlining that without limiting subsection (3), the court may order that a proceeding under subsection (2) (a) be started after the period stated in subsection (3) if the person making the claim has made a human rights complaint to the commission under the *Human Rights Commission Act 2005* about the act within the period stated in subsection (3); and it is unreasonable in the circumstances for the period to apply to the proceeding.

This is intended to capture circumstances where a person has sought, in good faith, to resolve their concerns by first making a complaint to the Human Rights Commission, and the limitation period has expired due to their good faith participation in the progression of the complaint under the relevant provisions of the Human Rights Commission Act. However, it would not be unreasonable for the court to apply the limitation period to an individual's claim in the Supreme Court if the complainant has unnecessarily delayed commencing the proceedings, not engaged constructively in conciliation, or otherwise acted vexatiously.

Part 3 Human Rights Commission Act 2005

Part 2 comprises clauses 11 to 24 dealing with amendments to the *Human Rights Commission Act 2005*.

**Clause 11 Main objects of Act
Section 6 (2) (j)**

This clause inserts human rights complaints to the main objects of the Act.

**Clause 12 Disability and community services commissioner's functions
New section 21 (1) (c) (vii)**

This clause adds dealing with a human rights complaint to the disability and community services commissioner's functions.

Clause 13 New section 41D

This clause adds a new section 41D to the Act setting out the requirements for a human rights complaint.

A person may complain to the commission about a public authority if the person believes the public authority has acted in contravention of the *Human Rights Act 2004*, section 40B.

However, a person must not make a human rights complaint unless they have made a complaint to the relevant person (the person complained about as if the complaint is a human rights complaint) about the contravention claimed; and either has not received a response to the complaint within 45 days after making the complaint, or has received a response they consider to be inadequate.

The Commission will be able accept a complaint that doesn't meet this requirement where the person makes a concurrent complaint under the *Human Rights Commission Act 2005* in relation to the same act, or the same circumstances or subject matter, or in exceptional circumstances. The exceptional circumstances provision is intended to capture time sensitive and other circumstances where it would disadvantage the complainant or render the complaint ineffective, for example where the conduct being complained about may have occurred or caused harm by the time the 45-day period had elapsed.

**Clause 14 What complaints may be made under this Act?
New section 42 (1) (da)**

This clause adds human rights complaints as complaints that can be made under the Act.

**Clause 15 Who may make a complaint under this Act?
New section 43 (1A)**

This clause specifies that for a human rights complaint, an aggrieved person includes a person who would be aggrieved by the act. This is intended to capture the same group of people who could make a complaint under section 40C (1) of the *Human Rights Act 2004*.

Clause 16 Final report
Section 81, new note

This clause adds a new note to section 81 stating that for final reports in relation to human rights complaints that are closed because the commission considers that conciliation is unlikely to succeed in resolving the complaint – see section 82D.

Clause 17 New section 82D

This clause adds a new section 82D to the Act which sets out requirements for closing human rights complaints if conciliation is unlikely to succeed (that is, section 78 (1) (f) applies).

The clause sets out, in these circumstances, what the final report in relation to a human rights complaint may include, that a recommendation need not be limited to matters raised by the complaint being closed, if a recommendation recommends that action be taken it must state the reasonable time within which the action should be taken, and the final report is not admissible in a proceeding under the *Human Rights Act 2004*, section 40C unless the complainant and the person complained about agree.

This section is additional to the other requirements of the Act for a final report.

Clause 18 Third-party reports
New section 83 (2A)

This clause adds a new sub-section to section 83 setting out that a third-party report given by the commission in considering a human rights complaint may recommend any action the commission considers the third party should take to ensure their acts and decisions are compatible with human rights.

Clause 19 New section 86A

This clause inserts a new section 86A regarding publication of information in relation to human rights complaints.

The commission may publish information about a human rights complaint that the commission has closed. The provision sets out what may be included in the publication and requires that the publication must not include personal information about an individual unless the information has been previously published or the individual consents to the information being published.

It is not intended that this power be able to be relied on to publish information relating to a non-complying entity without complying with the requirements set out in section 86, nor that this section allow publication of any information provided in confidence during conciliation.

Clause 20 New part 8

This clause inserts a new part 8 setting out transitional provisions for the *Human Rights (Complaints) Legislation Amendment Act 2023*.

If a person believes that a public authority has acted in contravention of the *Human Rights Act 2004*, section 40B before the commencement day, and the person is or would be aggrieved by the act, they may make a human rights complaint about the public authority on or after the commencement day.

Part 8 expires 2 years after the day the *Human Rights (Complaints) Legislation Amendment Act 2023*, section 13 commences.

Clause 21 Dictionary, definition of act

This clause substitutes the dictionary definition of *act* to include omission and for a human rights complaint includes a proposal to act.

Clause 22 Dictionary, new definition of *human rights complaint*

This clause inserts new definitions for *human rights complaint* into the dictionary of the Act.

Clause 23 Dictionary, definition of *person complained about*, new paragraph (d)

This clause inserts a new paragraph to the dictionary definition of *person complained about* setting out the meaning of this term in the Act in relation to a human rights complaint.

Clause 24 Dictionary, new definition of *public authority*

This clause inserts new definitions for *public authority* into the dictionary of the Act.

Schedule 1 Human Rights Act 2004 – Technical amendments

[1.1] Sections 8 and 10 to 14

This clause makes technical amendments in line with current legislative drafting practice with reference to gender to omit ‘his or her’ and substitute ‘their’.

[1.2] Sections 16 (2) and 18 (3)

This clause makes technical amendments in line with current legislative drafting practice with reference to gender to omit ‘him or her’ and substitute ‘them’.

[1.3] Section 18 (5)

This clause makes a technical amendment in line with current legislative drafting practice with reference to gender to omit ‘his or her’ and substitute ‘their’.

[1.4] Section 22 (2) (a) to (i)

This clause makes technical amendments in line with current legislative drafting practice with reference to gender.

[1.5] Section 23 (1) (c)

This clause makes a technical amendment in line with current legislative drafting practice with reference to gender to omit 'he or she is' and substitute 'they are'.

[1.6] Section 24

This clause makes a technical amendment in line with current legislative drafting practice with reference to gender to omit 'he or she has' and substitute 'they have'.

[1.7] Section 25 (2)

This clause makes a technical amendment in line with current legislative drafting practice with reference to gender to omit 'he or she benefits' and substitute 'they benefit'.

[1.8] Section 27 (1) and 27A (1)

This clause makes technical amendments in line with current legislative drafting practice with reference to gender.