

2024

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

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2024 (NO 2)

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

**Presented by
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Attorney-General**

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2024 (NO 2)

The Bill is **not** 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*.

This explanatory statement relates to the *Justice and Community Safety Legislation Amendment Bill 2024 (No 2)* as presented to the Legislative Assembly. It has been prepared to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly. The statement is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill.

OVERVIEW OF THE BILL

The Bill is an omnibus bill which amends of the following legislation in the Attorney-General's portfolio:

- *Fair Trading (Australian Consumer Law) Act 1992*;
- *Human Rights Commission Act 2005*;
- *Residential Tenancies Act 1997*; and
- *Retirement Villages Act 2012*.

It also amends legislation in the Minister for Disability, Carers and Community Services' portfolio:

- *Official Visitor Act 2012*.

CONSULTATION ON THE PROPOSED APPROACH

The amendments in the Bill were developed in targeted consultation within Government and with relevant stakeholders where appropriate. In some cases, minor and technical amendments were identified by the Government agency that administers or operates under the relevant Act, or by a working group of key stakeholders in the relevant sector.

In relation to the amendments to the *Fair Trading (Australian Consumer Law) Act 1992* (**FT(ACL) Act**), Access Canberra consulted with the Consumer Policy Network, a network of consumer representatives from each of the state, territory and commonwealth governments, on the inclusion of such provisions in relevant fair-trading legislation.

The Human Rights Commission (**HRC/the Commission**) and the Official Visitors (**OVs**) identified the reforms necessary to the *Human Rights Commission Act 2005* (**HRC Act**) and the *Official Visitor Act 2012* (**OV Act**), respectively.

Official Visitors (**OVs**), the OV Executive Officer and OV Operational Directorates (CSD, ACT Health Directorate and JACS (ACT Corrective Services)) were consulted in relation to the amendments to the *Official Visitor Act 2012* (**OV Act**).

ACT Courts and Tribunal were consulted on the amendments to the HRC Act in relation to referral statement to the ACT Civil and Administrative Tribunal (**ACAT**) and were supportive of the reforms.

The ACT Revenue Office (**ACT Bonds**) was consulted in relation to the amendments to the *Residential Tenancies Act 1997* (**RTA**).

The Retirement Villages Working Group was consulted in relation to the amendments to the *Retirement Villages Act 2012* (**RVA**) across working group meetings held in 2024.

SUMMARY OF AMENDMENTS

Fair Trading (Australian Consumer Law) Act 1992

The Bill makes amendments to limit the ability of bodies corporate and other persons, such as an employer, to use their employees or agents as a shield from liability. The amendments do this by:

1. Deeming the state of mind of a representative (including an employee, agent or director) of a person to be that of the person; and
2. Attributing conduct of a representative (including an employee, agent or director) of a person, to be that of the person.

These amendments are important, as to establish contravention of certain consumer and fair-trading laws, a plaintiff must show that a person engaged in specific conduct, or that they have a specific state of mind. Absent these amendments, there are barriers to establishing that a non-natural person has contravened a particular provision.

Similar provisions exist in every other Australian jurisdiction aside from the ACT. The amendments will bring the ACT into line with other jurisdictions, including the Commonwealth, and reduce the potential for protracted delays in the litigation of consumer disputes. It will also ensure the ACT's laws reflect societal expectations about the liability of non-natural persons and employers, who engage individuals to act on their behalf.

Human Rights Commission Act 2005

The Bill makes amendments to improve the operation of the HRC's complaints handling function under the HRC Act by:

1. allowing the Commission to conduct preliminary inquiries;
2. introducing an additional ground to close complaints;
3. clarifying the types of organisations to which the Commission may make recommendations;
4. removing the requirement to issue referral statements to the ACT Civil and Administrative Tribunal (**ACAT**) where the matter has otherwise been resolved or the complainant has disengaged with the complaints process; and
5. introducing a pathway for Commission-initiated considerations (**CICs**) relating to retirement village complaints, occupancy dispute complaints and conversion practice complaints to be referred to ACAT.

Preliminary inquiries

The HRC Act sets out how the Commission deals with complaints it receives across its complaint-handling jurisdictions, including permitted steps such as consideration, conciliation and closure (section 47(2)), and provides the Commission with broad discretion in the way a consideration of a complaint is conducted (section 72).

The amendment introduces an explicit power for the Commission to undertake preliminary inquiries in addition to other ordinary steps of dealing with a complaint. This acknowledges that many of the complaints made to the Commission are suitable for informal and swift resolution and can be dealt with and finalised after making initial inquiries to both parties.

This amendment will provide statutory clarity and certainty to respondents to complaints that they are authorised to engage and provide information to the Commission, even at this preliminary stage. This approach mirrors provisions in other complaints-handling regimes, such as section 68 of the *Human Rights Act 2019* (Qld) and section 38 of the *Information Privacy Act 2014* (**IP Act**).

Additional ground to close complaints

Section 78 of the HRC Act provides a broad range of circumstances under which the Commission either must or may close a complaint. These circumstances reflect the diversity of the Commission's complaints-handling jurisdictions, and the varying pathways for review.

However, some complaints do not fall neatly within the existing grounds for closure. One example is where the matter has been resolved by way of a negotiated agreement with the respondent prior to a complaint being made (e.g. a non-disclosure agreement, or a deed), but the complainant seeks to reopen the matter. This does not meet the

threshold of having been dealt with by a court or tribunal (per section 78 (2) (c) (iii)) and cannot be considered 'otherwise resolved' (per section 78 (2) (g)) since a complaint has been made.

Another example is where there may be a more suitable agency to deal with a matter, whether because of the subject matter or complexity of the matter, or because of the availability of binding powers to resolve a matter with remedies for the complainant.

The Bill introduces a new power to close complaints where there is no further consideration justified in the circumstances. This aligns with similar grounds in section 46PH(1)(c) of the *Australian Human Rights Commission Act 1986* (Cth) and section 116(e) of the *Equal Opportunity Act 2010* (Vic). This amendment will ensure that complaints can be closed promptly, rather than having to wait until the statutory time limit of 2 years is reached in accordance with section 78(1)(a).

The Commission has the power to reopen complaints in certain circumstances under section 79 of the HRC Act, which provides a safeguard for reconsideration of decisions to close complaints where necessary.

Clarifying types of organisations to which recommendations may be made

The Commission has the power under section 81 of the HRC Act to make recommendations to 'a person complained about' where that person has acted inconsistently with an applicable standard.

'Person complained about' is defined for some types of respondents in the HRC Act, but not others, and 'person' is defined under section 160 of the *Legislation Act 2001* as generally including a reference to a corporation as well as an individual.

This Bill will make it clear that respondents to complaints may also include unincorporated organisations which do not fall neatly within this definition of 'person complained about', and that the Commission may make recommendations to both incorporated and unincorporated organisations.

The Bill also makes a range of amendments throughout the HRC Act to replace the phrase *person complained about* with the term *respondent* instead. This is to ensure there is no ambiguity that unincorporated entities may be subject to the Commission's complaints-handling procedures.

HRC referral statements to ACAT

The Commission closes complaints by issuing a final report to both parties under section 80 of the HRC Act.

The Commission is required to include a referral statement with final reports for discrimination, retirement village, occupancy dispute and conversion practice complaints. These statements advise the parties that the Commission has closed the

complaint, and that the complainant may ask the Commission to refer the complaint to ACAT within 60 days for determination (or after 60 days in exceptional circumstances on application to ACAT).

This requirement does not apply where a conciliation agreement has been made or where the complainant has withdrawn the complaint.

The amendment acknowledges that the requirement also should not apply where an agreement has been reached to resolve the complaint without a formal conciliation agreement (e.g. an apology or adequate explanation), or where the complaint has been closed because the complainant has lost contact with the Commission. In such circumstances, the provision of a referral statement is unnecessary, and omitting it provides greater certainty to the parties that the complaint has been finalised.

Referral pathway to ACAT for HRC CICs

The Commission may, by way of a CIC, “step in the shoes” of a complainant and consider things about which a person could make, but has not made, a complaint under section 48 of the HRC Act.

Although discrimination, retirement village, occupancy dispute and conversion practice complaints from individuals may all be referred to ACAT for determination, currently only discrimination CICs may also be referred to ACAT under the HRC Act.

The amendment will include a specific referral pathway for retirement village, occupancy dispute and conversion practice CICs to ACAT to bring them into alignment with discrimination CICs and ensure the Commission can seek a determination on systemic issues that affect vulnerable people in the community.

Official Visitor Act 2012

The Bill amends the OV Act to insert two new provisions to authorise the sharing of information between OVs and to provide protection from civil or criminal liability to a person who makes a complaint to an OV.

OVs are independent statutory office holders who visit and provide oversight over visitable places under the OV Act in the disciplines of corrections, mental health, disability, children and young people, and homelessness. Visitable places are certain government or non-government residences or facilities where people are detained or reside in and are reliant on service providers.

In exercising their functions (e.g. making visits, inquiries, complaint resolution and reporting), OVs are bound by the OV Act, *Official Visitor Guidelines 2020*, the relevant Operational Act (*Children and Young People Act 2008*, *Corrections Management Act 2007*, *Disability Services Act 1991*, *Housing Assistance Act 2007*, and *Mental Health Act 2015*), as well as other legislation of general application to statutory bodies such as the IP Act.

Protection from civil or criminal liability for persons who make complaints to OVs

The OV Act provides that an entitled person at a visitable place, or anyone else, may complain to an OV about any aspect of the person's accommodation. Information obtained through these complaints enables OVs to address and report on systemic issues within visitable places.

The OV Act does not currently provide protection to those who make complaints to OVs from civil or criminal liability. To address this gap, the Bill inserts a new liability protection provision (section 24A) that provides that civil or criminal liability is not incurred only because of the making of a complaint to an OV honestly and without recklessness. It also provides that the making of a complaint is not a breach of confidence, or professional etiquette or ethics, or a rule of profession conduct.

This amendment is intended to encourage honest reporting of concerns about visitable places to OVs without fear of legal repercussions, which in turn promotes a culture of transparency and accountability in visitable places. These protections are particularly important in circumstances where complaints are made by entitled persons who are in positions of vulnerability due to their reliance on service providers.

Information sharing between OVs

The Bill inserts a new information sharing provision (section 25A) into the OV Act to provide explicit authorisation for OVs to share information received in the course of their functions with other OVs, to better facilitate collaborative work between OVs. The new provision provides that OVs may give information disclosed to them, or obtained by them, in the course of their functions to another OV, and the information recipient may use that information, if the information is necessary for the effective exercise of a function under the Act.

While the disclosure rules in the IP Act would likely authorise OVs to share information in many circumstances, an explicit information sharing provision will better support their effective cooperation, in the interests of entitled persons and systematic improvements in visitable places.

Residential Tenancies Act 1997

The Bill makes minor and technical amendments to the RTA. The amendments correct minor errors arising from the *Housing and Consumer Affairs Legislation Amendment Act 2024 (HCALAA)*, which passed in June 2024.

The HCALAA created new situations in which co-tenants' interests in a bond held by ACT Revenue may change, and on this situation arising, required the co-tenants to notify the Territory (specifically ACT Revenue who hold ACT rental bonds) about the changed interest. As it is optional for a landlord to require payment of a bond, the Bill clarifies that this obligation only arises where there is a bond held in relation to the property.

The Bill also replaces an erroneous reference to a notice to vacate with the correct term — notice of intention to vacate.

Retirement Villages Act 2012

The Bill makes minor amendments to the RVA relating to governance issues in retirement village committees that were raised by residents during consultation with the Retirement Villages Working Group. The amendments will address issues in relation to:

1. The term “office” - specifically around whether the term “office” is intended to refer to specific positions with designated functions on the committee (such as President, Secretary etc.) or whether it is intended to capture ordinary committee member positions as well; and
2. How to calculate the 3-year term limit that the RVA imposes on office holders. Confusion as to the length of an office holders’ term has arisen because, where the term ‘year’ is not defined, the *Legislation Act 2001* clarifies that a year is defined as a calendar year (which is a 12-month period beginning on 1 January). This definition causes uncertainty about term limits when an office holder assumes their role part way through a calendar year.

The Bill will address these issues by clarifying that the term “office” only applies to specific positions with designated functions on the committee (such as President, Secretary, etc.) and not ordinary committee members. It will also clarify that the term limit of three years runs from the date the office holder commences in their position (and not on a calendar year basis).

CONSISTENCY WITH HUMAN RIGHTS

Rights Engaged

The Bill engages the following sections of the *Human Rights Act 2004 (HRA)*:

- Section 8 – right to equality and non-discrimination (*promoted*)
- Section 12 – right to privacy (*limited*)
- Section 16 – right to freedom of expression (*promoted*)
- Section 21 – right to a fair trial (*limited*)
- Section 22 – rights in criminal proceedings (right to presumption of innocence) (*limited*)

The ways in which the Bill does this are set out below.

Rights promoted

In general, the amendments to the HRC Act promote all rights under the **HRA** by improving the HRC’s ability to deal with all types of complaints, including human rights complaints.

The Bill specifically promotes the right to equality and non-discrimination by allowing the HRC to resolve more complaints, including discrimination complaints, flexibly and informally.

The amendments to the OV Act promote the right to freedom of expression by providing protection from civil or criminal liability to a person who makes a complaint to an OV. This statutory protection reflects the strong public interest in ensuring that members of the community feel confident to share information with statutory bodies that investigate complaints or provide support to vulnerable members of the community.

Rights limited

The preamble to the HRA notes that few rights are absolute and that they may be subject to reasonable limits in law that can be demonstrably justified in a free and democratic society.

Section 28 (2) of the HRA contains the framework that is used to determine the acceptable limitations that may be placed on human rights.

Section 28 of the HRA requires that any limitation on a human right be authorised by a Territory law, be based on evidence, and be reasonable to achieve a legitimate aim. Whether a limitation is reasonable depends on whether it is proportionate.

Right to a fair trial – amendments to the HRC Act

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

Under section 21 of the HRA, everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing. This includes civil proceedings, such as complaints made under the HRC Act referred to ACAT for determination.

The proposed amendments to the HRC Act may limit the right to a fair trial by removing the requirement for the HRC to include a referral statement with a final report where:

- agreement has been reached to resolve the complaint without a formal conciliation agreement, or
- the complainant has lost contact with the Commission.

In these circumstances, the complainant will not have the opportunity to request that the complaint be referred to ACAT for a determination after a fair and public hearing.

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

The purpose of the amendment is to provide more certainty to parties, including respondents, that a matter has been finalised through the Commission's complaints-handling function and that a complainant may not suddenly make an application to ACAT to revisit the issues that were understood to be resolved, or to re-enliven the complaint after they had disengaged with the Commission

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

By no longer requiring a referral statement to be included in a final report where the complaint has otherwise been resolved or the complainant has lost contact with the Commission, there is no ability for that complainant to make an application to ACAT to re-enliven the complaint. This means that where the Commission has issued a final report, the matter will be closed, and the respondent can be confident that tribunal proceedings will not be commenced without warning.

4. *Proportionality (section 28 (e))*

The limitation is minor and will only impact a small group of complainants in discrimination, retirement village, occupancy dispute or conversion practice complaints:

- those who have resolved their complaint informally without a conciliation agreement, and
- those who have lost contact with the Commission in relation to their complaint despite best efforts to engage them in the complaints process.

Additionally, the HRC has discretion to reopen complaints under section 79 of the HRC Act. This means (for example) that where a complainant who has lost contact with the Commission decides to re-engage with the complaints process, there is still a possibility to request the complaint be reopened and that the matter be referred to ACAT for determination. This power is an important safeguard to ensure that where there is new information or exceptional circumstances, the complainant may still exercise their right to fair trial in requesting a referral statement to ACAT for their matter.

Right to privacy – Amendments to the OV Act

1. *Nature of the right and the limitation (section 28 (a) and (c))*

Section 12 of the HRA protects individuals from unlawful or arbitrary interference with privacy. The right to privacy protects personal and confidential information from unlawful or arbitrary interference.

The Bill may limit the right to privacy because it inserts into the OV Act a provision that explicitly authorises the sharing of information between OVs. The new provision provides that an OV may give 'official visitor information' to another OV, and that the receiving OV may use the information. 'Official visitor information' means information disclosed to, or obtained by, an OV in the exercise of a function under the OV Act. This may include, for example, information disclosed to an OV by an entitled person as part of a complaint under the Act about aspects of their accommodation.

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

The purpose of this amendment is to better support effective cooperation between OVs to ensure they can exercise their statutory functions efficiently and without facing unnecessary information sharing barriers. The new information sharing provision will better support collaborative work between OVs, which is in the interests of entitled persons and systemic improvements in visitable places.

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

There is a rational connection between the limitation and purpose because the amendment addresses a gap in the OV Act whereby there is no explicit authorisation for OVs to share information received in the course of their functions with other OVs. Existing rules apply to the information that OVs handle. The IP Act contains Territory Privacy Principles that regulate the collection, use, disclosure and management of personal information by public sector agencies. The *Health Records (Privacy and Access) Act 1997* establishes a similar framework that regulates the handling of medical records and health information.

While the disclosure rules in the IP Act would likely authorise OVs to share information in many circumstances, doing so requires OVs to undertake a case-by-case assessment and may result in outlier cases where information cannot be shared. Inserting an explicit information sharing power will increase clarity and efficiency in the sharing of information between OVs, enabling OVs to more effectively fulfil their functions.

4. *Proportionality (section 28(e))*

Information sharing is necessary for the effective exercise of functions under the OV Act. The pre-existing framework in the OV Act allows for the collection of information so that complaints can be resolved, and systemic issues can be raised. This ensures that the interference with the right to privacy is based on reasonable and identifiable criteria and is therefore not arbitrary. It also ensures that the law is sufficiently precise and confined so as not to give too much discretion to OVs.

Safeguards are included in the new provision so that any prohibitions on disclosing the information to third parties that apply to the OV giving the information will apply equally to the OV receiving the information. The provision only authorises sharing of information between OVs and does not authorise the sharing of information with any other third party.

Rights in criminal proceedings – FT (ACL) Act amendments

1. *Nature of the right and the limitation (section 28 (a) and (c))*

Section 22 (1) of the HRA provides that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law. The amendments to the FT (ACL) Act will not create new strict liability offences. However, they allow for the attribution of the conduct of agents and employees to an individual where the conduct of the agent or employee is at the direction of the individual or where it is within the scope of their actual or apparent authority. In doing this, the amendments will create a new pathway for individuals to be found guilty of existing strict liability offences in the Australian Consumer Law.

Strict liability offences engage and may limit the right to be presumed innocent until proven guilty as they impose guilt without the need to prove a person's fault.

There are also provisions in the Australian Consumer Law and the FT (ACL) Act with a reverse evidential burden, where the defendant is required to prove or disprove a fact, or where they are required to provide evidence sufficient to raise a reasonable possibility that a matter does or does not exist.¹

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

The purposes of the Australian Consumer Law (set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) and the FT (ACL) Act are to, respectively:

- Enhance the welfare of Australians through the promotion of competition and fair trading, and to provide for consumer protection; and

¹ See for example section 54 of the *Fair Trading (Australian Consumer Law) Act 1992*.

- To promote fair trading by ensuring a level playing field for the making of bargains between consumers and traders.

The legitimate objective of the amendments to the FT (ACL) Act is to achieve these objectives, promoting good consumer outcomes by ensuring that individuals cannot use their representatives as a shield from liability. Accountability and penalties, including strict liability offences or offences where there is a reverse evidential burden, are included in the scheme to assist in promoting this legitimate objective and regulating unlawful conduct.

3. Rational connection between the limitation and the purpose (section 28 (d))

The amendments will ensure that the legitimate purpose is achieved: that individuals can be held to account for conduct which, given their position of authority, is properly attributable to them, even though they did not personally engage in the conduct.

The intention behind these amendments is to ensure that proceedings can be commenced against the most appropriate party. For example, if an employer directs their employee to carry out work in contravention of the Australian Consumer Law, or FT (ACL) Act, it is important that the plaintiff be able to commence proceedings against the employer.

Absent the amendments, the employer may be able to escape liability for the contravention, or there may be significant costs and delays in securing their conviction (although actions may still be commenced against the individual employee).

Although proceedings may still be commenced against the individual employee, who engaged in the conduct, in absence of the amendments, the employer may escape liability. They may also not be deterred from engaging in the problematic conduct in future, nor will other businesses.

As such, the current challenges in commencing proceedings may see contravening conduct continue, and result in ongoing consumer harm.

The amendments to the FT (ACL) Act which may expose persons to criminal liability and indirectly impact upon their rights in criminal proceedings (because of the existence of strict liability offences and reverse burdens of proof) are necessary to address the challenges in commencing criminal proceedings against the proper defendant and to hold individuals to account for conduct, which, given their position of authority, is appropriately attributable to them. The limitations on rights in criminal proceedings will accordingly promote competition and fair trading, and ensure consumers are adequately protected.

4. *Proportionality (section 28 (e))*

Under the HRA, the presumption of innocence may be subject to reasonable and justifiable limitations in accordance with section 28 of the HRA. This means that limitations imposed by strict liability offences and reverse burdens can be justified where they are reasonable, necessary and proportionate in pursuit of a legitimate objective.

As mentioned above, the Bill is not creating any new offences. It is only creating a new pathway to hold individuals to account for the actions of their representatives where the conduct of their representative was at their direction, or within the scope to the representative's actual or apparent authority.

It is not considered that there are any less restrictive measures reasonably available to achieve the legitimate purpose of these amendments. Any less restrictive means would continue to expose individuals' representatives to greater liability than their employer, principal or director, even where they were only acting under direction. It would be unreasonable for this incongruity to remain.

Strict liability offences: Strict liability offences typically arise in a regulatory context where, to ensure regulatory schemes are complied with, criminal penalties are required. This is the case with the Australian Consumer Law and FT (ACL) Act. Businesses are reasonably expected, as a part of operating a business, to understand general consumer law requirements, and as such, the mental or fault element can justifiably be excluded. Accordingly, every individual to whom conduct may be attributed under these amendments should be aware of the offences.

Reverse evidential burden: The provisions of the Australian Consumer Law and the FT (ACL) Act with a reverse evidential burden are limited to matters that are specifically within the knowledge of the defendant, or, given the nature of the provisions, it would be unreasonable for the prosecution to establish.

The amendments also ensure that an individual cannot be imprisoned for committing an offence which, absent these amendments, they could not be found liable for. While there are currently no imprisonment offences under the Australian Consumer Law or FT (ACL) Act, these may be added in the future. This addition of the clause providing individuals cannot be imprisoned for conduct attributed to them ensures that the amendments remain least restrictive method of securing the legitimate objective of protecting consumers.

Further, it is noted that HRA protections only apply to natural persons, rather than corporations. While these provisions will operate to attribute liability to individuals in certain circumstances, most of the work done through these provisions will be to attribute liability to non-natural persons, such as corporations. This means that in most circumstances human rights will not be engaged.

JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT BILL 2024 (No 2)

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Justice and Community Safety Legislation Amendment Bill 2024 (No 2)**. 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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Tara Cheyne MLA
Attorney-General

CLAUSE NOTES

Part 1 Preliminary

Clause 1 Name of Act

This clause provides that the name of the Act is the *Justice and Community Safety Legislation Amendment Act 2024 (No 2)*.

Clause 2 Commencement

This clause provides for the commencement of the Act. This clause provides that all the provisions in this Act, other than section 13, 16 and 18, will commence on the 7th day after the notification day of the Act.

Sections 13, 16 and 18 will commence 3 months after this Act's notification day.

Clause 3 Legislation amended

This clause identifies the legislation that will be amended in the Bill:

- *Fair Trading (Australian Consumer Law) Act 1992*;
- *Human Rights Commission Act 2005*;
- *Official Visitor Act 2012*;
- *Residential Tenancies Act 1997*; and
- *Retirement Villages Act 2012*.

Part 2 Fair Trading (Australian Consumer Law) Act 1992

Clause 4 New section 65A

This clause inserts new section 65A into the *Fair Trading (Australian Consumer Law) Act 1992 (FT (ACL) Act)*. This new section operates to provide that, in certain circumstances, the conduct and state of mind of a representative of a person, is taken to also be that of the person themselves. A representative is defined to mean an employee, agent, or, if the person is a body corporate, a director of the body corporate.

Subsection 65A (1) provides that section 65A applies to a proceeding for conduct engaged in by a person under Schedule 2 of the *Competition and Consumer Act 2010 (Cth)* ('the Australian Consumer Law') or under the FT (ACL) Act itself.

Subsection 65A (2) provides that, where it is necessary to establish that a person had a state of mind, it is sufficient to show that:

- A representative of the person engaged in the conduct within the scope of the representative's authority, and
- The representative had that state of mind.

Subsection 65A (3) provides the following conduct is taken to have also been engaged in by the person:

- Conduct of a representative of the person, provided the representative was acting within the scope of their authority;
- Conduct engaged in by a third party. The third party must have engaged in the conduct at the direction or with the consent or agreement of a representative of the person. Further the direction, consent or agreement must have been within the scope of the representative's authority. The consent or agreement may be express or implied.

Subsection 65A (4) provides that a person is not liable to be punished by imprisonment for an offence if subsection 65A (2) or (3) applied in relation to the conviction, and the individual would not have been convicted of the offence if the subsection had not been enacted.

Subsection 65A (5) defines authority to include both actual and apparent authority and defines conduct to include both an act and an omission to do an act.

Clause 5 Dictionary, note 2

Clause 5 makes a minor and technical amendment to note 2 in the Dictionary section of the FT (ACL) Act, consequent to the insertion of the new section 65A. Note 1 in the Dictionary outlines that the *Legislation Act 2001* contains definitions and other provisions relevant to the FT (ACL) Act. Note 2 lists examples of terms defined in the *Legislation Act 2001* which are relevant to the interpretation of the FT (ACL) Act.

New section 65A uses the term 'individual' which is defined in the *Legislation Act 2001*. Accordingly, this clause adds 'individual' to the list of terms defined in the *Legislation Act 2001* which may assist in the interpretation of the FT (ACL) Act.

Part 3 Human Rights Commission Act 2005

Clause 6 Human rights complaints Section 41D (4), definition of *relevant person*

This clause substitutes the definition of *relevant person* in section 41D (4) so that it no longer uses the phrase *person complained about*, and instead refers to the *respondent* which is a new defined term for the Act (see clause 33). The Bill makes this change throughout the HRC Act, to make it clear that the Commission's

complaints-handling procedures (including the power to make recommendations at the end of a complaint) also apply to unincorporated entities.

**Clause 7 Commission’s obligation to be prompt and efficient
New section 45 (1A)**

This clause inserts new section 45 (1A) into the HRC Act, to confirm that the Commission has the power to make preliminary inquiries of any person to help inform how it may deal with a complaint. This is intended to support early resolution of complaints, where possible, and is consistent with the Commission’s existing broad discretion as to how it may deal with complaints.

Clause 8 Section 45 (2)

This clause makes a minor and technical amendment so that the drafting style of section 45 (2) will be consistent with new section 45 (1A).

Clause 9 Section 45 (3)

This clause makes a minor and technical amendment to update the drafting style of section 45 (3) as a result of the insertion of new section 45 (1A).

Clause 10 Section 45 (4)

This clause removes reference to the phrase *person complained of* in section 45 (4), and replaces it with the phrase *respondent*, which is a new defined term for the Act (see clause 33). The Bill makes this change throughout the HRC Act, to make it clear that the Commission’s complaints-handling procedures (including the power to make recommendations at the end of a complaint) also apply to unincorporated entities.

Clause 11 Section 45 (5) (b)

This clause makes a minor correction to section 45 (5) (b) for grammatical purposes and readability.

**Clause 12 Definitions—div 4.2B
Section 53F**

This clause omits section 53F (which contains the definitions of *person complained about* and *retirement village complaint*) because it is now unnecessary as a result of other amendments in the Bill.

The Bill removes the phrase *person complained of* and replaces it with the phrase *respondent*, which is a new defined term for the Act (see clause 33).

The definition of *retirement village complaint* has been moved to the Dictionary since it appears throughout the Act and not only in Division 4.2B.

Clause 13 New section 53IA

This clause inserts new section 53IA, which empowers the Commission to refer commission-initiated retirement villages matters to ACAT within 60 days after preparing a commission-initiated report under section 84.

This amendment enables the Commission to take ‘own-motion’ retirement villages matters to ACAT in the same manner as it is currently empowered to do with respect to own-motion discrimination matters. This better enables the Commission to support the community by pursuing systemic change in appropriate matters.

New section 53IA (3) requires the Commission to give notice of the referral to the respondent.

Clause 14 Division 4.2C, heading

This clause makes a minor amendment to omit the word ‘certain’ from the heading of Division 4.2C. The word ‘certain’ is inapt because Division 4.2C applies to all occupancy dispute complaints (not ‘certain’ occupancy dispute complaints).

Clause 15 Definitions—div 4.2C Section 53P

This clause omits section 53P (which contains the definitions of *person complained about* and *occupancy dispute complaint*) because it is now unnecessary as a result of other amendments in the Bill.

The Bill removes the phrase *person complained of* and replaces it with the phrase *respondent*, which is a new defined term for the Act (see clause 33).

The definition of *occupancy dispute complaint* is contained in the Dictionary (which cross-references section 42 (1) (k)).

Clause 16 New section 53SA

This clause inserts new section 53SA, which empowers the Commission to refer commission-initiated occupancy dispute matters to ACAT within 60 days after preparing a commission-initiated report under section 84.

This amendment enables the Commission to take ‘own-motion’ occupancy dispute matters to ACAT in the same manner as it is currently empowered to do with respect to own-motion discrimination matters. This better enables the Commission to support the community by pursuing systemic change in appropriate matters.

New section 53SA (3) requires the Commission to give notice of the referral to the respondent.

**Clause 17 Meaning of *person complained about*—div 4.2D
Section 53Z**

This clause omits section 53Z (which defines *person complained about*) because it is now unnecessary as a result of other amendments in the Bill.

The Bill removes the phrase *person complained of* and replaces it with the phrase *respondent*, which is a new defined term for the Act (see clause 33).

Clause 18 New section 53ZBA

This clause inserts new section 53ZBA, which empowers the Commission to refer commission-initiated conversion practice matters to ACAT within 60 days after preparing a commission-initiated report under section 84.

This amendment enables the Commission to take ‘own-motion’ conversion practice matters to ACAT in the same manner as it is currently empowered to do with respect to own-motion discrimination matters. This better enables the Commission to support the community by pursuing systemic change in appropriate matters.

New section 53ZBA (3) requires the Commission to give notice of the referral to the respondent.

Clause 19 Section 71A

This clause substitutes section 71A. The purpose of this amendment is to remove references to *person complained about* in section 71A and replace it with the phrase *respondent*, which is a new defined term for the Act (see clause 33). The Bill makes this change throughout the HRC Act, to make it clear that the Commission’s complaints-handling procedures (including the power to make recommendations at the end of a complaint) also apply to unincorporated entities.

**Clause 20 When complaints can be closed
New section 78 (1) (h)**

This clause inserts new section 78 (1) (h), which will allow the Commission to close a complaint where it is satisfied, taking into account all the circumstances, that further consideration of the complaint is not justified.

This new ground for closure reflects the breadth and diversity of the Commission’s jurisdictions and that there are a range of circumstances where it may not be appropriate for the Commission, in its discretion, to continue to consider a complaint.

**Clause 21 Final Report
Section 81 (1) and note**

This clause removes reference to the phrase *person complained of* in section 81 (1), and replaces it with the phrase *respondent*, which is a new defined term for the Act (see clause 33). The Bill makes this change throughout the HRC Act, to make it clear

that the Commission's complaints-handling procedures (including the power to make recommendations at the end of a complaint) also apply to unincorporated entities.

Clause 22 Closing discrimination complaints
New section 82 (2) (aa)

This clause inserts new section 82 (2) (aa), with the effect that the Commission will not need to include a discrimination referral statement in its final report under section 81 in relation to a discrimination complaint, where the complaint has been resolved (other than through a conciliation agreement) to the Commission's satisfaction.

Where the complaint is resolved, the inclusion of a referral statement informing the complainant of their right to ask for the matter to be referred to ACAT is unnecessary.

Clause 23 New section 82 (2) (c)

This clause inserts new section 82 (2) (c), with the effect that the Commission will not need to include a discrimination referral statement in its final report under section 81 in relation to a discrimination complaint, where the complaint has been closed because the complainant has, without good reason, failed to take reasonable steps to resolve it.

Where the complainant has ceased engaging with the complaints process, the inclusion of a referral statement informing the complainant of their right to ask for the matter to be referred to ACAT is unnecessary.

Clause 24 Closing retirement village complaints
New section 82A (2) (aa)

This clause inserts new section 82A (2) (aa), with the effect that the Commission will not need to include a retirement village referral statement in its final report under section 81 in relation to a retirement village complaint, where the complaint has been resolved (other than through a conciliation agreement) to the Commission's satisfaction.

Where the complaint is resolved, the inclusion of a referral statement informing the complainant of their right to ask for the matter to be referred to ACAT is unnecessary.

Clause 25 New section 82A (2) (c)

This clause inserts new section 82A (2) (c), with the effect that the Commission will not need to include a retirement village referral statement in its final report under section 81 in relation to a retirement village complaint, where the complaint has been closed because the complainant has, without good reason, failed to take reasonable steps to resolve it.

Where the complainant has ceased engaging with the complaints process, the inclusion of a referral statement informing the complainant of their right to ask for the matter to be referred to ACAT is unnecessary.

**Clause 26 Closing occupancy dispute complaints
New section 82B (2) (aa)**

This clause inserts new section 82B (2) (aa), with the effect that the Commission will not need to include an occupancy dispute referral statement in its final report under section 81 in relation to an occupancy dispute complaint, where the complaint has been resolved (other than through a conciliation agreement) to the Commission's satisfaction.

Where the complaint is resolved, the inclusion of a referral statement informing the complainant of their right to ask for the matter to be referred to ACAT is unnecessary.

Clause 27 New section 82B (2) (c)

This clause inserts new section 82B (2) (c), with the effect that the Commission will not need to include an occupancy dispute referral statement in its final report under section 81 in relation to an occupancy dispute complaint, where the complaint has been closed because the complainant has, without good reason, failed to take reasonable steps to resolve it.

Where the complainant has ceased engaging with the complaints process, the inclusion of a referral statement informing the complainant of their right to ask for the matter to be referred to ACAT is unnecessary.

**Clause 28 Closing conversion practice complaints
New section 82C (2) (aa)**

This clause inserts new section 82C (2) (aa), with the effect that the Commission will not need to include a conversion practice referral statement in its final report under section 81 in relation to a conversion practice complaint, where the complaint has been resolved (other than through a conciliation agreement) to the Commission's satisfaction.

Where the complaint is resolved, the inclusion of a referral statement informing the complainant of their right to ask for the matter to be referred to ACAT is unnecessary.

Clause 29 New section 82C (2) (c)

This clause inserts new section 82C (2) (c), with the effect that the Commission will not need to include a conversion practice referral statement in its final report under section 81 in relation to a conversion practice complaint, where the complaint has

been closed because the complainant has, without good reason, failed to take reasonable steps to resolve it.

Where the complainant has ceased engaging with the complaints process, the inclusion of a referral statement informing the complainant of their right to ask for the matter to be referred to ACAT is unnecessary.

Clause 30 Third-party reports Section 83 (6)

This clause makes a minor correction to section 83 (6) for grammatical purposes and readability.

Clause 31 New part 9

This clause inserts a new part 9 into the HRC Act, containing transitional provisions necessary to ensure the Bill's commencement functions as intended.

New section 127 confirms that the *commencement day* is the day the new part 9 commences.

New section 128 confirms that from commencement day, provisions of the HRC Act which referred to the *person complained about* are to be read as if the provisions referred to the *respondent*. This provision ensures that there will be no doubt that the Commission's procedures can continue for complaints that are in progress prior to the Bill becoming law.

New section 129 confirms that if a complaint is referred to ACAT, and has not yet been decided by ACAT, prior to commencement day, then the party to the ACAT proceedings who is the *person complained about* is taken to be the *respondent* and remains a party to the proceedings. This provision ensures that there will be no doubt that ACAT's proceedings can continue for complaints that are in progress prior to the Bill becoming law.

New section 130 provides that these transitional provisions will expire after 2 years, at which point they will no longer be necessary.

Clause 32 Dictionary, definition of *person complained about*

This clause omits the definition of *person complained about* from the Dictionary to the HRC Act. This is because the definition may give rise to ambiguity, including because it is currently only defined with respect to some types of complaints, and because the legal definition of *person* under the *Legislation Act 2001* captures natural and legal persons (incorporated entities) but does not extend to unincorporated entities.

Unincorporated entities may be the subject of complaints under the HRC Act, including, for example, with respect to discrimination law.

This amendment, together with the amendment in clause 33, removes any ambiguity.

Clause 33 Dictionary, new definition of *respondent*

This clause inserts a new definition of *respondent* into the Dictionary to the HRC Act.

The term *respondent* is given a particular definition with respect to human rights complaints, which may be made in relation to multiple entities that are public authorities under the *Human Rights Act 2004*.

For all other types of complaints, *respondent* is defined as the person or entity complained about. This amendment (together with the amendment in clause 32) removes ambiguity and confirms that an unincorporated entity may be subject to the Commission's complaints-handling procedures.

The Bill makes multiple other amendments throughout the HRC Act to replace the phrase *person complained about* with *respondent*.

Clause 34 Dictionary, new definition of *retirement village complaint*

This clause inserts a definition of *retirement village complaint* into the HRC Act (which cross-references to section 54G). This is a minor and technical amendment. The definition has been moved from another part of the Act (see clause 12) but the substance of the definition has not changed.

Clause 35 Further amendments, mentions of *person complained about*

This clause omits references to *person complained about* in multiple places in the HRC Act and replaces them with *respondent*. This is a minor and technical amendment, consequential to clause 33.

Part 4 Official Visitor Act 2012

Clause 36 New section 24A

This clause inserts a new section 24A (Protection of others from liability) to provide protection to an entitled person at a visitable place, or anyone else, who takes any of the following actions honestly and without recklessness from civil or criminal liability only because of taking the action: making a complaint under section 22 to an official visitor; making a complaint, or giving a document or information, as required or allowed under a territory law, to an official visitor. It provides that taking a mentioned action honestly and without recklessness is not a breach of confidence, or professional etiquette or ethics, or a rule of professional conduct.

Clause 37 New section 25A

This clause inserts a new section 25A which provides that an official visitor may give *official visitor information* to another official visitor, and the receiving official visitor

may use that information, if the information is necessary for the effective exercise of a function under the OV Act.

Safeguards are included in the new provision so that any prohibitions on disclosing the information to third parties that apply to the official visitor giving the information will apply equally to the official visitor receiving the information, which is important given the often-sensitive nature of the information disclosed to official visitors.

Part 5 Residential Tenancies Act 1997

Clause 38 Repayment of bond to former co-tenant – consecutive tenancy agreement New section 35BA (1) (ba)

This clause inserts a new subsection. The new subsection provides that section 35BA will only apply where there is a bond held in relation to the property.

Section 35BA outlines how co-tenants must deal with the bond held in relation to a property, if there is a change in the tenants living there under a consecutive tenancy agreement. The new subsection clarifies that co-tenants are not required to adhere to this process if there is no bond held in relation to the residential tenancy agreement.

Clause 39 Payment of bond by new co-tenant – consecutive tenancy agreement New section 35FA (1) (aa)

This clause inserts a new subsection. The new subsection provides that section 35FA will only apply where there is a bond held in relation to the residential tenancy agreement, and that residential tenancy agreement terminates or is terminated.

Section 35FA outlines the how a new tenant entering a consecutive tenancy agreement must pay their bond. The new section clarifies that the new co-tenant is not required to adhere to this process if there is not bond already held in relation to the now-terminated residential tenancy agreement.

Clause 40 Definitions – div 4.3A Section 46C, definition of notice of continuing tenancy

This clause makes a minor and technical amendment to the definitions section for Division 4.3A, which contains the provisions relating to the termination of a residential tenancy agreement because a tenant is experiencing family violence.

The clause substitutes a reference to section 46F (2) with a reference to section 46F (2) (a). This is a consequential amendment necessary as a result of the amendments to section 46F in clause 41 below.

Clause 41 Section 46F

This clause substitutes the existing clause 46F. Section 46F requires a landlord to notify the Territory and any remaining co-tenants that a tenant has terminated their interest in a residential tenancy agreement by giving a family violence termination notice.

The amendment to section 46F is minor and technical. It removes the requirement for a landlord to notify the Territory that a family violence termination notice has been received from a co-tenant, if there is no bond held in relation the property. However, this change means that the section needs to be restructured, and so this clause substitutes section 46F with a new section.

Clause 42 Co-tenancies – effect of serving family violence termination notice Section 46G (4)

This clause makes a minor and technical amendment to section 46G (4). Section 46G (4) provides that any remaining co-tenant may terminate a residential tenancy agreement after one tenant provides the landlord with a family violence termination notice.

This amendment provides that the remaining co-tenant can do so by issuing a notice of intention to vacate, replacing an erroneous reference to a notice to vacate.

Clause 43 Dictionary, definition of *notice of continuing tenancy*

This clause makes a minor and technical amendment to the definitions of a notice of continuing tenancy in the definitions part of the RTA. The clause substitutes a reference to section 46F (2) with a reference to section 46F (2) (a), consequent to the restructuring of section 46F in clause 41 above.

Part 6 Retirement Villages Act 2012

Clause 44 Membership of residents committee New section 104 (1A)

Section 104 of the RVA deals with membership of the retirement village's residents committee. It limits a person from holding office on a residents committee for a period of longer than 3 consecutive years, except in certain circumstances.

This clause inserts a new section 104 (1A) to clarify that the 3 consecutive year period is to be calculated from when the person first starts performing the functions of the office.

Clause 45 New section 104 (6)

This clause inserts new section 104 (6) to provide a definition of *office* in relation to a residents committee. Section 104 (6) (a) clarifies that an office includes a position with stated functions, while section 104 (6) (b) indicates that it does not include an ordinary member.

**Clause 46 Result of vote
Schedule1, section 1.4 (1) (a)**

This clause is a minor and technical amendment to improve drafting consistency and clarity. It replaces *an officer of the residents committee* with *a person who holds an office on the residents committee for the village*. The word *officer* is not used elsewhere in the RVA so the new reference to a person who holds an office on the residents committee is more consistent with language used through the RVA.