

**Tara Cheyne MLA**

Manager of Government Business

Attorney-General

Minister for Human Rights

Minister for City and Government Services

Minister for the Night-Time Economy

Member for Ginninderra

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**RESPONSE TO QUESTION ON NOTICE****Questions on Notice Paper No 2****7 February 2025****Question No. 152****MR CAIN:** To ask the Minister for Human Rights —

1. Is the right of a person to seek and obtain an effective remedy for a claimed violation of human rights fundamental to the concept of human rights.
2. Does the ACT Government recognise that the inability to seek and obtain an effective remedy for a claimed violation of human rights renders the concept of human rights meaningless in the practical sense of their application.
3. Is the *Human Rights Act 2004* (HRA) in accordance with the International Covenant on Civil and Political Rights (ICCPR), Article 4(2), which provides that the rights given under Articles 6, 7, 8(1-2), 11, 15, 16 and 18 of the ICCPR are non-derogable rights.
4. Does the HRA limit the right to seek remedy for violations of these rights under Articles 6, 7, 8(1-2), 11, 15, 16 and 18 of the ICCPR.
5. Are ACT residents entitled to less protection of their human rights than residents in international jurisdictions under the ICCPR.
6. What other means exists in the ACT for a person claiming violation of a non-derogable ICCPR right to have an effective remedy as required by Article 2(3) of the ICCPR due to the exclusion of courts from the definition of "public authority" under section 40(2)(b) of the HRA.
7. Is it still the case that the Statement of Compatibility with Human Rights made for the HRA that that legislation is compatible with Australia's and the ACT's human rights obligation, given that section 40(2)(b) of the HRA *may* be in violation of the ICCPR, Article 2(3).



**TARA CHEYNE MLA** - The answer to the Member's question is as follows:

The right to an 'effective remedy' for a violation of rights or freedoms recognised in the *International Covenant on Civil and Political Rights* ('ICCPR') is provided for in Art 2(3)(a) of the ICCPR. Art 2 of the ICCPR imposes a general obligation on States Parties to respect the ICCPR rights and to ensure them to all individuals in their territory and subject to their jurisdiction. The right contemplates the provision of accessible and effective remedies. An 'effective remedy' does not necessitate financial compensation and may, in an appropriate case, comprise an apology, the granting of injunctive or declaratory relief and changes in relevant laws and practices to ensure non-repetition of the breach.

The Commonwealth of Australia ('Commonwealth') signed the ICCPR on 18 December 1972 and ratified the ICCPR on 13 August 1980. The Commonwealth is the 'State Party' upon whom obligations are imposed under the ICCPR. The Australian Capital Territory is not party to the ICCPR. The Australian Capital Territory Legislative Assembly has enacted the *Human Rights Act 2004* ('HRA') to give statutory expression to an enumerated list of rights, having regard to the Australian constitutional framework and based on the dialogue model. Any comparisons drawn between the Australian Capital Territory and international jurisdictions must account for constitutional difference.

The HRA is not exhaustive of the rights an individual may have under domestic or international law, as set out in s 7 of the HRA. The rights contained in Part 3 and Part 3A of the HRA do not have standalone operation and may be subject to limits in the manner set out in s 28 of the HRA. The HRA requires a court to, so far as it is possible to do so consistently with its purpose, interpret a Territory law in a manner that is compatible with human rights, as set out in s 30 of the HRA. In this manner, the HRA forms part of the relevant interpretative material to be considered by the courts in the exercise of judicial decision-making. It also confers on a court the power to make a declaration of incompatibility under s 32 of the HRA.

A person may start a proceeding in the Supreme Court against a 'public authority' if that person claims that a 'public authority' has acted in a manner that is incompatible with a human right or, in making a decision, failed to give proper consideration to a relevant human right, pursuant to s 40C(2)(a) of the HRA. To the extent that a court is acting in an administrative capacity, it is a 'public authority' for the purposes of the HRA. A person may also rely on their rights under the HRA in other legal proceedings, pursuant to s 40C(2)(b) of the HRA. The Supreme Court may, in a proceeding under s 40C(2) of the HRA, grant the relief it considers appropriate except damages. This is in addition to the rights a person has to damages other than under the HRA (s 40C(7)(b) of the HRA).

Section 40C of the HRA does not affect a right a person has (otherwise than because of the HRA) to seek a remedy in relation to an act or decision of a public authority (s 40C(7)(a) of the HRA) or, indeed, other entities. It supplements, and does not replace, other forms of action available under common law and statute, and does not preclude access to other avenues for complaint, such as the

Ombudsman, the Human Rights Commission or, in the case of judicial officers, the Judicial Council. It also does not affect the availability of judicial review or statutory appeal of a judicial decision. The rights set out in the HRA are also recognised and given effect under other legislative regimes, such as the *Discrimination Act 1991*.

Noting that the Australian Capital Territory is not party to the ICCPR, whether a right is derogable or non-derogable under the ICCPR is not material to the Government's position that effective remedies are available in the ACT.

For completeness the Statement of Compatibility under the HRA is in respect of those rights contained in the HRA and not the ICCPR.

**Approved for circulation to the Member and incorporation into Hansard.**



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

**Date:** 18/3/24

This response required 2hrs 40mins to complete, at an approximate cost of \$256.40.