



ACT HUMAN RIGHTS COMMISSION

Australian Capital Territory

Secretary
Standing Committee on Administration and Procedure
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Via email Janice.rafferty@parliament.act.gov.au

Dear Ms Rafferty

Review of the *Australian Capital Territory (Self-Government) Act 1988* (Cwlth)

Thank you for the opportunity to comment on the Standing Committee on Administration and Procedure's Review of the *Australian Capital Territory (Self-Government) Act 1988* (Cwlth).

We recognise the broad range of issues that could potentially be canvassed in the Review. However, we have constrained our submission to matters directly relevant to our jurisdictions, particularly in relation to complaint handling.

About the ACT Human Rights Commission

The Human Rights Commission was established to promote the human rights and welfare of people living in the ACT under the *ACT Human Rights Commission Act 2005*. There are three Commissioners who each have specialised and equal roles in the Commission:

- Dr Helen Watchirs – Human Rights and Discrimination Commissioner
- Mr Alasdair Roy – Children and Young People Commissioner
- Ms Mary Durkin – Health Services Commissioner, and Disability and Community Services Commissioner.

The Commission's role is to take complaints in relation to the following areas:

- Health Services;
- Services for older people;
- Services for people with a disability;
- Services for children and young people;
- Services for carers of children and young people, older people, people with a disability, and people accessing health services; and
- Discrimination and Sexual harassment.

The Human Rights and Discrimination Commissioner also provides community education and information about human rights. She also reviews the effect of ACT laws on human rights and advises the Attorney-General on the operation of the Human Rights Act 2004.

The Health Services Commissioner's functions also include to promote:

- improvements in the provision of health services and services for older people
- the rights of users of health services and services for older people
- an awareness of the rights and responsibilities of users and providers of health services and services for older people.

The Commissioner's public health and safety role includes statutory joint consideration of all complaints made about health professionals with the relevant health professions boards.

The Children and Young People Commissioner's role includes consulting with children and young people, and providing advice to government and community organisations about how to improve services for children and young people. While the Commission is managed under a statutory model of collegiate decision making, the Children and Young People Commissioner also assumes primary responsibility for many of the Commission's corporate functions such as administration and community education.

The Disability Services Commissioner's roles includes:

- improvements in the provision of services for people with disability and their carers
- the rights of users of services for people with disability and their carers; and
- improving awareness of the rights and responsibilities of users and providers of disability services.

Complaint Handling and Commonwealth Bodies

One of the unique characteristics of the ACT is the large number of government services and agencies operating here across two layers of government. A frequent point of confusion for those who contact the Commission is how our jurisdiction interacts with Commonwealth bodies. This issue is complicated further by the dual Commonwealth/Territory complaint handling systems operating in the areas of discrimination law.¹ In relation to health complaints, a complementary complaints system has recently been introduced with the ACT Health Services Commissioner working collaboratively with the Australian Health Practitioner Regulation Agency.

The Human Rights and Discrimination Commissioner has previously received legal advice about the Commission's ability to handle complaints against Commonwealth bodies. That advice suggests that complaints may be possible against Commonwealth statutory authorities, that is bodies created by Commonwealth legislation, but not against Commonwealth Departments operating under the 'the Commonwealth Crown'. This advice particularly noted that Australian Federal Police officers operating as ACT police would not be subject to complaints of unlawful discrimination under the ACT *Discrimination Act 1991*. This is due to section 27 of the Self-Government Act:

27 Crown may be bound

Except as provided by the regulations, an enactment does not bind the Crown in right of the Commonwealth

¹ Complaints under Commonwealth discrimination law are made to the Australian Human Rights Commission.

These regulations have not been amended since 2006, and many of the laws listed have been repealed such as the Scaffolding and Lifts Ordinance 1957. There are several difficulties with this situation.

Firstly, complainants in the discrimination jurisdiction may be disadvantaged by not having the same protected attributes available to them merely because they have been treated unfavourably by a Commonwealth body. At the Commonwealth level only the attributes of sex, race, age and disability are protected.² In comparison under the ACT *Discrimination Act 1991* these attributes and an additional ten others are protected, including gender identity, industrial activity, relationship status, religious or political conviction, and profession, trade, occupation or calling. In addition, the ACT law has protection for unlawful vilification on the basis of gender identity, sexuality or HIV/AIDs status in addition to racial vilification. Only racial hatred/vilification is protected at both the ACT and Commonwealth levels. There are some additional protected attributes in the employment context under the Commonwealth *Fair Work Act 2009*, but again these are not as extensive as those under the ACT *Discrimination Act*.

Therefore, if a Commonwealth body treated an ACT resident unfavourably because of one of these additional attributes, they would be unable to make a complaint of unlawful discrimination.

Secondly, there are statutory protections at the Territory level not available in the Commonwealth. For example, there is no Commonwealth equivalent to the Health Services Commissioner, Disability and Community Services Commissioner or Children and Young People's Commissioner. This creates a potential inequity for ACT residents. Notwithstanding the new national health practitioner legislation, there may be jurisdictional impediments to the Health Services Commissioner handling a complaint against a health professional employed by the Commonwealth Department of Defence, particularly if the complaint concerned a breach of the ACT *Health Records (Privacy and Access) Act 1997*. Similarly, a Commonwealth agency whose staff delivered programs for children and young people in ACT schools, for example the police or the Department of Families, Housing, Community Services and Indigenous Affairs, may not be subject to a complaint to the ACT Children and Young People Commissioner. A similar situation may exist for national institutions that provide school holiday programmes for school students.

Finally, this situation also creates confusion in light of the reference in s.40 of the *Human Rights Act 2004* that ACT public authorities include police officers exercising a function under Territory law. It is obviously critical to the operation of the HR Act that police officers operating in the ACT be subject to human rights obligations, as many of the civil and political rights protected in the HR Act are directly relevant to criminal proceedings.

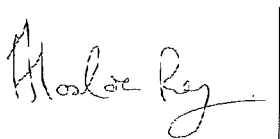
We submit that it would be more equitable for the Commonwealth to amend the Self-Government Act to submit all Commonwealth bodies operating in the Territory to the jurisdiction of ACT laws, including those dealing with complaints. Alternatively, the Commonwealth may amend the existing regulations so that Acts like the HR Act, *Discrimination Act*, *Human Rights Commission Act*, *Health Records (Privacy and Access) Act* and others bind the Commonwealth Crown operating in the ACT. However, this situation demonstrates that historically it has been difficult for the Commonwealth to continually regulate to include recently enacted ACT laws. A third option may be for the

² See *Sex Discrimination Act 1984*, *Racial Discrimination Act 1975*, *Age Discrimination Act 2004* and *Disability Discrimination Act 1992*

Commonwealth to 'opt-out' of ACT law via regulation, with the default position being that Commonwealth agencies are subjected to ACT law.

Thank you for the opportunity to provide this submission. The relevant contact at the Commission is Mr Sean Costello (ph: 6205 2222, sean.costello@act.gov.au).

Yours sincerely



Mr Alasdair Roy
Children and Young People
Commissioner



Mary Durkin
Health Services Commissioner
Disability and Community
Services Commissioner



Dr Helen Watchirs OAM
Human Rights and
Discrimination Commissioner

19 March 2012