



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
Mr Peter Cain MLA (Chair), Dr Marisa Paterson (Deputy Chair),
Mr Andrew Braddock MLA

Submission Cover Sheet

Inquiry into Petition 32-21 (No Rights Without Remedy)

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Mr Peter Cain MLA

Chair of the Justice and Community Safety Committee

**Submission to the Justice and Community Safety Committee's inquiry into Petition 32-21
(No Rights Without Remedy)**

Dear Chair,

Thank you for the opportunity to make a submission to the Justice and Community Safety Committee's ('Committee') inquiry into Petition 32-21 (No Rights Without Remedy) ('Petition').

I am currently employed as a research assistant at the College of Law at the Australian National University ('ANU'), working as part of the Australian Social Cohesion: Exploring New Directions project. In this role I have undertaken detailed research into federal anti-discrimination law,¹ in particular, focussing on its legal form, practical operation, and impact on social cohesion. Further, I have some background in human rights law having completed a substantial research project on the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and through other course work undertaken while studying the Juris Doctor at the ANU.

I am making this submission in my own personal and private capacity.

For the reasons outlined below, I support the changes proposed in the Petition.

The Human Rights Act and proposal in the Petition

The *Human Rights Act 2004* (ACT) ('HRA') was created to recognise certain fundamental rights in Territory law,² which it currently does in three ways.

Firstly, it seeks to ensure that, to the extent possible, Territory laws are interpreted consistently with human rights.³ Where not possible, the ACT Supreme Court is empowered

¹ Specifically, the *Australian Human Rights Commission Act 1986* (Cth), *Racial Discrimination Act 1975* (Cth), and the *Disability Discrimination Act 1992* (Cth).

² See, eg, Explanatory Statement, *Human Rights Bill 2003* (ACT) 2.

³ *Human Rights Act 2004* (ACT) pt 4.

to make a declaration⁴ which will notify the Attorney-General and Legislative Assembly of the incompatibility.⁵

Secondly, the *HRA* provides for the scrutiny of new laws proposed by the Government through an obligation to prepare compatibility statements⁶ and the scrutiny of bills by the Committee.⁷

Thirdly, the Act creates an obligation for public authorities to act in a way that is compatible with human rights and, when making decisions, to give relevant human rights proper consideration.⁸ Where an individual believes they have been affected by a public authority's failure to meet this obligation, they can start proceedings in the Supreme Court against the authority.⁹ It is this aspect of the *HRA* the Petition addresses.

In short, the petition asks that changes be made so that:

- complaints of breaches of the *HRA* can be made to the Human Rights Commission ('Commission') for conciliation, and
- if conciliation is unsuccessful, a complaint can be taken to the ACT Civil and Administrative Tribunal ('ACAT') for resolution.¹⁰

These proposed mechanisms appear to be in addition to the option for litigation in the Supreme Court. This would allow for an escalation of a complaint, starting with conciliation by the Commission, then to consideration by ACAT, with the final option being litigation in the Supreme Court.

Analysis

Part of the rationale for the *HRA* was to build a human rights culture in the ACT, with the Act later amended to create the obligation on public authorities and to allow for the direct right of action by individuals in the Supreme Court.¹¹ This duty and right of action was

⁴ *Human Rights Act 2004* (ACT) s 32.

⁵ *Human Rights Act 2004* (ACT) s 32(4), 33.

⁶ *Human Rights Act 2004* (ACT) s 37.

⁷ *Human Rights Act 2004* (ACT) s 38;

⁸ *Human Rights Act 2004* (ACT) s 40B.

⁹ *Human Rights Act 2004* (ACT) s 40C.

¹⁰ Sophie Trevitt, *No Rights Without Remedy* (Petition to the ACT Legislative Assembly, 23 November 2021).

¹¹ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 6 December 2007, 4027-8 (Simon Corbell, Attorney-General).

premised on improving the accessibility of remedies for breaches of human rights obligations.¹²

Accessible avenues of redress for human rights infringements are an important element of human rights law.¹³ Unfortunately, the choice to only allow action to commence in the Supreme Court limits the accessibility of this right of action. Litigation in court tends to be formal, technical, expensive, and time consuming. It can be difficult to manage without dedicated legal assistance, and can carry the risk of an adverse costs order if unsuccessful. These factors are a significant barrier which creates a gap when people feel their rights have been infringed yet are either unwilling or unable to litigate the matter in the Supreme Court.

I believe the changes proposed in the Petition offer a reasonable, sensible, and measured means of addressing this gap.

Firstly, the proposed measures would create a more approachable avenue for complaints to be addressed by reducing the barriers to access. For example, both the Commission¹⁴ and ACAT¹⁵ already have an analogous role of addressing complaints under the *Discrimination Act 1991* (ACT). Reporting by both organisations suggests that they often give significant support to individuals moving through the complaints process, and that these processes are relatively informal and approachable.¹⁶ Lacking the level of complexity and potential costs issues involved in Supreme Court litigation means the proposed changes could improve access to remedies for individuals.

Secondly, as noted above, the Commission and ACAT current address complaints under the *Discrimination Act 1991* (ACT). Accordingly, processes, expertise, and case management strategies already developed by these organisations could make taking on a new human rights complaints function relatively straightforward. Though an important caveat to mention here is that further resourcing may be required as ACAT has highlighted that managing discrimination complaints can be relatively resource intensive.¹⁷

Thirdly, by reducing the barriers complainants face, the proposed amendment may help bring to light instances where public authorities contravene their obligations under the *HRA*. This could help public authorities undertake their work in a way that supports and protects

¹² Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 6 December 2007, 4028 (Simon Corbell, Attorney-General).

¹³ See, eg, Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21 Rev.1/add. 13 (26 May 2004) 6 [15].

¹⁴ *Human Rights Commission Act 2005* (Cth) ss 42(1)(c), 45(1), 51.

¹⁵ *Human Rights Commission Act 2005* (Cth) ss 53A, 53BA.

¹⁶ See, eg, ACT Human Rights Commission, *Annual Report 2020-21* (Report, 25 November 2021) 30; Australian Capital Territory Civil & Administrative Tribunal, *Annual Review 2020-21* (Report) 36.

¹⁷ Australian Capital Territory Civil & Administrative Tribunal, *Annual Review 2020-21* (Report) 36.

the rights of individuals in the community. Further, providing accessible independent bodies to address complaints is an important way in which individuals who have concerns can see those concerns addressed in an appropriate manner. This would be an improvement on the current scheme where an individual's concerns or issues may go unaddressed due to the challenges associated with litigation in the Supreme Court.

Finally, the proposed changes retain the ability of the Supreme Court to address complaints under the *HRA* if the complainant wishes to continue to pursue the matter. Accordingly, the more formal and complex process of litigation in the Supreme Court would still be available for cases in which it is appropriate.

On this basis, I believe the proposed changes are appropriate, sensible, and desirable measures that could further the Act's goal of building a human rights culture in the ACT.

Conclusion

For the reasons outlined above, I support the changes outlined in the Petition. Consequently, I urge the Committee to recommend the necessary legislative amendments occur so these changes are reflected in the law (for example, by amending the *HRA*).

As a resident of the ACT, the Territory's commitment to supporting human rights through concrete legal mechanisms is something I am proud of. I believe the changes proposed in the Petition would further strengthen the ACT's record in this area, and could provide an important new access to justice avenue for members of the community.

Finally, if you have any questions about my submission, please feel free to contact me using the details below. Alternatively, if it would be of assistance, I am happy to appear before the Committee in person.

Kind regards,

Nicholas Bulbeck

[Redacted signature block]