



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
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Mr Andrew Braddock MLA

Submission Cover Sheet

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

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Dear Justice and Community Safety Committee,

Via email: LACommitteeJCS@parliament.act.gov.au

No Rights Without Remedy Inquiry

Thank you for the opportunity to provide this submission in support of the ‘No Rights Without Remedy’. We urge the ACT Government to provide an accessible complaints mechanism for Canberrans who believe that their human rights have been breached.

Canberra Community Law (CCL) (is a not-for-profit community legal centre that has been providing free, independent legal services to people on low incomes or facing other disadvantage in the ACT for over 30 years. CCL has substantial legal practice experience and expertise in homelessness and social security law, as well as tenancy and disability discrimination law. CCL has developed this expertise through the provision of specialist legal advice, assistance, and representation services to people in the ACT on low incomes.

We have long advocated for the inclusion of an accessible complaints mechanism in the *Human Rights Act 2004* (Human Rights Act) to ensure the ACT is a human rights jurisdiction in practice, as well as in name.

In this brief submission, we ask that the ACT Government implement the key requests of the ‘No Rights Without Remedy’ petition to amend the Human Rights Act to:

- enable a complaint about any breach of the Human Rights Act to be made to the Human Rights Commission for confidential conciliation, and
- if conciliation is unsuccessful, enable a complaint about a breach of the Human Rights Act to be made to the ACT Civil and Administrative Tribunal (ACAT) for resolution.

We also submit that any amendments must be accompanied with adequate resourcing for the Human Rights Commission, ACAT and also, to community legal services which already have established expertise in human rights law, to carry out this additional work.

We have included some composite case studies in this submission to protect client confidentiality. Whilst they do not represent the experience of any one client they can be taken as an accurate representation of the types of human rights breaches our clients face, and the barriers that prevent them accessing legal remedies under the Human Rights Act.

The limitations of the Human Rights Act

The Human Rights Act is a powerful tool, and at CCL we routinely raise it in both our informal advocacy, in conciliations and mediations, and in tribunal proceedings. However, there is one significant limitation - the absence of an accessible complaints mechanism.

As the Committee is aware, currently it is only possible for our clients to raise their human rights concerns in “*existing legal proceedings*”¹ or to commence an action in the Supreme Court². Supreme Court actions are complex, expensive, and run the risk of adverse costs orders with no ability to obtain damages for a violation of a human right.³ There is no avenue to make a complaint about a human rights violation under the *Human Rights Act* to the ACT Human Rights Commission. There is no mandated conciliation process. There is no ability to commence an action in ACAT.

CCL provides free legal services to individuals who are experiencing homelessness, living in or attempting to access public housing, rely on Centrelink, are experiencing or at risk of family violence and we have a dedicated program to support Aboriginal and Torres Strait Islander Canberrans who are facing legal issues. Our clients are some of the most vulnerable members of the Canberra community.

Further, as the only legal service in the ACT that delivers specialist free public housing and social security legal assistance, community demand exceeds our capacity to deliver legal services. It is not possible for us to mount legal actions in the Supreme Court on behalf of the vast majority of our clients whose rights have been breached under the *Human Rights Act*. There is also a real question of the utility of putting our clients through a potentially stressful and protracted legal challenge given the inability for compensation to be awarded and the risk of an adverse costs order.

It would not be difficult to overcome these barriers by creating a simple, low-cost pathway for individuals to make complaints. We have the institutions and infrastructure in place to do this, they just need to be enabled in legislation and adequately resourced.

The human stories behind the petition

Too often we talk about ‘human rights’ in the abstract, but these are the inherent dignities that are essential to all of us living a good quality of life. While gross breaches of human rights *do* occur in the ACT - in particular in our prison, youth detention and public housing systems - more minor breaches occur more frequently that may not make news headlines, but nonetheless erode the dignity and quality of life of Canberrans.

Below are four composite case studies which are drawn from the real experiences of our clients but do not represent the experience of any one client to protect our clients’ confidentiality.

Trisha

¹ *Human Rights Act 2004*, section 40C(2)(b)

² *Human Rights Act 2004*, section 40C(2)(a)

³ *Human Rights Act* section 40C(4)

Trisha is a 25 year old woman with mild cognitive and mental health disabilities. She has mostly lived with her mum in their public housing home for as long as she can remember – over 20 years. She moved out for a year with a man who was abusive to her.

About two months ago Trisha escaped her abuser and moved back in with her mother to look after her after she had a stroke. Unfortunately, Trisha did not understand she had to notify Housing ACT to be approved as a resident again. She was not recorded as living there and her income was not used to calculate the rent. This was something her mother had always done for her before.

Despite her best efforts, her mother's new disabilities were too severe for her to manage – Trisha herself is a woman who needs help with some aspects of daily living. Her mother moved into aged care. Trisha was left living alone in the home she grew up in – the only real place she had felt safe in. However, as soon as Housing ACT discovered she was living there she was informed she has no legal right to remain. This was because Trisha was not the tenant – her mother was.

Trisha has a long journey ahead dealing with the grief of what has happened to her mother, learning to live without her mother's support, and finding someone to help her navigate NDIS and other supports.

But then the housing manager turned up and explained that Trisha needed to move out immediately – her home is not her home. She cannot stay. Trisha was devastated. Not only had she lost her mum to the aged care system, but she also now found herself facing imminent homelessness.

If a case like Trisha's comes to us, we can call, email and write to Housing ACT. We would help her with an application for housing in her own name. We would argue for her human right to remain in her home – at the very least until she is able to get the supports, she needs to move to a smaller home. But in the past, in some of these sorts of cases, Housing ACT has come back with an absolute 'no'. They are adamant they will call the police to remove the person they regard as a 'squatter', and they will change the locks. There will be no hearing because no tribunal action is necessary to evict someone who does not have a tenancy.

And then Trisha faces the real prospect of being, literally, on the streets. Because even if she applies for Housing ACT it takes many months to get onto the priority housing list and then many more months (if not years) to be housed. Emergency shelter options are full. There is a severe housing crisis in the ACT.

If Trisha was our client, we might commence legal proceedings under the *Residential Tenancies Act 1997 (RTA)*. But it would be hard to have her rights recognised by the ACAT. We would need to run a test case. A person who is not a tenant without a direct relationship with the lessor has very few rights, despite having lived in a home for 20 years. The decision to lock her out is not a reviewable decision under the merits review process within the administrative review system.

However, Trisha does have human rights under our *Human Rights Act*. One option might be to raise Trisha's human rights by commencing Supreme Court proceedings to complain that a public authority has arbitrarily interfered with Trisha's right to privacy and home.⁴ But that is a difficult and complex process that requires legal representatives with capacity to drop an already overwhelming case load to run a complex Supreme Court proceeding.

⁴ Human Rights Act 2004, section 12.

Our client has the protection of section 12 of the *Human Rights Act* not to have her home interfered with arbitrarily by a public authority. The word ‘arbitrary’ here brings in considerations of proportionality. And there is no doubt that the actions of Housing ACT in evicting Trisha at short notice are not proportional to any legitimate aim they wish to achieve. But what use is that right if Trisha has no easy way to enforce it?

Peter

Peter is an Aboriginal man who is detained in the Alexander Machonochie Centre (AMC) – the ACT jail. Peter has severe mental health disabilities and a background of unspeakable tragedy including being removed from his family at a very young age and being cycled through the foster system where he was sexually abused. He started using alcohol before he reached puberty and has been involved with the juvenile detention system since he was 11. He has never learned to read or write.

His offending has all been drug related. In jail his mental health condition was not adequately treated, and he started to act out and self-harm. Peter started to cut himself whenever he could find something sharp enough and tried to hang himself on several occasions. He is difficult to manage which leads to him getting on the wrong side of the corrections officers. He stops cooperating. In one attempt to stop him from harming himself, the corrections officers found him with a homemade knife (which he is using to cut himself), and which he threatens officers with when they try to stop him. He is charged with further criminal offences and his initial eight months sentence for driving under the influence slowly turns into four years as more and more charges are brought against him in relation to his behaviour in the AMC.

For much of this time Peter has been kept in the management unit because AMC corrections officers feel that is the best way to manage him. He is kept in solitary for 24 hours a day. His entitlement to one hour of outside time is technical – in practical terms it is non-existent. Peter loses access to programs and to activities that keep the men inside sane. His mental health rapidly deteriorates. He has a TV, but he cannot control the channels. He is denied visits from his family. He is only allowed phone calls once a week.

Peter is being detained in a so called “human rights compliant prison”. There are signs up telling him he has a right to humane treatment when deprived of liberty. Section 19(1) of our Human Rights Act ensures that “anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person”. Section 10 is meant to protect him from being punished in a cruel, inhuman, or degrading way and from torture. But he is being locked up in solitary confinement for 24 hours a day. Section 27 says that as an Aboriginal person he must not be denied the right to maintain his cultural heritage and his kinship ties, but he is denied visits from his family. And, if he has a child – his child is being denied access to him.

What is happening here? And what can be done? Unfortunately, the answer is a difficult one. Although Peter’s human rights are protected by law, that is in theory only. Without an accessible complaint mechanism, it is the rare person who will turn his story into a costly and complex human rights complaint to the Supreme Court.

Kaylee

Kaylee is a 14-year-old girl with serious behavioural problems who has been detained in youth detention. In Bimberi she gets good education and good support at school, but she is a child. She should not be in detention.

On release Kaylee's family try to help her return to her local high school but is told she can only return a couple of hours a day, a couple of days a week. Her high school says she is not welcomed to attend more than that because of her history. There are programs she is meant to be able to participate in, but they are not providing her the education she needs.

Section 27A of the Human Rights Act says that "every child has the right to have access to free school education appropriate for his or her needs". But what is the worth of that human right to Kaylee if, when that right is violated, there is no accessible and independent mechanism for Kaylee to make a complaint to?

Ryan

Ryan is also incarcerated in the AMC. Unlike Peter, he has been doing really well inside. He has decided he never wants to return and has taken the opportunity to participate in the rehabilitation program available to him to overcome his alcohol addiction. He has been so successful that he starts the process to become a drug and alcohol counsellor and he wants to continue down that path so he can share his experiences with young people and help them resolve their own addiction issues. He has been supported well in this journey and has set himself up with a placement on his release. Ryan has been a model detainee and there is no reason to think he will be refused parole at his earliest release date.

However, Ryan has been served with a Notice to Vacate from Housing ACT for 'no cause'. To evict someone without a reason in the ACT requires 26 weeks' notice.⁵ Housing ACT uses these 'no cause' notices to evict people from their homes when they are incarcerated for extended periods.⁶

The policy behind that action seems relatively clear – why leave a house sitting empty while someone is in jail? Shouldn't it be used to house a person in our current homelessness crisis? Well. Maybe. Or maybe there is a bigger picture.

Without that home Ryan will not have a stable home to be paroled to. Ryan has applied for parole months ago. However, four weeks before the Sentence Administration Board is due to consider his application, the 26-week notice period expires, and Housing ACT applies to ACAT to evict him. The corrections officer writing the pre-release report learns that he is facing eviction proceedings. Her report notes the likelihood of eviction because it is on the basis of 'no cause'. After detailing how well Ryan has been otherwise doing, the corrections officer's final recommendation states: "Release to parole is not recommended due to absence of approved accommodation".

Ryan is being evicted because he is in jail. But he can't leave jail because he is being evicted.

If Ryan comes to CCL, we will advocate on his behalf. But it is tricky to extract someone from these nasty catch-22s. And what if, by the time we resolve the issue, Ryan has remained in jail for significantly longer than he might have otherwise? Simply because even though he had a home to go to, Housing ACT was threatening to evict him from it.

Section 18 of the *Human Rights Act* states that no-one may be arbitrarily detained,⁷ Is it arbitrary detention if the only reason for remaining detained is that there is a parole report

⁵ *Residential Tenancies Act 1997, Schedule 1, clause 94(a)*.

⁶ "Incarceration of Tenants Policy" updated 12 October 2020, accessed at https://www.communityservices.act.gov.au/hcs/policies2/incarceration_of_tenants

⁷ Human Rights Act 2004, section 18(1)

stating the only thing holding him back from release is stable housing, and at the same time Housing ACT is saying the only reason he is being evicted is because he remains incarcerated?

Who is responsible for this situation? Who can he complain to for having to spend those additional days or weeks or months in jail? Is there an easy way for him to do this without bring a costly and time consuming litigation to the Supreme Court?

There is not. There is currently no accessible way to bring a complaint.

What a complaints mechanism should look like


We support the petition's call for the establishment, and resourcing, of a two-tiered complaints mechanism. This proposed model uses the existing infrastructure of the Human Rights Commission and ACAT to provide a no-cost, simple pathway for individuals to make complaints.

We already know these pathways work for the community, as they are currently in utilization for other complaints, and CCL is experienced in assisting our clients / community members in navigating these processes.

We take this opportunity to stress that while these mechanisms already exist, for them to effectively respond to the additional workload that creating a new complaints mechanism would produce, they must be adequately resourced. We refer to the expertise of those bodies to provide guidance to Government as to what that would require. Additional funding is also required to ensure that legal services who already have expertise in human rights law are sufficiently resourced to provide assistance to people wishing to make complaints under this two-tiered complaints mechanism.

It is our sincere hope that the above changes would transform the *Human Rights Act* from being a largely theoretical document, to one which members of our community can use to ensure their human rights are protected.

At CCL we are strong and passionate supporters of the ACT *Human Rights Act*. We strongly urge the Committee to recommend that the ACT Government implement the petition demands in full, with adequate resourcing. This includes the need to resource and fund a Human Rights Law Program to provide advice to community members to bring these sorts of complaints from an independent community legal centre.

We would welcome the opportunity to give evidence before the Inquiry. If you have any queries or require further information please do not hesitate to contact Ms Genevieve Bolton on 

Yours faithfully,
CANBERRA COMMUNITY LAW LIMITED



Genevieve Bolton
Executive Director/Principal Solicitor