



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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Submission to the Standing Committee on Justice and
Community Safety

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to contribute to the ACT Legislative Assembly Standing Committee on Justice and Community Safety's Inquiry into Petition 32-21 (No Rights Without Remedy).
2. This submission will focus on two reforms that would offer accessible avenues for reporting and redress for complainants relying on *the Human Rights Act 2004* ('HR Act'):
 - i. The ALA supports amending the HR Act to include access to conciliation as the first level of redress for HR Act complaints. Under this recommendation, a Human Rights Commissioner charged with handling complaints could streamline the complaints process and enhance access to justice for many disadvantaged persons who would be prevented from pursuing a litigious process because of cost or health reasons.
 - ii. The ALA is also in favour of providing rights to external review of the actions or decisions of government agencies and authorities through the ACT Civil and Administrative Tribunal ('ACAT'), particularly with respect to questions about failure to comply with human rights obligations under the HR Act. This second level of redress is required in order to fulfil the HR Act's principle purpose of 'bringing rights home' to Canberrans.
3. This submission will outline the need for reform, as well as detail the importance of the aforementioned two proposed reforms.

The Need for Alternative Dispute Resolution

4. Unlike the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and Queensland's *Human Rights Act 2009*, the HR Act was amended in 2006 to provide a direct right of action against public authorities in the Supreme Court.
5. Despite this development, the volume of ACT cases has been much lower than the bigger jurisdiction of Victoria. Over 18 years, the ACT has had fewer ACAT cases than Victorian and

Queensland jurisdictions.² In relation to the Queensland *Human Rights Act 2019*, there have been 30 Supreme Court and Court of Appeal cases, with 120 Queensland Civil and Administrative Tribunal cases in the first two years of the Act.³

6. The ALA notes that the time, cost and stress of pursuing litigation are substantial. Initiating an ACT Supreme Court case costs an estimated \$15,44 per case with less than half of civil cases settled within 12 months.⁴
7. Without a complaint's mechanism, the HR Act leaves many disadvantaged individuals reliant on the Supreme Court's jurisdiction. Plaintiffs in these matters are likely to be vulnerable individuals, including detainees with complex trauma histories, particularly female detainees who can also be victims of crime, for example family violence and sexual assault. One consequence of this sole dependence on litigation in highlighting breaches of the HR Act is that our understanding of the legislation's impact is limited to a potential plaintiff's ability to bring a case to court, any reports in the media and information gained from other jurisdictions.
8. The ALA submits that in order to fulfil the practical purpose of the HR Act, two avenues of redress are needed: providing oversight and monitoring of complaints through a Commissioner of the ACT Human Rights Commission ('HRC') and second-level redress through the ACAT.

First-Level Redress: Human Rights Commissioner

9. Providing a complaints-mechanism within the HR Act itself allows for increased monitoring and oversight by the ACT HRC, creating greater transparency and accountability of executive action. When complaints are conciliated through the HRC via a designated Human Rights Commissioner, more complainants are able to report cases of potential human rights breaches, expanding our knowledge-base of public authorities' non-compliant behaviour.

² Dr Helen Watchirs, '18 years of the ACT Human Rights Act – time for an accessible complaints mechanism for consumers' (Keynote Address, Australian Lawyers Alliance Online Conference, 3 March 2022).

³ See *Ibid.*

⁴ Productivity Commission, *Report on Government Services* (20 January 2021) 7.14, 7.16.

10. In a recent keynote address at a conference hosted by the ALA last month, President and Commissioner at the ACT HRC Dr Helen Watchirs stated:

“We [The ACT] need an easy way to challenge government decision-making, which will build trust by investing in our democratic system. Better individual enforceability of the HR Act increases community awareness and participation, as well as more direct incentives for public authorities to comply. Over time, the HR Act has infused public debate, influenced public attitudes, shaped legislation and improved the conduct of service providers – we can be proud that the vision of a human rights culture has been woven into the fabric of law and society with some success, but that can be further built on by an accessible complaints mechanism.”⁵

11. There is a clear need for an accessible and affordable mechanism for complaints, similar to the existing discrimination jurisdiction exercised by the HRC, with recourse to merits review by ACAT.

12. At the time of its *Five-Year Review* in 2009, the HRC was fully supportive of a complaints model like the discrimination jurisdiction (excluding criminal *sub judice* matters). An ANU review of the HR Act agreed with this proposal in 2010:

Given the relative inaccessibility of Supreme Court proceedings for most people, we recommend that consideration should be given to providing a complaints-handling function to the Human Rights Commissioner, provided that the HRC is adequately resourced to undertake such a function.⁶

13. The same recommendation was made in October 2018 by the ACT Law Reform Advisory Council in its report *Canberra: Becoming a Restorative City*.⁷ This approach avoids concerns over duplicating existing complaints handling roles and simplifies the process by streamlining complaint handling of the respective agencies.

⁵ Dr Helen Watchirs, ‘18 years of the ACT Human Rights Act – time for an accessible complaints mechanism for consumers’ (Keynote Address, Australian Lawyers Alliance Online Conference, 3 March 2022).

⁶ The Australian National University, *The Human Rights Act 2004 (ACT): The First Five Years of Operation* (May 2009) 10.

⁷ ACT Law Reform Advisory Council, Parliament of ACT, *Canberra: Becoming a Restorative City* (Final Report, October 2018) 9.

14. The HRC has the necessary expertise and nuanced knowledge common to human rights cases. This allows the Commission to offer a broader range of remedies to conciliate the complaint, including but not limited to apologies, change in policies and procedures, staff training and compensation.⁸
15. In most court cases where the HRC intervenes, there are three counsel as well as instructing solicitors appearing for the plaintiff, defendant and intervener. With a complaint's mechanism, fewer resources are required: a HRC complaint handler and a respondent, as well as the complainant and possibly support people, such as an NGO.⁹
16. Having a Human Rights Commissioner whose role is designated to handling complaints also increases monitoring and oversight by the HRC, resulting in additional transparency and accountability of executive action.

Second-Level Redress: Administrative Review Tribunal

17. Generally speaking, Alternative Dispute Resolution options provide efficient, informal and accessible forums for individuals seeking resolution of their human rights grievances. Compared to the cost of Supreme Court proceedings, ACAT costs are lower at an average of \$717 per matter in 2019, with 84 percent of proceedings completed within 12 months.¹⁰
18. Given the sensitive and complex nature of the subject matter at hand and accessibility issues which complainants tend to experience, ACAT allows for remedies to be individually tailored to the situation thereby enhancing the restorative potential of the processes. In addition, ACAT members are more experienced and familiar with self-represented complainants.
19. Without the insight of complainants informing us of potential human rights breaches, our knowledge of public authorities' compliance behaviour by actually implementing human

⁸ Dr Helen Watchirs, '18 years of the ACT Human Rights Act – time for an accessible complaints mechanism for consumers' (Keynote Address, Australian Lawyers Alliance Online Conference, 3 March 2022).

⁹ See *Ibid.*

¹⁰ *Ibid.*

rights obligations is currently limited to litigation. Other sources include media reports and information gained from other jurisdictions within the HRC (such as discrimination cases).¹¹

20. There is a need to ensure remedies are accessible for the all Australians, some of whom might otherwise accept their fate in the interests of ‘peace of mind’ and avoiding costly litigation.

Conclusion

21. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Inquiry into Petition 32-21 (No Rights Without Remedy) by the Standing Committee on Justice and Community Safety and supports proposed amendments to the *Human Rights Act 2004* (ACT). Equipping the HR Act with these complaint mechanisms would, through practical measures, better promote fairness and equity – the purpose for which the Act was brought into being.
22. The ALA is available to provide further assistance and advice to the Standing Committee on Justice and Community Safety regarding the issues raised in this submission.

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¹¹ Ibid.