



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)

Submission Number: 06a

Date Authorised for Publication: 18 May 2022



Committee Secretary
Standing Committee on Justice and Community Safety
ACT Legislative Assembly
Via LACommitteeJCS@parliament.act.gov.au

13 May 2022

Dear Committee Secretary

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

1. The ACT Human Rights Commission is pleased to provide the following supplementary submission to the Committee's Inquiry into Petition 32-21 (No Rights Without Remedy) to address issues raised at the Committee's public hearing held on 28 April 2022.

A. Human rights complaints to the ACT HRC

2. As noted in the majority of submissions provided to the inquiry, the Commission's discrimination complaints handling process is well understood and well utilised and is a suitable model for a human rights complaints pathway.
3. The Commission's complaint handling service provides a free, accessible and confidential complaint handling process for the ACT community. The Commission can accept complaints across a range of jurisdictions, including discrimination, health services, victims of crime charter of rights, disability services and gender identity conversion practices, retirement village, veterinary practitioner services.
4. Where the Commission is not able to resolve a complaint in some types of matters the complainant can ask for the matter to be referred to the ACT Civil and Administrative Tribunal (ACAT). This process is available for discrimination, occupancy, retirement village, sexuality & gender identity conversion practice complaints.
5. Other types of complaints such as health services, children & young people complaints, vulnerable people complaints do not have a pathway to an enforceable remedy through ACAT.
6. The **appendix** to this submission includes case study examples of complaints that were received by the Commission that raise human rights issues and may have 'piggy-backed' (that is formed by a complaint on more than one ground) on a human rights complaint or been raised as a human rights complaint only if that pathway was available.
7. In 2020-21 there were 218 discrimination complaints dealt with by the Commission, with 55 (25 per cent) successfully conciliated and 29 (13 per cent) referred to ACAT.¹ The Commission's complaint handling KPI for timeliness relates to the number of complaints finalised under or over 250 days. In 2020/21 the Commission finalised 80 per cent of matters under 250 days.
8. The approach to conciliation of a complaint varies depending on a range of factors or questions including the nature of the dispute; whether there is an ongoing relationship; the outcomes being sought;

¹ ACT Human Rights Commission, Annual Report 2020-21, available at [ACT Human Rights Commission Annual Report 2020-21](#) pp 36-38.

immediate risk of harm such as where employment or housing is at risk; risk to the public in a health matter about professional conduct; whether the matter is time constrained e.g. where a child is out of school.

9. Given this range of factors, conciliation can take a range of forms including shuttle negotiations through to an in-person meeting convened by the Commission. Conciliation may occur quickly or at the end of a more detailed investigation process where the parties have had the chance to exchange responses on the allegations prior to a joint discussion with a view to resolving the complaint.
10. The conciliation process is conducted on a without prejudice basis subject to confidentiality provisions in the legislation that bind the Commission, but not parties to a complaint unless an agreement is entered into that includes a confidentiality or non-disclosure clause. The benefit of a generally confidential conciliation process is it enables the parties to discuss the issues raised by the complaint in an open manner with a view to resolution on terms agreed by the parties in good faith.
11. If a conciliation agreement is reached, then it may include a confidentiality clause, but it can relate to components of the agreement rather than the whole agreement. In matters where a resolution is about changes in policy or procedure, training, a review of information provision or other administrative processes there may be no conciliation agreement entered into by the parties.
12. In some matters the outcome may be public e.g. a change in practice or process, changes to access arrangements etc even if the complaint that led to the change is not in the public domain.
13. Many complaints referred to ACAT also go through alternative dispute resolution (ADR) such as mediation within the Tribunal process. ACAT aims to resolve all discrimination complaints within 12 months, but notes that these timeframes to 'finalisation can vary greatly, depending upon the resources available to the parties and whether a party's preparation for hearing is delayed by reason of disability, health or other accessibility issues'.²
14. ACAT reports that of the discrimination matters before it in 2020/21 eight (40 per cent) were resolved at ADR, one (5 per cent) was resolved after ADR and 11 (55 per cent) proceeded to hearing. Seven matters underwent a preliminary conference, with two (29 per cent) settling at ADR, one (14 per cent) settling prior to hearing and the remaining four (57 per cent) proceeding to hearing.³

Compensation – how many DA complaints involve compensation?

15. We are not able to provide an exact figure, noting the distribution of complaints across multiple jurisdictions, but only a small number of matters are resolved with financial outcomes, primarily in discrimination and health service complaints.
16. Outcomes to complaints that are conciliated also vary depending on the nature of the matter. Outcomes could include a policy or procedure change, agreement to undertake training or a review of particular processes, changes to information collection or sharing practices, apology or statement of regret, reimbursements of costs or financial compensation. The **appendix** to this submission includes case study examples of complaints that resulted in a compensation component as part of the conciliated agreement, settlement or ACAT orders.

² ACT Civil and Administrative Tribunal, Annual Review 2021-21, available at [ACAT Annual Review 2020–21 \(act.gov.au\)](https://www.act.gov.au) p 36-37.

³ Ibid, p 37.

Resourcing

17. The Commission acknowledges that the government may have uncertainty about the resources required to support this new jurisdiction. Proportionately there is unlikely to be a significant increase in the number of complaints – noting that many complaints that are already received may contain human rights elements. The changes will provide more clarity and certainty within the community about the proper avenue to air the issues and is likely to result in some saving as a result. For example, the Queensland Human Rights Commission received 369 complaints in 2020-21, with 344 finalised, 151 accepted, and 47 resolved through conciliation or early intervention, with only 26 referred and 2 reports containing recommendations issued.⁴
18. The Auditor-General's report into the ways in which public authority agencies were meeting their obligations under the *Human Rights Act 2004* (HR Act), found that the requirements of the HR Act may not be being realised operationally, and that there was a need for capability building and more resources and training to support staff to comply with their human rights obligations.⁵ The Commission believes that a human rights complaints pathway would lead to improvements in the internal complaint handling processes of government agencies as well as the quality of initial decision-making and compliance. This may also be expected to reduce the number of complaints that proceed to the Commission or to ACAT, while supporting an improved public service culture of respect for human rights in service delivery.
19. The Commission considers that additional resources may be required for complaint handling purposes. The Commission will typically take on a new jurisdiction and then consider further resources required as becomes apparent in the operation of the jurisdiction. In addition to individual complaints, systemic issues may be identified in matters brought to the Commission that may require us to work with agencies on recommendations and strategies to develop and implement systemic outcomes. The Commission considers additional resources may also be required to undertake training and develop additional information materials, in concert with JACS, to support agencies' human rights capability. However, we note in this regard that public authority obligations under the HR Act have been in place since 2009, so these are neither new nor novel requirements that are being imposed on government agencies.

Working with the ACT Ombudsman

20. The Commission is able to refer matters pursuant to s 52A of the *Human Rights Commission Act 2005* (HRC Act) to another agency or statutory office holder where a matter is more conveniently or effectively dealt with by that agency. The Commission has a memorandum of understanding (MOU) with the ACT Ombudsman regarding referral of complaints between the agencies which works effectively to ensure there is not duplication of effort and matters are referred in a timely manner.
21. The Commission envisages that if a human rights complaint mechanism were established the operation of the MOU would continue to ensure the streamlined management of matters lodged with both agencies and appropriate referral pathways. Regular meetings with the ACT Ombudsman team ensure there is a mutual understanding of the different jurisdictions and agreement regarding which matters are better handled by which agency. In 2020-21 the Commission received seven referrals from the ACT Ombudsman.

⁴ Queensland Human Rights Commission, Annual report on the operation of the Human Rights Act 2019 (2020-21) available at [Human-Rights-Annual-Report-2020-21.pdf \(qhrc.qld.gov.au\)](https://www.qhrc.qld.gov.au/annual-reports/2020-21) p 138.

⁵ ACT Auditor-General's Office, *Recognition and implementation of obligations under the Human Rights Act 2004*, Report 2/2019, available at [Recognition and implementation of obligations under the Human Rights Act 2004](https://www.audit.act.gov.au/2019-2020/reports-and-articles/2019-2020/reports/2019-2020-02), p 7-8.

45 day internal complaint waiting period

22. The Commission notes the Queensland model under which a complaint about an alleged breach of human rights is required to be made to the agency in the first instance and that organisation given first opportunity to resolve the complaint within 45 days. The Commission notes Queensland reports this has facilitated agencies implementing processes to better respond to complaints and seeking to resolve those complaints in the first instance with a complaint to the Queensland Human Rights Commission as a fall back.⁶
23. While we agree with this approach, it would be necessary to have exceptions to that requirement to accommodate circumstances where there is an urgency to the claim, where there is an egregious breach of rights or a power imbalance that would preclude the proper consideration of the matter by the agency. Similar provisions exist in Queensland.⁷

Should police be exempted?

24. The Commission considers that a human rights complaints mechanism should be aligned with the definition of a public authority under the HR Act, which includes police officers when exercising functions under Territory laws.
25. It has been a long-standing and significant issue of concern for the Commission that police services in the ACT are not subject to any local resolution-based complaints mechanism. In our view, local mechanisms for accountability, including dispute resolution processes are essential requirements for effective community policing, not least as they would provide important opportunities for enhancing public trust and confidence.
26. While the Commission has welcomed the recent amendments to the HRC Act to enable victims of crime to make complaints to the Commission with regard to their treatment by criminal justice agencies, including police, this complaints pathway is not available to the broader Canberra community. In particular, the Commission remains unable to handle discrimination complaints in relation to ACT Policing at the current time. The ACT is the only jurisdiction that does not have coverage of its police force under its discrimination legislation. A human rights complaint process that covers police would help to address that current gap.
27. By way of example, we note a recent report by the Commonwealth and ACT Ombudsman, which assessed whether ACT Policing's administrative framework for engaging with the ACT Aboriginal and Torres Strait Islander community supported consistent, fair and accountable decisions and actions.⁸ The Ombudsman noted that while there were examples of "excellent and respectful community policing", there also continued to be "examples of poor practice and disrespectful interactions".⁹
28. Extending the Commission's conciliation processes (via a human rights complaints mechanism) to the police would enhance their ability to address any concerns about systemic discrimination in police interactions with the community, as well as concerns about the impact of unconscious bias potentially

⁶ Queensland Human Rights Commission, *Human-Rights-Annual-Report-2019-20*, p 74.

⁷ *Human Rights Act 2019* (Qld), s 65(2).

⁸ Report by the Commonwealth and ACT Ombudsman, Michael Manthorpe PSM, under the *Ombudsman Act 1976* (Cth) and the *Ombudsman Act 1989* (ACT), [ACT Policing's administrative framework for engagement with the ACT Aboriginal and Torres Strait Islander community](#), Volumes 1 & 2, March 2021.

⁹ ACT Ombudsman's [Annual Report 2020–21](#), p 11.

leading to discrimination. The only recourse for ACT residents currently is to take a discrimination complaint to the Australian Human Rights Commission, which is not ideal as it takes the matter outside of the ACT and it is also a pathway that is rarely utilised, in our experience.

29. A human rights complaints mechanism that includes police would, in our view, have a positive impact on justice reinvestment outcomes by assisting ACT Policing with transparency and accountability with the community. It would also add to the effectiveness of other key government policies such as the Aboriginal Justice Agreement and the Disability Justice Strategy given police are fundamental to the success of both those strategies. It would enhance the implementation of both measures to have better visibility and accountability in relation to ACT Policing.
30. The experience to date in Queensland, where human rights complaints about police can be made to the Queensland Human Rights Commission, suggests that there are tangible benefits in adopting such a model. The Queensland Human Rights Commission Annual Report on Human Rights details the successful resolution of police complaints, with outcomes including public apologies and changes of policy.¹⁰ The Queensland Police Service also took steps to expressly incorporate human rights into its internal complaint handling processes by updating its complaints and grievance policies, procedures and mechanisms to ensure human rights complaints can be recorded, assessed and responded to appropriately.¹¹
31. While we appreciate that there are complexities to subjecting ACT Policing to an ACT-specific oversight/accountability mechanism - in part, because they are Australian Federal Police (AFP) officers who perform their ACT policing functions by arrangement – it is also important not to overstate those complexities.
32. As acknowledged in ACT Policing’s submission to this inquiry, ACT Policing are already subject to the public authority obligations in s 40B of the HR Act, which requires public authorities to act consistently with human rights and give proper consideration to human rights when making decisions:

“ACT Policing are subject to the public authority obligations under the HR Act. Section 40 of the HR Act declares a member of the AFP to be a ‘public authority’ for the purposes of the HR Act when exercising a function under Australian Capital Territory legislation.”
33. We note that the HR Act is not included in the regulations made under the *Australian Capital Territory Self-Government Act 1988* (Cth). As such the HR Act cannot of its own force bind the Crown in right of the Commonwealth. However, with respect to the application of the obligations in s 40B of the HR Act on AFP members, it is the provisions of the *Australian Federal Police Act 1979* (Cth) (AFP Act) itself, rather than the provisions of the Self-Government Act, that are more directly relevant:
 - Section 8(1) of the AFP Act establishes that one of the functions of the AFP is to provide policing services in the Territory and s 8(1A) of the AFP Act requires that those services “shall be in accordance with” the ACT Policing Arrangements. The current arrangements stipulate that “under the [HR Act], a member is expected to act consistently with human rights when exercising a function under a Territory law”.¹²

¹⁰ Queensland Human Rights Commission, [Human-Rights-Annual-Report-2020-21](#), pp 125, 162.

¹¹ Queensland Police Service, [2020-21 Annual Report](#), p 10.

¹² See, Policing Arrangement, commencing June 2017, p 2.

- Section 9(1)(b) of the AFP Act provides that AFP officers have “the powers *and duties* conferred or imposed on a constable or on an officer of police by or under any law (including the common law) *of the Territory*”. To the extent that s 40B is a duty that is imposed on *an officer of police* by a law of the Territory, the application of s 9(1)(b) of the AFP Act imposes s 40B obligations on AFP members.

34. In this way, the application of s 40B occurs by the force of a Commonwealth law (the AFP Act), which means that the restriction in the Self-Government Act that applies to Territory laws does not arise.

35. As a public authority under the HR Act, police conduct – like any other public authority conduct – can be challenged in the Supreme Court for breaching human rights.¹³ It would therefore be unremarkable for a human rights complaints function to also cover police. As noted above, the Commission already handles complaints about police under its victims of crime complaints jurisdiction.

B. Human rights complaints to ACAT

36. The Commission considers that contrary to assertions of government about the need for the ACT Civil and Administrative Tribunal (ACAT) to develop an expertise in human rights if vested with a human rights complaints function, ACAT already has experience with HR Act matters.

37. The HR Act arises in ACAT proceedings in two ways. First, the HR Act requires ACAT to consider human rights when interpreting Territory laws (s 30); and second, the HR Act also places obligations on public authorities. These obligations are relevant to ACAT because ACAT can itself be considered a public authority for the purpose of the HR Act in some circumstances, or because ACAT may be required to review the actions or decisions of other public authorities for breach of HR Act rights in certain circumstances where human rights are raised as part of an existing proceeding.

38. Since ACAT commenced operations in 2008, the HR Act has been raised in 117 cases, across areas such as planning and development application reviews, defamation claims, freedom of information disputes, mental health treatment orders, public housing applications, guardianship and administration of property orders, professional standards, discrimination cases and administrative review decisions.

39. These types of proceedings already involve extensive engagement of and consideration of human rights, and the framework of interpretation, proportionality and the obligations of public service agencies under the HR Act. These cases have involved detailed consideration and application of human rights principles across these broad fields falling within ACAT’s jurisdiction. In many of these decisions, ACAT was required to engage with the scope and content of rights under the HR Act, including relevant human rights judgments from the Supreme Court, look to case law from Victoria, Queensland and international jurisdictions with human rights statutes and to consider the obligations on public authorities to act compatibly with human rights and make decisions that give proper consideration to human rights.

40. There have been cases where the Human Rights Commission and Attorney-General have intervened in HR Act matters in ACAT. These include:

- a) guardianship proceedings which dealt with the approach to assessing capacity to consent to medical treatment in common law and international human rights law. ACAT agreed with the HRC’s

¹³ For example, the Commission was granted leave to intervene in a human rights action filed in the ACT Supreme Court against two officers from ACT Policing relating to the assault of a teenager in January 2017. The matter, however, was settled prior to proceeding to hearing. – see ACT Human Rights Commission, [Annual Report 2020-21](#), p 25.

submissions that capacity could fluctuate, is to be assessed in relation to the nature of the decision and that a person should be supported to make decisions;¹⁴

- b) a discrimination complaint relating the Health Directorate's policy for recruitment into its intern program which preference local applicants over foreign trained applicants. ACAT invited the Commissions to make submissions on reasonableness and whether that would support the discriminatory policy. ACAT ultimately found the policy was not reasonable and was therefore unlawful.¹⁵ This decision was appealed internally within the Tribunal and the original decision reversed, demonstrating ACAT's ability to resolve complex cases without need to refer issues to the Supreme Court;¹⁶
- c) a vilification complaint in which both the Attorney-General and the HRC intervened to make submissions about the extra-territorial application of the Discrimination Act, where vilifying material was posted about an ACT resident outside the ACT. ACAT agreed with the HRC's submissions that s 30 of the HR Act required the discrimination act to be given a beneficial interpretation consistent with the Act's purpose of protecting ACT residents from vilification. The Tribunal held that it did have jurisdiction to hear the matter.¹⁷

41. Such cases indicate the ability of ACAT to handle significant cases involving the application of human rights law and jurisprudence to complex factual circumstances while resolving the issues in a low cost and accessible jurisdiction.

42. This situation is the same in Victoria and Queensland, where although their Tribunals are not able to directly consider human rights complaints, they are still required to address human rights, either as a public authority themselves or through the interpretive obligation.

43. While allowing ACAT to receive human rights complaints from the HRC would be a new jurisdiction for it, the process by which ACAT considers and applies human rights would not be a novel reform.

C. Clarifying role of ACAT

44. The majority of submissions supporting the petition noted that the most obvious model for the provisions would be ACAT's discrimination complaints jurisdiction. Under the provisions in Division 4.2A of the *Human Rights Commission Act 2005* ACAT has three main functions under its discrimination complaints jurisdiction:

- a) hearing referred complaints from the HRC and determining whether the person complained about has engaged in unlawful conduct under the Discrimination Act¹⁸
- b) remedying the breaches through orders¹⁹

¹⁴ *In the Matter of E.R (Mental Health and Guardianship and Management of Property)* [2015] ACAT 73 at [40; 44].

¹⁵ *Wang v Australian Capital Territory (Discrimination)* [2016] ACAT 71 at [266-267].

¹⁶ *Australian Capital Territory v Wang (Appeal)* [2019] ACAT 65.

¹⁷ *Botrill v Sunol & Anor (Discrimination)* [2017] ACAT 81 at [66 -79].

¹⁸ *Human Rights Commission Act 2005*, s 53E(2).

¹⁹ *Ibid*, s 53E(3).

- c) making orders to enforce conciliated agreements between the parties, that have been lodged with it by the HRC.²⁰
45. For consistency with the discrimination complaints system, the human rights jurisdiction could cover the same range of remedies set out in s 53E(2) (but could potentially exclude damages in the first instance).
46. Discrimination Act remedies include that the person does not repeat or continue the unlawful act, that the person performs a stated reasonable act to redress any loss or damage suffered, and that that the person pay compensation.
47. In determining whether to make an order providing a remedy – under s 53E(3) ACAT must consider the person’s rights, their dignity, the public interest in balancing rights effectively, the nature of the act that breached rights and any mitigating factors.
48. Currently there is some uncertainty about the nature of decisions involving human rights determinations within ACAT and the lower courts, and the types of remedies that can be made.²¹ Legislating clearer and authoritative provisions to address this uncertainty would potentially avoid litigation and save time and resources, while giving the community a greater degree of confidence that human rights are accessible, enforceable and not just theoretical.
49. An explicit human rights complaints function including ACAT would support more complete and comprehensive investigation of actions by public authorities and in turn, better decision-making.

The NZ model

50. At the hearing, the Committee asked the Minister about whether the New Zealand model (whereby the NZ Human Rights Review Tribunal can hear “human rights” complaints that have not been successfully conciliated by the NZ Human Rights Commission), was a potential option for the ACT to consider.
51. For clarification, we note that despite its name, the NZ Human Rights Review Tribunal only deals with claims that relate to breaches of the *Human Rights Act 1993* (NZ), which is NZ’s anti-discrimination legislation similar to the ACT’s Discrimination Act. NZ’s human rights legislation (akin to the ACT’s HR Act) is called the *Bill of Rights Act 1990* (NZ). The NZ tribunal therefore only deals with *discrimination* complaints under the NZ’s anti-discrimination laws (i.e. the *Human Rights Act 1993*), and not *human rights* complaints more broadly (i.e., under the *Bill of Rights Act 1990*).

D. Benefits of a human rights complaints mechanism

52. The Commission considers that there would be significant societal benefits from the ACT legislating a human rights complaints mechanism. These would include:
- a) giving individuals an accessible, efficient and informal ability to enforce their rights;
 - b) giving individuals a direct voice to power as part of the conciliation process enabling more direct democracy, civic participation, and restorative processes where things go wrong;

²⁰ ACT Civil and Administrative Tribunal Act 2008, s 55; Human Rights Commission Act 2005, s 62.

²¹ See e.g. *LM v Childrens Court of the Australian Capital Territory and the Director of Public Prosecutions for the ACT* [2014] ACTSC 26 (24 February 2014) a [38]; *Director of Housing v Sudi* [2011] VSCA 266 (6 September 2011) at [43].

- c) improved understanding of human rights (including that human rights are not absolute, but are subject to reasonable and justifiable limitations necessary to balance with other public interests);
- d) greater trust in governance and the institutions of the executive and associated improvements in the wellbeing indicators;
- e) better internal decision-making processes in business units that regularly apply legislation because of increased oversight, accountability and guidance from the courts and tribunal on how to meet human rights obligations;
- f) proactive internal review and reform of procedures and policies to make them more compatible, consistent, and transparent with human rights and more human-centred; and
- g) savings to government in avoiding costly and drawn-out disputes that proceed to extended litigation in the Supreme Court, where issues could be more easily dealt with through better frontline decision making or the less formal conciliation or ACAT complaint processes.

53. Some of these benefits have been realised in Queensland where there are many case studies of agencies changing internal policies or clarifying practices to better consider and respect individuals' human rights. This often resulted in complaints being resolved internally rather than going to the Commission.²²

54. These case studies can be found in the Queensland Human Rights Commission's Annual Report on the operation of the *Human Rights Act 2019* (2020-21). The Queensland Commission noted that its "flexible and responsive early intervention model is continuing to be a successful one for resolving human rights matters".²³ Complaint outcomes that indicated changes public service practice included:

- a) information provided to people in quarantine includes improved communication about decision-making responsibility, rights of review and appeal, and setting realistic expectations about the conditions of quarantine²⁴
- b) a transport service agreed to conduct an internal review of its policies and procedures about the use of bus ramps for people with mobility access, and to provide a copy to all bus drivers employed by it. Employees were also required to attend training on the Anti-Discrimination Act and the Human Rights Act, and an internal training module on human rights and improving services to people with disability was introduced.²⁵
- c) employer who had been reported to government agency for an alleged breach of university plagiarism rules, agreed to contact the university and explain there was no evidence of wrongdoing, apologise in writing to the employee, and to review their policies and procedures relating to the issues raised in the complaint.²⁶

55. The Queensland Commission also noted that only 29.1% of human rights only complaints were resolved through conciliation and the piggy-back complaints resolved at a similar rate, compared with 50.3% of

²² Queensland Human Rights Commission, Annual report on the operation of the Human Rights Act 2019 (2020-21) available at [Human-Rights-Annual-Report-2020-21.pdf \(qhrc.qld.gov.au\)](https://www.qhrc.qld.gov.au/annual-reports/2020-21) p 128

²³ Ibid, p 155.

²⁴ Ibid, 155.

²⁵ Ibid, 158.

²⁶ Ibid, 165.

anti-discrimination complaints (not involving a public entity) were resolved through conciliation.²⁷ The Commission noted that this difference may be due to the fact that there is no avenue to the Queensland Tribunal for a binding and enforceable determination meaning that there is less incentive for parties to try to conciliate and agreement or settle the complaints. This was particularly the case in relation to government administration complaints.²⁸

56. Currently, while agencies are required to consider human rights in both acts and decisions, typically the government is more proficient at considering human rights in the legislative development and scrutiny phases, and there has been less cultural change at the frontline and operational level where supports for staff to comply with their obligations ‘vary in their quality and comprehensiveness’. This was the finding of the ACT Auditor-General’s office in its report *Recognition and implementation of obligations under the Human Rights Act 2004*, Report 2/2019.²⁹

57. A human rights complaints mechanism would provide greater impetus for agencies to now prioritise these supports and practices for staff internally and at the operational level to gain greater familiarity with human rights and how to apply them as a core part of their everyday business.

We thank the Committee for the opportunity to provide this supplementary submission. We trust that this additional information supports the Committee in its deliberations about this significant and important reform.

Yours sincerely,



Dr Helen Watchirs OAM

President and Human Rights Commissioner



Karen Toohey

Discrimination, Health Services, and Disability
and Community Services Commissioner

²⁷ Ibid, p 140.

²⁸ Ibid, pp 140-141.

²⁹ ACT Auditor-General’s Office, *Recognition and implementation of obligations under the Human Rights Act 2004*, Report 2/2019, available at [Recognition and implementation of obligations under the Human Rights Act 2004](#), p 2.

Appendix – Complaint case studies

Human rights issues that could better be dealt with under a human rights complaints pathway

The following case studies provide examples of matters brought to the Commission’s attention that could have given rise to a human rights complaint if the pathway had been introduced in the ACT.

- a. A detainee raised concerns with the Commission that their son had been involved in a motor vehicle accident interstate and was in intensive care. The detainee sought leave to visit the son. The detainee noted that they were shortly to be paroled and would be deported after parole due to their immigration status. This would preclude them returning to Australia and seeing the son for an extended period of time given his extensive injuries and extended rehabilitation period.
- b. A man contacted the Commission to complain he had been subjected to a squat and cough search in a secure facility in the ACT. The man considered the ‘search’ to be degrading and unauthorised by legislation.
- c. An elderly woman contacted the Commission regarding her tenancy situation. She is in public housing and is subject to a involuntary relocation. The woman raised concerns that she had undertaken modifications to her home to accommodate her mobility and she had not been given any information to indicate her modifications would be replicated in the new property or she would be compensated for those improvements to the property. The woman had been in the same property for a number of decades and was concerned about moving away from neighbourhood supports. She was upset that she was being required to put in a ‘submission’ regarding her reasons for objection when she wanted to talk to the decision makers and explain her concerns.
- d. A mother contacted the Commission regarding visiting arrangements for her husband who was dying from cancer. His three daughters had travelled from Melbourne to see him in his last few days of life. Each daughter had returned negative PCR and RAT COVID tests, but the facility would only allow two visitors at a time meaning two children were precluded from being with him at the time of his death.
- e. A grandmother complained to the Commission that her grandchildren had been placed in out of home care and she had not been given time or support to make an application for kinship care. The grandmother complained her contact with the grandchildren had been disrupted and she felt inadequate weight was given to hers and the children’s cultural rights in the decision-making process and the application and assessment processes.

Sample of complaints resulting in settlements with a compensation component

The following small sample from the 2020/21 Commission annual report are examples of matters with financial resolutions:

a) Health complaint

A woman lodged a complaint about an eye injury she received during nasal surgery. The injury was caused by chemical burns from an antiseptic used to clean the surgical area. The woman also raised concerns about her post-operative care, including a lack of compassion, poor pain management and a delay in referring her eye injury to a specialist.

The Commission sought responses from the hospital, the surgeon and the anaesthetist involved in the procedure. The Commission noted the product information indicates that the antiseptic should not be used on the face.

The Commission and the Medical Board of Australia jointly decided to caution the surgeon as their conduct fell below the accepted standard.

The surgeon, the hospital and the woman who lodged the complaint all participated in conciliation. The hospital changed its procedures to prohibit the use of the product in surgeries on the face. The hospital also apologised for the delay in seeking specialist advice for her injuries and changed its nursing procedures to respond to similar concerns by seeking specialist review earlier in recovery. The hospital also had direct conversations with all its surgeons and its nursing staff regarding the issue.

At conciliation, the surgeon committed to improvement, gave an apology and a \$15,000 payment as recognition of the woman's experience.

b) Race discrimination and education

A woman said that her children were being treated unfavourably at school because of their race. The woman said the method of teaching at the school disadvantaged her children's learning experience.

The woman said she made an application for an out-of-area enrolment but this was unreasonably declined. The woman sought an appeal of this decision as an outcome to her complaint and the children were subsequently transferred to a new school.

c) Mobility parking permit

A disability advocate lodged a complaint on behalf of their client about disability discrimination in the provision of goods, services and facilities by a government agency.

The advocate said their client had received parking infringements because he had displayed a copy of his mobility parking permit on his vehicle rather than the original.

The person used a copy of the permit because he found it difficult to reach the permit and transfer it from one vehicle to another due to his physical disabilities. He also said that numerous parking inspectors had told him it was reasonable for him to use a copy of his permit.

In response, the agency explained that it is a strict liability offence for a person to display a copy of a parking permit. After several discussions with the agency to explore alternative options, the agency agreed to provide the person with a second mobility parking permit.

d) Sex discrimination and sexual harassment in employment

A woman alleged she was discriminated against during her employment in a retail business due to sexual comments and aggressive language by her employer. The woman claimed she was unable to return to the workplace due the impact this behaviour had on her health, and she resigned.

The matter was resolved through facilitated negotiations between the parties with the employer agreeing to provide the woman with an apology and a reference (both in agreed terms), compensation of \$10,000, reimbursement for up to 10 consultations with a psychologist of the woman's choice and payment of entitlements.