



**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: 22**

**Date Authorised for Publication: 13 April 2022**



Environmental  
Defenders Office

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

**7 April 2022**

## **About EDO**

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

***Successful environmental outcomes using the law.*** With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

***Broad environmental expertise.*** EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

***Independent and accessible services.*** As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

[www.edo.org.au](http://www.edo.org.au)

## **About Healthy Environment & Justice Program**

EDO's ACT Practice falls within EDO's Healthy Environment & Justice Program (HEJ). The goal of the HEJ Program is to empower vulnerable communities to fight for environmental justice.

## **Acknowledgement of Contributions**

EDO wishes to acknowledge with gratitude the assistance provided by many people in the researching, drafting and review of this submission, including EDO solicitors, particularly Frances Bradshaw, and our fantastic volunteer, Sarah Cocco.

Lead author: Melanie Montalban

## **Acknowledgment of funding from ACT Government**

We acknowledge and are grateful to the ACT Government for its ongoing funding of the EDO's ACT Practice, without which it would not be possible for the ACT Practice to run.

## **Acknowledgment of Country**

The EDO recognises the Traditional Owners and custodians of the land, seas and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander elders past, present and emerging, and aspire to learn from traditional knowledge and customs so that, together, we can protect our environment and cultural heritage through law.

## **A note on language**

We acknowledge that there is a legacy of writing about First Nations without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. For the purposes of these submissions, we have chosen to use the term 'First Nations'. We acknowledge that not all Aboriginal and Torres Strait Island peoples will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

### **Submitted to:**

Standing Committee on Justice and Community Safety  
Legislative Assembly of the ACT  
GPO Box 1020, Canberra ACT 2601  
By email: [LACommitteeJCS@parliament.act.gov.au](mailto:LACommitteeJCS@parliament.act.gov.au)

### **For further information on this submission, please contact:**

Melanie Montalban  
Managing Lawyer, ACT

[REDACTED]  
[REDACTED]

CLASS Ref. Y366

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

### Submission from Environmental Defenders Office

#### A Executive Summary

1. The Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on Petition 32-21 (No Rights Without Remedy).
2. Petition 32-21 proposes to amend the *Human Rights Act 2004* (ACT) (Human Rights Act) to:
  - a. enable a complaint about any breach of the Human Rights Act to be made to the ACT Human Rights Commission (**the Commission**) for confidential conciliation; and
  - b. 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.
3. In EDO's ACT Practice, we are proud to live and work in a jurisdiction where we have the Human Rights Act, the first charter of human rights enacted in Australia. The ACT is one of only three Australian jurisdictions to have a bill of rights. Our Human Rights Act has many strengths and has delivered real-life benefits to many people in the ACT.
4. People in the ACT must be able to access effective remedies for human rights violations in order to protect and uphold their human rights. This is particularly important in an environmental context, given the enjoyment of many human rights – including the right to life, protection of family and children, and the right to culture – are infringed or threatened by environmental harm, including that caused by pollution, land clearing, climate change, natural disasters, and loss of biodiversity.
5. However, the remedies that are currently available under the Human Rights Act for human rights violations are not accessible by everybody in the ACT. In particular, the ACT is currently the only jurisdiction in Australia with human rights legislation that does not have an informal and non-judicial complaints mechanism. Victoria and Queensland both have free and accessible schemes, outside the court system, that allow people to make complaints about contraventions of their human rights. This means that people in the ACT – particularly our most vulnerable people and communities who experience disadvantage because of how society is structured and functions – currently experience a number of barriers to accessing justice for violations of their human rights.
6. **EDO strongly supports Petition 32-21** which, if accepted by the Assembly, would strengthen access to justice for human rights in the ACT. We also encourage the ACT Government to consider further amendments to the Human Rights Act in addition to the changes proposed in the Terms of Reference for this inquiry. We have made some additional recommendations in these submissions.
7. Reforming the Human Rights Act to provide access to effective remedies will ensure that the Act can realise its true potential to protect and promote our human rights.
8. Our submission is structured as follows:
  - a. **Summary of Recommendations:** we have summarised the EDO's recommendations for the Committee's consideration;
  - b. **Framework for Submission:** we have explained the lens from which the EDO has examined the Human Rights Act, particularly from an environmental context;

- c. **Five Key Barriers to Access to Justice:** we have identified five current barriers to justice that people in the ACT may face due to the limitations of the Human Rights Act as currently drafted;
- d. **The Case for a Human Rights Complaints Mechanism in the ACT:** in this section, we submit that an accessible human rights complaints mechanism should be introduced in the ACT, and have made a number of recommendations for how such a mechanism could function;
- e. **Australia's International Human Rights Obligations:** we have identified a number of additional recommendations for the ACT Government to consider in implementing an accessible human rights complaints mechanism, based on Australia's international human rights obligations as they relate to a safe, clean, healthy and sustainable environment.

## Contents

A	Executive Summary .....	1
B	Summary of Recommendations .....	3
C	Framework for Submission .....	5
D	Five Key Barriers to Access to Justice under the Human Rights Act.....	10
E	The Case for a Human Rights Complaints Mechanism in the ACT.....	14
F	Australia's International Human Rights Obligations .....	19
G	Conclusion .....	20

## B Summary of Recommendations

9. The EDO recommends that, in order for the Human Rights Act to better protect human rights in the ACT, ACT Legislation ought to be amended to implement the following:
- **Recommendation 1:** The Commission should be enabled to accept, and attempt to resolve, complaints about any breach of the Human Rights Act, including through confidential conciliation if appropriate.
  - **Recommendation 2:** If a human rights complaint cannot be resolved through the Commission, proceedings regarding breaches of the Human Rights Act may be initiated in the ACAT as an alternative to the Supreme Court.
  - **Recommendation 3:** Private entities should have the same obligations as public authorities under the Human Rights Act, and should be capable of being the subject of a human rights complaint.
  - **Recommendation 4:** The one-year limitation period to bring a complaint about a breach of the Human Rights Act should be extended to allow people in the ACT sufficient time to apply for a remedy, and should allow people to make a complaint without first having to apply to a court for an extension of time.
  - **Recommendation 5:** Damages should be available as a remedy for a complaint about a breach of the Human Rights Act.
  - **Recommendation 6:** There should be no monetary limit on the jurisdiction of ACAT to hear complaints about breaches of the Human Rights Act.
  - **Recommendation 7:** People who make complaints about breaches of the Human Rights Act should be protected against reprisal and vilification as a result of making a complaint.
  - **Recommendation 8:** Procedures to hear and deal with complaints about breaches of the Human Rights Act should be impartial, independent, affordable, transparent, and fair. Such procedures should incorporate measures to overcome obstacles to access such as language, literacy, expense and distance. There should be additional procedures to ensure that First Nations and disadvantaged people and communities are able to access human rights complaint mechanisms.
  - **Recommendation 9:** The Commission and ACAT should endeavour to review and deal with claims in a timely manner.
  - **Recommendation 10:** The Commission and ACAT should have the necessary expertise and resources to deal with human rights complaints. To this end, the ACT Government should ensure that appropriate staff and resources are dedicated to implementing a new human rights complaints mechanism, and that appropriate training is provided to staff.
  - **Recommendation 11:** Decisions should be made public and promptly and be effectively enforced. The ACT Government should ensure that outcomes from the Commission's complaints mechanism process (whether resolved or not) are made publicly available, de-identified where appropriate.
  - **Recommendation 12:** The ACT Government should provide guidance to the public about how to seek access to remedies. This includes engaging with the community early and providing ongoing education about the new human rights complaints mechanism.

- **Recommendation 13:** There should be broad standing allowing any person to bring a complaint in relation to the Human Rights Act.



## C Framework for Submission

10. We have examined the Human Rights Act against the following framework:
  - a. EDO's goal of achieving **environmental justice** for vulnerable communities in the ACT;
  - b. The human right to a healthy environment, and Australia's broader international human rights obligations as they relate to a **healthy environment**.
11. We have explained this framework further below.

### Environmental justice

12. Access to justice in the ACT refers to the right of people in the ACT to access advice and assistance for legal wrongs, and includes the right to access effective remedies. In the environmental context, access to justice refers to the ability of people to access environmental justice.
13. **Environmental justice** recognises the disproportionate impact of environmental degradation on individuals and communities who face structural disadvantage, and who are often the least responsible for such harm.
14. Individuals and communities can face **structural disadvantage** on the basis of race or colour, ethnicity, nationality, age, gender identity, disability or income. In the environmental context, communities and individuals that may face structural disadvantage include, for example, persons with disability, the elderly and young people who may be at higher risk from the impacts of heat and other extreme weather exacerbated by climate change. Low-income communities that live in close proximity to polluting industries can be structurally disadvantaged where they are reliant on an industry for their economic stability which may also be impacting their health and environment, or where they cannot afford to live elsewhere. Environmental burdens are also disproportionately felt by First Nations, through impacts to their Country, cultural practices and the resources that they depend on.
15. Environmental justice is not defined in any piece of Australian legislation, however it is often underpinned by three theories: distributive justice, procedural justice, and justice as recognition.
  - a. **Distributive justice** is concerned with the distribution of environmental goods (or benefits) and environmental 'bads' (or burdens).<sup>1</sup>
  - b. **Procedural justice** is concerned with the ways in which decisions, including decisions regarding distribution of environmental benefits and burdens, are made, and who is involved and who has influence in those decisions.<sup>2</sup>
  - c. **Justice as recognition** is concerned with who is given respect, and who is and is not valued. Justice as recognition requires the recognition of different social groups and communities, and of the natural environment and components of it.<sup>3</sup>

---

<sup>1</sup> Justice Brian Preston SC, 'The effectiveness of the law in providing access to environmental justice: an introduction' (Speech, 11th IUCN Academy of Environmental Law Colloquium, 28 June 2013) 1.

<sup>2</sup> Ibid, 2.

<sup>3</sup> Ibid.

## Australia's international human rights obligations

16. Australia has ratified seven out of nine main international human rights treaties,<sup>4</sup> including the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*. Under the ICCPR, Australia has obligations to provide for access for judicial and other procedures for effective remedies for violations of human rights.<sup>5</sup>
17. The UN Human Rights Committee has said that human rights obligations should be informed by international environmental law, and vice versa.<sup>6</sup> International environmental law includes the *Rio Declaration on Environment and Development*, adopted by the UN General Assembly in 1992,<sup>7</sup> and in particular Rio Principle 10 which provides that States shall provide '[e]ffective access to judicial and administrative proceedings, including redress and remedy'.<sup>8</sup>
18. Australia also has several other obligations resulting from being a party to international human rights treaties. The former Special Rapporteur on Human Rights and the Environment (**Special Rapporteur**) has proposed **16 Framework Principles** that States must comply with in order to satisfy their human rights obligations as they relate to the environment.<sup>9</sup> Each of the 16 Framework Principles are underpinned by existing obligations under international human rights treaties.<sup>10</sup> The Special Rapporteur has reiterated: '[t]o be clear, all States have obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, including States that have not yet recognised the right to a healthy and sustainable environment'.<sup>11</sup> As Australia is a party to a number of international treaties, the 16 Framework Principles represent Australia's current obligations with respect to human rights and the environment.
19. Relevantly for the purpose of this petition, Framework Principle 10 is that States should provide for access to effective remedies for violations of human rights and domestic laws relating to the environment.<sup>12</sup> The Special Rapporteur recommends that, in order to provide for effective remedies, States should ensure that individuals have access to

---

<sup>4</sup> Law Council of Australia, 'Australia's International Human Rights Obligations' (Web page, 2022) <<https://www.lawcouncil.asn.au/policy-agenda/human-rights/australias-international-human-rights-obligations>>.

<sup>5</sup> *International Covenant on Civil and Political Rights*, art. 2(3).

<sup>6</sup> UN Human Rights Committee, *General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, UN Doc CCPR/C/GC/36 (3 September 2019) at [62].

<sup>7</sup> UN General Assembly (**UNGA**), *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26/Rev.1 (Vol. I).

<sup>8</sup> *Ibid.*

<sup>9</sup> UN Human Rights Council (**HRC**), *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc. A/HRC/37/59 (24 January 2018).

<sup>10</sup> For a list of international sources underpinning the Framework Principles, see: Office of the UN High Commissioner for Human Rights, *Selected Sources for Framework Principles on Human Rights and the Environment* (February 2018).

<sup>11</sup> HRC, *Right to a Healthy Environment: Good Practices*, UN DOC A/HRC/43/53 (30 December 2019) at [8].

<sup>12</sup> Framework Principle 10 is underpinned by the obligation of States to provide for access for judicial and other procedures for effective remedies for violations of human rights. The sources for this obligation include the *Universal Declaration of Human Rights*, art 8 and the *International Covenant on Civil and Political Rights*, art. 2(3). For a full list of sources for Principle 10, see Office of the UN High Commissioner for Human Rights, *Selected Sources for Framework Principles on Human Rights and the Environment* (February 2018) pp 18-19.

judicial and administrative procedures that meet basic requirements, including that the procedures:

- a. are impartial, independent, affordable, transparent and fair;
- b. ensure that claims are reviewed in a timely manner;
- c. have the necessary expertise and resources;
- d. incorporate a right of appeal to a higher body; and
- e. issue binding decisions, including for interim measures, compensation, restitution and reparation, as necessary to provide effective remedies for violations.<sup>13</sup>

20. The Special Rapporteur also recommends:

- a. individuals should have access to effective remedies against private actors, as well as government authorities;
- b. remedies should be available for claims of imminent and foreseeable violations as well as past and current violations;
- c. decisions should be made public and promptly and effectively enforced;
- d. States should provide guidance to the public about how to seek access to remedies;
- e. States should help to overcome obstacles to access remedies such as language, literacy, expense and distance;
- f. standing should be construed broadly;
- g. those pursuing remedies must be protected against reprisals, including threats and violence; and
- h. States should protect against baseless lawsuits aimed at intimidating victims and discouraging them from pursuing remedies.<sup>14</sup>

21. In addition to the above, the EDO has long advocated for recognition of the **human right to a healthy environment** in Australia, and in particular since 2002 when a Bill of Rights was first considered for the ACT.<sup>15</sup> Although the ACT Government is currently investigating including the right to a healthy environment in the Human Rights Act, we acknowledge the Human Rights Act does not yet recognise the right. However, more than 80% of UN Member States legally recognise the right to a healthy environment either through constitutional recognition, ratification of regional treaties and/or national

---

<sup>13</sup> HRC, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc. A/HRC/37/59 (24 January 2018) at [29].

<sup>14</sup> *Ibid* at [28]-[30].

<sup>15</sup> Hanna Jaireth, Environmental Defenders Office ACT Inc., *Submission on the Need for an ACT Bill of Rights* (Submission #61, Bill of Rights Consultative Committee, 2002); Environmental Defenders Office ACT Inc., *Submission to the ACT Attorney General for Consideration under s 43 Review of Operation of the Human Rights Act 2004* (Submission, A-G Environment Related Human Rights, June 2005); Australian Network of Environmental Defender's Offices, *Submission to the National Human Rights Consultation* (Submission, National Human Rights Consultation, 15 June 2009); Environmental Defenders Office (Tasmania) Inc., *Proposed Charter of Human Rights for Tasmania* (Submission, Tasmania Human Rights Consultation, 2011); Environmental Defenders Office (Victoria) Inc., *Inquiry into Charter of Human Rights and Responsibilities Act 2006* (Submission No 271, 1 July 2011).

legislation.<sup>16</sup> In October 2021, the UN Human Rights Council adopted a resolution that recognises the right to a clean, healthy and sustainable environment, and invited the UN General Assembly to consider this resolution.<sup>17</sup>

22. The right to a healthy environment is a standalone fundamental right. However, it is comprised of a number of elements, which are derived from existing State obligations under international human rights treaties and multilateral environmental agreements, and their elaboration in international and regional courts and tribunals, UN treaty bodies and inter-governmental bodies.<sup>18</sup> These sources enshrine rights that are protected under the Human Rights Act, such as the right to life<sup>19</sup> and the right to enjoy culture, practice religion and use language.<sup>20</sup>
23. The substantive elements of the right include people's right to:
  - a. clean air;
  - b. a safe climate;
  - c. access to safe drinking water and sanitation;
  - d. healthy biodiversity and ecosystems;
  - e. toxic free environments; and
  - f. healthy and sustainably produced food.<sup>21</sup>
24. Recognition of the substantive elements must be accompanied by the recognition of the right's corresponding procedural elements:
  - a. the right to information;
  - b. the right to participate in decision-making; and
  - c. access to justice.<sup>22</sup>
25. Because the right to a healthy environment is implied in, or derived from, other human rights – including rights protected under the Human Rights Act – recognition of the right to a healthy environment is international best practice. It is therefore relevant to consider whether the Human Rights Act is consistent with the right.
26. Human rights are indivisible, interrelated and interdependent. A denial of one human right poses a direct threat not only to other existing human rights – such as the rights to life and culture – but also to the right to a healthy environment itself. It is therefore

---

<sup>16</sup> HRC, *Right to a healthy environment: good practices*, UN Doc A/HRC/43/53 (30 December 2019) at [10]-[13].

<sup>17</sup> HRC, *The Human Right to a Safe, Clean, Healthy and Sustainable Environment*, GA Res 48/13, UN Doc A/HRC/48/L.23/Rev.1 (8 October 2021). The HRC also adopted Resolution 48/14, appointing a Special Rapporteur on the promotion and protection of human rights in the context of climate change.

<sup>18</sup> The international sources for the right to a healthy environment are listed under Framework Principles 1 and 2: Office of the UN High Commissioner for Human Rights, *Selected Sources for Framework Principles on Human Rights and the Environment* (February 2018) p 2.

<sup>19</sup> *Human Rights Act 2004 (ACT)* s 9.

<sup>20</sup> *Ibid*, s 27.

<sup>21</sup> HRC, *Right to a Healthy Environment: good practices*, UN DOC A/HRC/43/53 (30 December 2019) at [2]. However, this list is not exhaustive and will evolve as our understanding of State obligations under international human rights law in relation to a healthy environment evolves.

<sup>22</sup> *Ibid*.

critical to ensure that all elements of the right – including access to justice – are protected at law.

## D Five Key Barriers to Access to Justice under the Human Rights Act

27. The ACT is fortunate to be one of three jurisdictions in Australia with human rights legislation. Our Human Rights Act has resulted in real life benefits for people in the ACT including from better policy and legislation, better protections for vulnerable people, and increased transparency and accountability of executive action.<sup>23</sup> In this way, the Human Rights Act has already resulted in stronger protection of human rights in the ACT.
28. In our view, the strengths of the Human Rights Act include:
- a. **imposition of duties on public authorities:** The Human Rights Act imposes a positive duty on public authorities to act consistently with human rights, and to properly consider relevant human rights when making decisions;<sup>24</sup>
  - b. **a direct cause of action to the Supreme Court:** People in the ACT whose human rights have been contravened have the right to bring an action in the Supreme Court of the ACT (**Supreme Court**) against a public authority for contravention of that right.<sup>25</sup> This is unique in Australia, as human rights legislation in Queensland and Victoria do not provide for a direct cause of legal action based solely on human rights violations to be initiated in courts or tribunals;
  - c. **broad standing provisions:** Although only individuals have rights,<sup>26</sup> any person who claims that a public authority has acted incompatibly with human rights or has failed to consider relevant human rights in making a decision, and is a victim,<sup>27</sup> may start a proceeding in the Supreme Court.
29. However, despite these positive characteristics, people in the ACT have limited rights to access justice for human rights contraventions. Below, we have identified five key barriers that currently exist under the Human Rights Act to access justice for human rights contraventions.

### **Barrier 1 - There are limited avenues for seeking redress for contraventions of human rights in the ACT.**

30. People in the ACT whose human rights have been contravened have the right to bring an action in the Supreme Court against a public authority for contravention of that right.<sup>28</sup> Apart from the Supreme Court, the alternative avenues for seeking redress are limited.

#### People cannot bring direct human rights claims in the ACT Civil and Administrative Tribunal

31. People in the ACT may rely on their rights under the Human Rights Act in other legal proceedings.<sup>29</sup> Raising human rights in the context of another legal claim is known as 'piggybacking'. People can piggyback human rights in legal proceedings in ACAT, an informal and accessible tribunal that hears and determines a wide range of cases and

<sup>23</sup> Helen Watchirs, 'Towards an Accessible Human Rights Complaints Mechanism' (2021) *Ethos: Law Society of the ACT Journal* (Issue 260, Winter 2021) at 63.

<sup>24</sup> *Human Rights Act 2004* (ACT) s 40B(1). The ACT Government has previously recognised that section 40B imposes a positive duty on public authorities: ACT Justice and Community Safety Directorate, *Inclusive, Progressive, Equal: Discrimination Law Reform – Discussion Paper 1 – Extending the Protections of Discrimination Law* (October 2021) at 42.

<sup>25</sup> *Human Rights Act 2004* (ACT) s 40C(2)(a).

<sup>26</sup> *Ibid*, s 6.

<sup>27</sup> For example, in *Chaloner & Anor v Australian Capital Territory* [2013] ACTSC 269, it was held that the granddaughters of a person who had experienced a breach of their human rights did not have standing under s 40B of the *Human Rights Act 2004* (ACT) because only a person whose right is infringed can be a 'victim', and they were not victims themselves.

<sup>28</sup> *Human Rights Act 2004* (ACT) s 40C(2)(a).

<sup>29</sup> *Ibid*, s 40C(2)(b).

disputes in the ACT. ACAT can also hear and determine discrimination complaints under the *Discrimination Act 1991* (ACT),<sup>30</sup> complaints about conversion practices,<sup>31</sup> and certain complaints about services for older people<sup>32</sup> and occupancy disputes.<sup>33</sup>

32. However, people are not able to bring an action in the ACAT directly under the Human Rights Act. In cases where human rights are piggybacked on to other legal proceedings, remedies under the Human Rights Act are not available. Although the Human Rights Act has featured in other legal proceedings, the Human Rights Commissioner has herself noted that it has rarely substantively affected the outcome of cases.<sup>34</sup>

#### People cannot make human rights complaints to the ACT Human Rights Commission

33. The Commission has powers under the *Human Rights Commission Act 2005* (ACT) (**HRC Act**) to receive and deal with complaints about certain matters including complaints about health services,<sup>35</sup> services for people with disability,<sup>36</sup> services for children and young people,<sup>37</sup> services for older people,<sup>38</sup> occupancy disputes,<sup>39</sup> the treatment of vulnerable people,<sup>40</sup> victims rights complaints,<sup>41</sup> discrimination complaints under the *Discrimination Act 1991* (ACT),<sup>42</sup> and conversion practices.<sup>43</sup>
34. When the Commission deals with such complaints, the Commission must act in accordance with the human rights protected under the Human Rights Act.<sup>44</sup> In addition, a person can make a complaint about a disability service on the basis that the service provider acted inconsistently with the human rights principles in the *Disability Services Act 1991* (ACT).<sup>45</sup> However, apart from this, there is currently no ability for the Commission to receive and deal with a complaint about a contravention of the human rights protected under the Human Rights Act.

#### **Barrier 2 - As the primary avenue for seeking relief under the Human Rights Act, the Supreme Court is not an accessible forum for everyone in the ACT.**

35. Although people in the ACT whose human rights have been contravened have the right to bring an action in the Supreme Court, the Supreme Court is not a widely accessible forum due to the need for legal representation and the expenses of Court proceedings.
36. Proceedings before the Supreme Court are lengthy and complex. As a court, the Supreme Court is a formal venue with a large number of rules, practices and procedures that many people in the ACT – particularly those without legal training or experience – will not have an understanding of. It is nearly always necessary to have legal

---

<sup>30</sup> *Human Rights Commission Act 2005* (ACT), Part 4, Division 4.2A.

<sup>31</sup> *Ibid*, Part 4, Division 4.2D.

<sup>32</sup> *Ibid*, Part 4, Division 4.2B.

<sup>33</sup> *Ibid*, Part 4, Division 4.2C.

<sup>34</sup> Helen Watchirs, 'Towards an Accessible Human Rights Complaints Mechanism' (2021) *Ethos: Law Society of the ACT Journal* (Issue 260, Winter 2021) at 64.

<sup>35</sup> *Human Rights Commission Act 2005* (ACT) ss 39 and 42(1)(d) and (f); *Health Records (Privacy and Access) Act 1997* (ACT) s 18.

<sup>36</sup> *Human Rights Commission Act 2005* (ACT) ss 40 and 42(1)(b).

<sup>37</sup> *Ibid*, ss 40A and 42(1)(a).

<sup>38</sup> *Ibid*, ss 41 and 42(1)(e).

<sup>39</sup> *Ibid*, ss 41A and 42(1)(g).

<sup>40</sup> *Ibid*, ss 41B and 42(1)(ea). A vulnerable person is person a who has a disability, or is at least 60 years old and has a disorder, illness, disease, impairment or is otherwise socially isolated or unable to participate in community life: s 41B(2).

<sup>41</sup> *Human Rights Commission Act 2005* (ACT) ss 41C and 42(1)(eb).

<sup>42</sup> *Ibid*, s 42(1)(c).

<sup>43</sup> *Ibid*, s 42(1)(ec).

<sup>44</sup> *Ibid*, s 15.

<sup>45</sup> *Ibid*, s 40(b)(ii).

representation to be able to bring an action in the Supreme Court. This itself presents a barrier due to the costs of obtaining legal representation, particularly for people who are not eligible for Legal Aid and are unable to find low cost or pro bono representation. It is also costly to commence and continue proceedings in the Supreme Court due to the fees that are payable unless waived by the Court. Applicants before the Supreme Court also bear a significant risk that the Court will grant a costs order if their application is unsuccessful. At the EDO, the risk of an adverse costs order is sometimes so significant for our clients that they are simply unable to proceed with litigation.

37. In practice, this means that in the ACT, relief for human rights contraventions is available only to individuals with the financial means to afford legal representation and other costs of proceedings.
38. Although individuals without financial means may apply for Legal Aid or seek the assistance of a community legal centre, community legal centres in the ACT are already significantly overworked and under-resourced, and do not have the capacity to represent everyone who seeks their assistance. The ACT Government should not have to rely on community legal centres to meet the gap in access to justice that is created by the unavailability under the Human Rights Act of less formal and less costly avenues for relief.

### **Barrier 3 - Proceedings may only be brought against public authorities and not private entities**

39. In the ACT, it is unlawful for a public authority to act in a way that is incompatible with a human right, or fail to properly consider a relevant human right when making a decision.<sup>46</sup> Proceedings can be brought in the Supreme Court for a public authority's contravention of this duty.<sup>47</sup>
40. A public authority includes an administrative unit, a territory authority, ACT Ministers, and ACT public service employees.<sup>48</sup> Entities that are not public authorities may choose to be subject to the human rights obligations of a public authority.<sup>49</sup> However, there is no requirement for them to do so. This means that most private entities in the ACT do not have an obligation to act consistently with the human rights protected under the Human Rights Act. This leaves people in the ACT vulnerable to breaches of their human rights by private entities, but no recourse to an accessible remedy for such breaches.
41. In the environmental context, it is particularly vital for remedies to be available for violations of human rights. Private businesses are a major contributor to the destruction of ecosystems and the loss of biodiversity, through deforestation, land-grabbing, extracting, transporting and burning fossil fuels, industrial agriculture, intensive livestock operations, industrial fisheries, large-scale mining and the commodification of water and nature.<sup>50</sup>

### **Barrier 4 - The one-year limitation period for an action in the Supreme Court is prohibitive for those seeking relief for a contravention of human rights.**

42. A legal proceeding relating to a contravention of human rights must be started in the Supreme Court within one year after the contravention occurs, unless the Court orders otherwise.<sup>51</sup>

---

<sup>46</sup> *Human Rights Act 2004* (ACT) s 40B.

<sup>47</sup> *Ibid*, s 40C.

<sup>48</sup> *Ibid*, s 40.

<sup>49</sup> *Ibid*, s 40D.

<sup>50</sup> UNGA, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc. A/75/161 (15 July 2020) at [75].

<sup>51</sup> *Human Rights Act 2004* (ACT) s 40C(3).



43. Although human rights schemes in Victoria,<sup>52</sup> Queensland,<sup>53</sup> and the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**)<sup>54</sup> also impose a one-year time limit on human rights complaints, the legislation in those jurisdictions provides that a complaint may still be made outside the one-year period, although the human rights body *may* elect not to consider the complaint.<sup>55</sup> This language is more permissive. In comparison, in the ACT, section 40C of the Human Rights Act provides that proceedings *cannot* be brought outside the one-year period, unless the Court orders otherwise.<sup>56</sup> This language is less flexible. It also requires an application to be made to the Court for an exception to the rule, and there is no guarantee that the Court will grant the request. In addition, one year is a short amount of time to seek a judicial remedy, particularly considering the amount of time it would take to seek and secure legal representation and otherwise prepare legal proceedings. It is particularly prohibitive for vulnerable people, including people who do not speak English as a first language, people from low socio-economic backgrounds, and First Nations and Indigenous peoples.
44. In effect, the one-year limitation period may prohibit a person from accessing a remedy for a contravention of their human rights, and is therefore a barrier to access to justice for human rights in the ACT.

**Barrier 5 - The unavailability of damages in the Supreme Court means that people in the ACT may be prohibited from accessing a suitable remedy for a contravention of their human rights.**

45. Although the Supreme Court may grant any relief that it considers appropriate, it may not grant damages (compensation) in human rights proceedings.<sup>57</sup> However, in some circumstances, an award of damages may be the only remedy that achieves justice for the applicant. In addition, given the time and cost of litigation, and the personal stress that it can cause, people may be dissuaded from pursuing legal proceedings if damages are not available.

---

<sup>52</sup> In Victoria, the Victorian Ombudsman may choose not to look into a human rights complaint if it has been more than 12 months since the decision or action being complained about: *Ombudsman Act 1973* (Vic) s 15A(2).

<sup>53</sup> The Queensland Human Rights Commission may refuse to deal with or continue a human rights complaint if the complaint was not made or referred to the Commissioner within one year after the alleged contravention occurred: *Human Rights Act 2019* (Qld) s 70.

<sup>54</sup> The Australian Human Rights Commission may decide not to inquire into an act or practice, or, if the Commission has commenced to inquire into an act or practice, may decide not to continue to inquire into the act or practice if the complaint was made more than 12 months after the act was done or after the last occasion when an act was done pursuant to the practice: *Australian Human Rights Commission Act 1986* (Cth), s 20(2)(c).

<sup>55</sup> *Ombudsman Act 1973* (Vic) s 15A(2); *Human Rights Act 2019* (Qld) s 70; *Australian Human Rights Commission Act 1986* (Cth), s 20(2)(c).

<sup>56</sup> *Human Rights Act 2004* (ACT) s 40C(3).

<sup>57</sup> *Ibid*, s 40C(4).

## E The Case for a Human Rights Complaints Mechanism in the ACT

46. EDO strongly supports Petition 32-21, which proposes to enable a complaint about any breach of the Human Rights Act to be made to the Commission for confidential conciliation, and if conciliation is unsuccessful, enable a complaint about the breach to be made to ACAT. If accepted by the Assembly, these amendments would strengthen access to justice for human rights in the ACT. We have also set out some additional issues and recommendations for the Committee's consideration.

### **Recommendation 1: The Commission should be enabled to accept, and attempt to resolve, complaints about any breach of the Human Rights Act, including through confidential conciliation if appropriate.**

47. An accessible complaints mechanism that promotes a culture of human rights should be introduced into the ACT.
48. The ACT is currently the only jurisdiction in Australia with human rights legislation that does not have an informal and non-judicial complaints mechanism. Victoria and Queensland both have free and accessible schemes, outside the court system, that allow people to make complaints about contraventions of their human rights.
49. In Victoria, a person can make a complaint to the Victorian Ombudsman about an administrative action taken by a public authority on the basis that the relevant action is incompatible with a human right in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Victorian Charter**), or on the basis that the authority failed to properly consider a relevant human right under the Victorian Charter when making a decision.<sup>58</sup> The Victorian Ombudsman may decide to conduct an investigation into the complaint.<sup>59</sup> In conducting an investigation, the Ombudsman has broad investigative powers similar to a royal commission.<sup>60</sup> On completion of an investigation, the Ombudsman publishes a report stating its opinion about the administrative action and making any recommendations the Ombudsman sees fit.<sup>61</sup> The Ombudsman can also attempt to resolve the complaint by alternative dispute resolution.<sup>62</sup> Although the Ombudsman's recommendations are not binding, the vast majority (approximately 98%) of recommendations are accepted.<sup>63</sup>
50. In Queensland, a person can make a complaint to the Queensland Human Rights Commission (**QHRC**) alleging that a public entity has contravened human rights, either by acting or making a decision that is not compatible with human rights, or by failing to properly consider a relevant human right when making a decision.<sup>64</sup> The Queensland Human Rights Commissioner conducts preliminary inquiries and determines how to deal with the complaint,<sup>65</sup> including whether to accept the complaint for resolution by the Commissioner.<sup>66</sup> If the Commissioner accepts a complaint for resolution, the Commissioner may take the reasonable action that they consider appropriate to try to resolve the complaint.<sup>67</sup> In attempting to resolve a complaint, the Commissioner may

---

<sup>58</sup> *Ombudsman Act 1973* (Vic) ss 13(2) and 14.

<sup>59</sup> *Ibid*, s 15B and Part IV.

<sup>60</sup> Victorian Ombudsman, 'Investigations' (Web Page, 2022) <<https://www.ombudsman.vic.gov.au/investigations/>>.

<sup>61</sup> *Ombudsman Act 1973* (Vic) s 23.

<sup>62</sup> *Ibid*, s 13G.

<sup>63</sup> Victorian Ombudsman, 'Investigations' (Web Page, 2022) <<https://www.ombudsman.vic.gov.au/investigations/>>.

<sup>64</sup> *Human Rights Act 2019* (Qld) ss 58(1) and 63.

<sup>65</sup> *Ibid*, s 68.

<sup>66</sup> *Ibid*, s 76.

<sup>67</sup> *Ibid*, s 77.

conduct a conciliation conference,<sup>68</sup> which is confidential.<sup>69</sup> If the Commissioner considers that the complaint has not been resolved by conciliation or otherwise, the Commissioner must prepare a report about the complaint as soon as the QHRC has finished dealing with the complaint, which may include the Commissioner's recommendations.<sup>70</sup> If the Commissioner considers that the complaint has been resolved, the Commissioner must give the parties a notice stating the outcome of the resolution of the complaint, and that the QHRC has finished dealing with the complaint.<sup>71</sup>

51. Since the Queensland complaints process has commenced, it has been utilised to achieve accessible, cost-effective, and meaningful outcomes for the people of that state. The QHRC's annual report from 2020-21 contains samples of feedback received about its conciliation process, with most feedback indicating that parties (both complainants and respondents) had a positive experience with the conciliation process.<sup>72</sup> We recommend introducing a similar model in the ACT, including for the following to occur:
  - a. If a complaint cannot be resolved (whether through conciliation or otherwise), the ACT Human Rights Commission should be required to publish a report on the complaint including to make any non-binding recommendations regarding how the complaint may be resolved.
  - b. If a complaint is resolved, the ACT Human Rights Commission should be enabled to issue a notice to the parties stating the outcome of the resolution of the complaint and that the Commission has finished dealing with the complaint.
52. We consider that such a scheme is not a significant departure from, and could be easily integrated into, the Commission's current process to resolve discrimination and other complaints under the HRC Act. However, unlike Queensland (and Victoria) where no further remedies are available other than piggybacking, we consider that the ACT's model should include the ability to seek a remedy in a higher tribunal or court if the parties do not agree with the Commission's findings or recommendations, which we have explained further below.

**Recommendation 2: If a human rights complaint cannot be resolved through the Commission, proceedings regarding breaches of the Human Rights Act may be initiated in the ACAT as an alternative to the Supreme Court.**

53. Unlike the ACT, people in Victoria and Queensland do not have the right to commence proceedings in relation to a contravention of human rights. Instead, they must piggyback human rights concerns in other legal proceedings. While the ACT Government ought to introduce a human rights complaint mechanism, and can be guided by the human rights complaint schemes in Victoria and Queensland, in our view the ACT Government must also do more to ensure that the Human Rights Act promotes access to justice.
54. In our view, ACAT should be granted jurisdiction to hear and resolve complaints about any breaches of the Human Rights Act, and make final determinations that are binding on the parties.
55. As we have explained earlier in these submissions, although the Human Rights Act provides a direct cause of action in the Supreme Court,<sup>73</sup> the Supreme Court is not an accessible forum for everybody in the ACT due to the need for legal representation and

---

<sup>68</sup> *Ibid*, s 79.

<sup>69</sup> *Ibid*, s 86.

<sup>70</sup> *Ibid*, s 88.

<sup>71</sup> *Ibid*, s 89.

<sup>72</sup> Queensland Human Rights Commission, *Annual Report 2020-21* (2021) at 53-54.

<sup>73</sup> *Human Rights Act 2004* (ACT) s 40C(2)(a).

the expenses of Court proceedings. In comparison, the ACAT is less far less formal and more accessible. Legal representation is not required in ACAT,<sup>74</sup> and ACAT fees are not as prohibitive as they are in the Supreme Court.<sup>75</sup> In addition, parties usually bear their own costs in ACAT proceedings,<sup>76</sup> which removes the risk of an adverse costs order for applicants.

56. In addition, Australia has obligations under international human rights law to ensure that individuals have access to judicial and administrative procedures that incorporate a right of appeal to a higher body, and issue binding decisions to provide effective remedies for violations.<sup>77</sup> We consider that giving ACAT jurisdiction to hear and determine human rights complaints would ensure that the ACT meets these standards.

**Recommendation 3: Private entities should have the same obligations as public authorities under the Human Rights Act, and should be capable of being the subject of a human rights complaint.**

57. As we set out earlier in these submissions, most private entities in the ACT do not have an obligation to act consistently with the human rights protected under the Human Rights Act, which leaves people in the ACT vulnerable to breaches of their human rights by private entities, but with no recourse to an accessible remedy for such breaches. International law requires individuals to be able to access effective remedies against private actors as well as government authorities.<sup>78</sup> In the environmental context, recognising that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life, the UN Human Rights Committee has declared that in order to fulfil their obligation to respect and ensure the right to life, States Parties must preserve the environment and protect it against harm, pollution and climate change caused by both public and private actors.<sup>79</sup>
58. For this reason, we recommend that private entities should have the same obligations as public authorities under the Human Rights Act, and should be capable of being the subject of a human rights complaint.

**Recommendation 4: The one-year limitation period to bring a complaint about a breach of the Human Rights Act should be extended to allow people in the ACT sufficient time to apply for a remedy, and should allow people to make a complaint without first having to apply to a court for an extension of time.**

59. In these submissions we have argued that the one-year limitation period for commencing proceedings in relation to a contravention of human rights is prohibitive. International law requires remedies to be available for claims of imminent and

---

<sup>74</sup> ACAT, 'Do I need to be represented at ACAT?' (Web page, 2022)

<<https://www.acat.act.gov.au/what-to-expect/representation-and-advice#Do-I-need-to-be-represented-at-ACAT->>.

<sup>75</sup> For example, the current filing fee for a civil dispute for an individual in ACAT is \$593.00: *Court Procedures (Fees) Determination 2022* (ACT), Schedule, item 1000. In comparison, the current filing fee for an individual to commence a proceeding in the Supreme Court is \$1,845: *Court Procedures (Fees) Determination 2022* (ACT), Schedule, item 1200.

<sup>76</sup> *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 48(1).

<sup>77</sup> HRC, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc. A/HRC/37/59 (24 January 2018) at [29].

<sup>78</sup> *Ibid* at [28].

<sup>79</sup> UN Human Rights Committee, *General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, UN Doc CCPR/C/GC/36 (3 September 2019) 13 at [62].

foreseeable violations as well as past and current violations.<sup>80</sup> In our view, best practice in the ACT would mean that there is no limitation period for complaints about breaches of the Human Rights Act. However, at a minimum, the one-year limitation period ought to be extended, to ensure that people in the ACT – particularly people and communities who are structurally disadvantaged – have sufficient time to access a remedy under the Human Rights Act. The language in section 40C the Human Rights Act should also be amended to be more permissive, similar to the language adopted in Queensland, Victoria and the AHRC Act, allowing people to make a complaint without needing to first apply for an extension of time.

**Recommendation 5: Damages should be available as a remedy for a complaint about a breach of the Human Rights Act.**

**Recommendation 6: There should be no monetary limit on the jurisdiction of ACAT to hear complaints about breaches of the Human Rights Act.**

60. We have also argued that the unavailability of damages for a human rights complaint is prohibitive and may dissuade people from seeking a remedy for violation of their human rights. In some cases, damages will be the only appropriate remedy for a violation of human rights, and the unavailability of damages in these cases means that people cannot access an effective remedy for violation of their rights. We therefore recommend that damages are available as a remedy for a complaint about a breach of the Human Rights Act.
61. If damages are available, it is possible that a complaint about a breach of the Human Rights Act would be considered a civil dispute application, which cannot be made to the ACAT for an amount greater than \$25,000, unless the excess is abandoned to come within ACAT's jurisdiction, or if the parties agree ACAT has jurisdiction.<sup>81</sup> There are also monetary limits imposed on ACAT's jurisdiction under the HRC Act to determine complaints about occupancy disputes,<sup>82</sup> although not for retirement village complaints or conversion practice complaints.<sup>83</sup> In some circumstances, \$25,000 may not be sufficient compensation to provide effective redress for a person whose human rights have been violated. We therefore recommend that there is no monetary limit on ACAT's jurisdiction for complaints about breaches of the Human Rights Act, similar to retirement village complaints and conversation practice complaints.
62. Alternatively, it may be appropriate for the Supreme Court (and/or the Magistrates Court) to remain available to hear human rights complaints for amounts greater than \$25,000.

**Recommendation 7: People who make complaints about breaches of the Human Rights Act should be protected against reprisal and vilification as a result of making a complaint.**

63. The Human Rights Act currently does not offer any protection for people who commence proceedings in the Supreme Court for contravention of their human rights. In contrast, for example, section 26 of the AHRC Act makes it an offence for a person to take reprisal action against another person as a result of making a complaint, including refusing to employ the other person, dismissing the other person from employment, or taking disciplinary action in relation to the other person.<sup>84</sup> International law requires

---

<sup>80</sup> HRC, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc. A/HRC/37/59 (24 January 2018) at [29].

<sup>81</sup> *ACT Civil and Administrative Tribunal Act 2008* (ACT) ss 18(1), 20 and 21.

<sup>82</sup> *Human Rights Commission Act 2005* (ACT) s 53X

<sup>83</sup> *Ibid*, ss 53N and 53ZE respectively.

<sup>84</sup> *Australian Human Rights Commission Act 1986* (Cth) s 26(2).

people pursuing remedies to be protected against reprisals, including threats and violence, and that governments should protect people against baseless lawsuits aimed at intimidating victims and discouraging them from pursuing remedies.<sup>85</sup>

64. In our view, people who make complaints about breaches of the Human Rights Act ought to be protected from reprisal and vilification merely by reason of making a complaint. This could be done by incorporating a provision into the Human Rights Act similar to section 26 of the AHRC Act.

---

<sup>85</sup> HRC, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc. A/HRC/37/59 (24 January 2018) at [30].

## F Australia's International Human Rights Obligations

65. If the ACT Government decides to proceed with introducing an accessible human rights complaint mechanism in the ACT, we also recommend that the ACT Government considers implementing the following recommendations to ensure that the complaint mechanism is consistent with Australia's obligations under international human rights law:

- **Recommendation 8: Procedures to hear and deal with complaints about breaches of the Human Rights Act should be impartial, independent, affordable, transparent, and fair.<sup>86</sup> Such procedures should incorporate measures to overcome obstacles to access such as language, literacy, expense and distance.<sup>87</sup> There should be additional procedures to ensure that First Nations and disadvantaged people and communities are able to access human rights complaint mechanisms.<sup>88</sup>**
- **Recommendation 9: The Commission and ACAT should endeavour to review and deal with claims in a timely manner.<sup>89</sup>**
- **Recommendation 10: The Commission and ACAT should have the necessary expertise and resources to deal with human rights complaints.<sup>90</sup> To this end, the ACT Government should ensure that appropriate staff and resources are dedicated to implementing a new human rights complaints mechanism, and that appropriate training is provided to staff.**
- **Recommendation 11: Decisions should be made public and promptly and be effectively enforced.<sup>91</sup> The ACT Government should ensure that outcomes from the Commission's complaints mechanism process (whether resolved or not) are made publicly available, de-identified where appropriate.**
- **Recommendation 12: The ACT Government should provide guidance to the public about how to seek access to remedies.<sup>92</sup> This includes engaging with the community early and providing ongoing education about the new human rights complaints mechanism.**
- **Recommendation 13: There should be broad standing provisions allowing any person to bring a complaint in relation to a breach of the Human Rights Act.<sup>93</sup>**

---

<sup>86</sup> Ibid at [29].

<sup>87</sup> Ibid at [30].

<sup>88</sup> Framework Principle 14 discussed in HRC, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc. A/HRC/37/59 (24 January 2018) at [40]-[46].

<sup>89</sup> Ibid at [29].

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

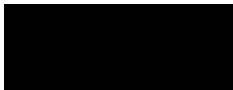
<sup>92</sup> Ibid at [30].

<sup>93</sup> Ibid.

## **G Conclusion**

66. EDO strongly supports Petition 32-21, and we urge the Committee to recommend that the ACT Government address the petition demands in full by amending our Human Rights Act to include an accessible complaints mechanism. We also ask the Committee to recommend that the ACT Government consider the additional recommendations that we have set out in this submission. We consider that making these suggested changes to the Human Rights Act will strengthen the Act by allowing the ACT community to access justice for their human rights, and better ensure their human rights are protected.
67. Melanie Montalban, Managing Lawyer of EDO's ACT Practice, and Frances Bradshaw, Senior Solicitor, are available to appear before the Committee to give evidence in person at its public hearing on 28 April 2022 if required.

### **Environmental Defenders Office**



Melanie Montalban

Managing Lawyer, ACT

CLASS Ref. Y366