



**LEGISLATIVE ASSEMBLY**  
FOR THE AUSTRALIAN CAPITAL TERRITORY

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

## Submission Cover Sheet

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

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**ACT**  
Government

# ACT Government Submission

Standing Committee on Justice and  
Community Safety Inquiry into  
Petition 32-21 (No Rights Without  
Remedy)

April 2022

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# 1. Introduction

The Justice and Community Safety Committee has invited submissions on the Inquiry into Petition 32-21 (No Rights Without Remedy). The Petition calls on the ACT Legislative Assembly to make amendments to human rights legislation in order to:

1. enable a complaint about any breach of the *Human Rights Act 2004* to be made to the Human Rights Commission for confidential conciliation, and
2. 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 for resolution.

The ACT Government welcomes the opportunity to provide a submission on this Inquiry. This submission is in addition to the Government Response to the Petition tabled in the Legislative Assembly on 22 February 2022.

This Submission seeks to assist the Committee by providing information regarding the existing human rights complaint mechanisms in the ACT and other jurisdictions in Australia, and identifies some considerations associated with the proposals in the Petition that may warrant further consideration by the Committee.

## 2. Human Rights in the ACT

### A. Overview

The ACT is a leading human rights jurisdiction in Australia and was the first State or Territory to introduce a legislative bill of rights.

We have a proud human rights record in the ACT and in addition to setting out individual rights, section 30 of the Human Rights Act requires that a Territory law, so far as it is possible to do so consistently with its purpose, must be interpreted in a way that is compatible with human rights. This means that human rights issues may be relevant in any ACT matter that considers the meaning of a particular law.

The ACT Government is committed to building and strengthening our culture of human rights across the ACT Government and broader community.

As part of that commitment, in 2008 a new section 40B was introduced into the *Human Rights Act 2004* to create a specific obligation for public authorities to act consistently with human rights. As a result, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. This obligation is currently enforced through a stand-alone cause of action set out in section 40C.

Since that time the Government has continued to undertake reforms to strengthen the Human Rights Act, including the introduction of the right to education, cultural rights of Aboriginal and Torres Strait Islander peoples, and the right to work.

Our Human Rights Act has proved to be a model for other jurisdictions to follow, with Victoria enacting their *Charter of Human Rights and Responsibilities Act* in 2006, while Queensland more recently adopted their *Human Rights Act* in 2019. The ACT Government recognises the importance of this community of human rights jurisdictions, and the positive effect of learning from incremental reforms in those jurisdictions, to ensure that we continue to take a leading role in human rights protection in Australia.

In the Parliamentary and Governing Agreement for the Tenth Legislative Assembly, the Government has committed to exploring the introduction of the right to a healthy environment into the Human Rights Act. The Government is also committed to reforming our *Discrimination Act 1991* to further strengthen protections for the right to equality, and to establishing an Aboriginal and Torres Strait Islander Children's Commissioner to strengthen protections for the rights of Aboriginal and Torres Strait Islander children and their families in the ACT.

## **B. Human Rights Complaints**

There are a number of ways that concerns about breaches of human rights by a public authority can be raised under the current legislative framework.

### **i. ACT Courts**

The Human Rights Act was the first human rights statute in Australia to include a stand-alone cause of action for a breach of human rights obligations by a public authority, under section 40C. If a person claims that a public authority has acted in contravention of section 40B, that person may start a proceeding in the Supreme Court against the public authority.

A number of applications have been brought under this provision. The ACT Human Rights Commission in *Look who's talking: A snapshot of ten years of dialogue under the Human Rights Act 2004* suggested that, "[t]he direct right of action in the HR Act also remains under-utilised and it may be a remedy that is out of reach for the vast majority of people in the community".<sup>1</sup>

It is important to note that while section 40C creates a stand-alone cause of action in the Supreme Court, under section 40C(2)(b) of the Human Rights Act, a person may also rely on their rights in relation to a claim against a public authority in other legal proceedings, for example in proceedings in the ACT Civil and Administrative Tribunal.

The Human Rights Commissioner and the Attorney-General may also intervene in a proceeding before a court that involves the application of the Human Rights Act under sections 36 and 35 respectively.

Finally, if a proceeding is being heard by a Supreme Court and an issue arises about whether a Territory law is consistent with a human right, the court may declare that the law is not consistent with that right, and the registrar must present the Attorney-General with a copy of a declaration of incompatibility which must be tabled in the Assembly. This does not invalidate the law, but allows the Government and Assembly to consider options for reform.

### **ii. ACT Human Rights Commission**

Human rights issues may also be raised indirectly via the ACT Human Rights Commission's complaints handling jurisdiction, which is established under the *Human Rights Commission Act 2005*. In addition to the Human Rights Commissioner's functions relating to education about human rights and advising the relevant Minister on the operation of the Human Rights Act, human rights issues may also in some circumstances be raised as part of the Commission's ability to handle complaints in relation to:

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<sup>1</sup> Available at: <https://hrc.act.gov.au/wp-content/uploads/2015/03/HRA-10-yr-snapshot-HRDC-webversion.pdf>.

- discrimination,
- health services,
- disability and community services,
- services for older people,
- services for children and younger people,
- treatment of vulnerable people,
- victims rights,
- occupancy disputes,
- retirement villages and
- prohibited conversion practices.

For example, the Discrimination Commissioner may consider complaints under the *Discrimination Act 1991* which supports the right to equal and effective protection against discrimination on any ground under section 8(3) of the Human Rights Act. In making orders in relation to unlawful acts under the Discrimination Act, the ACT Civil and Administrative Tribunal must consider the public interest in ensuring the balance between the right to equal and effective protection against discrimination and equality before the law without distinction or discrimination and other human rights.

Additionally, if a person complains about a disability service, under section 40(b)(ii) of the Human Rights Commission Act, the Disability and Community Services Commissioner can consider human rights principles set out under the *Disability Services Act 1991*.

Where a service provider is a public authority, in considering a complaint about the service, the Commission may also consider the human rights obligations of the public authority as part of the generally accepted standard of service delivery of the provider. The Commission has applied a human rights lens in considering complaints and Commission-initiated considerations about a range of Government services.

The Commission can also make recommendations in final reports to government and non-government agencies about human rights issues where the agency has breached an applicable standard.

Nevertheless, there are some situations where a human rights issue may not be covered by the Commission's complaint handling role, such as complaints about housing services or corrective services, where these do not involve unlawful discrimination.

### 3. Human Rights Act Complaints to Human Rights Commission

The first proposal in the Petition is to **enable a complaint about any breach of the Human Rights Act to be made to the Human Rights Commission for confidential conciliation**. While human rights issues may be raised indirectly via the Commission's functions as outlined above, the Human Rights Commission does not have a specific function to take complaints about breaches of the Human Rights Act as part of its ordinary complaints-handling function.

#### A. ACT Human Rights Commission's Complaints Process

##### i. Investigation

The Human Rights Commission has the jurisdiction to investigate and conciliate complaints about a broad range of issues as set out above. To support its investigative functions, the Commission may require a

person to provide information or produce a document or other thing under section 73 of the Human Rights Commission Act. In a practical sense, once the Commission receives a complaint and allocates it to a case officer, the first step is to write to the respondent providing a copy of the complaint and requesting a response to questions, a response to any outcomes being sought and copies of any relevant documents. However, in some circumstances it may be appropriate to resolve matters informally, for example by making phone calls to the parties.

Once the information has been received from the respondent, the Commission may share some or all of the information with the complainant to assist in resolving the complaint.

## **ii. Conciliation**

Some matters may be suitable to be dealt with by way of conciliation conference, which is a confidential meeting between the parties to a complaint facilitated by a conciliator. Conciliation may be in-person, online or, in some circumstances, via shuttle where the conciliator communicates with each party individually via telephone or correspondence.

Conciliation conferences may result in a written agreement, and if the complaint is a discrimination complaint, occupancy dispute complaint, retirement village complaint or a conversion practice complaint, must be given to the ACT Civil and Administrative Tribunal (ACAT) under section 62(3)(b) of the Human Rights Commission Act.

## **iii. Reports and Recommendations**

If the Commission closes a complaint but is nevertheless satisfied that the respondent to a complaint has acted inconsistently with an applicable standard, the Commission may include recommendations in the final report as per section 81 of the Human Rights Commission Act. The Commission may also prepare a report in relation to a Commission-initiated consideration.

Recommendations must state a reasonable time within which the action should be taken, and section 85 of the Act requires the entity to tell the Commission in writing the action that has been taken in relation to the recommendation. If the relevant entity does not comply with the recommendations, the Commission may publish the name and details of the non-complying entity or report them to the Minister under section 86 of the Human Rights Commission Act. The Minister may in turn present the report to the Legislative Assembly.

Section 87 of the Human Rights Commission Act states that the Commission may also, on its own initiative, give the Minister a written report of any matter of public importance related to the Commission, its functions or matters that may be complained about under the Human Rights Commission Act and this report must be presented to the Legislative Assembly.

While the petition does not specifically refer to this aspect of the Commission's complaint handling role, it may be useful to consider whether these powers would be equally relevant to any human rights complaint jurisdiction to ensure consistency in the approach taken by the Commission.

## **B. Other Jurisdictions**

There are only two other jurisdictions with a legislated bill of rights in Australia: Victoria and Queensland.

## i. Victoria

In Victoria under section 38 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter') it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. This provision is framed in very similar terms to the ACT Human Rights Act.

However, unlike the ACT, section 39 of the Charter does not provide a direct cause of action for breaches of human rights. Instead, section 39 allows a person who has commenced other proceedings about an act or decision of a public authority on the ground that the act or decision was unlawful to, in those proceedings, also seek relief or remedy in relation to a breach of human rights under the charter. In short, a person with a human rights complaint cannot go directly to court but would have to 'piggy-back' it onto another legal claim about the lawfulness of a public authority's act or decision.

Under section 13(2) of the *Ombudsman Act 1973* (Vic), the Victorian Ombudsman is able to consider complaints about administrative action including investigating whether that action is incompatible with, or failed to give proper consideration to, a human right set out in the Charter. The Victorian Ombudsman has some flexibility in the way it can handle complaints which includes informal resolution, formal investigation and reporting on outcomes to the relevant Minister and head of the relevant organisation.<sup>2</sup>

The Victorian review *From Commitment to Culture: 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* ('the Review') considered the benefit of alternative dispute resolution for vulnerable or disadvantaged people interacting with government.<sup>3</sup> The Review identified that "[h]aving an ongoing relationship with the community member, government has every incentive to try to work things out when an individual raises concerns. The involvement of an independent conciliator can help." One submission noted that alternative dispute resolution "provides a quick, cheap, accessible, informal and easy-to-navigate method of redress outside the traditional court system".

The Review considered the Victorian Equal Opportunity and Human Rights Commission's expertise in impartial dispute resolution for complaints of discrimination, sexual harassment, racial and religious vilification and victimisation, including conciliation, and the Victorian Civil and Administrative Tribunal's role in considering applications whether or not the dispute is resolved at the Commission.

Although acknowledging the Victorian Ombudsman's expertise in dealing with complaints about public sector authorities, the Review concluded that as the Ombudsman's investigative powers do not extend to dispute resolution, the Victorian Equal Opportunity and Human Rights Commission should be given the statutory function and resources to offer dispute resolution for disputes under the Charter.

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<sup>2</sup> Investigations: An overview of our investigation powers and processes, available at: <https://www.ombudsman.vic.gov.au/investigations/>.

<sup>3</sup> Recommendation 23, available at: [https://files.justice.vic.gov.au/2021-06/report\\_final\\_charter\\_review\\_2015.pdf](https://files.justice.vic.gov.au/2021-06/report_final_charter_review_2015.pdf).



The Victorian Government committed in its Government Response<sup>4</sup> to further consider this recommendation.

## ii. Queensland

As Australia's newest human rights jurisdiction, Queensland's *Human Rights Act 2019* has only been in effect for three years.

Like Victoria and the ACT, section 58 of the Queensland Human Rights Act makes it unlawful for a public entity to act or make a decision in a way that is not compatible with human rights. However, like Victoria, a person may only seek relief or remedy under section 59 if the application 'piggy-backs' on another independent ground of 'unlawfulness'.<sup>5</sup>

Queensland does provide a direct mechanism to make a human rights complaint under the Queensland Human Rights Act to the Queensland Human Rights Commission in the Act itself under Division 2 'Human rights complaints'. The Queensland legislation provides that complainants must first make a complaint to the relevant public entity about the alleged contravention. Only after at least 45 business days have elapsed, and the person has not received a response or has otherwise received an inadequate response, may the person then complain to the Queensland Human Rights Commission.

Subdivision 4 of the Queensland Human Rights Act sets out how conciliation of human rights complaints may be conducted, and Subdivision 5 sets out how complaints may be closed. The availability of early interventions under sections 68 and 77 of the Queensland Human Rights Act provides a more flexible approach to complaint handling as compared to complaints made under the *Anti-Discrimination Act 1991* (Qld).<sup>6</sup>

## 5. Human Rights Complaints to ACAT

The second proposal in the Petition is **if conciliation is unsuccessful, enable a complaint about a breach of the Human Rights Act to be made to ACAT for resolution.**

Currently, the ACAT may only consider complaints referred from the Human Rights Commission in relation to discrimination, retirement villages, certain types of occupancy disputes and conversion practices. It does not have a role in determining the range of service complaints that are considered by the Commission.

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<sup>4</sup> *Government response to the 2015 review of the Charter of Human Rights and Responsibilities Act*, available at: <https://www.justice.vic.gov.au/government-response-to-the-2015-review-of-the-charter-of-human-rights-and-responsibilities-act>.

<sup>5</sup> See e.g. *Dale v State of Queensland (Office of Industrial Relations)* [2022] QIRC 8 (13 January 2022), available at [http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QIRC/2022/8.html?context=1;query=%22hra2019148%20s59%22;mask\\_path=](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QIRC/2022/8.html?context=1;query=%22hra2019148%20s59%22;mask_path=)

<sup>6</sup> 'Human rights enquiries and complaints', *Human Rights Act 2019 Annual Report 2020-2021*, available at [https://www.ghrc.qld.gov.au/\\_data/assets/pdf\\_file/0018/36513/Human-Rights-Annual-Report-2020-21-Human-rights-enquiries-and-complaints.pdf](https://www.ghrc.qld.gov.au/_data/assets/pdf_file/0018/36513/Human-Rights-Annual-Report-2020-21-Human-rights-enquiries-and-complaints.pdf).

## A. Australian Tribunals

### i. Tribunals as Arbiters of Human Rights

As set out above, no human rights jurisdiction currently has a stand-alone cause of action for a breach of human rights to be heard by a tribunal.

In Victoria in situations where the Victorian Civil and Administrative Tribunal has jurisdiction to review a government decision, it can also consider a breach of the Charter as a ground for review and can award the same relief and remedies as for other grounds of review.<sup>7</sup>

Similarly, in Queensland, a tribunal has jurisdiction under section 59(1) of the Queensland Human Rights Act to consider claims of unlawfulness under that Act “by the back door, in providing for the right to make a claim or seek a remedy on the back of another claim regardless of whether it succeeds”.<sup>8</sup>

While some submissions to the Queensland Legal Affairs and Community Safety Committee’s 2015 report *Inquiry into a Possible Human Rights Act for Queensland* suggested that the Queensland Civil and Administrative Tribunal could be an accessible pathway for complaints, the overall Committee was unable to reach agreement about whether or not it was desirable to have a Queensland Human Rights Act at all, and Government Members ultimately recommended that the judiciary have no part in any complaint process where a person is perceived to have suffered a human rights matter.<sup>9</sup> The Explanatory Note of the *Human Rights Bill 2018* (Qld) acknowledged this background, and explained that the system for dealing with human rights complaints only was “to seek meaningful resolution of the human rights complaint in a way that is relatively informal”.<sup>10</sup>

In the ACT, ACAT does not have stand-alone jurisdiction to conduct any human rights review of the conduct of a public authority, but rather may consider issues arising under the Human Rights Act in the exercise of any discretion.<sup>11</sup>

Amending the Human Rights Act to enable ACAT to consider stand-alone human rights complaints, either to review matters that had been considered by the Human Rights Commission or to replace the ACT Supreme Court’s existing jurisdiction (at least in the first instance), would be a novel reform in Australia.

It would also create some complexity in relation to the range of service complaints currently considered and resolved by the ACT Human Rights Commission in relation to services (eg health services, services for children, services for people with disability and services for older people) which do not currently not have a Tribunal pathway. There may be a risk that creating a different pathway for service complaints that raise

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<sup>7</sup> See eg *Goode v Common Equity Housing* [2014] VSC 585 (21 November 2014), available at: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2014/585.html>.

<sup>8</sup> *The State of Queensland through the Department of Housing and Public Works v Tenant* [2020] QCAT 144 (15 May 2020), available at: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCAT/2020/144.html>.

<sup>9</sup> Available at: <https://documents.parliament.qld.gov.au/tableOffice/TabledPapers/2016/5516T1030.pdf>.

<sup>10</sup> Available at: <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2018-076>.

<sup>11</sup> *Commissioner for Social Housing v Cook* (Residential Tenancies) [2020] ACAT 36 (28 May 2020), available at: <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/act/ACAT/2020/36.html>.

human rights issues, compared with those that raise breaches of other standards, could cause confusion, and perceptions of inequity in the handling of these complaints.

## ii. Tribunals as Public Authorities

A tribunal's role in considering human rights issues is further complicated by the fact that case law in the ACT, Victoria and Queensland has established that tribunals, when acting in an administrative capacity, are themselves public entities. Tribunals are therefore required to comply with the provisions directed at public entities to act and make decisions in a way that is compatible with human rights, to give proper consideration to a human right relevant to the decision, and to interpret statutory provisions, to the extent possible that is consistent with their purpose, in a way that is compatible with human rights.<sup>12</sup>

In *Storch v Director-General, Department of Justice and Attorney-General* [2020], QCAT 152, Member Stepniak identified three steps a tribunal must take to give proper consideration to relevant human rights:

1. identify the protected human rights that may be affected by statutory provisions and their interpretation, as well as the tribunal's decisions and other actions
2. determine whether the relevant statutory provisions and their interpretation by the tribunal and the tribunal's decisions and actions are compatible with such human rights, and
3. even where a limit or an interference with a human right is identified, it may nevertheless be deemed compatible with human rights as long as the limitation is reasonable and justifiable.<sup>13</sup>

The question about whether or not a tribunal is acting as a public authority appears to depend on its jurisdiction under particular legislation. For example, in *Pye v Argyle Community Housing Ltd* CAN 002 761 855 (Appeal) [2021] ACAT 84, Presidential Member H Robinson found that in exercising its jurisdiction under the *Residential Tenancies Act 1997*, the tribunal is not acting as a public authority because the residential tenancies jurisdiction falls within the definition of the term 'court' under the Human Rights Act and residential tenancies proceedings do not involve ACAT acting in an administrative capacity.<sup>14</sup>

## B. United Kingdom

Outside Australia, there are examples of tribunals that can consider claims of human rights breaches. Under section 7 of the *Human Rights Act 1988* (UK), a person who claims that a public authority has acted (or proposes to act) in an unlawful way may bring proceedings against the authority under that Act in the appropriate court or tribunal. The appropriate court or tribunal may be determined in accordance with the relevant court procedures rules. The cause of action is stand-alone and does not require a complainant to have their complaint considered by an equality agency first.

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<sup>12</sup> *Storch v Director-General, Department of Justice and Attorney-General* [2020] QCAT 152 (6 May 2020), available at: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCAT/2020/152.html>.

<sup>13</sup> *Ibid.*

<sup>14</sup> Available at: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/act/ACAT/2021/84.html>.

## C. Referrals to the ACAT

The ACAT does have some experience considering claims of breaches of under the Human Rights Act, with the majority of reported decisions relating to human rights issues raised in the context of residential tenancies disputes.

In the ACT, certain types of complaints considered by the Human Rights Commission may already be referred to ACAT for determination:

- discrimination complaints,
- retirement village complaints,
- certain occupancy dispute complaints, and
- conversion practice complaints.

Generally speaking, if a complaint is not able to be resolved by conciliation (i.e. the complaint was closed with no conciliation agreement and the complainant did not withdraw the complaint), the complainant may ask the Commission to refer the complaint to the ACAT for determination.

## 6. Resource Implications

Introducing new avenues for human rights complaints will have resource implications for the ACT Human Rights Commission, the ACAT and the ACT Supreme Court. It may also have resource implications for public authorities, including ACT Directorates and agencies, and the legal assistance sector.

### A. ACT Human Rights Commission

The ACT Human Rights Commission already handles complaints across a broad range of jurisdictions as outlined above and if amendments were made to allow the Commission to consider human rights complaints as well, existing systems could be adapted to add this new jurisdiction. However, an increase in volume of complaints would likely require additional staffing and there may be some resources required for community education about the new jurisdiction.

### B. ACAT

As discussed above, certain types of complaints may already be referred to the ACAT and the ACAT does consider human rights issues in certain matters. Requiring complainants to go through the Human Rights Commission's complaints-handling process would help to reduce costs. However, if complaints which are not successfully conciliated are referred to the ACAT for determination, it could increase the ACAT's case load and resourcing requirements.

### C. ACT Supreme Court

It is difficult to assess how the proposed changes would impact the ACT Supreme Court's resourcing without further investigating how the ACAT's proposed jurisdiction to consider human rights complaints would interact with the Supreme Court's existing jurisdiction. On one hand, complaints may be diverted from the Supreme Court with complainants preferring the more cost-effective, informal service offered by the Human Rights Commission. However, there may be resourcing implications if matters can be appealed from ACAT to the Supreme Court.

## D. ACT Directorates and Agencies

If the Commission, and in turn the ACAT, is able to consider human rights complaints about public authorities, that will likely have resourcing implications for ACT Directorates and agencies. In addition to resources required for responding to complaints, opening up the possibility of conciliated financial outcomes will have potential funding implications.

Similarly, the Petition refers to the fact that there is currently “no ability to seek compensation [in the Supreme Court for harm done,” implying that there may be an expectation of compensation being awarded at ACAT. If the ACAT was to be able to award damages in human rights claims, that could have potentially significant implications for Directorates and agencies that are the subject of such complaints.

## E. Legal Assistance Sector

If individuals are able to make human rights complaints directly to the Commission, this may have resourcing implications for the legal assistance sector including Legal Aid ACT. Legal Aid ACT has previously represented individuals in Supreme Court matters<sup>15</sup> and allowing matters to be resolved in the first instance via the Commission’s complaints-handling process may both increase the number of requests for advice and decrease the number of matters requiring representation in the Supreme Court. Additionally, Legal Aid ACT has been found to itself be a public authority<sup>16</sup> and may also be required to respond to an increase in human rights complaints made to the Commission.

## Conclusion

The ACT Government is committed to continuing to build and strengthen our human rights culture in the ACT and is encouraged by the strong community interest in the ways in which our Human Rights Act can continue to be improved to protect the rights of everyone in the ACT. The Government welcomes this Inquiry and the detailed consideration by the Committee of the issues raised by the Petition.

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<sup>15</sup> See e.g. *LM v Childrens Court of the Australian Capital Territory and the Director of Public Prosecutions for the ACT* [2014] ACTSC 26, available at <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/act/ACTSC/2014/26.html>.

<sup>16</sup> See *Hakimi v Legal Aid Commission (ACT); The Australian Capital Territory (Intervener)* [2009] ACTSC 48, available at <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/act/ACTSC/2009/48.html>.



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1. enable a complaint about any breach of the *Human Rights Act 2004* to be made to the Human Rights Commission for confidential conciliation, and
2. 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 for resolution.

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## 2. Human Rights in the ACT

### A. Overview

The ACT is a leading human rights jurisdiction in Australia and was the first State or Territory to introduce a legislative bill of rights.

We have a proud human rights record in the ACT and in addition to setting out individual rights, section 30 of the Human Rights Act requires that a Territory law, so far as it is possible to do so consistently with its purpose, must be interpreted in a way that is compatible with human rights. This means that human rights issues may be relevant in any ACT matter that considers the meaning of a particular law.

The ACT Government is committed to building and strengthening our culture of human rights across the ACT Government and broader community.

As part of that commitment, in 2008 a new section 40B was introduced into the *Human Rights Act 2004* to create a specific obligation for public authorities to act consistently with human rights. As a result, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. This obligation is currently enforced through a stand-alone cause of action set out in section 40C.

Since that time the Government has continued to undertake reforms to strengthen the Human Rights Act, including the introduction of the right to education, cultural rights of Aboriginal and Torres Strait Islander peoples, and the right to work.

Our Human Rights Act has proved to be a model for other jurisdictions to follow, with Victoria enacting their *Charter of Human Rights and Responsibilities Act* in 2006, while Queensland more recently adopted their *Human Rights Act* in 2019. The ACT Government recognises the importance of this community of human rights jurisdictions, and the positive effect of learning from incremental reforms in those jurisdictions, to ensure that we continue to take a leading role in human rights protection in Australia.



In the Parliamentary and Governing Agreement for the Tenth Legislative Assembly, the Government has committed to exploring the introduction of the right to a healthy environment into the Human Rights Act. The Government is also committed to reforming our *Discrimination Act 1991* to further strengthen protections for the right to equality, and to establishing an Aboriginal and Torres Strait Islander Children's Commissioner to strengthen protections for the rights of Aboriginal and Torres Strait Islander children and their families in the ACT.

## **B. Human Rights Complaints**

There are a number of ways that concerns about breaches of human rights by a public authority can be raised under the current legislative framework.

### **i. ACT Courts**

The Human Rights Act was the first human rights statute in Australia to include a stand-alone cause of action for a breach of human rights obligations by a public authority, under section 40C. If a person claims that a public authority has acted in contravention of section 40B, that person may start a proceeding in the Supreme Court against the public authority.

A number of applications have been brought under this provision. The ACT Human Rights Commission in *Look who's talking: A snapshot of ten years of dialogue under the Human Rights Act 2004* suggested that, "[t]he direct right of action in the HR Act also remains under-utilised and it may be a remedy that is out of reach for the vast majority of people in the community".<sup>1</sup>

It is important to note that while section 40C creates a stand-alone cause of action in the Supreme Court, under section 40C(2)(b) of the Human Rights Act, a person may also rely on their rights in relation to a claim against a public authority in other legal proceedings, for example in proceedings in the ACT Civil and Administrative Tribunal.

The Human Rights Commissioner and the Attorney-General may also intervene in a proceeding before a court that involves the application of the Human Rights Act under sections 36 and 35 respectively.

Finally, if a proceeding is being heard by a Supreme Court and an issue arises about whether a Territory law is consistent with a human right, the court may declare that the law is not consistent with that right, and the registrar must present the Attorney-General with a copy of a declaration of incompatibility which must be tabled in the Assembly. This does not invalidate the law, but allows the Government and Assembly to consider options for reform.

### **ii. ACT Human Rights Commission**

Human rights issues may also be raised indirectly via the ACT Human Rights Commission's complaints handling jurisdiction, which is established under the *Human Rights Commission Act 2005*. In addition to the Human Rights Commissioner's functions relating to education about human rights and advising the relevant Minister on the operation of the Human Rights Act, human rights issues may also in some circumstances be raised as part of the Commission's ability to handle complaints in relation to:

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<sup>1</sup> Available at: <https://hrc.act.gov.au/wp-content/uploads/2015/03/HRA-10-yr-snapshot-HRDC-webversion.pdf>.

- discrimination,
- health services,
- disability and community services,
- services for older people,
- services for children and younger people,
- treatment of vulnerable people,
- victims rights,
- occupancy disputes,
- retirement villages and
- prohibited conversion practices.

For example, the Discrimination Commissioner may consider complaints under the *Discrimination Act 1991* which supports the right to equal and effective protection against discrimination on any ground under section 8(3) of the Human Rights Act. In making orders in relation to unlawful acts under the Discrimination Act, the ACT Civil and Administrative Tribunal must consider the public interest in ensuring the balance between the right to equal and effective protection against discrimination and equality before the law without distinction or discrimination and other human rights.

Additionally, if a person complains about a disability service, under section 40(b)(ii) of the Human Rights Commission Act, the Disability and Community Services Commissioner can consider human rights principles set out under the *Disability Services Act 1991*.

Where a service provider is a public authority, in considering a complaint about the service, the Commission may also consider the human rights obligations of the public authority as part of the generally accepted standard of service delivery of the provider. The Commission has applied a human rights lens in considering complaints and Commission-initiated considerations about a range of Government services.

The Commission can also make recommendations in final reports to government and non-government agencies about human rights issues where the agency has breached an applicable standard.

Nevertheless, there are some situations where a human rights issue may not be covered by the Commission's complaint handling role, such as complaints about housing services or corrective services, where these do not involve unlawful discrimination.

### 3. Human Rights Act Complaints to Human Rights Commission

The first proposal in the Petition is to **enable a complaint about any breach of the Human Rights Act to be made to the Human Rights Commission for confidential conciliation**. While human rights issues may be raised indirectly via the Commission's functions as outlined above, the Human Rights Commission does not have a specific function to take complaints about breaches of the Human Rights Act as part of its ordinary complaints-handling function.

#### A. ACT Human Rights Commission's Complaints Process

##### i. Investigation

The Human Rights Commission has the jurisdiction to investigate and conciliate complaints about a broad range of issues as set out above. To support its investigative functions, the Commission may require a

person to provide information or produce a document or other thing under section 73 of the Human Rights Commission Act. In a practical sense, once the Commission receives a complaint and allocates it to a case officer, the first step is to write to the respondent providing a copy of the complaint and requesting a response to questions, a response to any outcomes being sought and copies of any relevant documents. However, in some circumstances it may be appropriate to resolve matters informally, for example by making phone calls to the parties.

Once the information has been received from the respondent, the Commission may share some or all of the information with the complainant to assist in resolving the complaint.

## **ii. Conciliation**

Some matters may be suitable to be dealt with by way of conciliation conference, which is a confidential meeting between the parties to a complaint facilitated by a conciliator. Conciliation may be in-person, online or, in some circumstances, via shuttle where the conciliator communicates with each party individually via telephone or correspondence.

Conciliation conferences may result in a written agreement, and if the complaint is a discrimination complaint, occupancy dispute complaint, retirement village complaint or a conversion practice complaint, must be given to the ACT Civil and Administrative Tribunal (ACAT) under section 62(3)(b) of the Human Rights Commission Act.

## **iii. Reports and Recommendations**

If the Commission closes a complaint but is nevertheless satisfied that the respondent to a complaint has acted inconsistently with an applicable standard, the Commission may include recommendations in the final report as per section 81 of the Human Rights Commission Act. The Commission may also prepare a report in relation to a Commission-initiated consideration.

Recommendations must state a reasonable time within which the action should be taken, and section 85 of the Act requires the entity to tell the Commission in writing the action that has been taken in relation to the recommendation. If the relevant entity does not comply with the recommendations, the Commission may publish the name and details of the non-complying entity or report them to the Minister under section 86 of the Human Rights Commission Act. The Minister may in turn present the report to the Legislative Assembly.

Section 87 of the Human Rights Commission Act states that the Commission may also, on its own initiative, give the Minister a written report of any matter of public importance related to the Commission, its functions or matters that may be complained about under the Human Rights Commission Act and this report must be presented to the Legislative Assembly.

While the petition does not specifically refer to this aspect of the Commission's complaint handling role, it may be useful to consider whether these powers would be equally relevant to any human rights complaint jurisdiction to ensure consistency in the approach taken by the Commission.

## **B. Other Jurisdictions**

There are only two other jurisdictions with a legislated bill of rights in Australia: Victoria and Queensland.

## i. Victoria

In Victoria under section 38 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter') it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. This provision is framed in very similar terms to the ACT Human Rights Act.

However, unlike the ACT, section 39 of the Charter does not provide a direct cause of action for breaches of human rights. Instead, section 39 allows a person who has commenced other proceedings about an act or decision of a public authority on the ground that the act or decision was unlawful to, in those proceedings, also seek relief or remedy in relation to a breach of human rights under the charter. In short, a person with a human rights complaint cannot go directly to court but would have to 'piggy-back' it onto another legal claim about the lawfulness of a public authority's act or decision.

Under section 13(2) of the *Ombudsman Act 1973* (Vic), the Victorian Ombudsman is able to consider complaints about administrative action including investigating whether that action is incompatible with, or failed to give proper consideration to, a human right set out in the Charter. The Victorian Ombudsman has some flexibility in the way it can handle complaints which includes informal resolution, formal investigation and reporting on outcomes to the relevant Minister and head of the relevant organisation.<sup>2</sup>

The Victorian review *From Commitment to Culture: 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* ('the Review') considered the benefit of alternative dispute resolution for vulnerable or disadvantaged people interacting with government.<sup>3</sup> The Review identified that "[h]aving an ongoing relationship with the community member, government has every incentive to try to work things out when an individual raises concerns. The involvement of an independent conciliator can help." One submission noted that alternative dispute resolution "provides a quick, cheap, accessible, informal and easy-to-navigate method of redress outside the traditional court system".

The Review considered the Victorian Equal Opportunity and Human Rights Commission's expertise in impartial dispute resolution for complaints of discrimination, sexual harassment, racial and religious vilification and victimisation, including conciliation, and the Victorian Civil and Administrative Tribunal's role in considering applications whether or not the dispute is resolved at the Commission.

Although acknowledging the Victorian Ombudsman's expertise in dealing with complaints about public sector authorities, the Review concluded that as the Ombudsman's investigative powers do not extend to dispute resolution, the Victorian Equal Opportunity and Human Rights Commission should be given the statutory function and resources to offer dispute resolution for disputes under the Charter.

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<sup>2</sup> Investigations: An overview of our investigation powers and processes, available at: <https://www.ombudsman.vic.gov.au/investigations/>.

<sup>3</sup> Recommendation 23, available at: [https://files.justice.vic.gov.au/2021-06/report\\_final\\_charter\\_review\\_2015.pdf](https://files.justice.vic.gov.au/2021-06/report_final_charter_review_2015.pdf).

The Victorian Government committed in its Government Response<sup>4</sup> to further consider this recommendation.

## ii. Queensland

As Australia's newest human rights jurisdiction, Queensland's *Human Rights Act 2019* has only been in effect for three years.

Like Victoria and the ACT, section 58 of the Queensland Human Rights Act makes it unlawful for a public entity to act or make a decision in a way that is not compatible with human rights. However, like Victoria, a person may only seek relief or remedy under section 59 if the application 'piggy-backs' on another independent ground of 'unlawfulness'.<sup>5</sup>

Queensland does provide a direct mechanism to make a human rights complaint under the Queensland Human Rights Act to the Queensland Human Rights Commission in the Act itself under Division 2 'Human rights complaints'. The Queensland legislation provides that complainants must first make a complaint to the relevant public entity about the alleged contravention. Only after at least 45 business days have elapsed, and the person has not received a response or has otherwise received an inadequate response, may the person then complain to the Queensland Human Rights Commission.

Subdivision 4 of the Queensland Human Rights Act sets out how conciliation of human rights complaints may be conducted, and Subdivision 5 sets out how complaints may be closed. The availability of early interventions under sections 68 and 77 of the Queensland Human Rights Act provides a more flexible approach to complaint handling as compared to complaints made under the *Anti-Discrimination Act 1991* (Qld).<sup>6</sup>

## 5. Human Rights Complaints to ACAT

The second proposal in the Petition is **if conciliation is unsuccessful, enable a complaint about a breach of the Human Rights Act to be made to ACAT for resolution.**

Currently, the ACAT may only consider complaints referred from the Human Rights Commission in relation to discrimination, retirement villages, certain types of occupancy disputes and conversion practices. It does not have a role in determining the range of service complaints that are considered by the Commission.

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<sup>4</sup> *Government response to the 2015 review of the Charter of Human Rights and Responsibilities Act*, available at: <https://www.justice.vic.gov.au/government-response-to-the-2015-review-of-the-charter-of-human-rights-and-responsibilities-act>.

<sup>5</sup> See e.g. *Dale v State of Queensland (Office of Industrial Relations)* [2022] QIRC 8 (13 January 2022), available at [http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QIRC/2022/8.html?context=1;query=%22hra2019148%20s59%22;mask\\_path=](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QIRC/2022/8.html?context=1;query=%22hra2019148%20s59%22;mask_path=)

<sup>6</sup> 'Human rights enquiries and complaints', *Human Rights Act 2019 Annual Report 2020-2021*, available at [https://www.ghrc.qld.gov.au/\\_data/assets/pdf\\_file/0018/36513/Human-Rights-Annual-Report-2020-21-Human-rights-enquiries-and-complaints.pdf](https://www.ghrc.qld.gov.au/_data/assets/pdf_file/0018/36513/Human-Rights-Annual-Report-2020-21-Human-rights-enquiries-and-complaints.pdf).

## A. Australian Tribunals

### i. Tribunals as Arbiters of Human Rights

As set out above, no human rights jurisdiction currently has a stand-alone cause of action for a breach of human rights to be heard by a tribunal.

In Victoria in situations where the Victorian Civil and Administrative Tribunal has jurisdiction to review a government decision, it can also consider a breach of the Charter as a ground for review and can award the same relief and remedies as for other grounds of review.<sup>7</sup>

Similarly, in Queensland, a tribunal has jurisdiction under section 59(1) of the Queensland Human Rights Act to consider claims of unlawfulness under that Act “by the back door, in providing for the right to make a claim or seek a remedy on the back of another claim regardless of whether it succeeds”.<sup>8</sup>

While some submissions to the Queensland Legal Affairs and Community Safety Committee’s 2015 report *Inquiry into a Possible Human Rights Act for Queensland* suggested that the Queensland Civil and Administrative Tribunal could be an accessible pathway for complaints, the overall Committee was unable to reach agreement about whether or not it was desirable to have a Queensland Human Rights Act at all, and Government Members ultimately recommended that the judiciary have no part in any complaint process where a person is perceived to have suffered a human rights matter.<sup>9</sup> The Explanatory Note of the *Human Rights Bill 2018* (Qld) acknowledged this background, and explained that the system for dealing with human rights complaints only was “to seek meaningful resolution of the human rights complaint in a way that is relatively informal”.<sup>10</sup>

In the ACT, ACAT does not have stand-alone jurisdiction to conduct any human rights review of the conduct of a public authority, but rather may consider issues arising under the Human Rights Act in the exercise of any discretion.<sup>11</sup>

Amending the Human Rights Act to enable ACAT to consider stand-alone human rights complaints, either to review matters that had been considered by the Human Rights Commission or to replace the ACT Supreme Court’s existing jurisdiction (at least in the first instance), would be a novel reform in Australia.

It would also create some complexity in relation to the range of service complaints currently considered and resolved by the ACT Human Rights Commission in relation to services (eg health services, services for children, services for people with disability and services for older people) which do not currently not have a Tribunal pathway. There may be a risk that creating a different pathway for service complaints that raise

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<sup>7</sup> See eg *Goode v Common Equity Housing* [2014] VSC 585 (21 November 2014), available at: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2014/585.html>.

<sup>8</sup> *The State of Queensland through the Department of Housing and Public Works v Tenant* [2020] QCAT 144 (15 May 2020), available at: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCAT/2020/144.html>.

<sup>9</sup> Available at: <https://documents.parliament.qld.gov.au/tableOffice/TabledPapers/2016/5516T1030.pdf>.

<sup>10</sup> Available at: <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2018-076>.

<sup>11</sup> *Commissioner for Social Housing v Cook* (Residential Tenancies) [2020] ACAT 36 (28 May 2020), available at: <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/act/ACAT/2020/36.html>.

human rights issues, compared with those that raise breaches of other standards, could cause confusion, and perceptions of inequity in the handling of these complaints.

## ii. Tribunals as Public Authorities

A tribunal's role in considering human rights issues is further complicated by the fact that case law in the ACT, Victoria and Queensland has established that tribunals, when acting in an administrative capacity, are themselves public entities. Tribunals are therefore required to comply with the provisions directed at public entities to act and make decisions in a way that is compatible with human rights, to give proper consideration to a human right relevant to the decision, and to interpret statutory provisions, to the extent possible that is consistent with their purpose, in a way that is compatible with human rights.<sup>12</sup>

In *Storch v Director-General, Department of Justice and Attorney-General* [2020], QCAT 152, Member Stepniak identified three steps a tribunal must take to give proper consideration to relevant human rights:

1. identify the protected human rights that may be affected by statutory provisions and their interpretation, as well as the tribunal's decisions and other actions
2. determine whether the relevant statutory provisions and their interpretation by the tribunal and the tribunal's decisions and actions are compatible with such human rights, and
3. even where a limit or an interference with a human right is identified, it may nevertheless be deemed compatible with human rights as long as the limitation is reasonable and justifiable.<sup>13</sup>

The question about whether or not a tribunal is acting as a public authority appears to depend on its jurisdiction under particular legislation. For example, in *Pye v Argyle Community Housing Ltd* CAN 002 761 855 (Appeal) [2021] ACAT 84, Presidential Member H Robinson found that in exercising its jurisdiction under the *Residential Tenancies Act 1997*, the tribunal is not acting as a public authority because the residential tenancies jurisdiction falls within the definition of the term 'court' under the Human Rights Act and residential tenancies proceedings do not involve ACAT acting in an administrative capacity.<sup>14</sup>

## B. United Kingdom

Outside Australia, there are examples of tribunals that can consider claims of human rights breaches. Under section 7 of the *Human Rights Act 1988* (UK), a person who claims that a public authority has acted (or proposes to act) in an unlawful way may bring proceedings against the authority under that Act in the appropriate court or tribunal. The appropriate court or tribunal may be determined in accordance with the relevant court procedures rules. The cause of action is stand-alone and does not require a complainant to have their complaint considered by an equality agency first.

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<sup>12</sup> *Storch v Director-General, Department of Justice and Attorney-General* [2020] QCAT 152 (6 May 2020), available at: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QCAT/2020/152.html>.

<sup>13</sup> *Ibid.*

<sup>14</sup> Available at: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/act/ACAT/2021/84.html>.

## C. Referrals to the ACAT

The ACAT does have some experience considering claims of breaches of under the Human Rights Act, with the majority of reported decisions relating to human rights issues raised in the context of residential tenancies disputes.

In the ACT, certain types of complaints considered by the Human Rights Commission may already be referred to ACAT for determination:

- discrimination complaints,
- retirement village complaints,
- certain occupancy dispute complaints, and
- conversion practice complaints.

Generally speaking, if a complaint is not able to be resolved by conciliation (i.e. the complaint was closed with no conciliation agreement and the complainant did not withdraw the complaint), the complainant may ask the Commission to refer the complaint to the ACAT for determination.

## 6. Resource Implications

Introducing new avenues for human rights complaints will have resource implications for the ACT Human Rights Commission, the ACAT and the ACT Supreme Court. It may also have resource implications for public authorities, including ACT Directorates and agencies, and the legal assistance sector.

### A. ACT Human Rights Commission

The ACT Human Rights Commission already handles complaints across a broad range of jurisdictions as outlined above and if amendments were made to allow the Commission to consider human rights complaints as well, existing systems could be adapted to add this new jurisdiction. However, an increase in volume of complaints would likely require additional staffing and there may be some resources required for community education about the new jurisdiction.

### B. ACAT

As discussed above, certain types of complaints may already be referred to the ACAT and the ACAT does consider human rights issues in certain matters. Requiring complainants to go through the Human Rights Commission's complaints-handling process would help to reduce costs. However, if complaints which are not successfully conciliated are referred to the ACAT for determination, it could increase the ACAT's case load and resourcing requirements.

### C. ACT Supreme Court

It is difficult to assess how the proposed changes would impact the ACT Supreme Court's resourcing without further investigating how the ACAT's proposed jurisdiction to consider human rights complaints would interact with the Supreme Court's existing jurisdiction. On one hand, complaints may be diverted from the Supreme Court with complainants preferring the more cost-effective, informal service offered by the Human Rights Commission. However, there may be resourcing implications if matters can be appealed from ACAT to the Supreme Court.



## D. ACT Directorates and Agencies

If the Commission, and in turn the ACAT, is able to consider human rights complaints about public authorities, that will likely have resourcing implications for ACT Directorates and agencies. In addition to resources required for responding to complaints, opening up the possibility of conciliated financial outcomes will have potential funding implications.

Similarly, the Petition refers to the fact that there is currently “no ability to seek compensation [in the Supreme Court for harm done,” implying that there may be an expectation of compensation being awarded at ACAT. If the ACAT was to be able to award damages in human rights claims, that could have potentially significant implications for Directorates and agencies that are the subject of such complaints.

## E. Legal Assistance Sector

If individuals are able to make human rights complaints directly to the Commission, this may have resourcing implications for the legal assistance sector including Legal Aid ACT. Legal Aid ACT has previously represented individuals in Supreme Court matters<sup>15</sup> and allowing matters to be resolved in the first instance via the Commission’s complaints-handling process may both increase the number of requests for advice and decrease the number of matters requiring representation in the Supreme Court. Additionally, Legal Aid ACT has been found to itself be a public authority<sup>16</sup> and may also be required to respond to an increase in human rights complaints made to the Commission.

## Conclusion

The ACT Government is committed to continuing to build and strengthen our human rights culture in the ACT and is encouraged by the strong community interest in the ways in which our Human Rights Act can continue to be improved to protect the rights of everyone in the ACT. The Government welcomes this Inquiry and the detailed consideration by the Committee of the issues raised by the Petition.

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<sup>15</sup> See e.g. *LM v Childrens Court of the Australian Capital Territory and the Director of Public Prosecutions for the ACT* [2014] ACTSC 26, available at <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/act/ACTSC/2014/26.html>.

<sup>16</sup> See *Hakimi v Legal Aid Commission (ACT); The Australian Capital Territory (Intervener)* [2009] ACTSC 48, available at <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/act/ACTSC/2009/48.html>.