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FOR THE AUSTRALIAN CAPITAL TERRITORY

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

Submission Cover Sheet

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

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AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS™

No Rights Without Remedy

Submission to Inquiry into Petition 32-21

Standing Committee on Justice and Community Safety
ACT Legislative Assembly
GPO Box 1020, Canberra ACT 2601

7 APRIL 2022

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Human rights are the tools we use to fight for the basic rights and freedoms that should be protected in relation to every person in the world, from birth until death, no matter our race, gender, religion, abilities, political belief, sexuality, age or any other characteristics. Protecting our human rights ensures that we are treated fairly and equally.¹

Everyone has a right to an effective remedy for acts violating the human rights they are granted by law.

Acknowledgements

Australian Lawyers for Human Rights (**ALHR**) acknowledges the traditional owners and custodians of the lands on which we work in the Australian Capital Territory as the first people of this country. We recognise that the land belonging to these peoples was never ceded, given up, bought, or sold. We pay our respect to Elders past, present and emerging and express our strong support for the Uluru Statement from the Heart.

About Australian Lawyers for Human Rights

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees.

ALHR seeks to utilise its extensive experience and expertise in the principles and practice of international law and human rights law in Australia to:

- Promote Federal and State laws across Australia that comply with the principles of international human rights law;
- Engage with the United Nations in relation to Australian human rights violations;
- Promote and support lawyers' practice of human rights law in Australia;
- Engage internationally to promote human rights and the rule of law.

Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

¹ Anat Shenker-Osorio Op-cit.

Executive Summary

Australian Lawyers for Human Rights is grateful for the opportunity to make this submission to the ACT Legislative Assembly Standing Committee on Justice and Community Safety (**the Committee**) *Inquiry into Petition 32-21 (No Rights Without Remedy)*.

The 'No Rights Without Remedy' Petition (**the Petition**) was jointly supported by ALHR and the ACT Council of Social Services (**ACTCOSS**) and was signed by 518 signatories and tabled in the Legislative Assembly on 23 November 2021. The Petition, which forms the terms of reference for this Inquiry, calls for the *Human Rights Act 2004 (ACT)* (**the Act**) to be amended to include an accessible complaints mechanism.

ALHR is a strong supporter of the ACT Human Rights Act and we acknowledge that, as one of only three states and territories to have introduced a legislated human rights framework, the ACT plays a significant role in leading the country on human rights compliance. We applaud amendments to the Human Rights Act introduced since 2004 which have expanded the scope of the human rights protected by the Act.

However, we are concerned that there are key deficiencies in the Act that lead to the ACT being a human rights jurisdiction in name alone. While the ACT Human Rights Act was drafted to protect individuals against breaches of their human rights by government and government agencies, it currently fails to provide an accessible way for people to make complaints when breaches of the Act occur.

ALHR therefore urges the Committee to recommend that the ACT Legislative Assembly amend the Human Rights Act to include an accessible complaints mechanism. Doing so would transform the Human Rights Act from being a largely theoretical document, to one which everyone in the ACT community can use to ensure their human rights are meaningfully protected.

Recommendations

ALHR makes the following recommendations:

1. Noting that there is a human right to an effective remedy when human rights are violated, The *Human Rights Act 2004 (ACT)* should be amended to include an accessible two-tiered complaints mechanism that specifically enables:
 - a. a complaint about any breach of the Human Rights Act to be made to the ACT Human Rights Commission (HRC) and heard and reconciled by the Commission's internal complaint handling mechanisms for confidential conciliation; and
 - b. if conciliation is unsuccessful, a complaint about a breach of the Human Rights Act to be made to the ACT Civil and Administrative Tribunal (ACAT) for resolution.
2. The existing infrastructure of the HRC and ACAT currently in utilisation for discrimination and other complaints should be used in order to provide a no-cost, simple pathway for individuals to make complaints.
3. For the HRC and ACAT to effectively respond to the additional workload that creating a new complaints mechanism would produce, the ACT Government should:
 - a. ensure that the HRC and ACAT are adequately resourced; and
 - b. conduct an in depth consultation process engaging with the expertise of those bodies to receive guidance as to the precise nature of the resourcing that would be required.
4. The ACT Government should accompany any amendments to the *Human Rights Act 2004 (ACT)* with:
 - a. a broad program of human rights education, aimed at fostering understanding of the changes to the Act across the community, with particular attention to CALD, First Nations, people with disability and other marginalised or disadvantaged groups; and
 - b. adequate funding for a legal advice service to give individuals information, legal advice and assistance about their human rights..

Inadequacies of the existing system

While ALHR strongly supports the ACT Human Rights Act and acknowledges the role the ACT plays in leading the country on human rights compliance, ALHR is concerned that there are key deficiencies in the ACT Human Rights Act.

People in the ACT deserve laws that ensure everyone can live in safety, in freedom, and with dignity. Every person in the ACT is entitled to be treated fairly and equally, with compassion and respect. However, we know from experience that human rights are at risk of being rendered meaningless if they cannot be legally enforced. The addition of an accessible complaints mechanism in the ACT Human Rights Act would enable the ACT to meaningfully hold all behaviours up to the standards set out in the ACT Human Rights Act. In so doing it would better enable the ACT to address harmful and discriminatory practices.

As the Committee is aware, currently an individual is able to make a complaint if they believe that their rights have been breached by bringing a legal action to the Supreme Court. Such actions are very expensive and complex, making them difficult to access for everyday people in the ACT. There are significant cost barriers associated with this type of legal action, and - for most people - bringing a legal complaint to the Supreme Court can be an extremely intimidating, complex and inaccessible process.

Further, there is currently no way for an individual to seek any compensation for harm they have suffered due to the breach of their human rights.

The people of the ACT need easier, cheaper and simpler pathways to make a complaint if the ACT Human Rights Act is to realise its true potential to protect and promote human rights.

The Preamble to the Human Rights Act states that “human rights are necessary for individuals to live lives of dignity and value” and that “respecting, protecting and promoting the rights of individuals improves the welfare of the whole community.”² ALHR submits that the right to an effective and accessible remedy is an absolutely essential component of that legislative purpose.

ALHR therefore urges the Committee to recommend that the ACT Legislative Assembly amend the Human Rights Act pursuant to our recommendations to include an accessible

² *Human Rights Act 2004 (ACT)* Preamble

complaints mechanism. Doing so would transform the Human Rights Act from being a largely theoretical document, to one which members of our community can use to ensure their human rights are meaningfully protected.

It would not be difficult to overcome these barriers by creating a simple, low-cost pathway for individuals to make complaints. We already have the institutions and infrastructure in place to do this through our ACT Human Rights Commission (HRC). We just need it to be enabled in legislation and adequately resourced.

Relevant International Human Rights Law Principles

Amending the ACT Human Rights Act to include an accessible complaints mechanism would make the act more consistent with international human rights law standards.

The right to a remedy for victims of violations of international human rights law is an essential component of international human rights law and a fundamental principle found in numerous international instruments, in particular:

- article 8 of the Universal Declaration of Human Rights (UDHR)³;
- article 2 of the International Covenant of Civil and Political Rights (ICCPR)⁴;
- article 6 of the Convention on the Elimination of all Forms of Racial Discrimination (CERD)⁵;
- article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁶;
- article 39 of the Convention on the Rights of the Child (CRC)⁷;
- article 2 of the Convention on the Elimination of Discrimination against Women (CEDAW)⁸; and
- article 4 of the Convention on the Rights of Persons with Disabilities (CRPD).⁹

³ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A

⁴ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

⁵ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, A/RES/2106

⁶ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85

⁷ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3

⁸ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13

⁹ UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106

ICCPR Article 2.3 states:

Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

As well as noting the importance of judicial and administrative remedies, the United Nations Human Rights Committee (UNHRC) has noted

- the importance of investigative measures to ensure that breaches of human rights and those responsible for breaches are identified
- the important roles which may be played by national human rights institutions
- that remedies should include compensation and other remedial measures, and should also include preventive measures which may include changes in laws, policies and practices.
- that in some cases an appropriate remedy may include making an apology. The National Apology which followed from the Commission's Stolen Generations inquiry provide a clear example in this respect. Apologies are also frequently a part of agreed resolution of complaints to the Commission.

Mechanisms under the ICCPR and other human rights instruments for individual complaints to the ICCPR and other treaty monitoring bodies require that complainants have first exhausted all domestic remedies. In any such complaints involving Australia there will accordingly be issues regarding whether an effective domestic remedy is available.

The '*Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*'¹⁰ establish that the scope of States' obligations to respect, ensure respect for and implement international human rights law, includes, inter alia, the duty to:

¹⁰ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

- Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
- Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, irrespective of who may ultimately be the bearer of responsibility for the violation; and
- Provide effective remedies to victims.¹¹

Both the UNHRC and the Committee on the Elimination of Racial Discrimination¹² have stated that the right to an effective remedy encompasses not only an obligation to bring to justice perpetrators of human rights breaches but also to provide appropriate reparation to victims. Reparation can involve measures including compensation, restitution, rehabilitation, public apologies, guarantees of non-repetition and changes in relevant laws and practices.

Australian courts have not accepted attempts by complainants to rely on breaches of international treaty provisions.. Instead, complainants must find a basis for their claim in Australian law.¹³ Given the piecemeal protections of human rights across Australia with only Victoria, Queensland and the ACT having enacted Human Rights Act, this can be difficult and leaves Australians exposed to violations of their human rights without access to an effective remedy or accountability mechanism. This makes it all the more important that when a state such as the ACT has led the nation with its Human Rights Act, the protection offered includes access to an accessible complaints mechanism.

Amending the ACT Human Rights Act to include an accessible complaints mechanism would be consistent with Australia's international legal obligations.

Human Rights Act 2019 (QLD) Complaints Mechanism

ALHR submits that the experience of Queensland in incorporating an accessible complaints mechanism into the *Human Rights Act 2019 (QLD)* (QLD Human Rights Act) may inform the Committee and the ACT Government in consideration of amendments to the ACT Human Rights Act. Below, we detail the complaints mechanism that exists under the QLD Human Rights Act and draw the Committee's attention to the ways it has been used since 2019 via a selection of case studies and data.

¹¹ Ibid II 3 (b), (c) and (d).

¹² See UN Human Rights Committee General Comment No 31 (paragraphs 15 – 20), UN Committee on the Elimination of Racial Discrimination General Recommendation No 26, UN Human Rights Committee General Comment No 29 (paragraph 15, on derogations).

¹³ *Minogue v Williams* (2000) 60 ALD 366, 371.

The QLD Complaints Mechanism

The QLD Human Rights Act protects 23 human rights in law. It places obligations on public agencies to be compatible with human rights when acting or making a decision. People in Queensland are able to make a human rights complaint directly to the relevant public agency. Pursuant to Part 4 Division 2 of the QLD Human Rights Act¹⁴ they can also make a complaint to the Queensland Human Rights Commission (QHRC) to be resolved through conciliation if:

- (a) they have already made a complaint to the public agency about the alleged breach which is the subject of their complaint, and
- (b) at least 45 business days has elapsed since the complaint was made, and
- (c) they have not received a response to the complaint or have received a response that they consider to be inadequate.¹⁵

The QHRC Commissioner has discretion to accept a complaint where less than 45 days has elapsed if there are exceptional circumstances.¹⁶

When complaints are lodged with the QHRC they are previewed by an intake team to see if the complaint requires an urgent response. If the complaint involves any of the following circumstances of urgency, it may be prioritised if appropriate:

- a person or their family's life, liberty, health and/or safety are at imminent and significant risk;
- where the delay would cause significant harm to a person in some other way;
- or where the delay would deprive a person of an effective potential remedy, for example, where a child or student has been excluded/suspended from school and it is important for them to return for exams or graduation

The QHRC receives complaints via an online complaint form which gathers the information necessary to ensure that a complaint can be assessed efficiently.

Where a complaint is covered by both the *Anti-Discrimination Act 1991 (QLD)* and the *QLD Human Rights Act*, it is not necessary for a person making a complaint to know which aspects of their complaint involve discrimination or human rights in order to lodge it. Further, the QHRC can deal with complaints that engage both Acts (known as "piggy-back")

¹⁴ See *Human Rights Act 2019 (QLD) Part 4 Division 2* available at <https://www.legislation.qld.gov.au/view/html/asmade/act-2019-005#pt.4-div.2>

¹⁵ S.65 *Human Rights Act 2019 (QLD)*

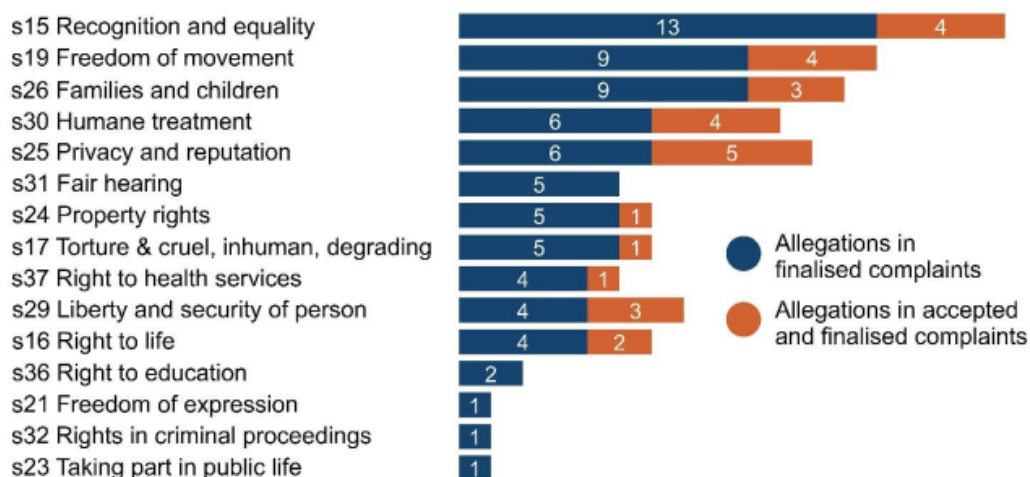
¹⁶ IBID S. 65(2)

complaints) under the *AntiDiscrimination Act 1991* as if they were a contravention of the *AntiDiscrimination Act 1991*.¹⁷

The inclusion of this accessible complaints mechanism in the QLD Human Rights Act has ensured people whose rights are breached have a means to pursue a resolution, adding an important dimension by offering a framework whereby solutions that are satisfactory for all parties can often be reached without resort to litigation in the courts, thus reducing costs and improving human rights outcomes in Queensland.¹⁸

Data on the use of the Queensland Complaints Mechanism 2019 - 2020

The below table take from “*Putting people first: the first annual report on the operation of Queensland's Human Rights Act, 2019-20*” shows the human rights relevant to the allegations raised in the complaints finalised by the QHRC in 2019–20



¹⁷ IBID S.75

¹⁸ See “Balancing life and liberty: the second annual report on the operation of Queensland's Human Rights Act, 2020-21” available at: https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0018/36513/Human-Rights-Annual-Report-2020-21-Human-rights-enquiries-and-complaints.pdf

The below table taken from “*Balancing life and liberty: the second annual report on the operation of Queensland's Human Rights Act, 2020-21*” shows the human rights relevant to the allegations raised in the complaints finalised by the QHRC in 2020–21



Case Studies Illustrative of the Success of the QLD Complaints Mechanism

The following resolved complaint case studies from the QHRC illustrate the practical ways in which the inclusion of a conciliatory complaints mechanism in the QLD Human Rights Act is providing Queenslanders with an accessible remedy when their human rights are breached.

Access to family during COVID¹⁹

A teenager held in remand in youth detention wanted to see his family for his birthday. However, due to restrictions imposed to prevent the spread of COVID-19, family visits were postponed at the centre. Through conciliation, the detention centre and the young person's mother agreed on a plan to maintain family contact during the pandemic. The young person talked to his family for one hour on a video call for his birthday, and once the restrictions eased his family was able to visit him in person.

Relevant rights: Recognition and equality before the law, protection of families and children: Sections 15 and 26 *Human Rights Act 2019 (QLD)*

Transport service reviews disability policies and commits to training²⁰

A woman who had mobility issues made a complaint about the limited number of accessible parks at a bus terminal, and being issued with a number of fines for parking in other places. She said that on two occasions the bus driver refused to engage the ramp, requiring her to struggle up and down the bus stairs.

The complaint was resolved on the basis that the transport service agreed to conduct an internal review of its policies and procedures about the use of ramps, and to provide a copy to all bus drivers employed by it. Employees were also required to attend training on the Anti-Discrimination Act and the Human Rights Act, and an internal training module on human rights and improving services to people with disability was introduced.

Relevant rights: Recognition and equality before the law: Section 15 *Human Rights Act 2019 (QLD)*

¹⁹ *Putting people first: the first annual report on the operation of Queensland's Human Rights Act, 2019-20* p134-135

²⁰ *IBID*, p.158

Railway station not accessible²¹

An older person who had serious back problems following an operation was having difficulty accessing a train station when escalators at the station were replaced by steep stairs. The complaint was resolved through the conciliation process in which it was agreed that escalators would be installed as part of a station upgrade.

Relevant human rights: Recognition and equality before the law, freedom of movement: Sections 15 and 19 *Human Rights Act 2019 (QLD)*

Approved absence from social housing allowed mother to pursue training opportunity²²

A social housing provider had a general rule that absences from the home of more than 5 months were not permitted. A mother of four children needed to leave her home for several months at a time to commence defence force training. She sought to better her employment opportunities, with her husband being the primary carer of the children. One of her four children has an intellectual disability and a hearing impairment. She was told by the housing provider that if she commenced the training as planned, she would be in breach of the 5- month rule and the family would need to leave their home.

Through conciliation it was agreed that the woman would be permitted to be absent from the property to complete the training, on the condition that she provide evidence of the requirement to attend, return to the property shortly after each absence, notify the housing provider once the training was completed, and continue to pay rent and maintain responsibility for the property during her absence.

Relevant rights: Recognition and equality before the law, freedom of movement, property rights), protection of families and children: Sections 15, 18, 24 and 26 *Human Rights Act 2019 (QLD)*

²¹ Op.cit. "Putting People First QHRC, p. 135

²² IBID, p.161

Police express regret about asking traditional custodians to move on while exercising their cultural rights²³

Community leader Adrian Burragubba and his family were camping, practicing their culture, and performing traditional ceremonies on a pastoral lease area. Police officers approached the group and asked them to leave, stating that the mining company Adani had claimed they were ‘trespassing’. The site was the subject of an Indigenous Land Use Agreement but the family opposed the agreement and the mine, saying that Aboriginal people had been exercising their culture by fishing and hunting and performing ceremonies for 40,000 years.

Cultural rights of Aboriginal peoples and Torres Strait Islander peoples are specifically protected by the Human Rights Act, including the right to maintain their distinctive spiritual, material, and economic relationship with the land and waters with which they hold a connection. The family told the police that they had received expert advice that they could lawfully exercise their cultural rights and responsibilities. However, the police required the group to pack up their equipment and leave within an hour. The family says that this caused grief and trauma.

The Queensland Police Service (QPS) agreed to provide a statement of regret which was able to be shared publicly. The statement acknowledged that the events caused embarrassment, hurt, and humiliation for the complainant and his extended family, that there are complex legal issues and cultural sensitivities, and that the QPS will commit to take into account the issues in the complaint in future responses.

Relevant rights: Recognition and equality before the law, freedom of movement, cultural rights – Aboriginal peoples and Torres Strait Islander peoples: Sections 15, 18 and 28 *Human Rights Act 2019 (QLD)*

²³ IBID, p.162

Family needed accessible social housing²⁴

An Aboriginal woman with a disability lived in social housing with her 3 children (who also have disabilities) and was issued with a Notice to Leave because of a serious breach of the tenancy agreement. The circumstances leading up to the eviction were in dispute, but QCAT made an order that the woman vacate the property. After leaving the premises, the woman and her children were in unstable accommodation, and she understood that she could no longer receive any housing assistance from the social housing provider. The woman also raised concerns that while in the property it took too long to arrange modifications to the social housing property to meet her disability needs so she could safely shower and access the kitchen. The complaint settled on a financial sum and an expression of regret about the delay in progressing modifications to the property. The social housing provider also agreed to continue to provide services to her and her children, including supporting her to apply for appropriate and accessible accommodation in the area.

Relevant human rights: Recognition and equality before the law, property rights, privacy and reputation, protection of families and children: Sections 15, 24, 25 and 26 *Human Rights Act 2019 (QLD)*

Suitable social housing secured for older woman with mobility issues²⁵

A 73-year-old woman with lung cancer had been approved for social housing, but had only been offered properties that she considered to be unsuitable for her mobility needs. She also needed a yard area for her dog. She was facing homelessness, as her private rental was up for sale and she had been unsuccessful in applying for around 30 properties in the private market. The social housing provider expressed empathy for her circumstances but explained that demand for housing exceeded the supply, and that allocations had to be made depending on the number of available properties and the needs of those in queue for social housing. Through the conciliation process, the social housing provider offered the woman a suitable one-bedroom apartment with an enclosed courtyard.

Relevant rights: Recognition and equality before the law, right to privacy and reputation. Sections 15 and 25 *Human Rights Act 2019 (QLD)*

²⁴ Op.cit. "Putting People First QHRC, p. 137-138

²⁵ IBID, p.164

Employer takes steps preventing breaches of privacy & reputation in future²⁶

A state government employer suspended an employee who was receiving financial support for her university course and who was alleged to have received the assistance of a colleague for the coursework during work hours. Without first speaking with her about the allegations, the employer emailed the employee's university to advise them of potential academic misconduct

The employee complained that this disclosure came before the external investigation had started, that she had not had the opportunity to learn details of the allegation or to respond, and that her employer had been under no obligation to raise the allegation or investigation with the university.

In making a human rights complaint about the issue, she argued that her employer failed to properly consider her human rights – in particular the right to privacy and reputation set out in section 25 of the Human Rights Act. The employee said that her employer's actions had negatively impacted on her professional and academic reputation. To resolve the complaint the employer agreed to contact the university and explain there was no evidence of wrongdoing, apologise in writing to the employee, and to review their policies and procedures relating to the issues raised in the complaint.

Relevant rights: Privacy and reputation: Section 25 *Human Rights Act 2019 (QLD)*

Other Comparable Legal Systems

New Zealand

In New Zealand, there is both a Bill of Rights and a Human Rights Charter. Beyond these two important statutes, some rights are specifically protected in other pieces of legislation – e.g. rights relating to education are guaranteed under the New Zealand *Education Act 1989*.

²⁷ The NZ Court of Appeal has held that effective and appropriate remedies must be available for a breach of one of the rights contained in the NZ Bill of Rights.²⁸ President Cooke stated that 'we would fail in our duty if we did not give an effective remedy to a person

²⁶ IBID,p.165

²⁷ Geoffrey Palmer & Andrew Butler, 'A Constitution for Aotearoa New Zealand' (Victoria University Press, 1st ed, 2016), 161-162.

²⁸ *Simpson v Attorney General (Baigent's Case)* [1994] 3 NZLR.

whose legislatively affirmed rights have been infringed'.²⁹ ALHR strongly agrees with this statement by President Cooke.

Complaints of breaches under the Human Rights Act 1993 are made to the Human Rights Commission. The Human Rights Commission receives complaints and assists the parties to resolve them, but does not make decisions. Importantly, the Human Rights Commission contains an independent Office of Human Rights Proceedings that provides free legal representation to complainants to take select cases to the Human Rights Review Tribunal. If the Commission is unable to resolve the complaint, the complaint can be referred to the Human Rights Review Tribunal for a decision to be made on the matter. The Human Rights Review Tribunal is a specialist body that deals with cases brought under the law and can award damages for losses suffered and lost dignity.

Canada

In Canada, human rights are constitutionally protected by the Canadian *Charter of Rights and Freedoms* 1982 ('Charter').³⁰ Under the Canadian Charter, remedies are available from the court, including declaratory relief, damages, mandamus and injunctions, as well as a declaration that the law (or part thereof) is invalid.³¹ Under the federal, provincial, and territorial human rights acts, remedies are available through the respective Human Rights Commissions and Tribunals. An individual makes a complaint to the respective Human Rights Commission. If the complaint has merit, the Commission refers the complaint to the respective Tribunal, which is independent. If the Tribunal cannot resolve the complaint through mediation, it conducts a hearing and makes a decision.

At the federal level, under s 53 of the Canadian Human Rights Act, the Canadian Human Rights Tribunal may order cessation of, and measures to prevent in future, the discriminatory practice; making available to the victim the denied rights, opportunities or privileges; compensation for lost wages, the additional costs of obtaining alternative goods, services, facilities, or accommodation, and pain and suffering; and interest on compensation. Provincial and territorial Tribunals may make similar orders.

²⁹ IBID 676.

³⁰ *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

³¹ Sections 24 and 52(1). Charter remedies are generally available under s 52(1) (in the case of an unconstitutional law) or s 24(1) (in the case of unconstitutional government action), not both (*Schacter v Canada* [1991] 2 SCR 79). Some exceptions are if the government's conduct was "clearly wrong, in bad faith or an abuse of power" (*Mackin v New Brunswick* [2002] 1 SCR 405) or if the court wishes to exempt the applicant from the application of the infringing law during (*Nova Scotia (Workers Compensation Board) v Martin* [2003] 2 SCR 96) or after (*R v Demers* [2004] 2 SCR 489) a temporary suspension of the declaration of invalidity.

United Kingdom

The *Human Rights Act 1998* (UK)³² came into force in October 2000 and sets out the fundamental rights and freedoms that everyone in the United Kingdom is entitled to. It incorporates the rights set out in the *European Convention on Human Rights* (ECHR)³³ into domestic British law. The Human Rights Act may be used by every person resident in the United Kingdom regardless of whether or not they are a British citizen or a foreign national.

The UK Human Rights Act legislates an ability to seek justice in a British court. If Convention rights are breached, complainants can take their case to a British court rather than having to seek justice from the European Court of Human Rights in Strasbourg, France. Judges must also read and give effect to other laws in a way which is compatible with Convention rights.

What an ACT Human Rights Act Complaints Mechanism Should Look Like

ALHR supports the petition's call for the establishment, and resourcing, of a two-tiered complaints mechanism. This proposed model uses the existing infrastructure of the ACT Human Rights Commission (HRC) and the ACT Civil and Administrative Tribunal (ACAT) to provide a no-cost, simple pathway for individuals to make complaints.

This would allow individuals to make an initial written or oral complaint to the Human Rights Commission about a breach of their rights. The HRC would then facilitate a conciliation where possible to resolve the issue. If this is not successful, the HRC is then able to refer the complaint to the ACT Civil and Administrative Tribunal (ACAT) where it can be heard before a Tribunal Member. The ACAT is designed to be a simple, no-cost process that can be navigated by members of the community to have their matters resolved.

We already know these pathways work for the community, as they are currently in utilisation for other complaints.

³² *United Kingdom: Human Rights Act 1998*

³³ *Convention for the Protection of Human Rights and Fundamental Freedoms.* Council of Europe Treaty Series 005

Recommendation 1

Noting that there is a human right to an effective remedy when human rights are violated, The *Human Rights Act 2004 (ACT)* should be amended to include an accessible two-tiered complaints mechanism that specifically enables:

- c. a complaint about any breach of the Human Rights Act to be made to the ACT Human Rights Commission (HRC) and heard and reconciled by the Commission's internal complaint handling mechanisms for confidential conciliation; and
- d. if conciliation is unsuccessful, a complaint about a breach of the Human Rights Act to be made to the ACT Civil and Administrative Tribunal (ACAT) for resolution.

Recommendation 2

The existing infrastructure of the HRC and ACAT currently in utilisation for discrimination and other complaints should be used in order to provide a no-cost, simple pathway for individuals to make complaints.

Resourcing a Complaints Mechanism

ALHR notes the importance of ensuring that there is adequate resourcing for implementation of human rights law reform. The commitment of adequate resourcing is an expression of commitment for transformative law reform and vital to enable the meaningful translation of laws into policy and practice.

We take this opportunity to stress that while these mechanisms of the ACT Human Rights Commission already exist, for the Commission to effectively respond to the additional workload that creating a new complaints mechanism would produce, it must be adequately resourced. We refer to the expertise of those bodies to provide guidance to the ACT Government as to what that would require.

Recommendation 3

For the HRC and ACAT to effectively respond to the additional workload that creating a new complaints mechanism would produce, the ACT Government should:

- a. ensure that the HRC and ACAT are adequately resourced; and
- b. conduct an in depth consultation process engaging with the expertise of those bodies to receive guidance as to the precise nature of the resourcing that would be required.

Community Education and Access to Independent legal Advice

ALHR notes that an important aspect of amending the ACT Human Rights Act to include an accessible complaints mechanism would be subsequent community education in relation to the changes and this would require adequate resourcing. An important part of ensuring the public and individuals have access to information about their rights would also include an adequately resourced and independent legal advice and assistance service.

Recommendation 4

The ACT Government should accompany any amendments to the *Human Rights Act 2004* (ACT) with:

- a. a broad program of human rights education, aimed at fostering understanding of the changes to the Act across the community, with particular attention to CALD, First Nations, people with disability and other marginalised or disadvantaged groups; and
- b. adequate funding for a legal advice service to give individuals information, legal advice and assistance about their human rights.

Conclusion

The introduction of an accessible complaints mechanism into the Human Rights Act would demonstrate the ACT's tangible commitment to the recognition, promotion and protection of human rights, particularly for the most vulnerable and disempowered members of our society.

The introduction of an accessible complaints mechanism would be consistent with international human rights law and accepted community values. It would provide a much stronger framework for interaction between the government, authorities, businesses and communities in respect of pressing human rights issues. It will enhance the human rights dialogue between Parliament, courts, the executive and the people of the ACT in order to assist facilitation of a human rights culture and its interplay with the creation, interpretation and application of the law.³⁴

Our existing human rights framework seeks to promote a society that is inclusive, respectful and committed to equality. Providing individuals with a framework through which they can bring a complaint to an independent commission will have the effect of increasing the confidence of the people of the ACT in government and public policy. The lives of marginalised, vulnerable and disadvantaged people in our Territory stand to be improved by the recognition of their right to take action when their rights under our Human Rights Act are breached.³⁵

ALHR submits that an accessible complaints mechanism in the ACT Human Rights Act would contribute to the growth and development of the ACT through improved public service delivery resulting from human rights complaints outcomes. As a result democracy in the ACT would be enhanced.

ALHR submits that the implementation of our recommendations by the ACT Government would transform the Human Rights Act from being a largely theoretical document, to one which members of the ACT community can use to ensure their human rights are protected.

³⁴ George Williams and Daniel Reynolds, "A Human Rights Act for Queensland? Lessons from recent Australian experience" (2016) *Alternative Law Journal* 41(2), 42 available at: <https://www.austlii.edu.au/au/journals/UNSWLRS/2016/42.pdf>.

³⁵ *International Covenant on Civil and Political Rights (ICCPR)*; *International Covenant on Economic, Social and Cultural Rights (ICESCR)*; *International Convention on the Elimination of All Forms of Racial Discrimination (CERD)*; *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*; *Convention on the Rights of the Child (CRC)*; *Convention on the Rights of Persons with Disabilities (CRPD)*.

We strongly urge the Committee to recommend that the Government ACT address the petition demands in full, by amending the ACT Human Rights Act to include an accessible complaints mechanism with adequate resourcing.

If you would like to discuss any aspect of this submission, please email me at: [REDACTED] We look forward to appearing before the Committee to give oral evidence on the 28th April 2022.

Yours faithfully,



Kerry Weste
President
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Any information provided in this submission is not intended to constitute legal advice, to be a comprehensive review of all developments in the law and practice, or to cover all aspects of the matters referred to. Readers should take their own legal advice before applying any information provided in this document to specific issues or situations.