



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
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Submission Cover Sheet

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

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The Secretary
Justice and Community Safety Committee

Email - LACommitteeJCS@parliament.act.gov.au

Dear Madam/Sir

Petition 32-21 (No Rights Without Remedy)

Kindly accept this submission in relation to the above Petition.

1. THE IMPORTANCE OF HUMAN RIGHTS LEGISLATION

The ACT's *Human Rights Act 2004* was the first of its kind in Australia. It implemented an explicit statutory basis for protecting and promoting human rights. Strongly influenced by the International Covenant on Civil and Political Rights, the Act identifies human rights as "necessary for individuals to live lives of dignity and value."¹ In the 18 years following its implementation, drawing heavily upon the ACT's foundation, other Australian jurisdictions such as Queensland and Victoria have followed suit and realised their own human rights legislation.

The Act uses a dialogue model to protect human rights, whereby public authorities are subject to a duty to exercise their powers in accordance with rights and the judiciary oversees complaints of incompatibility or breach.² It is unique as it has embraced change; it has continually and incrementally evolved to remain consistent with its original purpose of protecting human rights.

Human rights are not an amorphous creature of statute; they are real and have clear impacts on our day to day lives. Therefore, human rights legislation is not only a tool of accountability and enforcement, but also a reflection of the engagement between government and the constituency that it oversees. Accountability between a constituency and public service providers puts people at the heart of decision-making. Service providers benefit from greater understanding of their internal processes through an external accountability lens. The two-pronged solution provided by the petition ensures that accountability remains at the forefront of the Act.

2. ACCESSIBILITY AND ACCOUNTABILITY: WHERE ONE FALTERS, THE OTHER FAILS

Two overarching issues arise from gaps in the ACT human rights legislation: lack of access to justice for breach of a human right and consequent lack of accountability within decision-making bodies. These are inextricably linked to the two purposes of human rights legislation as set out above.

As a tool of enforcement and accountability, human rights legislation should provide access to justice for breach of a human right. The current mechanisms for a human rights complaint theoretically include conciliation through the ACT Human Rights

¹ *Human Rights Act 2004* (ACT) Preamble ('*Human Rights Act*')

² Kolodizner, Irina, 'The Charter of Rights Debate: a Battle of the Models' (2009) 16(16) *Australian International Law Journal* 219, 224.



Commission (AHRC), proceedings in the ACT Civil & Administrative Tribunal (ACAT), or judgment through the Supreme Court; however, in practice the AHRC and ACAT have a very defined scope. They can only handle certain complaints, notably, their powers centre upon discrimination-based claims. Human rights issues outside of this scope rely on a claim to be brought before the judiciary; however, human rights are real and impactful on our everyday life. Therefore, access to justice for a breach should be cost-effective and efficient. In situations where breaches commonly arise, such as in public housing or prison settings, it is highly unlikely that individuals would have the means or time to bring a claim to the Supreme Court. Accessibility and accountability are inherently connected: where one falters, the other fails. Justice in these circumstances must be accessible in a cost-effective and timely manner, yet these are the circumstances where our vulnerable are currently the least able to obtain remedy.

Human rights legislation also functions as a reflection of the connection between government and the constituency it oversees. The intermediaries in this connection are the decision-making bodies which provide services to the constituency. The Act identifies that setting out human rights “makes it easier for them to be taken into consideration in the development and interpretation of legislation,”³ yet without access to remedy in circumstances of a breach, there is no real protection of rights. High level client-centred policy may be overlooked or misinterpreted when applied by decision-makers. For many reasons, a human rights culture is not embedded in Australian society or its government agencies. Often internal cultures within decision-making bodies do not incorporate comprehensive discourse of human rights without external accountability measures. A jurisdictional gap currently exists for human rights claims lessening these external accountability measures.

The focus on policy over remedy stems from the type of model that the Act is based on. Other models function upon an adversarial ideal focusing on the case-by-case resolution of breaches of human rights; however, the dialogue model takes a ‘big picture’ approach whereby Parliament is tasked with the protection of human rights from conception at a policy development and administrative level.⁴ The drawback to this model is that it mitigates practical application of human rights; they remain theoretical and amorphous, lacking concrete application to our everyday lives. A remedy to a cause of action against public authorities remains only as useful as access to it.

3. REMOVING THE BARRIERS

The petition proposes two fundamental changes to the ACT’s *Human Rights Act*: that a complaint about any breach of human rights be able to be made to the AHRC for conciliation, and that if unsuccessful, complaints be allowed to go to the ACAT for resolution.

Greater accessibility supports greater accountability. These accessibility and accountability mechanisms ensure that theoretical human rights are made real to public authorities. The removal of barriers to remedies under the Act enables effective and timely resolution of complaints. The implementation of this two-pronged approach

³ *Human Rights Act* Preamble.

⁴ Kolodizner (n 2) 229.

ensures that the vulnerable - who are often in the greatest need of access to justice - are realistically able to seek it.

Moreover, the implementation of accessible remedies for human rights breaches would rectify the tension currently present in the Act between the fundamental principles of human rights, such as access to justice, and the current gaps in the legislation. Resolving this inconsistency reasserts the importance of human rights and delivers a higher level of qualitative justice.

Far from constituting a burden on public authorities, additional accountability measures provide a useful framework for public service providers and empowers them to make better decisions by placing people at the heart of their actions. It is a win-win. The relationship between government and community can only be strengthened by human rights legislation that includes accessible avenues for complaint resolution.

The proposals enhance the practical functioning of the Act while retaining allegiance to the original dialogue model. The creation of a mechanism for case-by-case consideration mitigates the drawbacks of the dialogue model without losing the benefits of the 'big picture' approach.

4. CONCLUSION

The Council supports the addition of these remedies to the existing *ACT Human Rights Act*. The lack of accessibility and accountability mechanisms are remedied by these proposals. Without change, barriers to remedy prevent the vindication of real rights.

We trust this is of assistance to you in your deliberations.

We acknowledge the assistance of interns Kate Power and Alexis Samuels in the preparation of this submission.

Yours Faithfully



Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
17 January 2022