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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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Standing Committee on Justice and Community Safety
Office of the Legislative Assembly for the ACT

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

Dear Committee Secretary,

I provide this submission to the above Inquiry. This submission may be published by the Committee.

I am a legal academic with expertise in human rights law and statutory charters of rights. I have a decade experience as a practicing lawyer, including in human rights proceedings. I have a PhD in Law, and my research regarding human rights and charters of rights has been published in leading Australian law journals. I am a member of the Law Institute of Victoria and the LIV Human Rights Committee.

Summary

This submission **does not** support the proposed amendment of the *Human Rights Act 2004* (ACT) ('HRA') as set out in Petition 32-21 ('Petition'). That is, it does not support amendments:

- Enabling a complaint about any breach of the HRA to be made to the ACT Human Rights Commission ('HCR'), or
- Where conciliation is unsuccessful, enabling a complaint about breach of the HRA to be made to the ACT Civil and Administrative Tribunal ('ACAT') for resolution.

However, this submission **recommends** increased resourcing of public education and information regarding the operation of the HRA, to raise public awareness regarding its operation.

The proposed amendments are not appropriate

The amendments proposed in Petition 32-21 have considerable rhetorical force. They are consistent with the principle 'where there is a right there must be a remedy'.¹ This principle can be traced to Aristotle² and notions of corrective justice, which underpin many areas of private law (such as contracts and torts).³

¹ In Latin, *ubi ius, ibi remedium*.

² Aristotle and WD Ross, *Nicomachean Ethics* (Lesley Brown (ed) Oxford University Press, 2009).

³ Ernest Weinrib, 'Corrective Justice in a Nutshell' (2002) 52(4) *University of Toronto Law Journal* 349.

The proposed amendments would also bring the HRA into line with the procedures and forms of redress available under the *Discrimination Act 1991* (ACT) ('DA').⁴ That is, the amendments would treat breach of the HRA as a legal wrong against an individual and enable that person to claim compensation as redress.

However, the approach taken by the HRA, and other statutory charters, is intentionally very different. Unlike the DA, the HRA specifically **does not** treat breach of the rights in the HRA as a wrong against an individual, and it **does not** allow any private law remedies, such as damages. Further, this approach is not an oversight, but a deliberate feature of the model of rights protection adopted by the HRA.

The HRA seeks to protect human rights in two specific ways:

1. Parliamentary scrutiny,⁵ and
2. Statutory interpretation.⁶

Additionally, the HRA provides a limited avenue for reviewing the conduct of 'public authorities' in the Supreme Court.⁷

Finally, the HRA enables the HRC to review ACT laws and to report to the Minister.⁸

The HRA is very specific regarding when proceedings can be commenced regarding an alleged breach of the HRA. It specifically confines such proceedings to the Supreme Court.⁹ Further, the HRA specifically excludes an award of damages for breach of the rights in the HRA.

Self-evidently, the HRA seeks to protect rights primarily by preventing rights-infringing laws from being enacted (by parliamentary scrutiny), and by requiring all ACT laws to be interpreted in a rights-compatible way.¹⁰ The HRA specifically limits the ability to commence legal proceedings based on alleged breach of rights. Where it does allow legal proceedings, these proceedings are *public law* procedures and forms of redress, rather than proceedings to protect individual rights and their counterpart *private law* remedies.

Petition 32-21, on the other hand, is underpinned by private law values and assumptions, as it emphasises the importance of individual remedies such as damages. Some scholars argue that damages are an appropriate remedy for breach of human rights, as they vindicate the wrong done to the victim.¹¹ However, vindication can take many other forms, such as a declaration by a court that certain rights have been infringed.

Private law, and associated principles of corrective justice, apply in the context of a legal wrong done by one person to another, such as a tort or breach of contract.¹² In this context, it makes sense to enable legal proceedings to rectify the wrong. Complaints of discrimination under the DA, for example, fit within this framework.

⁴ The procedures for resolving complaints made under the DA are set out in the *Human Rights Commission Act 2005* (ACT) Part 4.

⁵ HRA Part 5.

⁶ HRA Part 4.

⁷ HRA s 40C.

⁸ HRA s 41.

⁹ HRA ss 32 and 40C.

¹⁰ HRA s 30.

¹¹ Jason Varuhas, *Damages and Human Rights* (Bloomsbury, 2016).

¹² Ernest Weinrib, *The Idea of Private Law* (Oxford University Press, 1995).

On the other hand, a breach of human rights necessarily involves a wrong done **by the state** against a person. This necessarily involves different considerations to breaches of legal rights by a person. Ensuring that the state is accountable for human rights breaches, and that such breaches are condemned, are important considerations. This can be achieved, for example, through proceedings in the Supreme Court and associated (presumably, negative) publicity. It should not be assumed that individual remedies such as damages are more effective or appropriate in this regard than a judicial declaration, for example.

More broadly, Petition 32-21 emphasises notions of access to justice and enforceability of rights. These notions are laudable. However, the accessibility of Supreme Court proceedings is a matter for that Court and depends for example on the fees set regarding certain proceedings. Further, enforceability means different things in different contexts. It should not be assumed that individual enforcement of rights is the most effective or appropriate method. Rather, the HRA (and other statutory charters in Australia) emphasise public law remedies, such as statutory interpretation and administrative law orders. These types of orders may be equally (or perhaps, more) effective and appropriate than private law remedies such as damages in preventing, deterring and condemning human rights breaches.

More appropriate mechanisms are available for ensuring accountability

In Victoria, the Ombudsman can receive complaints about the administrative actions of state government agencies and councils and may investigate and report on such complaints.¹³ The Ombudsman has brought significant publicity to human rights breaches, such as the sudden and prolonged lockdown by Victorian authorities of residents in Melbourne public housing towers in 2020, which was subsequently found to not be based on direct public health advice.¹⁴

Similarly, the ACT Ombudsman can receive complaints from members of the public and investigate and report on the administrative actions of ACT government agencies, including alleged breaches of the HRA.¹⁵ Further, this option may be more suitable and effective than commencing legal proceedings, for three reasons. First, the Ombudsman can investigate and report on systemic or widespread human rights breaches, such as the hundreds of people affected by the Melbourne public housing tower lockdown. Legal proceedings, on the other hand, can only resolve individual disputes. Second, there is no cost for making a complaint to the Ombudsman, so this option is extremely accessible. Finally, the Ombudsman can make a broad range of recommendations regarding human rights breaches and can bring significant public attention to such issues. Legal proceedings, on the other hand, can provide limited remedies and often receive little or no public attention.

Greater resourcing of public education regarding the HRA is needed

Petition 32-21, which was signed by 518 residents of the ACT, embodies some common but fundamental misunderstandings regarding the operation of the HRA and statutory charters of rights in Australia. This indicates that the operation of the HRA is not well understood by ACT residents.

¹³ *Ombudsman Act 1973* (Vic) s 13(2).

¹⁴ Victorian Ombudsman, *Tower lockdown breached human rights*, Ombudsman finds (17 Dec 2020) <https://www.ombudsman.vic.gov.au/our-impact/news/public-housing-tower-lockdown/>

¹⁵ Unlike the Victorian Act, the *Ombudsman Act 1989* (ACT) does not specifically authorise the Ombudsman to inquire into or investigate alleged breaches of human rights by public authorities. However, such authority would exist under the Ombudsman's general investigative powers. See ACT Human Rights Commission and ACT Ombudsman, *Relationship Protocol between ACT Human Rights Commission and ACT Ombudsman* (June 2021) https://www.ombudsman.act.gov.au/_data/assets/pdf_file/0027/114858/ACT-Human-Rights-Commission-and-ACT-Ombudsman-relationship-protocol.pdf

The objects of the HRC include promoting the provision of community education, information and advice in relation to human rights, and promoting understanding and acceptance of, and compliance with the HRA.¹⁶ The HRC is therefore well-placed to provide clarity to the general public regarding the operation of the HRA and the particular mechanisms for rights-protection which it provides.

This submission **recommends** greater resourcing of the HRC, to facilitate a clearer understanding among ACT residents of the nature of human rights protection provided by the HRA, and the mechanisms available to protect human rights in the ACT.

Thank you for the opportunity to provide a submission on these important topics. I am available to appear at a public hearing regarding this submission.

Yours sincerely,

A solid black rectangular box used to redact the signature of Dr. Bill Swannie.

Dr Bill Swannie

¹⁶ *Human Rights Commission Act 2005 (ACT)* s 6.