LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
Mr Peter Cain MLA (Chair), Dr Marisa Paterson (Deputy Chair),
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Submission Cover Sheet

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

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ACT BAR ASSOCIATION

A.C.T. BAR ASSOCIATION

Submissions to ACT Legislative Assembly

Justice and Community Safety Committee

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

April 2022

Submissions of the ACT Bar Association

1.The A.C.T. Bar Association makes the following Submissions to the ACT Legislative Assembly's Justice and Community Safety Committee regarding the Inquiry into the current Petition to the Assembly "No Rights without Remedy".

2.The ACT Bar Association's Membership includes Practising Barristers at the Private Bar and other categories of Barristers, Academics and Judicial Officers.

3.The ACT Bar Association takes a very close interest in the recognition and vindication of Human Rights and Freedoms and also of the other Antecedent Rights and Freedoms of all individuals, which are embodied, enacted, recognized and preserved by the *Human Rights Act* 2004 (ACT) and in other legislation enacted by the Commonwealth of Australia Parliament since 1981.

4.Such Fundamental Rights and Freedoms are of prime importance within any body politic predicated upon and dedicated to Freedom, to the Rule of Law and to the Equal Protection of the Laws for all within its jurisdiction. Traditionally, the Bar in this Territory, as elsewhere in Australia and indeed around the World, has taken a major role in the development and reform of the law in this regard. Leading examples were Dr H.V. Evatt PC QC, a former High Court Judge and later Attorney-General of the Commonwealth and the President of the United Nations, who took a major role in the development of the Universal Declaration of Human Rights at Paris in 1948 and related International Law matters; as well as Dame Roma Mitchell QC, a Supreme Court Justice and foundation Chair of the Commonwealth Human Rights Commission which was established in 1981.

5. In more recent years, other eminent jurists such as the Honourable Michael Kirby AC CMG, have encouraged greater and better recognition of Human Rights and Fundamental Freedoms within Australian Jurisprudence and in our legal system. Among Australian Barristers who have also done important work in this field are Fr. Frank Brennan AO who with Dr Hilary Charlesworth AM, now a Judge of the International Court, took part in developing the *Human Rights Act* 2004 (ACT).

6.In this direction, the ACT Bar Association welcomes the proposals in the Petition "No Rights Without Remedy" reflecting as they do, the need for contemporary law and jurisprudence to develop ways and means to better promote, recognize and most importantly, to vindicate, Human Rights and Fundamental Freedoms and the cognate Antecedent Rights and Freedoms, which of course, are duly preserved by the *Human Rights Act* 2004 (ACT).

Background

7.As indicated in the papers on the proceedings of the Legislative Assembly, the Committee is now examining, under its Terms of Reference, matters as follows.

8.Justice and Community Safety Committee is inquiring into Petition 32-21, which was tabled in the Assembly on 23 November 2021 with 518 signatories.

9.The petition calls on the Assembly to amend the *Human Rights Act 2004* to:

- 'enable a complaint about any breach of the Human Rights Act to be made to the Human Rights Commission for confidential conciliation, and
- 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.'

10.This proposal would supplement the Human Rights Commission's existing complaints powers. It would also supplement, but without encroaching upon, the existing jurisdictions of the Courts, in regard to both Human Rights and Fundamental Freedoms and the cognate Antecedent Rights and Freedoms.

Importance of Accessibility to Real Remedies as to Human Rights Breaches

11.Amendments in this direction would address the well-recognized problem of proper accessibility to legal remedies for the protection and vindication of such rights and freedoms, in a manner that is compatible with the framework of our existing legal structure in the Australian Capital Territory.

12.Indeed, the Petition to the Assembly "No Rights Without Remedy" notes the limitations of the existing Human Rights legislation in these respects, including that the *Human Rights Act* 2004 (ACT) (the Act) fails to provide individuals with a truly *accessible* way to make complaints about breaches of these Rights and Freedoms.

At present, it is most unfortunate that the provisions of the Act are such that "the only recourse available is to take legal action to the Supreme Court" and "there are considerable costs barriers associated with that type of legal action and moreover, there is no ability or avenue to seek compensation for the harm done" apart from in some cases, the ability to claim breaches of Human Rights and Fundamental Freedoms and cognate antecedent Rights and Freedoms in association with or incidental to, other claims for legal or equitable relief from the Courts.

13. These are powerful arguments, as a matter of the need for the truly Equal Protection of the Laws, especially for the most vulnerable people in our community and the indigent whose financial means are limited.

14.The issue is not limited to the vulnerable and indigent, as even a reasonably well-off person will think twice before engaging in any major litigation. We have seen in recent times, both in Australia and also worldwide, serious concerns raised by governmental actions under "Emergency" and public health statutes, which have put enormous limitations and burdens both upon people's lives and even by proscriptions upon some of their very livelihoods. When these concerns are addressed, as they no doubt will be in coming times, there do need to be better and more accessible avenues, for the vindication of Human Rights and Fundamental Freedoms, well beyond the present situation.

15.These avenues need to include actual and real remedies, because it is true that without proper Remedies, there are really, no substantive Rights. Some years ago, Justice M.D. Kirby made the important point that deficient examples of regimes in regard to Human Rights, were those jurisdictions which indeed had their own and much-vaunted "Human Rights" statutes, but they lacked any mechanisms to enforce, protect and vindicate Human Rights and Fundamental Freedoms. The people of the United States of America have long enjoyed a Bill of Rights, which enables them to vindicate their rights under it, in the ordinary Courts. It is this very *accessibility* to justice and *vindication* by appropriate *remedies*, which has been a major factor in their rise to a leading place in the World in respect of Freedoms of Individuals, which as their 1776 Declaration correctly recites, inhere in the people, *antecedently* to any statute and are not the mere gift of any Governments.

Current events around the World underline the capital importance of such principles, which are now increasingly coming under major attack. These are principles needing to be put into modern legal practice.

Public Utility of Providing Real Remedies for Human Rights Breaches

16.In addition to the need for accessibility to justice in respect of fundamental rights and freedoms, there is also the need for the greater development of Remedies for breaches. Indeed, under the International Covenant on Civil and Political Rights 1966 (ICCPR) which is scheduled to the *Human Rights Act* 2004 (ACT) it is important to note that States Parties (of which Australia is one) undertake an obligation (Article 2) to develop judicial remedies to vindicate the fundamental rights and freedoms set out in the ICCPR. This goes also to the point that is it of little practical use to have an enacted statute stating such

rights, if there are no accessible and useful remedies available by law to protect and vindicate those rights and freedoms when they have been breached. This also entails the further development of jurisprudence as to the protection and vindication of those rights and freedoms in a positive manner.

Again, it profits no-one to have, for instance, Human Rights legislation enacted declaring that "everyone" has various rights and freedoms, if it is not possible for Courts and Tribunals to have and to exercise jurisdiction to grant substantive relief by appropriate remedies for denials and breaches of those rights and freedoms.[1]

17. The importance of effective and accessible remedies is noted in the ICCPR:

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized 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;

[1] The difficulties and limitations of the existing terms of the *Human Rights Act* 2004 (ACT) in terms of the absence of effective remedies accessible without resort to daunting and expensive Supreme Court proceedings are illustrated by various cases in the ACT, including *R v. Fearnside* [2009] ACTCA 3; *Re Application for Bail by Islam* [2010] ACTSC 147; 4 ACTLR 235. It is submitted these show that the so-called "dialogue" notion of Human Rights legislation for the ACT has hardly been any outstanding success, either in terms of results, nor in terms of providing really effective and accessible remedies for violations of fundamental rights and freedoms.

(c) To ensure that the competent authorities shall enforce such remedies when granted." [Emphasis added]

Also, Australia lodged the following "Declaration" in acceding to the ICCPR:

Declaration:

"Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise." [Emphasis Added] This embraces action by the Australian Capital Territory to provide accessible remedies in accordance with, and otherwise for due compliance with, Article 2 as above.

18. One of the problems which flow from Australia lacking any Bill of Rights comparable with that of the United States, is that the positive development of jurisprudence in Australia has lagged well behind that of other advanced nations in respect of fundamental rights and freedoms. For historical reasons, Australian jurisdictions have often seemed locked into quite narrow and restrictive views of individuals' rights and freedoms, mainly derived from mid-Victorian legal "orthodoxies", which on proper examination, are often at odds with earlier approaches by the great 18th Century reforming Judges, such as Lord Mansfield. Instead, there can often seem to be an undue emphasis on attempts to construe legislation in ways which either leave breaches of these rights and freedoms to go unremedied, or to read down the rights and freedoms, in ways that render them of little or no practical effect. Curiously, reported decisions by the early Judges of New South Wales in the 1830s show a more positive approach to the vindication of individuals' fundamental rights and freedoms than is sometimes the case now, despite the wide discussion of these things and statutes enacted. This is probably because they were then more closely informed by things like Lord Mansfield's ruling against Slavery and other landmark cases for rights.

19.Much has been said in the Human Rights context about the "educative effect" of the very enactment of Human Rights legislation. That is all well and good, but what is also needed is a greater scope for the development of an Australian jurisprudence on these rights and freedoms, giving them emphasis, rather than by declining them, or reading them down. The proposed reforms as indicated in the Petition "No Rights Without Remedy" provide ways in which this Territory can build positively upon what it enacted in the statute of 2004. These would enable the ACT Lower Courts and the ACAT to come into the forefront of these developments, and at the same time enable citizens to have an *accessible* means of redress for breaches of fundamental right and freedoms.

20.In particular, the ACAT is especially well-placed to deal with such matters, as it already exercises jurisdiction in regard to anti-discrimination matters under the *Discrimination Act* 1991 (ACT) many of which are cognate with things dealt with in the *Human Rights Act* 2004 (ACT). The time has come for the ACT to further develop its extant legislation about fundamental rights and freedoms, in the direction of providing accessible remedies for breaches.

Conclusions

21.Accordingly, the ACT Bar Association considers that the proposed reforms in the Petition "No Rights Without Remedy" are important and positive ones. Their adoption and enactment into law would be of real public utility in this Territory for the protection and vindication of fundamental rights and freedoms of individuals. They would demonstrate a clear commitment to Human Rights and Fundamental Freedoms not as mere concepts or virtue-signalling, but as part of the Body of Law and the Rule of Law, for the benefit of all Territorians, who would gain new accessible avenues for the vindication of those Rights and Freedoms, of which they are right to expect proper protection and vindication. The Association hopes to participate in development of reforming legislation.

22."No right without a remedy" is a well-known maxim in the Law. As the *Boston Review* noted in 2012, about "What's a Right Without a Remedy?":

"In the momentous 1803 case *Marbury v. Madison*, [US] Chief Justice Marshall observed that the "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he [or she] receives an injury" and warned that a government cannot be called a "government of laws, and not of men [and women]. . . . if the laws furnish no remedy for the violation of a vested legal right." … More broadly, judicial remedies perform an important expressive function: they drive home to the public that the law takes constitutional violations seriously. This can galvanize popular movements to vindicate constitutional values even more fully. For example, the Supreme Court's decisions in *Brown v. Board of Education* (1954–55), held that purposeful racial segregation of public schools violated the Fourteenth Amendment's equal protection clause and ordered that school boards dismantle their dual school systems. The *Brown* decisions by themselves achieved very little actual integration, but the Court's condemnation of segregation provided critical support to a mass movement that culminated in statutes such as the Civil Rights Act of 1964, which crafted more effective tools for dismantling [racial discrimination] in schools, public accommodation, employment, and housing. …So a lot depends on the availability of a remedy: when the courts refuse to provide one, rights can be reduced to mere lines on paper." These comments do go to the very core of the need for appropriate remedies.

23.This accords with the point made in Australia by the Honourable Michael Kirby, as mentioned above, about Human Rights legislation. Legislation means little or nothing without actual remedies being available - and they do need to be accessible remedies.

SUBMISSION BY: A.C.T. BAR ASSOCIATION

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