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NO RIGHTS WITHOUT REMEDY

CLA submission to the ACT Legislative Assembly Justice and Community Safety Committee

INQUIRY INTO PETITION 32-21

INTRODUCTION

In 2004 the ACT became the first Australian jurisdiction to pass a Human Rights Act. It has since built on that legacy, adding the right to education, Indigenous cultural rights and the right to work. The ACT Government continues to commit publicly to defending and upholding the human rights of all people living in the ACT as the basis of a jurisdiction that is sustainable, liveable and fair.

CLA supports the "No Rights Without Remedy" petition (the Proposal) to extend the ACT Human Rights Commission (ACTHRC) complaints process. It is an important step toward the ACT becoming a robust human rights jurisdiction and meets the promise of a Human Rights Act (HRA) that articulates the government's obligations to the powerless. The Proposal will:

- resolve inequities in the ACT's rights complaints process by creating a single consistent approach to managing all human rights breaches to the benefit of everyone in the ACT Government's jurisdiction;
- ensure objective third party scrutiny of all ACT Government decision makers' processes, embedding an incentive to continually improve those processes;
- by increasing the accountability of government decision makers to individuals, measurably increase people's confidence that the ACT government will behave ethically in a genuine participatory democracy; and
- also provide leadership to other Australian jurisdictions as they consider introducing or developing human rights legislation.

CLA notes that the Proposal may have implications for the ACT Assembly's current inquiry into discrimination law reform.

BACKGROUND: The Government's commitment to human rights

All human rights are inter-related, indivisible, inter-dependent and equally important. The ACT Government publicly recognises 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.

This is why the ACT Government applies compatibility statements to its consideration of new legislation and measures the community's perception of the government's respect for human rights as an indicator for its Wellbeing Framework. Human rights measures affect most of the Framework domains indirectly and, in the governments and institutions domain, they directly measure people's confidence that government will behave ethically in a genuine participatory democracy.

THE ISSUE: ACT'S three class system of managing rights complaints

Consistency in respecting, protecting and promoting human rights needs a complaints handling process that offers a consistent opportunity for individuals to seek remedy for breached rights, irrespective of the right or the individual. The ACT's rights complaints process divides complainants into three classes:

1. People with rights complaints that fall under discrimination law can settle with the decision maker and, if that is unsuccessful, seek independent conciliation through the ACT Human Rights Commission (ACT HRC). ACT HRC can pass the case on to the ACT Civil & Administrative Tribunal (ACAT) for a mandated remedy at the applicant's request if conciliation is unsuccessful. (In 2020-21, 30% of all applications before the ACT HRC and 1% of all applications before ACAT were discrimination cases);
2. People with rights complaints in health, disability, community services and abuse of the vulnerable. They can seek independent conciliation through the ACT HRC if initial discussions with the decision maker do not resolve the issue, but cannot access mandated remedies or compensation through ACAT; and
3. People with any other rights complaint. They have no access to either the ACT HRC or ACAT, and must rely on the regulatory or administrative good will of decision makers for remedies, or take the case straight to the ACT Supreme Court.

This division is inconsistent with the concept of human rights as indivisible, inter-dependent and equally important and it is inconsistent in the opportunities it provides victims of human rights breaches to seek remedy and/or compensation. The inconsistency is not mitigated by the existing link between the ACT's Human Rights Act and the ACT Supreme Court. The Supreme Court is beyond the financial reach of most human rights complainants, is not designed for quick and efficient decision making and is not able to mandate compensation.[1]

THE ISSUE: Consequences for people in the ACT's jurisdiction

Four studies provided by Canberra Community Law for the Canberra Law Society's ETHOS Winter 2021 edition[2] illustrate the practical effect of dividing rights complaints into three classes:

- You are a young woman with an intellectual disability. Your mother has just had a stroke and is now in care. You have been threatened with eviction from social housing you have lived in your whole life because your mother was the tenant and she isn't there anymore.

- You are a model prisoner in the Alexander McConochie Centre (AMC) and you have been paroled, but you can't get out of gaol and back into the community because a stable home is a

[1] The Productivity Commission was told in 2019 that the average internal cost of an ACT Supreme Court case was $15 444 – and less than half the civil cases it considered were settled in 12 months. By contrast, the average internal cost at ACAT was $717 in 2019 and ACAT cases were settled in an average of 162 days. Sc *Productivity Commission Ongoing Report On Government Services Section C: Justice* reported in ACT Human Rights Commissioner Dr Helen Watchirs' presentation to the Australian Lawyers' Alliance on 03 March 2022. The Supreme Court also carries the risk that costs could be awarded against the applicant. Parties to ACAT cases generally carry their own costs.

[2] https://issuu.com/act.law.society/docs/ethos_260_winter_2021_-_print

condition of your parole and ACT Housing has taken you off its priority list.

- You are a 14 year old child who has been excluded by your high school from the educational programs you need because of your behavioural issues. Those programs are the ones designed to help with your behavioural issues in the first place.

- You are a First Nations man with severe mental health disabilities and a tragic background, including being removed from your family, and sexual abuse. You are in AMC for drug related crimes and you are self-harming. You are kept in solitary in the management unit for 24 hours a day because corrections officers feel that is the best way to manage you. You have lost access to your culture and to programs and activities that keep the men inside sane and you are denied visits from your family.

While the HRA articulates the Government's obligation to be humane to the powerless, the ACT's human rights complaints process identifies these individuals, and many others like them, as second and third class because they can't get to an independent tribunal that can mandate a remedy despite clear and consequential breaches of their rights.

Cases like these are underlined by a broader concern emerging from the ACT Wellbeing Framework. Initial indications from the "Living Well in the ACT Region" Survey (the Survey) are that carers and those with disabilities in particular had a substantially lower level of confidence in the ACT human rights processes than those who were neither carers nor disabled.[3]

CLA anticipates that human rights measure data collected in future surveys[4] will show a greater gap between the perception and the reality of human rights in the ACT. It will confirm that the more likely you are to interact with the ACT's human rights processes, the less confident you will be that your rights will be protected by it.

The ACT's inconsistent approach to remedy is therefore contrary to Government objectives, damaging to the rights of people under the ACT's jurisdiction and detrimental to the value of the ACT as a place to live. It will also lead to increasing pressure on the budget and government policy development as the Wellbeing Framework further exposes underperformance on governance and human rights measures.

Ironically, these outcomes are likely to be exacerbated if the ACT Government implements its rights reform package without complementary reform to the rights complaints process. The current Parliament and Government Agreement commits to:

- enact ACT modern slavery legislation;
- raise the minimum age of criminal responsibility;
- review the Discrimination Act as part of the "Capital of Equality" strategy;
- enact the Multicultural Recognition Act to establish a Multicultural Charter;

[3] 57% of people who were not carers had a high confidence that human rights are protected in the ACT. Only 38.5% of carers shared that confidence. 65.8% of those living without a disability had a high confidence that human rights are protected in the ACT. Only 54.5% of people living with a disability shared that confidence. *Living well in the ACT Region Survey, University of Canberra 2020 report p 45*.

[4] This is an action recommended in the Survey report to improve the granularity of human rights measure data for vulnerable groups in the ACT. *Living well in the ACT Region Survey, University of Canberra 2020 report p 45*.

- consider introducing the "right to a healthy environment" into the Human Rights Act; and
- develop a Charter of Rights for parents and families involved with the care and protection system and embed this in the Children and Young Peoples' Act.

The ACT Government will need to ensure that the promises it makes to protect and uphold human rights don't just create more second and third class individuals for whom the promise of rights has not been underpinned by access to justice. There are no rights without remedy.

NO RIGHTS WITHOUT REMEDY: a modest Proposal

The No Rights Without Remedy petition proposes that the ACT Government treat everyone as a first class individual by expanding the current complaints process to cover all human rights complaints in a similar way to the first class process for discrimination complaints. This is a pathway to rights remedies with a clear hierarchy of remedy that is well understood by administrators and decision makers, does not create any new decision makers or tribunals and is relatively simple, quick, fair, inexpensive and informal for applicants.

CLA also strongly recommends that the new pathway to remedy for human rights breaches be reinforced by a template schedule applied to any ACT Bill which the relevant Human Rights Compatibility Statement identifies as either promoting or limiting human rights. This will help to develop the pathway by allowing the Assembly to clearly identify:

- How people can expect to be treated by public authorities under any legislation related to the schedule, including any specific human rights identified from the ACT's Human Rights Act that underpin that treatment;
- the basis on which a complaint about a rights breach can proceed or will be found vexatious or groundless; and
- The complaints process applied to seek fast, affordable and fair remedy for breaches of those rights.

CLA has developed a draft template schedule to illustrate how this might be done, based on the recent Public Health Amendment Bill (No.2) 2021, at the request of the Assembly Standing Committee on Health and Community Wellbeing (see **Attachment A**). Implementing the Proposal with the draft template schedule will:

- Create a single pathway to resolve and remedy any human rights complaint by an individual as simply, quickly, fairly, inexpensively and informally as possible, consistent with achieving justice;
- Provide common grounds for understanding the rights complaints process for the Assembly, decision makers, complainants, respondents and the judiciary;
- Allow all complainants to appear before an independent referee on an equal footing with those alleged to have breached the complainants' rights;
- Give everyone access to remedies when their rights have been breached; and
- Allow all rights to be balanced consistently through a single process by a clear hierarchy of competent decision makers and authorities.

NO RIGHTS WITHOUT REMEDY IMPLEMENTATION OUTCOMES – wider implications for the Wellbeing Framework

CLA expects that implementing the Proposal and the template schedule will improve Wellbeing Framework measures of people's confidence that the ACT government will behave ethically in a genuine participatory democracy.

The Proposal will allow individuals to hold Governments to account for any rights breaches, which will help mitigate the decline in human rights measures likely as future Surveys explore the confidence of people who have regular contact with the ACT's human rights complaints process.

The Survey also found that only 19% of respondents had a high confidence in their ability to contribute to ACT Government decision making processes. People with greater exposure to the ACT's human rights processes – single parents, people with a disability and carers – were more likely to have low confidence in having a say and being heard. Lifting the perception that the Government is accountable to individuals will improve people's feeling that their voice and perspective matters. This in turn will improve measures for indicators in the Framework's governance domain.[5] It will also have a positive effect on measures relating to trust in Government, which will be the subject of future Surveys.

NO RIGHTS WITHOUT REMEDY IMPLEMENTATION OUTCOMES – better decision making and the cost of justice.

The Proposal removes inequities from the ACT's current rights complaints process and will make measurable improvements to the welfare of the ACT community. CLA has assumed that relevant agencies will make an estimate of the costs of the proposal, based on their estimate of the likely additional case load. In addition to improving the quality of life in the ACT gained by implementing the proposal, CLA expects that the following will be accounted for in any cost estimate:

- The effect of improved decision making on ACT HRC and ACAT caseloads; and
- The agencies' overall workload in the context of the estimated rise in cases.

The proposal increases accountability by allowing individuals to hold decision makers to account for rights breaches, and by ensuring independent third party scrutiny on any case that is not settled by the decision maker. CLA expects that this will increase the priority on getting decisions right and managing disputes at the lowest possible level.

The Queensland Human Rights Commission (QHRC) can conciliate on any human rights case since the Queensland Government enacted its human rights legislation in 2019. While QHRC case numbers have been skewed by COVID19 impact on human rights, there is promising circumstantial evidence emerging from QHRC discussions with state government entities that improvements to decision making and complaints handling had occurred in direct response to increased interest from QHRC under the new Act.[6]

[5] *Living well in the ACT Region Survey, University of Canberra 2020 report p 42*.
[6] *Balancing Life and Liberty. The second annual report on the operation of Queensland's Human Rights Act 2019* p 91-95

While QHRC has not attempted to estimate the potential reduction in cases that would have otherwise been brought to it, better decision making at the lowest possible level represents a saving to the complaints process as a whole. These savings will need to be factored in to any estimate of costs arising from any increase in case numbers at either the ACT HRC or ACAT, as will the benefits arising from resolving inequities in the ACT's rights complaints process.

CLA accepts that resources for both ACAT and the ACT HRC are calibrated to existing workloads and there may be a need for additional resources as the number of applications before the ACT HRC and ACAT rise. It is important to put that rise into context. In 2020-2021, ACAT conducted 6357 substantive hearings and received 4136 applications. Of these applications, only 39 were discrimination referrals from the ACT HRC. [7]

CLA is not clear on what proportion of the total time used by ACAT went into dealing with discrimination applications. We understand that discrimination applications are likely to be more complex and take more time to resolve, and that it is possible that other human rights applications are as complex as discrimination cases, but the increase in cases would have to be substantial to have more than a minor effect on the overall ACAT workload.

The ACT HRC received 1819 enquiries and 922 complaints, of which 200 related to discrimination.[8] It would appear that the ACTHRC is an effective filter for ACAT, and that while both organisations could make a case for greater resourcing, ACT HRC is likely to require more resources to deal with the increase in applications, and for helping ACT agencies to improve their decision making.

NO RIGHTS WITHOUT REMEDY: Conclusion

The ACT can be proud of its leadership in human rights and its Framework for measuring and improving the ACT's well-being. However, measuring the success of the ACT's HRA has exposed people who are being treated as second and third class Territorians by the processes that are supposed to protect them. We can do something about that now, or we can observe and measure the decline in Territorians' confidence in the Government to behave ethically in a genuine participatory democracy.

The ACT Government has been very clear on its aim to put human rights at the foundation of a jurisdiction that is sustainable, liveable and fair. The Proposal contained in the No Rights Without Remedy petition offers the best way to start identifying and removing inequities in the complaints process that are preventing that from happening. It will also provide leadership to other Australian jurisdictions as they consider introducing or developing human rights legislation.

An ideal time to cement the Proposal into ACT law would be in July 2024, on the 20th anniversary of the first human rights legislation in Australia...enacted in the ACT. CLA commends the Proposal to the Assembly.

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[7] *ACAT Annual Review 2020-21*.pp *26 and 35*. NB ACAT also receives a copy of conciliation agreements reached at the ACT HRC. In the reporting period the tribunal received 32 conciliation agreements from the ACT HRC. A party to a conciliation agreement may apply to the ACAT for orders to give effect to the agreement. During the reporting period no applications for orders were received.

[8] *ACT Human Rights Commission Annual Report 2020-21* p12

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ATTACHMENT A

HUMAN RIGHTS TEMPLATE SCHEDULE FOR NEW LEGISLATION

CLA undertook to provide the Assembly Standing Committee on Health and Community Wellbeing with the first draft of a template it is developing as a standard schedule to any new ACT legislation or amendment to existing ACT legislation. A copy of the draft is attached.

The schedule aims to standardise the ACT Government's current approach to "charters" as part of a broader reform to provide a consistent pathway to remedy across all ACT legislation for a breach of any right covered by the ACT Human Rights Act (the Act). The standard schedule identifies:

- how people can expect to be treated by public authorities under any legislation related to the schedule;
- any specific rights that underpin that treatment; and
- the ethical infrastructure needed to seek fast, fair remedy for breaches of those rights.

The schedule would be applied to any ACT Bill the relevant Human Rights Compatibility Statement identifies as either promoting or limiting human rights. CLA has applied the standard template to Public Health Amendment Bill (No 2) 2021 to illustrate broader shortfalls in the ACT's pathways to remedy for human rights breaches. These include:

1. Treatment of human rights breaches that depends on the right is being breached. You can seek a mandated remedy for rights under discrimination law and ACT Human Rights Commission conciliation for rights breaches in health, disability, community services, and abuse of the vulnerable. All other rights in the HR Act can only be remedied by regulatory or administrative fiat or by recourse to the Supreme Court. This approach is inconsistent with the concept of human rights as inter-dependent and equally important, and does not provide consistent opportunities to seek remedy for rights breaches;

2. Lack of third party scrutiny as an incentive to have human rights breaches managed at the level of the decision maker; and

3. Lack of clear and consistent messaging to the public about how to approach the ACT Government to remedy a rights breach.

SCHEDULE TO THE PUBLIC HEALTH ACT 1997 AS AMENDED

THE CHARTER OF COVID RIGHTS

Preamble

This charter of rights explains how people who are subject to government directions pursuant to *Public Health Amendment Bill 2021 (No 2)* (this Amendment) can expect to be treated by relevant decision makers.

Public authorities have an obligation to act consistently with the *Human Rights Act 2004* (HR Act) when:

- Making and issuing declarations, directions and guidelines pursuant to this Amendment; and
- applying them to decisions they make when protecting the public from the public health risks of COVID 19, in circumstances where those risks may not give rise to a public health emergency.

1. Rights promoted by this Amendment

The rights promoted by this Amendment are:

- Right to life (Section 9 of the HR Act) – the measures included in this Amendment have the intent of preventing or limiting the spread of COVID 19, thereby protecting members of the ACT community from the risk of serious illness or death that could result from a COVID 19 infection or equally from other diseases or injury due to a hospital and health system overwhelmed by COVID 19 cases; and

- The child's right to protection – needed because of the child's unique vulnerability and the child's lesser ability to take certain health measures required by directions under this Amendment (Section 11 2 of the HR Act)

These rights will be protected through directions relating to specific circumstances defined in this Amendment and through guidelines issued to inform decisions made pursuant to those directions.

The ACT Government understands that promoting these rights through this Amendment is likely to limit other rights guaranteed by the HR Act.

2. Rights that may be limited by this Amendment

The rights most likely to be limited by this Amendment include:

- The right to equality (Section 8 HR Act);
- The right to freedom of movement (Section 13 HR Act);
- The right to demonstrate religious beliefs (section 14 (1) HR Act);
- The right to freedom of assembly and association (Section 15 HR Act);
- The right not to have your privacy, family or home interfered with (Section 12 (a) HR Act);
- The right to liberty (Section 18 HR Act);
- The right to be treated humanely when deprived of liberty (section 19 HR Act); and
- The right to work (Section 27 (B) HR Act).

3. **Limiting rights under this Amendment – the constraints on Government decision makers:**

Every limitation on a human right that is, or may be, imposed by the provisions of this Amendment must be through the ACT Government decision makers meeting their obligation to protect the health and lives of the ACT community from the significant public health risk posed by COVID 19.

Every decision must demonstrate:

- A legitimate purpose (section 28 (b) HR Act) derived from the Objects of this Amendment (this Amendment Division 6C.1 section 118M);
- A rational connection between the limitation and the purpose (Section 28 (2) (a), (c) and (d) HR Act); and
- Proportionality (Section 28 (2)(e) HR Act).

4. **When decisions are made that limit your rights – what you can expect from ACT Government decision makers:**

The ACT Government recognises that everyone affected by the provisions of this Amendment has the right to be safe, respected, heard and treated fairly. You can:

- expect a timely explanation in writing about what is happening to you;
- ask questions about what is happening to you;
- seek timely clarification on elements of the decision that you do not like or understand;
- expect timely information, in writing, about the process for seeking a review of the relevant decision through this Amendment by either the decision maker or an independent third party;
- expect timely information, in writing, about how to make a complaint or raise concerns; and how complaints will be dealt with;
- expect that your access to appropriate treatment is not constrained; and
- be in contact with the people you care about.

5. **When you believe your rights have been breached – what you can expect from ACT Government decision makers:**

The ACT Government recognises that you have the right to an effective remedy by the competent tribunal for acts breaching the fundamental rights granted to you by law, and that remedy may include compensation for losses and damages resulting from rights breached by decisions pursuant to this amendment. You have the right to access the ethical infrastructure you need to seek fast, fair remedy for breaches of those rights. This includes:

- Having a decision reviewed by the decision maker and, if necessary, remade;
- Third party conciliation through the ACT Human Rights Commission conciliation processes; and
- Access to the appropriate tribunal, including ACAT and the lower courts, to obtain a mandated remedy or compensation for any damages or losses resulting from decisions made under COVID directions.