

RIGHTS IN SIGHT #2 (MAY 2022)

...THE ROAD TO A FEDERAL HUMAN RIGHTS ACT

More observations, strategies, hints and tips from CLA'S discussions and correspondence with more than 80 decision makers and affected parties, over two years, on a future Federal Human Rights Act (FHRA).¹

THE VISION: *Upholding all human rights through an ethical infrastructure that is applied consistently, drawing on a single codified set of human rights, is the best way to create a society that is sustainable and liveable, and that enjoys the greatest possible freedom.*

THE PROMISE: *A FHRA that articulates and enforces the government's obligations to the powerless.*

THE STORY SO FAR:

There have never been more people working to bring about a FHRA. From every Human Rights Commission to the Law Council of Australia, from the Human Rights Law Centre to every Council of Social Services, from the Uniting Church and Jesuit Social Services to Humanists Victoria there is work under way to encourage the political leadership to deliver a FHRA. On the downside, FHRA advocates and their opponents agree that a FHRA is unlikely without that leadership because the political capital required to invest in its success will not be repaid at the ballot. From its discussions to date with parties and decision makers across the political, economic and social spectrum, CLA has concluded that:

- the review on whether Australia should upgrade its current Federal Human Rights Framework to a FHRA promised by Labor in its national platform offers the only road to a FHRA; and
- that review will need to occur early in a new federal Labor Government to ensure that ensuing legislation does not get caught up in the following election.

CLA'S FOCUS:

CLA is well aware of the width and depth of work being done across Australia on a future FHRA. We have chosen to focus our resources on two clear objectives:

- *Rights In Sight*: encouraging a review of Australia's human rights framework in the first 100 days of the next Labor Government to avoid a FHRA becoming an electoral liability in the identity politics and dog whistling that dominates election campaigns; and

¹ Access the previous edition of this newsletter at: [Human Rights - Civil Liberties Australia \(cla.asn.au\)](https://cla.asn.au)

- *No Rights Without Remedy*: ensuring a future FHRA allows individuals easier and quicker access to the lower-level commissions, tribunals and courts to seek mandated remedies or compensation for human rights breaches by Government decision makers.

RIGHTS IN SIGHT UPDATE: what the election has shown

The Federal election campaign reinforced CLA's view that a FHRA is seen by progressive candidates as generally a good idea but an electoral liability in the hyperbolic election environment of Death Taxes and Medicare.² During the campaign Labor was silent on its platform promise to review the current Federal Human Rights Framework. The Greens kept a charter of human and environmental rights in their policy platform, but did not advocate for it directly – choosing instead to emphasise individual rights when they addressed particular issues like workplace laws and discrimination.

RIGHTS IN SIGHT UPDATE: A FHRA to underpin the success of a Commonwealth Integrity Commission

Progressive and centre independent candidates focussed their election pitch to improve Australia's ethical infrastructure on a Commonwealth Integrity Commission (CIC), believing that previous governments provided fertile ground for cultivating voter support. CLA strongly supports the introduction of a truly independent CIC as a means to improve integrity in government decision making, but CLA believes that any CIC would be improved by reforming the context in which it operates.

The aim of ethical infrastructure is to preserve society's integrity and coherence, and to act as a shock absorber to cushion the effects of change. In advanced democracies other than Australia, a CIC forms part of a broader ethical infrastructure based on a human rights act.

These acts are designed to consciously apply core values and principles to moderate government behaviour and help resolve ethical dilemmas where equally valid rights compete. In the absence of a FHRA, any model for the CIC would operate without reference to the rights that other advanced democracies believe are necessary to underpin their ethical infrastructure.³

A FHRA must be a priority for an incoming Government if it is to succeed. Over late-2021 and 2022, CLA has worked to keep a FHRA front of mind for Federal Labor and encouraged other organisations pushing for a FHRA to do the same. We have also canvassed the views of the Greens and centre independents on a FHRA as a condition of their support for a future minority government. CLA has drawn the link between the CIC and a FHRA in those communications and noted that a FHRA will help local members to resolve claims by their constituents that the Federal Government has breached individual rights.

RIGHTS IN SIGHT UPDATE: Human Rights Acts for domestic jurisdictions

CLA has taken advantage of recent domestic political changes to promote human rights acts at the state and territory level. The Western Australian and South Australian Governments both have commitments

² For more discussion, see "Rights In Sight" issue #1 at [Human Rights - Civil Liberties Australia \(cla.asn.au\)](https://cla.asn.au)

³ You can read more about the link between a CIC and a FHRA and the missed opportunity it represents in "CLA's response to the Government's proposal for a Commonwealth Integrity Commission" at: [Human Rights - Civil Liberties Australia \(cla.asn.au\)](https://cla.asn.au)

to move to state Human Rights Acts in their party platforms. CLA has noted that the electoral position of the McGowan government is beyond the threat of a populist attacks, leaving it free to seriously consider a WA Human Rights Act. CLA has also produced a video calling for a WA Human Rights Act to end the trauma caused by human rights abuses in WA gaols.⁴

In South Australia we are working closely with Rights Resource Network South Australia to help SA Best and the Greens promote a SA Human Rights Act through the SA Legislative Council Committees. We have also written to SA Attorney General Kyam Maher, reminding him of SA Labor's commitment to consider a Human Rights Act, and its value in underpinning discussions with First Nations.

Impetus for a human rights act in Tasmania was to have come from the Tasmanian Law Reform Institute re-examination of its 2007 paper on the issue. Sadly, that paper has been very badly delayed and the Institute itself is under review by the University of Tasmania. CLA continues to press for the finalisation of the report, and will be taking up the issue with the new Tasmanian Premier Jeremy Rockliff. Tasmanian Labor and the Tasmanian Greens remain committed to considering a human rights act.

RIGHTS IN SIGHT: Join In

While CLA keeps the contents of its discussions with FHRA advocates and opponents confidential, we are happy to help anyone interested in lobbying Labor, the Greens and centre independents for "Rights In Sight". Contact Chris Stamford at hracampaignmanager@cla.asn.au

NO RIGHTS WITHOUT REMEDY update:

Human rights acts in the ACT, Victoria and Queensland guide the development of legislation and encourage human rights accountability in Government decisions, but in practice individuals cannot use these HRAs as a primary way to access an enforceable decision for a mandated remedy. In the ACT you can "lawyer up" at considerable expense and get to the ACT Supreme Court on a matter that only arises from the ACT HRA, but the Court cannot set compensation.⁵

From its FHRA discussions CLA noted an emerging view that a FHRA would only be truly effective if individuals had easier and quicker access for mandated remedies and compensation for a breach of *any* of their human rights. CLA is developing a test case for this approach in the ACT. We coordinated with Australian Lawyers for Human Rights (ALHR), Canberra Community Law (CCL) and the ACT Council of Social Services (ACTCOSS) to petition the ACT Legislative Assembly to consider a proposal to:

- extend the ACT Human Rights Commission (ACT HRC) complaints processes to cover all rights in the ACT HRA; and
- allow individuals to seek mandatory remedy/compensation through the ACT HRC, ACT Civil & Administrative Tribunal (ACAT) and the Supreme Court (if necessary) for any breach of a right under the ACT Human Rights Act.

This would resolve a number of inequities that have crept into the ACT human rights complaints process and form a model that makes remedies for all human rights breaches accessible and affordable

⁴ You can access the video "TRAUMA, Rights and Remedies" at: [Trauma Rights and Remedies - YouTube](#)

⁵ For more discussion, see "Rights In Sight" issue #1 at [Human Rights - Civil Liberties Australia \(cla.asn.au\)](#)

for individuals whose complaints were not dealt with by Departmental complaints processes or conciliated by the Human Rights Commissions (HRC). It would also put the pressure of external and public scrutiny on Departments to ensure that their human rights complaints processes are effective.

CLA then lobbied across the ACT Assembly in support of the petition, arguing that the petition would:

- be a substantial step toward the promise made by the ACT Government for a human rights-based jurisdiction that was liveable, sustainable and fair.
- Lead to measurably better and more effective complaints processes at the lowest appropriate level of government decision making, offsetting the cost of any potential increase in cases before the ACT's HRC; and
- increase confidence across the ACT that human rights are protected, and that the ACT Government will behave ethically in a genuine participatory democracy.

20 of the 27 submissions to the subsequent review by the Legislative Assembly's Justice and Community Safety Committee said that implementing the proposal will make justice available to people who are currently missing out. Those 20 submissions also agreed that the proposal will remove inequities in the current complaints process. The Committee raised issues around:

- legal novelty and whether ACAT needs to develop jurisdiction and expertise on human rights matters;
- whether there will be a substantial rise in complaints that will need increased resources for the HRC and ACAT;
- how the new jurisdiction would fit with the activities of existing agencies; and
- whether the government would be more vulnerable to substantial compensation claims

These matters were dealt with by witnesses in the JACS public hearings. A copy of the CLA submission containing our argument on issues raised by the Committee is at **Attachment A**.

The suite of submissions to the review and transcripts of the hearings provide a comprehensive and valuable library of arguments in favour of a FHRA allowing individuals access to mandated remedies and compensation for any breach of their human rights.⁶

Importantly, the Committee did not feel the need to ask whether giving ACAT the power to mandate remedies for human rights breaches placed too much power in the hands of an unelected judiciary. While this has been a concern about human rights acts in jurisdictions that do not have one, after 18 years of human rights practice, the ACT has moved past the view that putting human rights cases before the courts threatens the authority of the Assembly.

⁶ NB: Four of the remaining seven submissions were opposed to the proposal in the petition and three were studiously neutral. Of the neutral submissions: the ACT Government's submission agreed that the petition should be considered, but raised a similar set of issues to the Committee; the ACT Policing submission had no issues with the petition provided that policing was carved out to avoid conflict with its obligations as a (sub-agency of a) Federal authority; and the ACT Ombudsman reminded the Committee that any changes to the ACT HRC complaints process would need to account for the Ombudsman's legislated responsibilities. "No Rights Without Remedy" submissions and transcripts can be accessed at: <https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/jcs/inquiry-into-petition-32-21#tab1914921-2id>.

If JACS reports favourably on the petition, further action will come down to Government priorities. CLA is coordinating with other advocates for the petition to encourage the Assembly to make the proposal contained in the petition a priority, given the range of human rights related legislation planned for the current term.

NO RIGHTS WITHOUT REMEDY: Join In

While CLA keeps the contents of its discussions with petition advocates and opponents confidential, we are happy to help anyone interested in lobbying to make “No Rights Without Remedy” a priority. Contact Chris Stamford at hracampaignmanager@cla.asn.au

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Civil Liberties Australia (CLA) is a community service association. Among other activities, we campaign for national rights laws for Australia, and for the states and the NT which do not have such laws, as well as proposing improvements to the laws in the ACT, Victoria and Queensland. All CLA members are volunteers: no-one is paid.



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.⁷

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 edition⁸ 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 Maconochie 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 condition of your parole and ACT Housing has taken you off its priority list.

⁷ 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. See *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.

⁸ https://issuu.com/act.law.society/docs/ethos_260_winter_2021_-_print

- 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.⁹

CLA anticipates that human rights measure data collected in future surveys¹⁰ 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;
- 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.

⁹ 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.*

¹⁰ 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.*

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.¹¹ 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.¹²

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.

¹¹ *Living well in the ACT Region Survey, University of Canberra 2020 report p 42.*

¹² *Balancing Life and Liberty. The second annual report on the operation of Queensland's Human Rights Act 2019 p 91-95*

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.¹³

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.¹⁴ 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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¹³ *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.

¹⁴ *ACT Human Rights Commission Annual Report 2020-21* p12

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.

