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Justice and Community Safety Committee
Legislative Assembly for the Australian Capital Territory
196 London Circuit
Canberra ACT 2601

7 April 2022

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

1. No matter who we are or where we are, our lives are better when we all treat each other with fairness and respect and when we can enjoy our rights and freedoms. That is why the Human Rights Law Centre has been a longstanding supporter of federal, state and territory Charters of Human Rights or Human Rights Acts.
2. Charters of Human Rights and Human Rights Acts help to ensure that the decisions and actions of our governments are guided by values of freedom, equality, compassion and dignity. They foster respect for human rights and help everyone to understand the rights and freedoms that we all share. Charters and Human Rights Acts help to prevent human rights violations by putting human rights at the heart of decision-making when governments are developing laws and policies and delivering services. Importantly, they give power to people and communities to take action if their rights are breached. Charters and Human Rights Acts help to articulate the kind of society we all want to live in.
3. The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. The enactment and improvement of human rights legislation at a state, territory and federal level has long been at the heart of our work. We frequently advise clients and litigate under human rights legislation and international human rights frameworks.
4. We commend the Justice and Community Safety Committee (**the Committee**) for holding this inquiry and welcome the opportunity to make a submission. Given the present inquiry is directed squarely at Petition 32-21 (No Rights Without Remedy) (**the Inquiry**), our submissions will be largely confined. However, we will conclude with some brief remarks on the need for wider reform of the *Human Rights Act 2004* (ACT) (**HRA**).

Context

5. Delivering the second reading speech for the *Human Rights Bill 2003* on 20 November 2003, then-chief minister Jon Stanhope described the moment as a “historic day for the chamber”. He continued:

Members, it is time to recognise that we are part of a system that promotes respect for and protection of fundamental human rights. We contributed to the development of these principles. They are a part of our history and our culture and we have chosen to adopt them freely as a free exercise of

Australian sovereignty. No country can claim the perfect human rights record and Australia does do better than most, but we can't afford to be complacent. We can't take our fundamental rights and freedom for granted in the 21st century any more than our forebears and ancestors could in the centuries that went before. ...

I am aware that some will say that this bill does not go far enough. There are many who want to see economic, social and cultural rights enshrined in law, but I have to say to you, "Let us at least begin." Let us begin with what is well accepted in the rest of the common law world. The world has moved on from the Magna Carta. Let us begin by incorporating the work done 60 years ago at the formation of the United Nations. This bill may not be exhaustive of all rights, but it is a beginning. I have already announced that economic, social and cultural rights will form part of the social plan. This issue can be looked at as part of a review of the Human Rights Act in the future.

6. Residents of the Australian Capital Territory (**ACT**) can feel rightly proud in the jurisdiction's position at the forefront of human rights protections in Australia. When enacted in 2004, the *HRA* was ground-breaking. For the first time, an Australian government was willing to place into domestic law many of the human rights that Australia had committed to protect and promote under international law. The ACT blazed a trail – followed by Victoria, with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) and most recently Queensland, with the *Human Rights Act 2019* (Qld) (**Qld HRA**).
7. But as Chief Minister Stanhope acknowledged in his second reading speech, the *HRA* remains unfinished. We can never take human rights, and their protection, for granted. At present, the *HRA* remains a document that influences legislative and executive behaviour rather than being accessible to the people of the ACT. At present, people who want to protect their human rights are required to bring expensive, difficult and time-consuming proceedings in the Supreme Court of the ACT. Legal action in the Supreme Court carries the risk of an order to pay significant legal costs for the other party if the legal action is unsuccessful. This is an intimidating, complex and inaccessible enforcement process. Further, if a person succeeds in obtaining a ruling that their rights were violated, the *HRA* specifically prohibits the court from awarding them compensation for the harm they suffered.
8. To address these shortcomings in the *HRA*, the petitioners requested the Assembly 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. (the **Petition**)*
9. The Petitioners noted that such reform would transform the *HRA* 'from being a largely theoretical document, to one which members of our community can use to ensure their human rights are protected.' We echo this sentiment.

No Rights Without Remedy

Summary

10. The Human Rights Law Centre strongly supports the Petition. The *HRA* would be considerably improved, to the benefit of all residents of the ACT, if the two proposals in the Petition are adopted and the *HRA* is amended accordingly. Such changes will require further resourcing for the ACT Human Rights Commission (**HRC**) and the ACT Civil and Administrative Tribunal (**ACAT**). We consider that such further resourcing will be modest, scalable to meet demand and likely to be balanced out by savings achieved as a result. Accordingly, we wholeheartedly commend the Petition to the Inquiry.
11. In enacting the *HRA*, the ACT put itself at the forefront of human rights protection in Australia. We consider that this Inquiry, and the reform proposed by the Petition, provides the ACT with an opportunity to again lead the way for other Australian jurisdictions. The impact of the *HRA* has been evident, in the Victorian *Charter* and more recently the *Qld HRA*. We are confident that, in time, other Australian states and territories, and the federal legislature, will enact human rights laws, inspired by the example set by the ACT. The ACT can and should now lead again, by making further improvements to the practical operation of the *HRA*.

Recommendation 1: The Inquiry should support the Petition’s proposals for a complaint to be able to be made to the ACT Human Rights Commission, and if not resolved for a legal proceedings to then be able to be commenced in the ACT Civil and Administrative Tribunal.

Accessible Complaints Mechanisms

12. There needs to be a more accessible dispute resolution mechanism within the *HRA*. As noted above, the ACT Supreme Court, is expensive and inaccessible. While it may be appropriate in some cases, it is particularly inaccessible for disadvantaged and marginalised individuals and community – precisely those who are most likely to need the protection offered by the *HRA*.

HRC

13. The HRC would be well-placed to conciliate *HRA* complaints. The *HRA* already has jurisdiction for receipt and conciliation of discrimination complaints under the *Discrimination Act 1991* (Cth). The skills and expertise the HRC currently possesses in relation to that jurisdiction will be largely transferable, subject to appropriate additional resourcing.
14. The *Qld HRA* gave similar functions to the Queensland Human Rights Commission (**QHRC**). While that scheme remains in its infancy, the initial outlook is promising. As Sean Costello, principal lawyer at the QHRC, wrote in the *Alternative Law Journal*, “the early indication is that the Queensland model is offering some positive outcomes.” (2021, Vol. 46(3) 228–231). The QHRC’s latest annual report details its experience thus far; in 2020-21, the first full year of operation, the QHRC received 340 complaints. The majority were successfully conciliated.

15. As part of the introduction of the *Qld HRA*, the QHRC received a funding boost of approximately \$1.3 million for the recruitment of 10 additional staff members. Given relative population sizes, we would envisage the HRC requiring substantially less than that amount to hire additional staff and resourcing initially, subject to complaint numbers.
16. ACAT is well-suited to determining human rights proceedings given its existing anti-discrimination jurisdiction. Some additional funding and resourcing for ACAT will likely be required. We note that the anti-discrimination experience is that the vast majority of complaints are resolved at the HRC level, or early in an ACAT phase, such that matters that proceed to full hearing are rare. A similar pattern is likely to follow under these proposals.
17. We note also that similar functions were recommended for the HRC and ACAT's Victorian counterparts in the 2015 review into the Victorian *Charter*. We echo the relevant observations made in that report: Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*.
18. While we appreciate that these proposals, if accepted, will require some additional resourcing, we consider that to be money well spent. Moreover, we consider it likely that much, if not all of that additional funding will be recouped – by way of reduced burden on the Supreme Court and minimised downstream costs as a result of early, efficient resolution of human rights complaints.
19. Additionally, as model litigants, we would expect government agencies to respond to complaints effectively and efficiently, compromise to resolve matters by conciliation where possible and not take an unnecessarily legalistic approach. We anticipate this will minimise the burden on the HRC and ACAT, in a way that might not be the case if the respondent in such matters was a private litigant.
20. To ensure complainants are advised on their options and, where appropriate, represented in the HRC and ACAT, additional funding to community legal centres and ACT Legal Aid to ensure adequate resourcing to assist *HRA* complainants should be provided.

Recommendation 2: The Inquiry should recommend that appropriate additional funding be provided to the HRC and ACAT to support the practical implementation of accessible remedies within the *HRA*. Consideration should also be given to funding for community legal centres and ACT Legal Aid to provide pro bono assistance with complaints to the HRC and proceedings in ACAT.

Wider Reform is Needed

21. The *HRA* is now 18 years' old. Over time, particularly with judicial interpretation of the *HRA*, the *Charter* and the *Qld HRA*, we have identified issues and limitations with elements of the *HRA*. We would welcome the opportunity to outline further ways the *HRA* can be improved to achieve its purpose.

22. Moreover, the scope of the *HRA* has not evolved to the extent perhaps anticipated by its advocates when introduced. Economic and social rights, protected by international law and in human rights charters and constitutions in foreign jurisdictions, remain largely absent from the *HRA*. The recent push for a right to a healthy environment to be recognised in the *HRA* is indicative of the need for wider reform to ensure economic and social rights are protected in the ACT.
23. Protecting a wider range of economic and social rights, such as health and housing, is a natural next-step in the evolution of this important legislation. This evolution has already been displayed by the ACT Government and Parliament recognising additional rights in the Human Rights Act regarding education and work. To again quote Stanhope, who delivered a paper at the federal Parliament in February 2012 entitled, 'Who's Afraid of Human Rights?'

The Human Rights Act, with only ICCPR protection, has not, as I said earlier, led to a significant increase in litigation, and the ACT courts and tribunals have adopted a cautious approach to the application of civil and political rights. There is no reason to suggest that the inclusion of economic, social and cultural rights would have more than a modest and appropriate impact in strengthening protections for these fundamental rights in the Territory.

24. Noting that the *HRA* will soon celebrate its 20th anniversary, we consider that the coming years would be an appropriate time to conduct a more wide-ranging review. This review might similarly consider the practical operation of the reforms recommended by the Petition, if enacted (considering, say, the first 12 months of operation). We consider that wider reform to the *HRA* would be a fitting birthday present for this Australia-first legislation in 2024. Doing so would ensure that it remains a legislative scheme of which ACT residents can be rightly proud.

Recommendation 3: The Inquiry should recommend that the ACT Government conducts a wide-ranging review into the *HRA*, incorporating input from the HRC and civil society.

25. We attach to this submission a report of 101 case studies of how Charters of Human Rights and Human Rights Acts have assisted people in the ACT, Queensland and Victoria. We hope this helps illustrate the practical benefits of human rights being placed at the heart of decision making and service delivery. More effective remedies, and broader recognition of all relevant human rights, would not only mean more people benefit from their rights being respected, but also better government.
26. We would welcome the opportunity to appear before the Committee to discuss these issues further.

DRAFT SUBMISSION

Kind regards,

A handwritten signature in black ink, appearing to be 'H. de Kretser', with a horizontal line extending to the right.

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