ACT HUMAN RIGHTS COMMISSION
Australian Capital Territory

Committee Secretary
Parliamentary Joint Committee on Human Rights

1 July 2023

Dear Secretary

Inquiry into Australia's Human Rights Framework

The ACT Human Rights Commission welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Human Rights' Inquiry into Australia's Human Rights Framework.

The Commission strongly support the introduction of a federal Human Rights Act and welcomes the model proposed in Australian Human Rights Commission's *Position Paper on a federal Human Rights Act, Free and Equal: A Human Rights Act for Australia* (March 2023). We agree with the view of the Australian Human Rights Commission that the next step towards a federal Human Rights Act is to develop a draft exposure bill based on the Australian Human Rights Commission's proposed model.

We do not address all the Terms of Reference for this Inquiry, limiting our submission to the following two issues the Committee has expressly invited comment on:

- whether the Australian Parliament should enact a federal Human Rights Act, and
- the effectiveness of the ACT Human Rights Act in protecting human rights in the Australian Capital Territory.

Our submission primarily seeks to assist the Inquiry by outlining the ACT's experience twenty years on since the introduction of the *Human Rights Bill* into the ACT Legislature Assembly, including outlining what has worked well and what lessons might be drawn for introducing such a model at the larger Australian scale.

Yours sincerely

Dr Helen Watchirs OAM
President and Human Rights Commissioner

Karen Toohey
Discrimination, Health Services, and Disability and Community Services Commissioner

1. Summary

The ACT HR Act has changed the ACT for the better. Learning from our experience as a key player within a "dialogue" model of human rights, we endorse the recommendations made by the Australian Human Rights Commission (**AHRC**) in the *Free and Equal Report*.[1]

We consider the scope of human rights included in the Free and Equal Report to be appropriate. The proposed range of protected rights is broader that those contained in the ACT *Human Rights Act 2004* (**ACT HR Act**), but the additional rights are important and ones we have been calling on the ACT government to implement for many years. These include the right to health and, importantly, the incorporation of UNDRIP[2] and its principles. We commend the proposed inclusion of a right to a healthy environment and look forward to the inclusion of such a right within our own ACT HR Act in the near future.

Human rights are vibrant and not stagnant. A human rights act must likewise be a living document, ensuring protections keep pace with changes in society. It is for this reason we support a model that is not constitutionally entrenched. Examples of fundamental shifts in community views over time include in relation to areas such as marriage equality reforms and voluntary assisted dying. Regular review of human rights protections is therefore important and, in the ACT, past mandated reviews have led to important reforms. Although there is currently no future review scheduled for the ACT HR Act, it is our view that mandated reviews should continue at regular intervals. We recommend that any future federal human rights framework incorporate such reviews to ensure human rights reform remains on the legislative agenda.

We see it as critical that any new human rights legislation contain positive obligations on public authorities to act compatibility with human rights and to consider human rights impacts in decision making. It is essential that commonwealth government agencies demonstrate their compliance with Australia's obligations under international human rights law and including a positive obligation to do so is critical to demonstrating a commitment to human rights principles.

The ACT experience is that the positive obligation on its own is not enough to change the culture of the government agencies whose discretionary decision most impact on individual's human rights. Any such obligation must be accompanied by regular and well-funded community engagement and education. We also see the direct right of court action coupled with an accessible and efficient complaints mechanism as key to ensuring both that a body of human rights jurisprudence is developed over time and so those seeking efficient and ready resolution of human rights concerns have an accessible avenue to do so. Both court access and an accessible complaints mechanism will require funding for the AHRC to receive and conciliate complaints and to carry out community education and engagement.

2. About the ACT Human Rights Commission

The ACT Human Rights Commission (**the ACTHRC**) is an independent agency established by the *Human Rights Commission Act 2005* (**the HRC Act**). Its main object is to promote the human rights and welfare of

[1] Australian Human Rights Commission *Position Paper on a Federal Human Rights Act, Free and Equal: A Human Rights Act for Australia* (March 2023)

[2] *United Nations Declaration on the Rights of Indigenous People* (**UNDRIP**)

people in the ACT. The HRC Act became effective on 1 November 2006 and the ACTHRC commenced operation on that date. The current composition of the ACTHRC includes:

- The President and Human Rights Commissioner
- The Discrimination, Health Services, Disability and Community Services Commissioner
- The Public Advocate and Children and Young People Commissioner; and
- The Victims of Crime Commissioner

This submission primarily reflects the views and advice of the President and Human Rights Commissioner at the time of drafting, Dr Helen Watchirs. Among her various functions, the President and Human Rights Commissioner advises government on the impact of laws and government services on human rights. She is also responsible for promoting community discussion, and providing education and information, about the *ACT Human Rights Act 2004* (**ACT HR Act**) and human rights generally.

3. History of the ACT Human Rights Act and the "dialogue model"

The ACT HR Act came into force on 1 July 2004. The legislation was first tabled in 2003 following a comprehensive consultative process and report by the ACT Bill of Rights Consultative Committee, chaired by Professor Hilary Charlesworth.[3] The ACT HR Act became the first statutory bill of rights to be enacted in any Australian jurisdiction and provided both a model and an impetus for other jurisdictions to follow suit: Victoria with the *Charter of Human Rights and Responsibilities Act 2006* (**the Victorian Charter**) and Queensland with the *Human Rights Act 2019* (**the Queensland HR Act**). All three human rights acts are "dialogue" models which ensure parliamentary sovereignty is retained while also encompassing the ability for a "dialogue" between all three arms of the Westminster system – the legislative, the executive and the judiciary.

The ACT HR Act has benefited from being a non-entrenched law, allowing both incremental and substantial changes to be introduced over the decades since its introduction. Significant improvements to the ACT HR Act over time have included an early amendment in 2008 to introduce an obligation on public authorities to comply with human rights, the introduction of the right to education in 2012, the express recognition of Aboriginal and Torres Strait Islander cultural rights in 2016 and the right to work in 2020.

4. The Human Rights Act and the development of legislation

The most significant impact of the ACT HR Act has been in its influence on the culture and development of legislation in executive and legislative processes. The ACT differs significantly in this regard from other jurisdictions in Australia where, on the contrary, scrutiny processes have had limited success in influencing legislative outcomes.[4] The difference in the ACT is that we have been successful in developing a system which has ensured that human rights scrutiny is integrated early in the development process and is not an afterthought. When consideration of human rights implications come at an early stage it can make a difference, as opposed to formal scrutiny mechanisms which may make recommendations at a point in when amendment of legislation is unlikely due to in-principle support of the majority of the legislature having already been obtained through cabinet processes.[5]

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[3] Report of the ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, May 2003.
[4] Debeljak, J & Grenfell, L "Diverse Australian Landscapes of Law-Making and Human Rights: Contextualising Law-Making and Human Rights" in Debeljak, J & Grenfell, L (Eds.) (2020), *Law Making and Human Rights: Executive and Parliamentary Scrutiny Across Australian Jurisdictions,* p.3

[5] Ibid

One reason for this success can be attributed to a culture distinct to the ACT which routinely involves early and confidential consultation with the ACT HR Commission. Although this consultative process is only reflected in government protocol and without a formal legislative basis, there is now a strong and accepted practice which involves the ACT HR Commission in a pre-introduction scrutiny. The ACT Cabinet Handbook has for nineteen years required that cabinet submissions explicitly consider human rights and the availability of less restrictive options. This has been partially responsible for the development of the practice of circulating to the Human Rights Commissioner most draft cabinet submissions for comment while at the same time accepting the full statutory independence of the role. Such a balance requires mutual trust between the executive arm of government that is developing legislation and the Human Rights Commission which accepts the role of receiving early drafts in confidence while giving robust and strong advice when human rights concerns are noted and making public statements once bills are tabled.

Another important practice in the ACT is that the ACT Attorney-General has centralised the role of developing human rights compatibility statements for government bills to ensure consistency. In our view this allows the ACT to avoid many of the shortcomings of comparative scrutiny regimes where compatibility statements are decentralised to the responsible Minister. Early involvement of the HR Commission also assists to embed an understanding of human rights in those developing and drafting new policy and legislation. This means that those drafting legislation develop a culture and understanding of the content of relevant human rights as well as concepts such as proportionality as a mechanism to consider when limitations of human rights may be justified according to international standards.

In this way the ACT pre-enactment scrutiny culture has had a direct impact on improving the human rights compatibility of laws by ensuring there is a method for detecting disproportionate limitations on human rights that might otherwise be overlooked. This may happen through redrafting a proposed section or entire components of a Bill. In some cases, early acceptance of adverse advice from the ACT Human Rights Commission may act as a complete brake on policy proposals that impose unjustifiable restrictions on human rights[6].

A better framework for protecting public health: the COVID19 experience

A key example of the effectiveness of using the ACT HR Act to protect human rights occurred during the Covid-19 pandemic when we engaged in open scrutiny of the ACT Government's COVID public health measures. Our advocacy throughout the pandemic, particularly in the second lockdown from August to October 2021, contributed to the Government building in more balanced restrictions on human rights that were targeted, necessary and proportionate. Our oversight and advocacy helped to guide the development of a dedicated legislative framework for managing the pandemic beyond the initial emergency response The *Public Health Amendment Act 2021* includes express provisions to consult the Human Rights Commissioner in making directions and guidelines. Other human rights safeguards include the dedicated legislative framework in part 6C of the *Public Health Act 1997* requiring publication of human rights justifications; oversight by the Legislative Assembly of ministerial and chief health officer directions and guidelines; and review of quarantine and isolation orders

Because Human rights scrutiny at early policy development or drafting stages occurs prior to introduction to the Legislative Assembly, much consultation occurs on a confidential basis, or is subject to cabinet

[6] For more on this topic, see Watchirs, H., Costello, S. and Thilagartnam, R., "Human Rights Scrutiny under the Human Rights Act" in Debeljak, J & Grenfell, L (Eds.) (2020), *Law Making and Human Rights: Executive and Parliamentary Scrutiny Across Australian Jurisdictions.*

confidence. One observation is that there is therefore limited public awareness of this aspect of our role, this being a necessary trade off to facilitate human rights considerations being more readily accommodated in the development of legislation.

It is our experience that our early advice is taken very seriously within government, with the positive consequence that there is genuine concern among policy and legal officers involved in the development of legislation to ensure bills are introduced, where possible, with human rights compatibility. Over the nineteen years no bill has been introduced with a statement of incompatibility contrasting with Victoria and Queensland where expressly incompatible legislation has been enacted.

Once bills are tabled in the Legislative Assembly, and if the HR Commission retains concerns, our statutory independence means we are still in a position to make strong, robust and public comments. An example of this has been in the development of the policy relating to the lifting of the Minimum Age of Criminal Responsibility.

Raising the Minimum age of criminal responsibility

The ACT HR Commission has, since 2005, advocated for the minimum age of criminal responsibility (MACR) in the ACT to be increased. Science has increasingly understood the limited ability of children to understand and discern right and wrong (especially in emotional circumstances, peer settings or where overlaid by complex needs). It is also clear that the earlier a child becomes engaged in the criminal justice system, the more likely they are to continue offending and causing harm in the community. In 2005, the ACT HR Commissioner audited the former Quamby Youth Justice Centre and recommended that the MACR be reviewed and raised to 12 years of age. The ACT HR Commission reiterated this view in July 2011 in its inquiry into the ACT Youth Justice System, including the Bimberi Youth Justice Centre, and, recently, for the Australian Human Rights Commission's Children's Rights Report 2019. The ACT Government has now introduced legislation that will raise the minimum age of criminal responsibility from 10 to 12 with a view to further raising it to 14 in time. The Bill establishes a therapeutic and early intervention approach, with children, young people and their families referred to a multidisciplinary panel for coordinated support at the earliest opportunity and based on assessment of risk to themselves and community.

Although the ACT HR Commission strongly supports the national leadership the ACT Government is taking in raising the minimum age of criminal responsibility, we have made public our concern with the proposal to include exceptions to that model.[7] In our view although the proposal advances human rights protections, the inclusion of exceptions cannot be compatible with human rights. Our independence in strongly advocating this public position has not been diminished despite the early scrutiny processes outlined above.

In addition to the role of the ACT HR Commission in pre-enactment scrutiny, the ACT Legislative Assembly's Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) (**the Scrutiny Committee**) examines all bills and subordinate legislation presented to the Assembly for human rights compatibility. This committee plays a similar role in the ACT to the PJCHR at the federal level and is currently constituted of one representative from each political party. It is chaired by a non-government member and is assisted by external legal advisers.

[7] Submission of the ACT Human Rights Commission (9 June 2023) to *Inquiry into Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023* by the Standing Committee on Justice and Community Safety.

One area for improvement is with respect to secondary legislation which is generally not subject to scrutiny by the ACT HR Commission and, depending on which type of delegated legislation it is, may also not be subject to scrutiny by the Scrutiny Committee either. This lack of oversight means there remains a significant gap in pre-legislative scrutiny. This has important consequences because of the increasing reliance by governments on delegated legislation to implement important policy changes which may have serious human rights impacts[8].

We recommend that any future human rights framework or Human Rights Act consider ways to incorporate pre-enactment scrutiny into the executive's role in developing of policy and the drafting of all legislation, including delegated legislation.

Human Rights Advocacy in action: *Terrorism (Extraordinary Temporary Powers) Act 2006*
The ACT HR Commission has consistently advocated for human rights compatible laws to deal with the threat of terrorism. Over several years since the introduction of the *Terrorism (Extraordinary Temporary Powers) Act 2006*, our advocacy has guaranteed and extended the human rights safeguards that govern preventive detention orders made under the act, which reflect best practice and distinguish it from other comparable schemes in Australia. The HR Act enabled advocacy from the community and legal sector to contribute to the development of a legislative framework that included human rights safeguards. These included: full judicial review and oversight; higher and more stringent tests for making preventative detention orders; express prohibition on the admissibility of evidence obtained from torture; shorter duration of interim orders; restrictions on rolling warrants; limitations on duration of preventative detention orders; court ordered compensation for wrongful detention; presumption of confidential legal communications; assistance for legal representation, prohibitions on detention of children under 18, among others.

5. Human Rights in the Courts

5.1 Direct Right of Action against Public Authorities

The ACT is the only Australian jurisdiction with a direct right of action against public authorities for breaches of human rights. Section 40C of the ACT HR Act states that if a person claims a public authority has acted in contravention of its obligations to act consistently with human rights or has failed to give proper consideration to human rights, then a person who claims to be a victim of that contravention may start a proceeding in the Supreme Court. The ACT HR Act also contains what is generally referred to as a "piggyback" provision which enables a person to rely on their human rights in "other legal proceedings"[9]. It is through this latter provision that human rights have been considered in proceedings of the ACT Civil and Administrative Tribunal (**the Tribunal**) and in the ACT Magistrate's and ACT Children's Court.

Contrary to the perception that a direct right of action may open the "flood gates" to human rights litigation, the direct right of action has in our experience been used in a limited number of cases. Although there has been a recent uptick in the number of cases raising human rights, all reviews of the ACT HR Act have found only a small number of cases where parties raised human rights issues either directly or in conjunction with other legal proceedings.[10] Our own review of reported decisions indicates that over the

[8] See Watchirs et al (2020) for further discussion at [6.130] including an example of the consequence of this gap.
[9] ACT HR Act, section 40C
[10] See overview of the three reviews in respect of the Courts in Watchirs et all (2020) from [6.170] following.

19 years since the ACT HR Act has been in force it has been mentioned in 366 ACT Supreme Court and Court of Appeal cases and 128 decisions of the ACT Civil and Administrative Tribunal.

The reasons for the limited use of the ACT HR Act in litigation are varied. The main reason is that the direct right of action is only available in the Supreme Court. The Supreme Court is out of reach for the majority of the population and legal aid is not routinely available.[11] In addition, a person may seek any relief except damages which may limit those who feel aggrieved by human rights infringements taking action where the only remedy available for past actions might be general declaratory relief.[12] We are hopeful that the ACT Government's commitment to introduce an accessible complaints mechanism later this year will pave the way for more frequent reliance on and therefore greater awareness of the ACT HR Act, which we discuss further under heading 6.1 below.

Despite the relatively small numbers, there have been some important outcomes from human rights litigation in the Courts and Tribunal and an ACT human rights jurisprudence has started developed. The ACT HR Commission has recently published *A Collection of 20 Human Rights Cases* for the 20th Anniversary of the Human Rights Bill. This publication summarises some of the important impact human rights has had in the courts and the Tribunal across a variety of areas including housing, health care, vilification and discrimination, mental health, disability, guardianship and criminal law issues such as bail, sentencing, and fair trials.

Human Rights in the Courts: conditions in detention.
The ACT HR Act has played an important role in court cases relating to conditions in Canberra's places of detention. The ACT HR Commission has been granted leave to intervene in several such cases

The 2022 case of *Davidson v JACS*[13] concerned a detainee's isolation in his cell for disciplinary reasons. Mr Davidson was confined to his cell and only allowed out for limited periods into a small internal courtyard covered with a mesh roof, connected to his cell and around the same size of his cell. The Court found that this denied him the guaranteed minimum daily hour of access to open air and an adequate space to exercise (which was available in external exercise yards), was not humane and therefore was incompatible with human rights under both international standards and ACT laws

As another example, an Aboriginal girl detained at the Bimberi Youth Justice Centre alleged that her human rights were breached by segregation from other young people, and by staff confiscating her artwork and Koori Mail newspaper. The ACT HR Commission intervened in the Supreme Court action, which settled prior to a decision and included an apology given by the ACT Government

4.2 Statutory Interpretation

The introduction of human rights legislation has led to two key developments affecting existing common law statutory interpretation principles. The first regards the requirement in the ACT HR Act to interpret

[11] A class of matter in which legal assistance may be granted in matters involving Territory law includes "Matters which in the opinion of the Chief Executive Officer [of Legal Aid] raise real questions of denial of breach of human rights" Legal Aid ACT *Legal Assistance Guidelines*, Reprinted with Amendments: 17 August 2017.
[12] Section 40C(4) of the ACT HR Act states the Supreme Court may "grant the relief it considers appropriate except damages" [emphasis added].
[13] *Davidson v Director-General, Justice and Community Safety Directorate* [2022] ACTSC 83 (**Davidson v JACS**)

other laws consistently with human rights. The second regards the use of international and foreign jurisprudence to interpret the scope of protections afforded by the ACT HR Act itself.

Section 30 of the ACT HR Act states that an ACT law must be interpreted in a way that is compatible with human rights "so far as it is possible to do so consistently with its purpose". The parallel provision in the VIC Charter was considered by the High Court in *Momcilovic v The Queen*[14] but that decision created rather than resolved uncertainty as to how interpretative provisions are to be applied. In the ACT, the Supreme Court position has been similar to the Victorian position in reconciling the differing positions. In Victoria the Courts have essentially taken the Charter's interpretative provision as largely codifying the common law concept of legality, although broadening the scope of relevant rights.[15] In the ACT, the Court has developed a similar approach viewing section 30 as imposing an interpretative provision which goes little further than applying existing interpretative principles, albeit with specific reference to the relevant human right to be considered.[16] Despite the relatively conservative approach, the interpretative provision has nevertheless assisted the Court to determine the meanings of legislation where more than one apparent construction is available to prefer the human rights compatible interpretation or else (if none is available) to issue a statement of compatibility.

Balancing competing human rights

The case of *R v QX* (No 2)[17] considered whether allowing a witness to give evidence with the support of an intermediary impacted on the right to a fair trial of the accused person. An intermediary is a person who supports a witness to give their best evidence in the courtroom, particularly if the witness has a communication difficulty, is vulnerable because of their age, is impacted by trauma or mental health issues, has a disability or requires other support.

The ACT Human Rights Commissioner intervened and referred the Court to relevant domestic and international jurisprudence regarding the scope of each right engaged and outlining her views as to the way the interpretative provisions should be applied when the balancing of rights must occur. The Court considered the rights of the accused person to a fair trial and criminal process rights in sections 21 and 22 of the ACT HR Act. These protections include the right of the accused to ask questions of witnesses. The accused person argued that having an intermediary support person present would stop them from properly asking challenging or confronting questions of the witness. The Court also considered the right to equality and the rights of the child at sections 8 and 11 of the ACT HR Act, which required that the Court make its processes suitable for the participation of all witnesses.

The Court decided that a fair trial involves "a triangulation of interests" which takes into account the human rights of the accused, the human rights of the victim and their family, as well as the public interest. The Court had to balance the rights of the accused person to defend themselves by asking challenging questions; the rights of the vulnerable witness; and the interests of the community in having the best evidence to properly judge whether crimes were committed. The Court found that allowing an intermediary to support the witness struck the right balance and did not unreasonably affect the ability of the accused person to defend themselves.

[14] [2011] HC 34 (8 September 2011)
[15] For a discussion of the two concepts see Bruce Chen, "The Principle of Legality and section 32(1) of the Charter: Same Same or Different?" on AUSPUBLAW (26 October 2016).
[16] *In the matter of an application for bail by Islam* [2010] ACTSC 147
[17] *R v QX* (No 2) [2021] ACTSC 244 (1 October 2021)

Where section 30 is concerned with how the ACT HR Act may be used to interpret other legislation, section 31(1) concerns how the Court should interpret the scope of rights within the ACT HR Act itself. The ACT HR Act expressly provides that international law, and foreign and the judgements of foreign and international courts and tribunals relevant to a human right may be considered in interpreting a human right. In our experience the ACT Supreme Court has had no difficulty considering international jurisprudence in this way. For example, in *Davidson v JACS* the ACT Court looked to relevant international jurisprudence such as the New Zealand case of Taunoa v Attorney-General[18] and the standards contained in the *UN Standard Minimum Rules for the Treatment of Prisoners* (**the Mandela Rules**). In the case of *R v QX* (No 2) the Court looked to the General Comment No 32 of the UN Human Rights Committee to articulate the content of the accused right to cross-examine witnesses.[19]

4.3 Declarations of Incompatibility

Although declarations of incompatibility have played an important role in the "dialogue" models of human rights in the United Kingdom and in New Zealand, their utility in the ACT and other Australian jurisdictions with human rights acts has been questionable. We agree with the AHRC position recommending that an equivalent power not be incorporated in any future federal Human Rights Act, primarily due to questions regarding the constitutionality of such powers.[20]

Statutory interpretation and a statement of incompatibility: the dialogue model in action.
In 2010 the ACT Supreme Court considered whether bail laws could be interpreted in a manner consistent with human rights or whether they were simply incompatible with the ACT HR Act. In the ACT legislation regarding bail generally upholds the principle that a person is entitled to be in the community while awaiting trial. However, for serious offences, including attempted murder, bail is only available if the accused person can show special or exceptional circumstances. The question for the Court was whether restricting access to bail in this way was compatible with the right to liberty and to presumption of innocence contained in section 18 of the ACT HR Act, and in particular section 18(5) which expressly provides a right to bail. The question was whether laws making bail only available in special or exceptional circumstances for those accused of certain serious crimes could be interpreted consistently with this human rights principle

Although the Court acknowledged that there was a need to balance the interests of public safety and making sure the accused would not flee to avoid trial, ultimately the Court determined the high threshold for bail could be interpreted to be compatible with section 18(5). The Court issued a Declaration of Incompatibility indicating to the Government that it believed the law was inconsistent with human rights. The Declaration of Incompatibility itself did not itself affect the validity of the Bail Act. The Attorney General was required to present the Declaration to the Legislative Assembly and then later provide a government response to the Declaration, but the law itself has never been changed. The special and exceptional circumstances test therefore still applies to serious offences, including attempted murder. The case provides a key illustration of how parliamentary supremacy is retained in the dialogue model.

[18] [2007] NZSC 70
[19] [2021] ACTSC 244 (1 October 2021)
[20] Free and Equal Report, p.261

There have been two declarations of incompatibility made in the ACT. The first was a declaration that the bail laws in the ACT could not be interpreted compatibility with the ACT HR Act.[21] That declaration was tabled in the Legislative Assembly but, over a decade later, is yet to be acted upon. The second declaration of incompatibility was in regard to a delegated legislative instrument (an operating procedure) which the Court had in any case found was invalid as if it never had any legal effect.

4.3 The ACT HRC Intervention Role

Section 36 of the ACT HR Act states that the ACT Human Rights Commissioner may intervene in court proceedings that raise the ACT HR Act, with the leave of the court. The power provides an avenue of independent advocacy for human rights principles. The ACT Human Rights Commissioner cannot initiate proceedings in their own right nor can they represent an individual or organisation in proceedings.

The current ACT Human Rights Commissioner has used her powers to play an important role as intervener in key Supreme Court human rights cases. The assistance to the Court is generally well received and our submissions have been favourably referred to in published decisions. There are, however, two key improvements that could be made in this space which we recommend be incorporated into any proposed federal human rights act.

The first is that the ACT Human Rights Commissioner does not have a right to intervene but must seek leave from the Court.[22] By contrast, in Queensland and Victoria, human rights commissioners have the right to intervene in court or tribunal proceedings that involve consideration of the ACT HR Act. In addition, the ACT Attorney-General also has a right to intervene and is not required to seek leave[23]. Although the ACT Human Rights Commissioner has generally only sought to intervene in a small numbers of cases, when she has done so it is in matters raising particularly important issues of human rights significance. It is our view that ACT Human Rights Commissioner ought to have a standing right to intervene that is not contingent on Court consent. We do recognise that it may be appropriate for the Court to set parameters for intervention.

The second area where we see reform is needed relates to an anomaly contained in the ACT HR Act which only requires notification to the ACT HR Commission of cases raising human rights which do not involve the Territory as a party. This presents difficulties because actions under the ACT HR Act are only available against public authorities meaning only extremely rare cases raise human rights where the Territory is not a party. The duty to notify the ACT HR Commission therefore rarely applies. The lack of a duty to notify the ACT HR Commission means that, unless a plaintiff or other party is aware of our role, we may be informed too late in the process at a stage when intervention is difficult.[24] Sometimes, particularly when a plaintiff may be unrepresented, we may not be informed at all and only become aware of cases that have raised human rights due to media reports or at publication. The ACT HR Commission has advocated for the ACT HR Act to be amended to require notification to the ACT Human Rights Commissioner in all cases which raise the ACT HR Act. Such notifications would not necessarily increase the number of cases the ACT Human Rights Commissioner chooses to intervene in but would enable us the ACT HR Commission to have greater visibility of trends and emergent issues giving rise to human rights litigation, would support the Court in

[21] *In the matter of an application for bail by Islam* [2010] ACTSC 147
[22] ACT HR Act, section 36.
[23] ACT HR Act, section 35.
[24] In one such case the ACT Human Rights Commissioner sought leave to intervene in an adoption matter was but refused leave due to the intervention coming too late in the proceedings.

efficient administration of matters by allowing applications for intervention at early stages and would generally allow more effective exercise of the Commissioner's statutory functions.

We recommend any future federal Human Rights Act confer a right upon the AHRC to intervene in proceedings raising human rights. We also recommend incorporation of a requirement that a party to a proceeding who raises human rights be required to notify the AHRC.

6. Human Rights and Public Authorities

6.1 The obligation on public authorities

Section 40B(1) of the ACT HR Act makes it unlawful for public authorities (which includes private entities who have a public function)[25] to act in a way that is incompatible with a human right or in making a decision to fail to give proper consideration to a relevant human right. A public authority is, essentially, all government agencies, statutory authorities and those contracted to carry out government functions. The Free and Equal Report refers to this obligation as a "positive duty". An important exception is where another law expressly requires the public authority to act in particular way that is inconsistent with a protected human right.[26]

We agree with the AHRC framing that the obligation on public authorities should be recognised as the "centre" of any future federal Human Rights Act. Such an obligation is critical for human rights culture to become embedded into everyday discretionary decision making by those public agencies directly impacting individuals' lives. At the State and Territory level these obligations bind those delivering services such as public housing, public education, public health services, corrections and youth justice facilities and child and protection services. At the federal level these obligations would impact on areas such as federal detention facilities, Centrelink decisions, Medicare and NDIS services. The obligation requires a decision maker who has the discretion to do so to consider the human rights impacts of a decision and requires limitations of those rights to only occur when such a limitation is set by law and in a way that is proportionate: meaning it is reasonable and aimed at and rationally connected to a legitimate purpose and is the least restrictive way of achieving the purpose[27].

As we have outlined above, the ACT has been successful in embedding human rights cultural change, especially in those parts of the executive that are developing legislation and certain policies. It is our view, however, that there is still some way to go before such a human rights culture is also firmly embedded into the public authorities delivering frontline services. In our view, it is critical for strong scaffolding to be implemented to support the positive obligation. This includes ensuring accessible remedies, properly funded oversight mechanisms by independent statutory authorities and properly funded ongoing human rights education to support cultural change within agencies. It is our experience that when such scaffolding is in place, necessary cultural changes can and do occur.

[25] Section 40(1)(g) of the ACT HR Act
[26] Section 40B(2).
[27] ACT HR Act, Section 28 outlines when human rights may be limited and is discussed in more detail in this submission at heading 7 below.

Public authorities required to give consideration to human rights.

In *Little v Commissioner for Social Housing* [2017] ACAT 11 a public housing tenant raised her human rights after facing eviction following separate proceedings in the residential tenancies division of the Tribunal for rental arrears. The Commissioner for Social Housing had been successful in obtaining a warrant for her eviction based on those arrears. Prior to execution of the warrant of eviction the tenant was successful in applying for a stay of that process to allow her to bring proceedings to seek administrative review to dispute the significant amount of rent she was alleged to have owed. The rental arrears debt was based on her having been charged full market rent for the previous year rather than the subsidised rebated rent she was entitled to as a pensioner.

The tenant raised her human rights and the Tribunal in its administrative division considered the Commissioner for Social Housing's refusal to accept the tenant's application to backdate her rental rebate application despite documented domestic violence and the death of her son. The need to backdate the rebate was necessary because she had not been able to submit the necessary documentation within the required timeframes, causing her rebate to be cancelled and full market rent to be charged.

The Tribunal decided that, in exercising its discretion not to backdate her rebate, the Commissioner for Social Housing did not given proper consideration to the human rights of the tenant under the ACT HR Act. The Tribunal decided the specific circumstances of the tenant needed to be considered in making a decision whether to backdate a rebate including the reasons the rebate had been initially cancelled following serious domestic violence and grief following the death of her son. The consequence of the rebate cancellation was the tenant being charged full market rent and therefore a direct cause of the rental arrears and the warrant for eviction.

The Tribunal decided the decision not to backdate the rebate engaged section 11 of the ACT HR Act and was an arbitrary interference in her privacy and home. The rebate was backdated and the rental arrears were significantly reduced. The warrant for eviction was not pursued and the tenant was able to remain in her home.

6.1 Accessible remedies – a human rights complaints mechanism

As outlined under heading 5.1 above, the ACT is unique among Australian jurisdictions in that it includes a direct right of action to the Supreme Court to seek a remedy (other than damages) when it is claimed a public authority has acted incompatibility with its human rights obligations and a person alleges they are a victim of that contravention. The direct right of action has been important for developing human rights jurisprudence, but the ACT HR Commission has for over fifteen years called for the direct action to the courts to be supplemented by an accessible mechanism due to the costly, complex and formal barriers that are intrinsic to commencing Supreme Court litigation. Our 2022 submission to the ACT Legislative Assembly Inquiry into an accessible complaints mechanism details the benefits of a confidential conciliation pathway to the ACT HR Commission followed by a referral to the Tribunal if that process is unsuccessful in resolving the complaint.[28]

[28] Submission of the ACT Human Rights Commission to the Legislative Assembly's Standing Committee on Justice and Community Safety Inquiry into Petition 32-21 (No Rights Without Remedy) published on 13 April 2022 https://www.parliament.act.gov.au/__data/assets/pdf_file/0010/1990153/Submission-06-ACT-Human-Rights-Commission.pdf

A complaint mechanism exists in relation to complaints under the Queensland HR Act and the Victorian Ombudsman performs a similar function in relation to the Victorian Charter. Both states have reported the benefit of these processes on cultural change within public authorities and on their decision making processes.[29]

In October 2022 in response to our advocacy and community calls via a petition to the Legislative Assembly, the ACT Government announced its commitment to creating a new pathway for complaints about the ACT HR Act.[30] The ACT Human Rights Commission already receives complaints across a wide range of jurisdictions, many of which include consideration of complaints under the ACT HR Act. Bringing together the complainant and the agencies involved to conciliate a complaint is something the ACT HR Commission does regularly through its many other complaint jurisdictions. Our experience is that that this is of great benefit both to the person bringing the complaint but also to assist with cultural change within the relevant agencies. Accessible complaints mechanism support restorative justice approaches and empower individuals who would be otherwise prevented from commencing legal proceedings to raise their concerns in a forum that encourages efficient and effective early resolution.

The ACT HR Commission therefore welcomes the ACT Government's announcement and is hopeful that the existence of such a mechanism will facilitate the cultural changes required to truly emend human rights thinking into discretionary decision-making processes of public authorities.

7. Limitations on human rights in the ACT Human Rights Act

The ACT HR Act explicitly recognises that human rights are not absolute and that they may be limited to balance competing rights or for reasons articulated at section 28 of the ACT HR Act. Section 28(1) states human rights "may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society". Section 28(2) sets out a set of considerations for determining whether a limit is reasonable, including whether or not there is any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

Section 28 also intersects with a number of other limitations contained within the ACT HR Act including limitations "internal" to specific rights such as the right to privacy and reputation at section 12(a), the interpretative clause at section 30 and the disapplication of public authority obligation clause at section 40B(2). These intersections have caused some ongoing interpretative difficulties in the jurisprudence and we recommend that limitations clauses be carefully synthesised at the drafting stage of any future human rights act to ensure clarity. Our experience strongly supports the comments made in the AHRC *Free and Equal Report* which states at page 254:

> "for the avoidance of confusion there should be one overarching limitations clause. This means that limitations within rights should not be included in the test itself, as the limitations process is covered through the overarching clause. Otherwise there would be 'double up' in the limitations process…"

[29] Ibid – for which see summary of both jurisdictions experiences.
[30] Tara Cheyne MLA (Human Rights Minister), Media Release dated 20 October 2022

8. The human rights protected by the ACT Human Rights Act

8.1 Rights currently protected in the ACT HR Act

When first introduced, the ACT HR Act protected human rights derived from the *International Covenant on Civil and Political Rights* (**ICCPR**). In 2012 a new right to education was introduced into the ACT HR Act, with subsequent reforms in 2016 ensuring the ability to fully enforce that right by including it within the public authority obligations. This was the first protected right drawn from the *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**) to be protected by the ACT HR Act.

Amendments in 2016 also introduced Aboriginal and Torres Strait Islander cultural rights sourced from the *United Nations Declaration on the Rights of Indigenous People* (**UNDRIP**) on the recommendation by the ACT HR Commission in partnership with our Elected Body. The ACT HR Commission supports further expansion this right to include the full suite of UNDRIP rights in particular self-determination, consultation and participation rights.

Aboriginal and Torres Strait Islander cultural rights

The Human Rights Commission had consistently called for amendments to the ACT HR Act to recognise unique and distinct cultural rights of Aboriginal and Torres Strait Islander Peoples, since the signing of the UNDRIP by the Australian Government in 2009. UNDRIP has widespread support from indigenous peoples around the world.

The ACT HR Commission worked with the Aboriginal and Torres Strait Islander Elected Body and the ACT Government to recognise cultural rights including to practice and maintain cultural heritage, language, spiritual beliefs, and kinship ties and to have their material and economic relationships with land and waters recognised and valued.

The recognition of cultural rights has been an important advocacy tool. It has been used to argue for new protections for Aboriginal scarred trees, more recognition of the need culturally appropriate and safe services, including health services, and the need to reform care and protection and justice system policies and practices to reflect Aboriginal cultural needs and experiences. We expect to see greater focus in in the ACT Government on supporting Aboriginal community-controlled organisations to deliver services directly to their communities and empowering those communities to have more say in the development of policies that affect them. As an example of the use of section 27(2) in practice, the Dhurrawang Aboriginal Human Rights Program at Canberra Community Law helped an Aboriginal woman living in a one-bedroom public housing property who provided respite care for her grandchildren and niece, and gave her family significant cultural and other support as an elder. Housing ACT initially refused her application for a larger home, as there were no formal arrangements for the care of her grandchildren and niece. They advocated that her cultural and family rights protected under the ACT HR Act were denied, and the housing authority approved her application for a larger home.

8.2 Proposal to introduce the Right to a Healthy Environment

The ACT Government has committed to amending the ACT HR Act to incorporate the right to a healthy environment. Unlike rights derived from the ICCPR or ICESCR, the right to a healthy environment derives elements from both civil, political and economic and social rights.

The ACT HR Commission strongly supports the proposed amendment which, if introduced, will mean that the ACT becomes the first jurisdiction in Australia to expressly enact a human right to a healthy environment. The inclusion of such a right would promote early consultation by agencies about the implications of proposed legislation on the right to a healthy environment, even if that legislation was not environmentally focused itself. There would also need for agencies to provide justification as to whether any actions or decision taken that limit the human right to a healthy environment would be reasonable, necessary and proportionate. Coupled with the proposed accessible complaints mechanism that would allow individuals to take action when they believe their right to a healthy environment has been infringed, such a right will in our view create further incentives for organisational change to enable better consideration of the impacts on the human rights of those impacted by decisions affecting the environment.

The introduction of the ACT HR Act almost twenty years ago has been a positive experience for the ACT. We welcome the continued evolution of the ACT HR Act over time to better reflect Australia's international human rights obligations. Our experience that is the ACT HR Act reflects a balanced approach to introduction of rights protection and demonstrates an effective way of achieving cultural change, expressing the ACT Government's commitment to international human rights obligation.

We again commend to the inquiry the adoption of the recommendations made by the AHRC outlined in the Free and Equal Report. Our experience in the ACT provides an evidence base illustrating that the proposed model can work to improve human rights protections and we trust the examples we have provided assist the current inquiry. The recommendations for improvements in the ACT scheme we have made in this submission are not intended to diverge from the AHRC model. The relevant learnings support the AHRC proposed model and may provide further assistance in respect of the detailed implementation of any proposed scheme.