Ten Years of the ACT Human Rights Act: Continuing the Dialogue, 1 July 2014

The Impact of the Human Rights Act in the Community

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Thank you for the opportunity to speak today.

Acknowledgement

I begin by acknowledging the traditional owners of the land on which we meet. In the context of our discussion today about Human Rights, I take the opportunity to recognise the immeasurable Human Rights abuses that Aboriginal and Torres Strait Islander people have experienced at the hands of non-indigenous persons since white settlement. Today, Aboriginal and Torres Strait Islander members of our community remain at greatest risk of not receiving the support they need to remedy legal issues. Despite this, generations of Aboriginal and Torres Strait Islander peoples in this region have kept their families strong in the face of extraordinary hardship. I take this opportunity to acknowledge your strength, and to pay you my respects.

Introductory Comments

Today I’ve been invited to speak about the impact of the Human Rights Act in the ACT community. For those who don’t know me, my background is working as a solicitor in the community legal sector and legal aid sectors. My focus on client work was warmly interrupted by the opportunity to work for several months last year with Dr Watchirs and her team at the Commission. I have since returned to the Women’s Legal Centre. It is in my capacity as a community legal centre lawyer that I speak to you today about how the Human Rights Act has impacted the community where I live.

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We know that a Human Rights culture has the potential to significantly change the way communities operate, and the way individuals perceive themselves and those around them.

Ten years on from the commencement of the ACT Human Rights Act it is timely to ask – where are we up to? Passing of the Act ten years ago was groundbreaking, and the Canberra Community has come some way along the road in terms of weaving Human Rights into its fabric.

I’m going to undertake a quick poll of the room.

- Outside of your professional role, how many of you have had a conversation with a family member or friend about a human-rights related issue in the past month?

- I’d now invite you to think about your favourite neighbour. How many of you think that they would have had a conversation about a human-rights related issue in the past month?

- Bring to mind your favourite child and young person. How many of you think that they would have had a conversation about a human-rights related issue in the past month?

I have asked these questions because I think it’s important for us to be thinking about who in our community is thinking about, and talking about, Human Rights.

Hilary invited today’s speakers to cast a critical eye on the operation of the Act. I am going to take that opportunity because I have to say that in my opinion, day-to-day community engagement with the Act, and the notion of Human Rights generally, remains low.

Today, I will make some observations about why I think this is, and how we might continue to grow a Human Rights culture in Canberra.

**Public Comment**

I’ll start by saying that one of the things that has increased the impact of the Human Rights Act in the Canberra community is the media presence of the
Human Rights and Discrimination Commissioner, Dr Watchirs. It’s not unusual to see Helen’s comments or hear her voice on television and in print media. Her media presence reminds Canberrans, over their cornflakes, doing they’re pre-breakfast work-out, or whilst dodging traffic to get their kids to school on time, that a Human Rights lens can be applied to day-to-day matters, whether it be about shopping trolleys, serving kids at the local IGA, or the conditions in our prisons.

But what else could we do to increase community engagement with the Human Rights Act?

**The work of the Human Rights Act ‘behind the scenes’**

One of the key challenges is that some of the Human Rights Act’s most important work is done ‘behind the scenes’ as a mechanism that is gradually improving the human-rights compliance of our laws. As you would be aware, all new legislation goes through a ‘Human Rights lens’ through the requirement of a compatibility statement. The ACT public service and legislature genuinely does a remarkable amount of work at the ‘front end’ of new legislation to make sure law-makers consider the rights engaged by each new bill, and how such rights may be impacted by new or amended law.

As he discussed this morning, Jon Stanhope envisaged a new Human Rights culture for the ACT and I think it’s fair to say his legacy of a culture of respect for Human Rights is still very much alive in the bill-drafting process.

In my mind, there’s no doubt that all individuals in the community will benefit, in the long-run, from Human Rights scrutiny of new laws. However, it remains the case that the community is unlikely to be aware, or engaged in this process.

I also take this opportunity to note that ongoing government support and ‘buy-in’ to a culture of Human Rights isn’t necessarily hard-wired. The significance of this has been highlighted by colleagues in other jurisdictions, where anecdotally, public servants may feel less empowered to inform their decision-making, and identify potential conflicts, using Human Rights legislation, where the reigning government is more antagonistic towards such legislation.
So if the community generally aren’t engaged in the work that’s happening to ensure our new laws are HR compliant – how can they be engaged in the growth of a Human Rights culture?

**More Human Rights education**

I’m stating the obvious when I say that more education on the Human Rights Act and the significance of a Human Rights culture across the ACT would better engage the community in a Human Rights dialogue.

There have been a range of reports and discussions around the national curriculum and the inclusion of Human Rights. The ACT has a particular interest in ensuring that our local schools – public and private – are talking about Human Rights. Ideally, this would not just be happening in a one-week topic called ‘getting to know your Human Rights’. Rather, I would hope that when my four year old nephew is learning about ‘who is in my family’ at pre-school, teachers would be talking about how important it is to be able to know and spend time with your family. They would be talking about the ‘right to family’ in child-friendly language, something our ACT Children and Young People Commissioner, Alasdair Roy, and his team are particularly skilled at. Ideally, when we’re teaching economics at high-school level and beyond, we’d be teaching about economic social and cultural rights. When we’re teaching geography, demographics and population studies, we’d be talking about Human Rights and geography. In this way, knowledge and understanding of Human Rights would be threaded throughout curriculum.

Importantly, knowledge of the ACT Human Rights Act and its basis in international Human Rights law provides a lens for young people to better understand themselves as rights holders, and also to consider the many political and social problems that confront them through a Human Rights lens. Young people in the ACT and Victoria are in the unique position of being able to relate national and international conversations about the Human Rights of asylum seekers, or civilians in Syria, back to a local law.

This is significant. And we must build on it.

**Targeted community campaigns**
Beyond our schools, the Human Rights Commission undertakes important, targeted education activities with vulnerable parts of our community. They’ve rolled out the federal ‘Racism, it stops with me’ campaign across ACT Bars and Clubs. Each year, they work with Canberra’s Multicultural and Aboriginal and Torres Strait Islander communities around the impact of racism, culminating in the annual Race Relations Roundtable. I understand the Commission are also looking at how the right to education plays out for families who have recently immigrated to the ACT. All of this is good work. It is work that takes resources, and that must be continued.

*Bringing legal and community advocates on board*

There is also a significant amount of work yet to be done in training lawyers and community-based advocates to use the Human Rights Act in their advocacy work. Whether you are talking to a local housing co-op regarding a client’s right to privacy, or to child protection regarding a client’s right to family, the Act can and should be used.

Our colleagues in Victoria *and* the British Institute of Human Rights have both published resources which containing case studies that explore how Human Rights legislation is being used by groups and individuals to challenge poor treatment.

To be frank, I think we would be hard-pressed to gather these kinds of case studies in the ACT. My work in the legal and community sectors suggests that advocates, with a few key exceptions, have a long way to go in terms of feeling comfortable with using the Human Rights Act as a framework for advocacy. I think this is in no small part due to challenges with the framework of the Human Rights Act. Nonetheless, I would urge the Commission to prioritise further help for non-government organisations and the legal community regarding what Human Rights arguments might look like, particularly in common civil disputes.

In summary, I hope that those of us here today may share the goals of increasing the impact of the Human Rights Act in the community by:

- ensuring Canberrans better understand the ‘behind the scenes’ role of the Act in shaping legislation;
• providing better education, from pre-school and beyond, about Human Rights and their application; and

• skilling up community-based and legal advocates to use the Act.

However, as anyone who has delivered community legal education knows, if you’re out in the community talking about Human Rights and the importance of raising them in day-to-day life you’re bound to get the question: ‘But what do I do if they just won’t listen?’

What happens, at rock bottom, when you think your Human Rights have been breached and the conversations you’ve had, the phone calls you’ve made (assuming you have a phone), the emails you’ve written (assuming you can write and access the net), and the letter from the lawyer you paid the last of your savings to (or saw for free at a community legal centre), haven’t gotten you anywhere?

Where is the Remedy?

**Supreme Court Proceedings**

Section 40C of the Human Rights Act states that if a public authority acts in a way that is incompatible with your Human Rights, or doesn’t give your rights proper consideration when making a decision, you can start proceedings in the Supreme Court.

I’m not going to be backwards in coming forwards about the fact that whilst this direct right of action sets us apart from our Victorian colleagues, and is a substantial improvement compared to the absence of any right of action, it is a remedy that is out of reach and wholly unavailable to the majority of people in the ACT.

Indeed, the associated financial and resource costs and the reality of requiring legal representation (in a under-resourced free legal assistance sector) makes this remedy out of reach for basically all vulnerable clients who may need it most.

Relying on your Human Rights in other legal proceedings
The good news is that section 40C of the Human Rights Act also allows you to ‘rely on your Human Rights’ in other legal proceedings.

- Ah! Says a client, so we can talk about my Human Rights tomorrow when you appear for me in my eviction matter before the residential tenancies jurisdiction of the ACT Civil and Administrative Tribunal.

- Great. Says another client. So we can raise my right to family in the final hearing at the Children’s Court next week when the Department is trying to take away my kid.

Well actually, I say, it’s not quite that simple.

The problem here of course is that despite discussion in a number of recent cases, it is not yet clear whether people can rely on their rights under the Human Rights Act in tribunals and courts other than the Supreme Court. Nor is it clear whether other courts and tribunals have powers to specifically remedy a breach of the Act, as only the Supreme Court has the express power to grant relief.

So in both cases, we have a problem. We have a legal framework that, to my mind, discourages, rather than encourages, community engagement with the Act.

So what could be done about this?

**Amendments to s40C**

In the first instance, I would call upon the ACT Government to make clear their intentions as to whether decision-makers in ACT Courts sand Tribunals other than in the Supreme Court can consider, and remedy, would-be breaches of Human Rights arguments.

This would be best addressed through reform of the Act.

Such reform would pave the way for Human Rights arguments to be considered, and potentially remedied, in far more cost-effective and accessible jurisdictions, in a much broader range of cases, argued by a much larger number of advocates.
Introducing a Human Rights Complaints Mechanism

Secondly, I would welcome the introduction of a Human Rights complaints mechanism that sits beneath the existing direct right of action to the Supreme Court. This could operate similarly to the conciliation-based complaints mechanism that Dr Watchirs administers under the Discrimination Act.

Late last week, a colleague and I were lamenting the poor use of the direct right of action. This colleague, a lawyer in the community legal sector, has worked over many years to weave reference to the Human Rights Act through her advocacy for vulnerable clients.

My colleague commented:

‘When you’ve got a Human Rights Act that allows people to articulate what is wrong with a situation, but then doesn’t allow them ready access to a remedy, you are simply creating frustration. Indeed, the results is that the client feels more frustrated than if the Act wasn’t there at all, and it undermines peoples’ faith in the whole notion of Human Rights being important to decision-makers, and to Government.’

In my view, there would be considerable benefit in allowing individuals to make a complaint to the Human Rights Commission where they believe their rights have been breached by a public authority. The Commission is well-practiced in complaint handling, and has the experience to guide the complainant, and respondent, through a clear dispute-management pathway.

The conciliation settlement rate for discrimination matters is remarkably high and the benefits of conciliation are well documented, not least because it is: free; quick; provides the opportunity for the afflicted person to tell their story; and allows for creative, timely remedies.

Where conciliation is not successful, it is likely that the matters at hand have at least been laid out and explored with the respondent, making it easier for the complainant to seek advice, pro bono or otherwise, on their prospects of success if they were to take the matter further.

As a discrimination lawyer, I am well aware that conciliation is not fool-proof. For example, many of the women I see in sexual harassment matters decide
not to access existing conciliation-based complaints processes on the basis that they would be too confronting, too time-consuming or simply not a priority in the midst of crisis.

However, they make this decision for themselves, weighing up information and possible outcomes in terms they understand. This differs significantly from being barred from a supreme court action due to a lack of financial and legal resources. It is very different from it being a case of ‘the Supreme Court or bust.’

**Human Rights ‘Community Alerts’**

I’m getting into the detail here but as part of a new Human Rights complaints mechanism, I would welcome the introduction of Australian Taxation Office-style ‘Community Alerts’ that could be distributed following the successful or unsuccessful conclusion of conciliated matters.

As many of you would know, there is presently minimal access to precedents that interpret provisions of the Act, particularly outside of a criminal law context. This situation contributes to generally poor understandings of how the Act may apply to broader community issues.

At the conclusion of a Human Rights complaint, it would be ideal if the Commission were resourced to provide a de-identified ‘community alert’ which, like an ATO alert:

- identified the key Human Rights (not tax) issues at stake in the matter;
- briefly described and highlighted the Human Rights issues raised; and
- provided an analysis of the key issues, including the Commissioner’s view on how the law could or should be interpreted in such cases.

This ‘alert’ would then become a community resource. In the words of the ATO:

‘...if you’re entering into, or are thinking about entering into an arrangement similar to one described in a community alert, you will be informed of the ATO
view, but retain the right to request a formal determination through a private complaint if you wish.’

My description of this process has necessarily been simplistic but in principle, I’m keen to look for ways for the Human Rights Commissioner’s expertise regarding interpretation of the Act to reach the community and the legal profession more broadly, more often.

**Damages**

A final solution that I will not explore in-depth today is the option of making damages available in matters brought under the direct right of action. In my view, this would significantly increase the profession’s engagement with the Act as well as the number of firms willing to act pro bono in Human Rights matters.

**Summary of Possible Reforms**

So I think there are a number of things we could do to increase the impact of the Act in the ACT community.

- We could do education better by embedding Human Rights in education curriculums.

- We could appropriately resource the Commission to undertake its essential work in promoting a Human Rights dialogue, particularly amongst vulnerable communities, and amongst legal and community-based advocates.

- We could amend the Act itself and make it clear that a person can rely on their Human Rights, and seek remedies for breach of them, in all ACT courts and tribunals.

- We could introduce a Human Rights complaints mechanism, similar to that which exists under the Discrimination Act, to increase accessibility for all persons, but particularly for vulnerable persons, whose Human Rights have arguably been breached.
• And we could review the question of damages for breaches of Human Rights.

I look forward to hearing your thoughts on these matters during the discussion panel at the end of this session. I am sure everyone in the room could come up with many more concrete ways to increase the impact of the Human Rights Act and I’m sure Dr Watchirs and her team would welcome your thoughts in this regard.

**Review of Statutory Office Holders**

I would like to close by making a few remarks regarding the current review of statutory office holders that is underway in the ACT. I was pleased to hear the Attorney confirm this morning that community consultation will occur in relation to this review.

Personally, I am particularly concerned to ensure that any review of the Human Rights Commission is based around consideration of the key functions performed by the three Commissioners.

My short time working with the Commission last year made it abundantly clear just how valuable and far-reaching the work of Helen Watchirs, Mary Durkin and Alasdair Roy is. The Commissioners are the ‘last point of call’ for many community members who call upon them to not only manage individual disputes, but to advocate for systemic reform of broken systems and outdated policies that may be breaching the Human Rights of multiple Canberrans.

My key concern in the current review process is to ensure that any reform to the Commission does not decrease the resources available to the Commission. Further, any review must be driven by a need to ensure that any new ‘better’ structure results in better access to processes that better protect the rights of everyone in our community.

Many thanks again for the opportunity to speak with you today.