



**Response to Consultation Paper:**

**Designing a model for**

**the effective protection of human rights**

*a discussion paper prepared by*

*the Justice & Community safety Directorate*

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**About Women With Disabilities ACT (WWDACT)**

Women With Disabilities ACT (WWDACT) is a systemic advocacy and peer support organisation run by women with disabilities for women with disabilities. Established in 1995, WWDACT is guided by human rights, based on the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Elimination of (All Forms Of) Discrimination Against Women (CEDAW) and works with government and non-government organisations to improve the status and lives of women with disabilities in the ACT and surrounding region. WWDACT, through its membership, has strong links to relevant ACT advocacy organisations and also has a close association with Women With Disabilities Australia (WWDA), the peak organisation for women with all types of disabilities in Australia. The success of WWDACT relies heavily on the volunteerism of its members who are committed to improving the status of women with disabilities in the ACT. All members of its five-member Steering Committee are women with disabilities, and actively seeks to employ women with disabilities. WWDACT is funded by the Community Services Directorate of the Australian Capital Territory.

Women With Disabilities ACT acknowledge the Ngunnawal people as the traditional owners and continuing custodians of the lands of the ACT. We pay our respects to their elders past and present. We acknowledge that the forced removal of Aboriginal and Torres Strait Islander children from their families as well as past racist policies and actions have an effect which continues today.

## **Rationale for a strong, well-resourced body to oversee the protection of human rights in the ACT**

Women With Disabilities ACT believes that the ACT needs a strong, well-resourced body to oversee the protection of human rights in the Territory. It is a matter of pride for the Territory to have enacted the first statutory 'bill of rights' in Australia with the passing of the *Human Rights Act* in 2004. It is imperative that it is therefore able to carry out this role effectively.

Despite living in one of only two human rights jurisdictions in the country, and having a whole of government focus on inclusion, respect and rights protection, women and girls with disabilities experience high levels of discrimination in the community, including public harassment, tenancy refusal in the private rental market and supply shortage in accommodation services, workplace discrimination including in supported employment, inequality of access to education, transport and personal care services.

At present, the annual number of complaints from people with disabilities to the Disability Commissioner remains low (27 during the 2013-14 financial year and only a small fraction of total complaints received by the Commission). However the number of complaints could be expected to rise as more people transition to the National Disability Insurance Scheme (NDIS) and are no longer constrained by fear of withdrawal/downgrading of a service as a result of a complaint.

The review of the Statutory Office Holders (SOHOs) in the Territory identified an increase in the breadth and complexity of the work compared to its status when the Human Rights Commission was set up. It is therefore important that the new model takes this into account. Furthermore, WWDACT supports a structure which will deliver the most efficient and cost-effective protection of human rights. However, WWDACT believes that addressing the increased need for services must take precedence over cost-saving.

### **General Comments**

WWDACT believes that the working title, New Human Rights Commission (NHRC), of a remodelled Commission, must remain just that – a working title. The HRC brand is recognisable in the community although perhaps not fully understood. Also less known is the Commissioners' function of investigating ACT services, but this can be addressed in promotion that the Commission undertakes, rather than expanding the title in any way, e.g. by adding 'Other Services' to the HRC name.

WWDACT does not believe that the model proposed is workable, or that it will save money in the short- or long-run. Setting up a hierarchical structure in which the president has a supervisory role, but in which the commissioners do not report to the president seems to be

a contradiction, and would lead to internal conflict of interest and delays in decision-making (see response to Key Question 1).

The public needs to have identifiable commissioners with named titles and to understand the roles of the individual commissioners. Arguably this is not clear in the current structure, and any new model needs to address this. At the same time, consideration needs to be given to the distribution of workloads. Once the workloads are allocated, the title of each role needs to reflect this allocation. WWDACT argues that there is a human rights and discrimination component in the work of the current Commissioner for Children & Young People and of the Commissioner responsible for Disability, Older People Health Services, and Community Services, so that separating out this function is confusing for the public.

WWDACT would prefer a model in which there are three full time Commissioners with a more evenly distributed workload, and autonomy to make their own decisions but with the ability to operate in a collegiate manner where there are complex cases. WWDACT does not propose how that distribution might be done, except that it believes that the current functions of the Office of Public Advocate should be retained close to the HRC, and that each commissioner would undertake human rights and discrimination complaints and identify systemic advocacy matters. In addition a new administrative, or secretariat, role could be created to undertake corporate and administrative functions, including administration of the Guardianship program. The administrator would report to and take directions from the Commissioners. This structure would address the current misunderstanding of the roles of the commissioners, with administrative roles being undertaken at a subordinate level.

## **Key Questions**

**Key Question 1:** should the president review decision of commissioners?

WWDACT believes that giving the president such power would reduce the legitimacy of the (untitled) commissioners, and emphasise a hierarchical structure of the Commission. It is important for efficiency of operation that the Commissioners have autonomy in their areas of expertise, with the ability to act without fear or favour, and without the constant uncertainty that a decision could be overturned by the president. It would be more useful to promote a collegiate structure through which commissioners have the ability to discuss complex cases and to moderate decisions for consistency. At the same time a flatter structure would enable each commissioner to build expertise in their portfolio areas.

In the proposed structure in which the president has a review function, an approval-chain of operation is set up. There will inevitably be delays in such a system. For the complainant, this means that there could be frustrating and sometimes costly delays in a resolution being found. Under such a system, in a small jurisdiction such as Canberra, it would not be long before the perception of inherent delays would become a barrier to making a complaint. For vulnerable consumers, such as women with disabilities, this would mean that even fewer

women would bring complaints to any commissioner and result in a reduction of rights protection.

**Key Question 2:** Should the president exercise a systemic advocacy function while performing a discrimination complaints handling function?

WWDACT believes that there is a conflict of interest in this proposal. People who bring discrimination complaints to the commission need to have undivided attention to the circumstances under which their complaint has arisen. Individual complaints could have components which indicate the need for system changes in different government portfolio areas, for example health and housing. Complaints commissioners are therefore in a position to compile the evidence necessary to undertake systemic advocacy in either separate or several systems. Building the evidence base could be overseen by the administrator, with the systemic advocacy undertaken by the relevant Commissioner as appropriate.

**Key Questions 3:** What are the benefits and risks of moving the public guardian functions to sit in a separate arm of the office of the Public Trustee?

WWDACT believes that this question has to be addressed in the light of the outcome of the current review of the *Guardianship & Management of Property Act 1991* being undertaken by the ACT Law Reform Advisory Council. The protection of human rights must be an inherent component of any decisions around guardianship. This may indicate that such function most logically sits in close proximity to, or as part of, the Human Rights Commission. (This is not to obviate the needs for human rights consideration to underpin operations across all agencies and operations in the ACT.)

Article 12 (Equal Recognition Before the Law) of the Convention on the Rights of Persons with Disabilities (CRPD) requires us to recognise that *persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life* and that *we take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.*

The exercise of Supported Decision Making (SDM) in the context of guardianship will require considerable adjustment on the part of agencies and of appointed guardians. It also requires capacity building for people with disabilities to make decisions. In addition, in order to exercise their equal rights, people with disabilities will require access to appropriate supports to make decisions. These support mechanisms are not yet well developed in the ACT. Where there is a representative making decisions in a supportive role, there will need to be checks and balances which maximise the participation on the person with disabilities, and that their wishes must direct the decision making.

Developing SDM will take resource input to develop both the capacity of people with disability to make decisions for themselves and also develop the capacity of those who

support them to enable the decision making to be that of the individual. Without such training, there is a risk of regression into substitute decision making behaviours. Understanding of these processes fits logically within a human rights setting, e.g. the Office of the Public Advocate (OPA) should provide advice and training services to foster SDM.

It could be that the OPA could logically administer Powers of Attorney in matters that are dealt with by the HRC, e.g. health, disability, and SDM including any new Guardianship Act, and a Mental Health Act. Thus, the Public Trustee would retain administration of Powers of Attorney only in matters of Trusteeship, e.g. property, estate management, etc., and retaining the current more financial and administrative roles in these areas. It could be that the review of the Guardianship Act would make this division of roles clearer.

The OPA needs to provide advice services about SDM including guardianship, ACAT applications, consent to medical/dental treatment; guardianship support to private guardians, and contribute to the systemic advocacy undertaken by the HRC. The OPA in conjunction with the HRC should undertake the training role for SDM in the ACT, and provide support to the new mechanisms which will enable effective SDM, such as those proposed by the Advocacy for Inclusion ACT, e.g. through support networks, single supporters, co-decision making agreements and representative agreements.

Arguably the current Official Visitor Program should be a part of the OPA duties, as it is in Victoria.

Irrespective of which office assumes the function of the Public Guardian, there must be sufficient resources to prevent the drive for efficiencies leading to allowing a default option of substitute decision making to prevail.

## **Conclusion**

WWDACT agrees that the structure of the ACT Human Rights Commission warrants review and that amendment of associated legislation may be required. However, it does not believe that the proposed model sufficiently addresses the requirement to protect the human rights of the people of the ACT whilst at the same time delivering the best value for money.