ACT HUMAN RIGHTS COMMISSION
Australian Capital Territory

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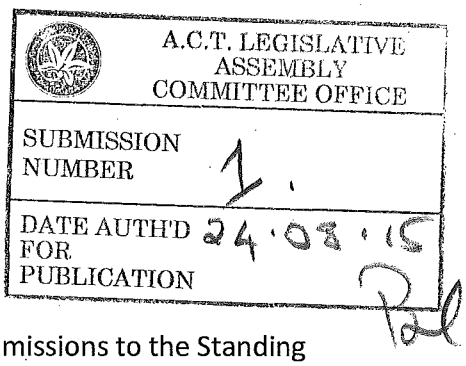

Via email

Dear Mr Doszpot

Inquiry into the Human Rights Amendment Bill 2015

Thank you for your letter received on 29 May 2015 inviting submissions to the Standing Committee on Justice and Community Safety's Inquiry into the above bill. The bill seeks to amend the *Human Rights Act 2004* (HR Act) to introduce the following key changes:

- insert a new s 27(2) to explicitly recognise the distinct cultural rights of Aboriginal and Torres Strait Islander peoples in the ACT; and
- extend the application of part 5A of the HR Act to the right to education in s 27A of the Act, thereby imposing direct obligations on public authorities to act and make decisions consistently with the right to education.

The Commission strongly supports these amendments to the HR Act. The Human Rights and Discrimination Commissioner ('HR Commissioner') has advocated for several years that the HR Act should include explicit recognition of Indigenous cultural rights. In particular, the HR Commissioner's staff and officers from the JACS Directorate worked collaboratively with the Aboriginal and Torres Strait Islander Elected Body to seek agreement on the new cultural right. The expansion of the right to education to give effect to the Government's 2014 review of the HR Act is also very welcome.

The Commission understands that the bill has been referred to the Standing Committee on Justice and Community Safety for inquiry and report in part because of concerns raised by the Scrutiny of Bills Committee about the nature and scope of the amendments (see *Scrutiny Report 31*, 28 April 2015). The submissions below are primarily directed at addressing those concerns.

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The Commission notes that the Attorney-General provided a detailed response to the issues raised by the Scrutiny of Bills Committee, which was published in full in *Scrutiny Report 32* on 11 May 2015. The Commission endorses the explanations provided in the Attorney-General's response and notes that the Scrutiny of Bills Committee was satisfied that the Attorney-General had adequately addressed its concerns, in so far that the Committee made no further comment on the bill (or the response).

1. Recognition of cultural rights of Aboriginal and Torres Strait Islander peoples

The HR Act currently protects the cultural rights of minorities in s 27 of the Act. The bill proposes to amend this provision to include specific recognition of Indigenous cultural rights, although Aboriginal and Torres Strait Islander people already enjoy some protection under the existing s27, and are generally mentioned in the preamble.

New s 27(2) will provide that Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied the right to maintain, control, protect and develop their cultural heritage and distinctive spiritual practices, observances, beliefs and teachings, their languages and knowledge, and their kinship ties. This includes the right of Aboriginal and Torres Strait Islander peoples to have their material and economic relationships with the land and waters and other resources with which they have a connection under traditional laws and customs recognised and valued.

The proposed provision has been substantially modeled on s 19(2) of the Victorian *Charter of Rights and Responsibilities Act 2006*, and also draws on articles 25 and 31 of the UN Declaration on the Rights of Indigenous Peoples. Section 19(2) of the Victorian Charter is in turn based on the interpretation given to the right to culture in article 27 of the International Covenant on Civil and Political Rights (ICCPR) by the UN Human Rights Committee – specifically that article 27 of the ICCPR encompasses the obligation to protect the cultural rights of Indigenous peoples.[1] It is also informed by article 25 of the UN Declaration on the Rights of Indigenous Peoples.[2]

This is a small but important (and overdue) amendment which will give due recognition to the special significance of human rights to Aboriginal and Torres Strait Islander peoples, which is currently only acknowledged in the preamble to the HR Act but not in the substance of the specific rights protected under the Act.

In its report on the bill, the Scrutiny of Bills Committee raised several questions and concerns about the proposed provision. In the main, the Committee's comments related to the following issues:

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[1] Justice Department (Vic), *Charter Guidelines, Section 19(2): Distinct Cultural Rights of Aboriginal Persons* (2008), p 126 – 127, available at: http://assets.justice.vic.gov.au/justice/resources/2ee04722-240f-4e08-a0a9-73f6de06b0ef/charteractguidelinespart1.pdf.

[2] Ibid.

- Whether proposed s 27(2) '[cuts] across existing HR Act rights to an extent that is unacceptable', in particular the right to equality and non-discrimination in s 8 of the HR Act;
- Whether it is appropriate to draw on the UN Declaration on the Rights of Indigenous People as a reference for the provision, given that the Declaration is a non-binding instrument;
- Whether the provision could have unintended legal consequences, in particular in relation to intellectual property and land rights.

In identifying these concerns, the Committee surprisingly made no mention of the fact that a comparable provision has been fully operational in Victoria since 2009 without any apparent difficulty.

Interaction with the right to non-discrimination (and other rights) in the HR Act

The Scrutiny of Bills Committee suggested that recognising the distinct cultural rights of Aboriginal and Torres Strait Islander peoples in the HR Act may unacceptably 'cut across' the right to equality and non-discrimination in s 8 of the Act. The Committee noted that the right in s 8 was not absolute and may be subject to reasonable limits under s 28 of the HR Act but considered that insufficient justification had been provided to demonstrate why such protection was necessary.

Section 8 of the HR Act requires laws to be non-discriminatory in terms of their substantive content as well as in their implementation. The Committee was correct to note that compliance with s 8 does not require uniform treatment when there are significant differences in circumstances between one group and another (that is, there must be an objective and reasonable justification for differential treatment). To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination (as will the unequal treatment of persons whose situations are objectively the same).

There are clearly objective and reasonable justifications for expressly protecting Indigenous cultural rights in the HR Act. Culture holds a unique significance for Aboriginal and Torres Strait Islander peoples, who as a group are particularly vulnerable to losing their traditional customs, knowledge and language. The Attorney-General acknowledged in his second reading speech that '[o]ne of the factors that influence the poorer outcomes for Aboriginal and Torres Strait Islander people, including in terms of health and overrepresentation in the justice system, is the impact of disconnection from country and cultural heritage'. He further noted the centrality of culture to Aboriginal and Torres Strait Islander peoples in his response to the Committee:

> Aboriginal and Torres Strait Islander cultures are a crucial part of the ACT's cultural identity and must be recognised and valued. Aboriginal peoples have inhabited the Canberra region for over 20,000 years. Central to the notion of culture for Aboriginal and Torres Strait Islander people is a relationship with land and waters. Proposed section 27(2) recognises these distinctive and unique relationships.

Numerous benefits would flow from explicit recognition. These include correcting the current omission in the HR Act, and bringing ACT law into line with community expectations. Express recognition would provide a positive mechanism for meaningful and inclusive engagement with the Aboriginal and Torres Strait Islander community in the ACT, and promote greater transparency and accountability for decision-making with regard to some of the most vulnerable people in our community.

The Committee's concerns that new s 27(2) could override other rights in the HR Act – including by giving rise to arguments of 'cultural relativism' being used as a potential defence against criminal charges – are manifestly unfounded. The existing operational framework of the HR Act means that Indigenous cultural rights cannot trump or sit above any of the other rights in the Act. As with all rights in the HR Act, these cultural rights would be equally subject to justifiable limits, where it can be shown that such limitations are reasonable, necessary and proportionate to a legitimate objective. The application of s 28 of the HR Act would ensure that individual and community interests are appropriately balanced.

At times, s27(2) will also complement other rights in the HR Act, including the right to equality. For example, in *Parks Victoria (Anti-Discrimination Exemption),*[3] the Victorian Civil and Administrative Tribunal considered an application from Parks Victoria to advertise for and employ Aboriginal people to care for Wurundjeri country. The Victorian *Equal Opportunity Act 2010* (EO Act) provides that VCAT can exempt organisations from discrimination law, but found that the proposal was a 'special measure' and so no exemption was required. This was particularly so because of the connections to country and culture recognised under s19 of the Charter, upon which proposed s27(2) is based. The Tribunal was also required to consider if the conduct was a reasonable limitation on the right to equality under the Victorian Charter. The Tribunal found the right to equality was not limited at all by the proposal, as 'the disadvantage that the measure seeks to remedy has been caused by past and continuing direct and indirect discrimination'.[4] While the Victorian Charter includes at s8(4) an explicit caveat that such special measures will not constitute discrimination, this is generally understood to be also part of the protection under international human rights law, upon which both the Victorian and ACT rights to equality are based.[5] Section 27 of the ACT *Discrimination Act 1991* also explicitly protects special measures.

Status of UN Declaration on the Rights of Indigenous People

The Scrutiny of Bills Committee was correct to note that the UN Declaration on the Rights of Indigenous People does not have the status of a treaty. However, the Declaration is not

[3] [2011] VCAT 2238.

[4] Ibid, [63].

[5] The Convention on the Elimination of Radical Discrimination in article 1.4 explicitly recognises such measures. Further, in General Comment 18 on non-discrimination under the ICCPR, the Human Rights Committee stated that 'The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.'

simply an aspirational document. Under s 31 of the HR Act international law relevant to a human rights may be considered in interpreting the human right - the Dictionary of the HR Act defines 'international law' as including 'declarations and standards adopted by the UN General Assembly that are relevant to human rights'.

The Declaration provides a relevant standard for analysing human rights issues affecting Aboriginal and Torres Strait Islander peoples. The Parliamentary Joint Committee on Human Rights, for example, has noted that the Declaration is widely accepted as elaborating many of the details of relevant obligations under the human rights treaties to which Australia is already a party.[6] The Federal Government has also acknowledged that the Declaration 'provides some useful elaboration on how human rights standards under the international treaties apply to the particular situation of Indigenous peoples.'[7] The Declaration is also considered to represent customary international law binding on Australia in many respects.[8]

Therefore, the Declaration is an influential and authoritative source of guidance that should be drawn on in policymaking and the development of legislation,[9] and it would have been imprudent not to have taken its standards into account when developing these provisions.

Impact on intellectual property and land rights

The Scrutiny of Bills Committee questioned whether the explanatory statement had understated the potential legal effect of proposed section 27(2). In particular, the Committee asked whether the right to have 'material and economic relationships with land' would apply to interests in land now lawfully held by third parties; and whether the right to protection of Aboriginal and Torres Strait Islander peoples' 'knowledge' would lead to the recognition of new types of intellectual property.

The Commission notes that the Attorney-General fully responded to these concerns in his response to the Scrutiny Committee's report. He further emphasised during the second reading debate on the bill that:

> ... it is important ... to place on the record that the government has looked very closely and carefully at the issues arising from title and intellectual property. The government has, through its own processes, reached the conclusion that it can have a high level of confidence that the recognition of these rights does not expand into the areas raised by members of the opposition.

The Commission does not consider that these amendments would give rise to the types of issues identified by the Scrutiny Committee for the reasons explained by the Attorney-

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[6] Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation*, 27 June 2013, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2013/2013/112013/index.

[7] Ibid.

[8] Ibid.

[9] Ibid.

General in his response to that Committee. Neither have such issues arisen under comparable provisions in the Victorian Charter, which have been in operation for more than six years now.

2. Extension of public authority obligations to the right to education

As noted above, the Commission welcomes the proposal to extend the public authority obligations in Part 5A of the HR Act to the right to education. The Scrutiny of Bills Committee correctly noted that these changes will directly require public authorities to act consistently with the right to education (s 40B, HR Act), and will enable a person to commence proceedings in the Supreme Court for relief (except damages) in respect of a contravention of these obligations (s 40C, HR Act). The Committee, however, appeared to take exception with the factual description in the explanatory statement that the HR Act presently 'operated to limit the right to education in section 27A to an interpretational right only, with the obligations on public authorities in Part 5A of the Act not extending to the right to education'. According to the Committee:

> An "interpretational right" is however significant, and what section 40B adds to the effect of [the interpretive provision in] HRA section 30 is not clear. The Committee assumes that there is some difference.

The Attorney-General addressed the interaction between the interpretive provision in s 30 of the HR Act and the duty on public authorities to comply with human rights in s 40B of the HR Act in some detail in his response to the Committee's report on the bill. The Commission agrees with the Attorney-General's comments and considers that they amply address the Committee's concerns. However, during the second reading debate on the bill, Mr Hanson MLA suggested that there was still some uncertainty with regard to this issue, so it is worth making the following points.

The HR Act was amended in 2008 to introduce express duties on public authorities to comply with human rights. Prior to that, the HR Act applied directly to legislation only. It did not impose direct duties on public authorities, and it did not apply directly to administrative decision-making or conduct, except through its effect on the interpretation of legislation.[10] Human rights issues could only be raised in the context of existing litigation, and, except for the ability of the Supreme Court to issue a declaration of incompatibility, only existing remedies, which were already available, applied in cases where a human rights argument was raised.[11]

The Government's 12-month Review of the HR Act, which recommended that the HR Act be amended to expressly apply to public authority conduct, noted that there may be scope for the HR Act to indirectly deal with conduct of public authorities and to provide remedies through the operation of the interpretive provision within the HR Act'.[12] However, that

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[10] ACT Department of Justice and Community Safety (JACS), '*Human Rights Act 2004* Twelve Month Review Report' (2006)

[11] Ibid.

[12] Ibid.

report concluded that the indirect operation of the interpretive provision to achieve such outcomes was potentially limited to the exercise of statutory powers, unnecessarily complex, and could restrict the growth of a broad rights dialogue.[13] As a result, the report recommended that the HR Act be amended to expressly apply to public authority conduct and those recommendations were eventually given effect to by the *Human Rights Amendment Act 2008*.

The Scrutiny of Bills Committee's remaining concerns with regard to this issue are therefore perplexing, given that the applicable provisions have been in operation since 1 January 2009. While this concern may have been relevant to raise during the passage of the original amendments in 2008, they appear to be extraneous to the amendments that are currently before the Assembly. Indeed to exclude the application of public authority obligations for just the right to education, when such obligations already apply for the rest of the rights in the HR Act, would entrench a two-tier system of rights protection within the HR Act for no sound reason.

The Committee's concerns about the 'potential consequences of the adoption of [such] a clause so far as concerns the availability of Supreme Court relief under subsection 40C(4)' would also appear to be unwarranted, given that the right to education contained in s 27A of the HR Act is essentially a right to non-discrimination with regard to access to education, which, for all relevant purposes, is already covered by the equality rights in s 8 of the HR Act. Given the limited content of the right to education recognised in the HR Act, there is no risk that these amendments would give rise to any of the uncertainties that are usually (even if incorrectly) associated with the justiciability of economic, social and cultural rights.

3. Clarification of children's rights under the HR Act

The bill proposes to insert a note in relation to section 11 of the HR Act to indicate that children have the benefit of all rights in the HR Act, and not just to the express protections afforded under section 11 of the Act. The explanatory statement to the bill states that:

> This clause implements a conclusion of the 2014 review of the HRA, and a proposal of the Children and Young People Commissioner that an explanatory note be included in section 11 - protection of the family and children to indicate that a child also has the other human rights set out in the HRA. This note will alert the reader to the fact that the HRA applies equally to children, and that children are entitled to enjoy all rights guaranteed in the HRA in their own right and not only by virtue of their membership in the family unit, which must be protected by society.

This proposal does not adequately reflect the suggestion made by the ACT Children & Young People Commissioner (CYP Commissioner) during the 2014 review. At that time, the CYP Commissioner noted his concerns that the current wording of section 11 may inadvertently give the impression that the rights of children and young people are limited solely to the 'right to protection', rather than many other rights, including, importantly, the right to participate in decisions affecting their lives.

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[13] Ibid.

To address these concerns, the CYP Commissioner proposed the inclusion of a note at section 11 indicating that *the right 'to protection' does not in any way limit the application of other rights applicable to children and young people, including those rights contained elsewhere in the HR Act*. The Commissioner remains of the view that this wording would be preferable.

Additionally, the CYP Commissioner suggested two other amendments to the HR Act.

Separation of Section 11

Section 11 should be separated into two distinct parts, one recognising the rights of the family, and the other the rights of children:

The HR Act currently protects the rights of 'the family and children' in a single section of the Act (section 11):

> **11 Protection of the family and children**
>
> (1) The family is the natural and basic group unit of society and is entitled to be protected by society.
>
> (2) Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

By contrast, in the International Covenant on Civil and Political Rights, from which these rights are drawn, the rights of children are set out separately in Article 24, which provides that:

> 1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

Children's rights in Article 24 are thus independent of the rights of the family, which are set out in Article 23.

Combining the rights of the family and children in a single section of the HR Act reduces the prominence of the rights of children as individuals, and sends an inaccurate message that children only have rights in the context of the family unit.

It remains the Commission's view that section 11 should be separated into two distinct parts, one recognising the rights of the family, and the other the rights of children.

The term 'children' be replaced with the term 'children and young people'.

Not only is this language consistent with other ACT legislation, it is also more inclusive and respectful of young people (those over 12, but not yet 18, years) in the ACT.

It remains the Commission's view that the term 'children' be replaced with the term 'children and young people'.

Conclusion

The Commission commends the work of the Standing Committee, and anticipates the release of its final report. In particular, the Committee is urged to recognise the importance of this bill for achieving improved outcomes for Aboriginal and Torres Strait Islander peoples. The inclusion of Indigenous cultural rights in the HR Act means that it will become a focus of human rights dialogue in the Territory. These amendments will increase awareness and understanding by requiring public authorities and members of the ACT Legislative Assembly to fully consider these rights when they make policies and enact laws.

Thank you for the opportunity to provide these comments.

Yours sincerely

Dr Helen Watchirs Human Rights and Discrimination Commissioner	Alasdair Roy Children and Young People Commissioner

28 July 2015