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FOR THE AUSTRALIAN CAPITAL TERRITORY


STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
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Submission Cover Sheet

Inquiry into Human Rights (Workers Rights) Amendment Bill 2019

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ACT HUMAN RIGHTS COMMISSION

Australian Capital Territory

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31 January 2020

Dear Committee Secretary

Human Rights (Workers Rights) Amendment Bill 2019

The ACT Human Rights Commission welcomes the opportunity to provide a submission to the Standing Committee on Justice and Community Safety's inquiry into the Human Rights (Workers Rights) Amendment Bill 2019.

About the ACT Human Rights Commission

The Commission is established under the *Human Rights Commission Act 2005*, and its main object is to promote the human rights and welfare of people in the ACT. The Commission includes the ACT Human Rights Commissioner, the ACT Discrimination Commissioner, the ACT Children and Young People Commissioner, and the ACT Victims of Crime Commissioner, each of whom has distinct statutory functions that give effect to, support, or are otherwise relevant to fundamental human rights.

The Commission contributes to law reform in several ways, including by reviewing legislative proposals as part of the cabinet process, and advising government on the impact of laws on human rights, including obligations of public authorities to comply with human rights. The Commission also provides advice on private members bills at the request of Members of the Legislative Assembly (MLAs), pursuant to the Parliamentary Agreement for the 9th ACT Legislative Assembly.

As independent office holders with key oversight and advocacy functions in relation to human rights, the Commission is uniquely placed and welcomes the opportunity to assist the Committee with its inquiry into these proposed amendments. Our submission covers the Issues identified for consideration by the Committee with regard to the bill and draws on the advice we provided on the draft bill prior to its introduction into the Legislative Assembly, at the request of the bill's proponent, Ms Bec Cody MLA.

Summary of our submission

- The Commission supports the extension of the *Human Rights Act 2004* (HR Act) to protect economic, social and cultural rights (ESC rights), including workers' rights.
- We consider that the relevant workers' rights to be included should be drawn from the International Covenant on Economic, Social and Cultural Rights (ICESCR), rather than directly from International Labour Organisation (ILO) Conventions.
- In line with the bill's proposed approach of not confining workers' rights to their 'immediately realisable' aspects, similar amendments should be extended to the right to education in s 27A to ensure that there is overall consistency of approach to the protection of ESC rights in the HR Act.
- It has been the Commission's long-standing view that the HR Act should be amended to provide comprehensive protection for the full suite of ESC rights, including requiring public authorities to act and make decisions consistently with such rights.
- Failing the provision of comprehensive coverage of ESC rights in the HR Act, we recommend that the HR Act should be amended in the first instance to at least require statements of compatibility and scrutiny reports to include consideration of the full range of ESC rights.

Overview of bill

The bill is seeking to amend the HR Act to expressly recognise the rights of workers by inserting new s 27B in part 3A (economic, social and cultural rights) of the HR Act:

27B Right to work

- (1) Everyone has the right to work, including the right to choose their occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.
- (2) Everyone has the right to the enjoyment of just and favourable conditions of work.
- (3) Everyone is entitled to enjoy these rights without discrimination.
- (4) Everyone has the right to form or join a work-related organisation with the objective of promoting or protecting their economic or social interests.
- (5) Everyone has the right to protection against acts of anti-union discrimination in relation to their employment.

The bill states that the rights in subsections (1)-(4) are sourced from article 6(1) of the ICESCR,¹ while the primary source of subsection (5) is article 1 of the ILO Right to Organise and Collective Bargaining Convention, 1949 (No. 98).²

¹ See Item 5 of the bill, which will insert new item 2 into Schedule 2 of the HR Act.

² See note to subsection (5).

Issues for consideration

(i) Express coverage of ESC rights in the HR Act

The Commission has long advocated for the HR Act to be extended to include ESC rights. The sole ESC right currently contained in part 3A of the HR Act is only a limited right to education in s 27A. We would therefore have no objection in principle to amending the HR Act to expand its scope of coverage to expressly guarantee workers' rights.

However, we have some reservations about prioritising workers' rights over other ESC rights (such as the right to housing and the right to health,³ as well as related rights like the right to social security, which have been the subject of previous reviews and recommendations) for specific inclusion in the HR Act.

We also note that workers' rights under the ICESCR are not just protected under the right to work in article 6(1), but are given effect through a combination of interrelated rights, including, in particular, article 7 (right to just and favourable conditions of work); article 8 (right to form and join trade unions, including the right to strike); article 9 (right to social security); article 10(2) (right to maternity leave); and article 10(3) (prohibition against child labour).

The indivisibility of human rights means that all ESC rights should have the same status as civil and political rights. Yet at the present time the Legislative Assembly has chosen to incorporate through the HR Act only civil and political rights and, with the exception of the limited right to education, has largely ignored ESC rights.

As the 2010 *Report of the ACT Economic, Social and Cultural Rights Research Project* made clear,⁴ there is a strong and compelling case for the HR Act to be amended to cover the full suite of ESC rights. We submit that a more coherent way to approach the implementation of ESC rights would be to revisit the recommendations made in the 2010 Report.

Extending scrutiny to cover economic, social and cultural rights

We acknowledge that it may not be feasible to consider amending the HR Act as part of these current proposals to also include comprehensive recognition of all other ESC rights, in particular for the purposes of extending the public authority obligations under Part 5A of the HR Act to all ESC rights.

However, we consider that it would be possible for the HR Act's pre-enactment scrutiny mechanisms – namely the requirement for statements of compatibility and scrutiny reports to provide an assessment of any human rights matters raised in bills introduced in the Legislative Assembly – to be extended to cover such rights in the first instance.

³ We note that the recently introduced Queensland *Human Rights Act 2019* expressly protects a right to health: see, s 37.

⁴ ACT ESCR Research Project Report, available at: http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/Final_Report_of_the_ACT_ESCR_Research_Project.pdf.

This would not be a big step to take, given that it is already the approach adopted under the Commonwealth's human rights scrutiny model, which has been in operation since 2012. That model, established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), is not limited to civil and political rights but instead requires the preparation of statements of compatibility and systematic scrutiny by Parliament against all of Australia's international human rights obligations, including ESC rights.⁵

A similar approach has also been introduced more recently in the Northern Territory Legislative Assembly through the adoption of temporary standing orders.⁶ As a result, each bill introduced into the Assembly must be accompanied by a statement of compatibility with 'human rights', as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), and may be reviewed by a legislation scrutiny committee.⁷ In this way, bills introduced into the NT Assembly are subject to scrutiny against the full range of human rights, including all ESC rights.⁸

We strongly urge the Committee to consider recommending appropriate amendments to the HR Act to adopt a similar approach. Marginally extending the HR Act in this way would be consistent with the incremental approach that has been taken to improvements to the HR Act previously.

The application of the HR Act's pre-legislative scrutiny requirements to all ESC rights would improve the Assembly's oversight of human rights matters in the legislative process. Even if ESC rights are not initially granted full status under the HR Act, the enhancement of the scrutiny process in this way has the potential to offer vastly improved protections for these rights.

(ii) Jurisdictional issues

We note that the government has previously rejected the inclusion of workers' rights in the HR Act, arguing that 'the extent of Commonwealth responsibility for industrial relations under the *Fair Work Act 2009*' would result in the 'limited application' of such rights in the ACT.⁹

⁵ Human rights are defined in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) as the rights and freedoms contained in seven core human rights treaties to which Australia is a party. These treaties are: International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; and Convention on the Rights of Persons with Disabilities.

⁶ Sessional Order 12.3 (Adopted 24 August 2017 and readopted 27 November 2019), available here: https://parliament.nt.gov.au/data/assets/pdf_file/0008/492137/13th-Assembly-Sessional-Orders-as-adopted-by-the-Assembly-on-27-November-2019.pdf.

⁷ See Session Order 13 (Adopted 27 November 2019), *ibid*.

⁸ See, for example, the statement of compatibility provided for the Residential Tenancies Legislation Amendment Bill 2019, which addresses the bill's engagement with the right to housing, available here: https://parliament.nt.gov.au/data/assets/pdf_file/0005/744233/Statement-of-Compatibility-with-Human-Rights.pdf.

⁹ ACT Government Response to the ACT ESCR Research Project Report, March 2012, p 10, available at: http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/ESCR_government_response_PDF.pdf.

In our view, this is not in itself a rationale for the non-inclusion of workers' rights in the HR Act as there will still be aspects that fall within the competence of the Territory to implement. For example, the ACT sets out certain protections that are relevant to workers' rights at the Territory level, such as through the *Work Health and Safety Act 2011* and the *Workers Compensation Act 1951*. Workers' rights are also engaged by ACT laws such as the *Workplace Privacy Act 2011*, the *Long Service Leave Act 1976*, and the *Long Service Leave (Portable Schemes) Act 2009*. In addition, we note that the *Discrimination Act 1991* makes it unlawful to discriminate against a person in the workplace on various prohibited grounds.

(iii) Alignment with ICESCR rights

We note that s 27B(5) of the bill is drawn from article 1 of ILO Convention No. 98 - Right to Organize and Collective Bargaining. We would query the necessity to include an express provision of this nature. While a right to collective bargaining is not explicitly mentioned in the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR, it is nevertheless considered to be an integral element of the right to freedom of association in article 22 of the ICCPR and the right to form and join trade unions in article 8 of the ICESCR.¹⁰

As set out in the attached table, there is considerable overlap between the core labour standards contained in the ILO conventions and rights guaranteed under the ICESCR and the ICCPR. In this regard, we note that the HR Act – which is primarily based on the ICCPR rights – already provides protection (both directly and indirectly) to many of the rights articulated in the eight fundamental ILO Conventions, including freedom of association and assembly (s 15, HR Act), the right to equality and non-discrimination (s 8, HR Act), children's rights (s 11(2), HR Act), and freedom from forced labour (s 26, HR Act). In accordance with s 31 of the HR Act, the laws of the ILO are directly relevant to interpreting these HR Act rights in the context of workers. We also note that the right to freedom of association in s 15 of the HR Act is drawn from article 22 of the ICCPR, which specifically references ILO standards.

We consider that, should additional workers' rights be expressly included in the HR Act, their appropriate expression should be drawn from the ICESCR, rather than directly from the ILO Conventions. The HR Act - like other charters of human rights – is intended to be a high-level document that lists a range of fundamental human rights. It is not intended to comprehensively explain every aspect of the rights listed. It is largely accepted that the ILO Conventions spell out the details of relevant obligations pertaining to workers' rights under the human rights treaties. They are therefore an important source for interpreting those rights and obligations, and for elaborating how human rights standards apply to the particular situation of workers.¹¹ However, they may be less suitable for direct expression in the HR Act.

¹⁰ See, for example, CESCR, *Concluding Comment on Korea*, E/C.12/KOR/CO/3 (17 January 2009), [20]; HRC, *Concluding Comment on Canada*, CCPR/C/79/Add.104 (7 April 1999), [17].

¹¹ We note that the Commonwealth's Parliamentary Joint Committee on Human Rights has similarly taken the view that ILO standards are relevant to interpreting workers rights under the ICESCR and the ICCPR. See, for example, PJCHR, *Second Report of the 44th Parliament*, 11 February 2014, [146], available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2014/24/~/media/Committees/Senate/committee/humanrights_ctte/reports/2014/2_44/report.ashx.

(iv) Ensuring consistency of approach for implementing ESC rights in Part 3A of the HR Act

The HR Act currently only contains one ESC right in Part 3A: the right to education in s 27A. Section 27A(3) provides that the right to education is limited to its 'immediately realisable aspects', namely, the right to enjoy the rights in ss 27A(1) and 27A(2) without discrimination; and the right of parents to ensure the religious and moral education of their children in conformity with their own convictions. We note that the comparable right in the Queensland *Human Rights Act 2019* and the UK *Human Rights Act 1998* are not similarly qualified.¹²

In contrast, the protection of workers' rights as proposed by the bill will not be restricted to any 'immediately realisable aspects'. We strongly support the approach adopted in the bill, and consider that similar amendments should be extended to the right to education in s 27A to ensure that there is an overall consistency of approach to the protection of ESC rights in the HR Act.

We therefore propose that s 27A should be amended as follows:

27A Right to education

- (1) Every child has the right to have access to free, school education appropriate to his or her needs.
- (2) Everyone has the right to have access to further education and vocational and continuing training.
- (3) ~~These rights are limited to the following immediately realisable aspects:-~~
 - ~~(a) everyone is entitled to enjoy these rights without discrimination;~~
 - ~~(b) To ensure the religious and moral education of a child in conformity with the convictions of the child's parent or guardian, the parent or guardian may choose schooling for the child (other than schooling provided by the government) that conforms to the minimum educational standards required under law.~~

As noted below, we do not consider that it is necessary to include an explicit non-discrimination provision for each right because the application of s 8 of the HR Act ensures that all rights must be guaranteed without discrimination.

Further, the government's obligations in relation to ESC rights, as with all human rights, entail both negative and positive obligations to respect, protect and fulfil rights. While ESC rights also involve obligations of immediate effect and obligations of progressive realisation, the work of the Commonwealth's Parliamentary Joint Committee on Human Rights over the last five years has demonstrated that limitations of ESC rights, including any retrogressive steps contrary to the obligation of progressive realisation, can be assessed through the same reasonable limitations test as contained in s 28 of the HR Act.¹³

¹² *Human Rights Act 2019* (Qld), s 36. See also, *Human Rights Act 1998* (UK), Article 2 of the First Protocol in Schedule 1, Part II.

¹³ See, for example, PJCHR, *Interim Report on Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012*, 20 September 2012, pp 11-13, available at:

We consider that it would therefore be practicable for the implementation of ESC rights under the HR Act to adopt a similar approach as that taken by the Commonwealth. Such an approach also has the benefit of achieving consistency with the underlying structure of the HR Act.

(v) Further points for clarification

Item 5 of the bill states that the source of ss 27B(1)-(4) is article 6(1) of ICESCR. We agree that article 6(1) is the basis for the right in s 27B(1). However, on our reading, the rights in ss 27B(2) and 27B(4) appear to be drawn from articles 7 and 8 of ICESCR respectively, not article 6(1).

We also query the need for s 27B(3), given that the right to non-discrimination is a crosscutting right in the HR Act, as guaranteed under s 8 of the Act. As currently drafted, it is also unclear if s 27B(3) is intended to apply to all the rights in s 27B or only the ones that precede it in ss 27B(1) and s 27B(2).

(vi) Provision for review

We suggest that the bill should make provision for a review of the amendments after an appropriate time (for example, two years) to assess the operational impact of the reforms and to determine next steps to continue fostering the human rights culture within the Territory.

Such a review would enable an opportunity to consider the inclusion of further ESC rights (if the full suite of rights is not included at this stage), and/or whether to extend the public authority obligations under the HR Act to such rights (if they are only granted partial recognition in the first instance). The review could also include consideration of complaints-handling power for the Commission to deal with human rights complaints, similar to that provided under the Queensland *Human Rights Act 2019*,¹⁴ and as recommended in the recently released report by Law Reform Advisory Council on '*Canberra – becoming a restorative city*'.¹⁵

We look forward to the progression of the Committee's inquiry. We would be pleased to answer any questions the Committee may have and to provide further information on any of the issues raised in this submission.

Yours sincerely



Dr Helen Watchirs OAM
President and Human Rights Commissioner

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2012/42012/index

¹⁴ See, *Human Rights Act 2019* (Qld), Part 4.

¹⁵ LRAC, *Final Report: Canberra – becoming a restorative city*, October 2018, Recommendation 3.

Core labour standards under the ILO's fundamental conventions ¹⁶		Related right in the ICCPR/HR Act and ICESCR	Comments
Freedom of association and the right to collective bargaining	<ul style="list-style-type: none"> • ILO Convention No. 87 - Freedom of Association and Protection of the Right to Organize, 1948 • ILO Convention No. 98 - Right to Organize and Collective Bargaining, 1949 	<ul style="list-style-type: none"> • Article 8 ICESCR (s 15 HR Act); • Article 22 ICCPR 	<p>Article 8 ICESCR recognises the right of everyone to form trade unions and to join the trade union of their choice, as well as the right of trade unions to function freely. Article 22 of the ICCPR protects the right to freedom of association with others, including the right to form and join trade unions.</p> <p>Neither the ICCPR nor the ICESCR explicitly provide a right to collective bargaining. But both the HRC and CESC have found the right to collective bargaining to be an integral element of Article 22 ICCPR and Article 8 ICESCR respectively.¹⁷</p>

¹⁶ There are over 180 ILO Conventions, establishing a system of international labour standards. Of these, eight are considered to be fundamental conventions, covering four core labour standards:

- 1) **freedom of association and the right to collective bargaining** (C87 Freedom of Association and Protection of the Right to Organise Convention, 1948; and C98 Right to Organise and Collective Bargaining Convention, 1949);
- 2) **elimination of forced or compulsory labour** (C29 Forced Labour Convention, 1930; and C105 Abolition of Forced Labour Convention, 1957);
- 3) **elimination of discrimination in respect of employment and occupation** (C100 Equal Remuneration Convention, 1951; and C111 Discrimination (Employment and Occupation) Convention, 1958.); and
- 4) **abolition of child labour** (C138 Minimum Age Convention, 1973; and C182 Worst Forms of Child Labour Convention, 1999).

Australia is a state party to all the fundamental ILO Conventions except C138 Minimum Age Convention, 1973.

¹⁷ See eg, CESC, *Concluding Comment on Korea*, E/C.12/KOR/CO/3 (17 January 2009), [20]; HRC, *Concluding Comment on Canada*, CCPR/C/79/Add.104 (7 April 1999), [17].

Elimination of forced and compulsory labour	<ul style="list-style-type: none"> • ILO Convention No. 29 - Forced Labour, 1930 • ILO Convention No. 105 - Abolition of Forced Labour, 1957 	<ul style="list-style-type: none"> • Article 8 ICCPR (s 26, HR Act); • Article 6 ICESCR 	<p>Article 8 ICCPR prohibits forced or compulsory labour.</p> <p>Article 6 ICESCR recognises the right to work, including the right of everyone to the opportunity to gain their living by work they freely choose. The fact that work must be freely chosen means state parties must prohibit forced labour.¹⁸</p>
Elimination of discrimination in respect of employment and occupation	<ul style="list-style-type: none"> • ILO Convention No. 100 - Equal Remuneration, 1951 • ILO Convention No. 111 - Discrimination (Employment and Occupation, 1958 	<ul style="list-style-type: none"> • Articles 3 and 7 ICESCR; • Articles 2 and 26 ICCPR (s 8, HR Act) 	<p>Article 3 ICESCR and article 2 ICCPR require the rights established under those Covenants to be extended without distinction of any kind on the ground of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.</p> <p>Article 26 ICCPR recognises the right to equal protection of the law without discrimination. Article 26 is not limited to the rights in the ICCPR and requires laws in all areas to be non-discriminatory in terms of substantive content as well as implementation.</p> <p>Article 7 ICESCR recognises the right of everyone to the enjoyment of just and favourable conditions of work, including remuneration which provides all workers with fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those</p>

¹⁸ CESCR, *General Comment No. 18: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (art 6)*, E/C.12/GC/18 (24 November 2005), [6], [9].

			enjoyed by men, with equal pay for equal work; and a decent living for themselves and their families.
Abolition of child labour	<ul style="list-style-type: none"> • ILO Convention No. 138 - Minimum Age Convention, 1973 • ILO Convention No. 182 - Worst Forms of Child Labour, 1999 	<ul style="list-style-type: none"> • Articles 6, 10 ICESCR; • Article 24 ICCPR (s 11(2), HR Act) 	<p>Australia has not ratified ILO Convention No 138 Minimum Age Convention, 1973. However, ICESCR, which Australia has ratified, contains an overt prohibition of child labour in article 10(3): Children and young persons should be protected from economic and social exploitation.</p> <p>The rights of children to protection is also recognised in article 24 ICCPR.</p>