



**LEGISLATIVE ASSEMBLY**  
FOR THE AUSTRALIAN CAPITAL TERRITORY

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STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY  
Mrs Giulia Jones MLA (Chair), Ms Bec Cody MLA (Deputy Chair), Mr  
Deepak-Raj Gupta MLA

## Submission Cover Sheet

### Inquiry into Human Rights (Workers Rights) Amendment Bill 2019

**Submission Number: 07**

**Date Authorised for Publication: 25 February 2020**



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Dear Mrs Jones

Thank you for the opportunity to make a submission to the Justice and Community Safety Standing Committee on the Human Rights (Workers Rights) Amendment Bill 2019 (the Bill).

The Bill will amend the *Human Rights Act 2004* (Human Rights Act) to include workers' rights in the ACT's human rights framework by adding a new Section 27B 'Right to work' in Part 3A of the Act. The Bill is intended to recognise workers' rights protected in the International Covenant on Economic, Social and Cultural Rights (ICESCR) to which Australia is a party.

The Explanatory Statement for the Bill states that:

"The Bill provides workers with various social, economic and cultural rights that form part of Human Rights more generally, including a right to work; to choose their occupation or profession freely; to enjoy just and favourable conditions of work; and to enjoy the above-mentioned rights without discrimination. The Bill also provides for a right to join a work-related organisation with the objective of promoting or protecting their economic or social interests and to protections against acts of anti-union discrimination."

### Summary

The Government has yet to finalise its position in relation to this Bill. Overall it is noted that the inclusion of the right to work in the Human Rights Act would represent a progressive step in continuing to extend protections for economic, social and cultural rights (ESCR) in the ACT. While some aspects of workers' rights, such as freedom of association, non-discrimination and the right not to be subject to forced labour are already protected in the Human Rights Act, the Bill has the

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potential to further clarify the application of these rights in employment contexts and to provide additional protection for rights such as the right to work and the right to just and favourable conditions of work. Nevertheless, in settling its position on the Bill, the ACT Government will need to fully assess questions of risks and benefits.

There are some limitations on the legislative powers of the Territory in relation to workplace rights, with the federal *Fair Work Act* 2009 (Cth) regulating workplace activity. Obligations under the Human Rights Act will apply only to the extent that the ACT Government is able to regulate or influence aspects of employment in the Territory. It was for this reason that workers' rights were not initially prioritised for inclusion by the Government in 2012, when the right to education was added to the Human Rights Act.

However, there would still be scope for an expanded protection of workers' rights to have effect within the ACT context. The ACT Government currently regulates aspects of employment including discrimination in employment and workplace safety. The Government is also a significant employer within the Territory, and the inclusion of workers' rights in the Human Rights Act would mean that giving consideration to these rights and acting consistently with them would form part the Government's obligations as an employer under section 40 B of the Human Rights Act.

The Bill reflects key international human rights obligations, but if the intention is to align the Bill with the current structure and approach of the Human Rights Act some clarification of the expression of workers' rights may be considered (as set out below). In particular, aligning the rights with the broader expression of ESCR in ICESCR, rather than directly adopting the more detailed specification of rights in the relevant International Labour Organization Conventions (ILO), would be more consistent with the current approach.<sup>1</sup> It is noted that ILO Conventions and ILO jurisprudence, as a specialised body of law, would remain relevant to the interpretation of these rights under section 31 of the Human Rights Act.

The treatment of workers' rights proposed in the Bill differs from the approach taken to the right to education (the first ESCR to be included in the Human Rights Act) as these rights are not expressed to be limited to immediately realisable aspects of the rights. It is noted that limiting workers' rights to immediately realisable aspects may reduce the utility and effect of these rights, as these aspects are already protected in the Human Rights Act. There have been significant developments in international and comparative jurisprudence around the enforceability and adjudication of ESCR over the last decade, including through the entry into force of the Optional Protocol to the ICESCR in 2013.<sup>2</sup> Nonetheless, if this Bill is adopted in its current form, there may be some merit in further clarifying the legislative principles that are intended to apply to the adjudication of the standard of progressive realisation.

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<sup>1</sup> Article 22(3) of the International Covenant on Civil and Political Rights (ICCPR) and article 8 of the ICESCR expressly refer to ILO Convention No. 87.

<sup>2</sup> UN General Assembly, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights : resolution / adopted by the General Assembly*, 63<sup>rd</sup> sess, opened for signature on 5 March 2009, UN Doc A/RES/63/117 (entered into force 13 May 2013). See also Malcolm Langford, Bruce Porter, Rebecca Brown, Julieta Rossi (eds) *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (2016) Pretoria University Law Press – PULP.

### Economic, Social and Cultural Rights in the Human Rights Act

When enacted in 2004, the Human Rights Act contained only rights drawn from the International Covenant on Civil and Political Rights (ICCPR) and did not incorporate ESCR. This approach did not fully reflect the recommendations of the Bill of Rights Consultative Committee which led work on developing the Human Rights Act. The Committee had emphasised the interrelated and indivisible nature of human rights and recommended that rights be included from both the ICCPR and ICESCR.<sup>3</sup>

However, in taking the significant step to introduce Australia's first legislative bill of rights, and in response to concerns raised by many stakeholders about the uncertain impact of ESCR, the ACT Government adopted a measured approach, committing to assess the impact of the Human Rights Act before considering the inclusion of ESCR.

In 2010 an Australian Research Council linkage project between the Australian National University and the Justice and Community Safety Directorate examined the feasibility of introducing ESCR into the Human Rights Act. The Final Report of the Project recommended the introduction of a range of ESCR into the Human Rights Act including the right to housing, the right to health, the right to education, the right to take part in cultural life and the right to work, including the right to enjoy just and favourable work conditions and the right to form and join work-related organisations.<sup>4</sup>

The ESCR Project Report considered that each of the recommended ESCR should be considered equally important, noting that:

"The overall case for limiting the choice of ESCR is not compelling. There is no reason why social security or employment rights are any less important than the rights to housing, education or health. Taken together, they provide holistic support for a dignified life that does not involve material or other deprivation."<sup>5</sup>

The Government response to the ESCR Project Report noted that an incremental approach to the adoption of ESCR rights was preferred, with the right to education being the initial focus but with the potential for further ESCR rights to be considered over time.

In 2012 a new Part 3A: 'Economic, Social and Cultural Rights' was added to the Human Rights Act, and the first ESCR right, the right to education, was added in section 27A. This right was expressed to be limited to the immediately realisable aspect of non-discrimination in the provision of education.

While the right to education was initially also limited in application so that it did not give rise to direct obligations on public authorities, and had an interpretive function only, this constraint was removed in 2016. The right to education must now be considered by public authorities where relevant in decision-making and public authorities must act consistently with this right pursuant to section 40B of the Human Rights Act.

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<sup>3</sup> ACT Bill of Rights Consultative Committee: Towards a Human Rights Act 2003.

<sup>4</sup> Australian Capital Territory Economic Social and Cultural Rights Research Project, Australian Research Council Linkage Project LP0989167 Report September 2010 [http://regnet.anu.edu.au/sites/default/files/uploads/2015-05/ACTESCR\\_project\\_final\\_report.pdf](http://regnet.anu.edu.au/sites/default/files/uploads/2015-05/ACTESCR_project_final_report.pdf).

<sup>5</sup> ESCR Project Report at p 155.

### Scope of rights protected in the Bill

ESCR have aspects that are immediately realisable, which means they have immediate effect and must be respected by public authorities, like other human rights currently protected in the Human Rights Act. They also have aspects that are required to be progressively realised by the State over time and subject to available resources.

As discussed below, the aspects of the right to work that are immediately realisable largely mirror existing obligations that are already protected in the Human Rights Act, such as the right to non-discrimination in employment, the right not to be subject to forced labour, and rights to freedom of association.

The aspects of workers' rights that are subject to progressive realisation (discussed below) would require the Government to take steps to realise these rights over time and subject to resources. The standard of progressive realisation has been clarified over time through the work of the UN Committee on Economic, Social and Cultural Rights ('CESCR')<sup>6</sup> and the jurisprudence of a number of domestic courts.<sup>7</sup>

The obligation of progressive realisation in respect of these rights also comes with a corresponding obligation not to take unjustifiable retrogressive measures, or backward steps, that would undo protections that are already in place. Retrogressive measures are a form of limitation on ESCR. However, it is important to note that these rights will also be subject to reasonable limitations where these can be justified under section 28 of the Human Rights Act.

The consideration of ESCR by the federal Parliamentary Joint Committee on Human Rights (PJCHR) in its scrutiny role under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) provides useful guidance as to the way limitations on ESCR rights can be considered.<sup>8</sup> Since 2012, the PJCHR has assessed all bills and legislative instruments that have come before the Commonwealth parliament against the seven core human rights treaties to which Australia is a party.<sup>9</sup> Relevantly, the PJCHR has considered the right to work, the right to just and favourable conditions at work and the right

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<sup>6</sup> See, eg, Malcolm Langford, Bruce Porter, Rebecca Brown, Julieta Rossi (eds) *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (2016) Pretoria University Law Press – PULP; CESCR General Comment No. 3: *The nature of States parties obligations* (Art 2, Para 1, of the Covenant), 5th CESCR sess, UN Doc E/1991/23 (1990); General Comment No. 9: *The Domestic Application of the Covenant*, 19th CESCR sess, UN Doc E/C.12/1998/24 (1998). See also *The Limburg Principles on the implementation of the international covenant of economic social and cultural rights*, UN ESCOR 4th Comm, 43rd sess, UN Doc E/CN.4/1987/17 (1986).

<sup>7</sup> Progressive realisation has been considered in several jurisdictions, with the South African Constitutional Court being a leading example: see *South Africa v Grootboom* (2000) 11 BCLR 1169 (ZACC); *Minister of Health v Treatment Action Campaign* ['TAC case'] (2002) 5 SA 721 (ZACC). Other examples include *Argentina: Viceconti v. Ministry of Health and Social Welfare - Poder Judicial de la Nación*; *Ecuador: Mendoza & Ors v Minister of Public Health and the Director of the National AIDS-HIV-STI Program* (Tribunal Constitucional, 3ra. Sala, Ecuador, Resolucion No. 0749-2003-RA, 28 Jan. 2004); *India: Unnikrishnan J.P. v State of Andhra Pradesh* (1993) 1 SCC 645; *Colombia*: see Magdalena Sepulveda, 'Colombia: The Constitutional Court's Role in Addressing Social Injustice' in Malcolm Langford (ed), *Social rights jurisprudence - Emerging trends in international and comparative law* (2008) citing T-595/02; T-025/04 (in which the Colombian Constitutional Court explicitly refers to General Comments Nos 3 and 14); T-602/03.

<sup>8</sup> See, PJCHR, Scrutiny Reports

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports)

<sup>9</sup> The core conventions are: the ICCPR; ICESCR; 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; Convention on the Rights of Persons with Disabilities.

to freedom of association including the right to form and join trade unions on numerous occasions.<sup>10</sup> In its work, the PJCHR has developed a consistent approach to its assessment of limitations of both ESCR and civil and political rights, which is derived from international law. For all limitations on human rights the analysis focuses on: whether the measure limiting human rights is prescribed by law, pursues a legitimate objective, is rationally connected to (that is, effective to achieve), and proportionate to, that objective (the permissible limitation criteria). This permissible limitation criteria applied by the PJCHR is substantively equivalent to the test of reasonable limitations under section 28 of the Human Rights Act. This would appear to indicate that ESCR are capable of potentially fitting within the existing framework of the Human Rights Act.

#### Detail of rights protected

The Bill relevantly provides:

#### **New section 27B**

*in part 3A, insert*

#### **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.

##### **Examples—discrimination**

Discrimination because of race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.

- (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.

*Note* The primary source of the rights in s (5) is the International Labour Organisation Right to Organise and Collective Bargaining Convention, art 1.

#### **5 ICESCR source of human rights Schedule 2, new item 2**

*insert*

|   |                |               |       |
|---|----------------|---------------|-------|
| 2 | 27B (1) to (4) | right to work | 6 (1) |
|---|----------------|---------------|-------|

<sup>10</sup> See, PJCHR, Scrutiny Reports

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports)

### Proposed new section 27B

Proposed new section 27B would amend the Human Rights Act to provide protection for a range of economic and social rights related to the workplace. Unlike the existing right to education in section 27A, the workplace rights in proposed section 27B are drafted so as not to be limited to the aspects of the rights that are of immediate effect, but also include obligations of progressive realisation. These rights appear to broadly reflect the rights contained in articles 2(2), 6-8 of the ICESCR.

### Proposed new section 27B(1) – the right to work

Proposed new section 27B(1) would provide that ‘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.’ This proposed section draws on, and largely reflects, the content of article 6(1) of the ICESCR which provides that state parties will protect ‘the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.’

The right includes a number of elements:

- (a) freedom to choose and accept work where it is available;
- (b) a right not to be unfairly deprived of work including on discriminatory grounds;
- (c) an implied prohibition on forced labour; and
- (d) the obligation to provide for a system of access to employment or employment opportunities progressively over time.

Elements (a), (b) and (c) are immediately realisable aspects of the right which would need to be respected and protected by ACT Government and public authorities if the Bill is passed, while (d) requires progressive realisation.<sup>11</sup>

Freedom from forced work is already protected under section 26 of the Human Rights Act and this right would not impose additional obligations on the ACT.<sup>12</sup> More generally, the right to work does not require that the Government or employers give work to anyone who wants it; relevant qualifications skills, experience and availability are still required.<sup>13</sup>

Element (d) would require the ACT Government to put measures in place over time to progressively realise employment opportunities subject to resources. A number of the ACT Government’s policies relating to employment address this element, such as policies providing dedicated pathways to improve opportunities for employment of Aboriginal and Torres Strait Islander people, and people with disability in the ACT Public Service.

One way that the right to work will be engaged and potentially limited is where conditions or requirements are imposed by ACT laws on working in a profession or occupation through, for example, licencing arrangements. An example of this would be where someone is excluded from a particular profession on the basis of a criminal conviction. A ‘fit and proper’ person test imposed in

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<sup>11</sup> UN Committee on Economic, Social and Cultural Rights, General Comment 18: the right to work.

<sup>12</sup> See, also, ICCPR article 8.

<sup>13</sup> Ben Saul et al, *International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (2014) 280.

relation to holding a licence to work in a particular industry would be a further example of a potential limitation.

While not strictly required (as the right would be subject to limitations under section 28), the proposed wording of section 27B(1) explicitly states that the 'practice of a trade, occupation or profession may be regulated by law.' As such, it clarifies that professions can be regulated. Where such conditions, requirements or regulation are imposed, this does not mean that they would be incompatible with the right to work, but rather the limitation will need to be justified. The criteria in section 28 could be applied in this respect and would include consideration of the legitimate purpose of the limitation, whether the limitation is capable of achieving this purpose and whether it is proportionate.

In the ACT, measures that restrict access to certain forms of employment (through for example licences) will already engage equality rights in the Human Rights Act, including discrimination on the grounds of irrelevant criminal record (section 8 of the Human Rights Act), and will require consideration as to whether limitations are reasonable under section 28.

Clause 5 of the Bill relevantly identifies article 6(1) of the ICESCR as the source of the right to work. As discussed below, if the intention of the Bill is to draw on other relevant provisions of the ICESCR consideration could be given to amending this clause to include additional references.

#### Proposed new section 27B(2) – right to just and favourable conditions of work

Proposed new section 27B(2) would provide that 'everyone has the right to the enjoyment of just and favourable conditions of work'. This reflects the preliminary part of article 7 of the ICESCR which protects 'the right of everyone to the enjoyment of just and favourable conditions of work.' This right is one that requires progressive realisation by the State rather than being immediately realisable.

Article 7 of ICESCR sets out further information about the content of the right, including that it provides for fair remuneration and a decent living, safe working conditions, equal opportunity and leave, rest and leisure. From a legal and practical perspective, as noted above, the scope of this right if included in the Human Rights Act may be somewhat restricted as much of the legal framework that governs these issues is the subject of Commonwealth rather than ACT laws.

However, the right would still be of relevance, where there are ACT laws that deal with such issues or where the ACT is undertaking actions, for example, as an employer. As an obligation of progressive realisation, as noted above, there would be a corresponding duty to refrain from the taking backward steps (or retrogressive measures) in the level of attainment of the right without justification.

However, the introduction of this obligation would not mean that every reduction in a workplace entitlement will amount to a retrogressive measure. For example, as part of an enterprise bargaining process, there may be an agreement that certain conditions are reduced in exchange for other conditions or pay such that overall there is not a backward step in the right to just and favourable conditions at work. Nevertheless, as noted above, limitations may be permissible applying the criteria under section 28 of the Human Rights Act. In the context of ESCR, this could include consideration of matters of resources.

Clause 5 of the Bill does not identify article 7 of the ICESCR as the source of the right contained in section 27B(2). As such, if the intention is to draw on article 7 (as indicated in the Explanatory Statement) consideration could be given to amending clause 5 of the Bill so the source of section 27B(2) is listed as article 7 of the ICESCR.

Proposed new section 27B(3) – enjoyment of rights without discrimination

Proposed new section 27B(3) provides that ‘Everyone is entitled to enjoy these rights without discrimination.’ This right is immediately realisable. By way of context, article 2(2) of the ICESCR also prohibits discrimination in relation to all rights contained in the ICESCR including workplace rights. Article 2(2) of the ICESCR is substantively identical to article 2(1) of the ICCPR. Moreover, section 8 of the Human Rights Act reflects article 2(1) and 26 of the ICCPR and already protects against discrimination both as a freestanding right and in relation other rights. Accordingly, the proposed provision would not substantively expand the range of obligations that the ACT currently holds under the Human Rights Act. Nevertheless, if introduced, the section may clarify that non-discrimination obligations apply in relation to the new workplace rights contained in that section.

Clause 5 of the Bill does not identify article 2(2) of the ICESCR as the source of the right contained in section 27B(3). As such, if the intention is to draw on article 2(2), consideration could be given to amending clause 5 of the Bill so the source of section 27B(3) is listed as article 2(2) of the ICESCR. Additionally, consideration could also be given to clarifying the scope of application of the obligation. Currently, there is some uncertainty in the Bill as to whether section 27B(3) applies to all the rights in the section or only the rights that precede it. The Bill could be amended to clarify this issue subject to the policy intention of the Bill.

Proposed new section 27B(4) – Everyone has the right to form or join a work-related organisation

Proposed new section 27B(4) would provide that ‘Everyone has the right to form or join a work-related organisation with the objective of promoting or protecting their economic or social interests.’ This reflects aspects of article 8(1)(a) of the ICESCR which provides the right ‘to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests.’ Article 8 of ICESCR is also referred to as the right to freedom of association in the workplace.

The right to freedom of association is also protected in article 22 of the ICCPR which also contains express reference to ‘the right to form and join trade unions’ for the protection of interests. Article 22(3) of the ICCPR and article 8 of the ICESCR expressly refer to the guarantees of the freedom of association and the right to collectively organise contained in the International Labour Organisation Convention No. 87.<sup>14</sup>

The Human Rights Act already protects the right to freedom of association under section 15(2). While section 15(2) applies in a range of contexts including in relation to trade unions, this is not expressly mentioned in the wording of section 15(2). Proposed section 27B(4) would not appear to substantively expand this provision but may clarify that Human Rights Act protection clearly extends to work-related organisations. Draft section 27B(4) does not refer directly to other aspects of article 8(1)(b)-(d) of the ICESCR which include a number of specific elements.

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<sup>14</sup> ICCPR, Article 22(3); ICESCR, Article 8(3).

Clause 5 of the Bill does not identify article 8 of the ICESCR as the source of the right contained in section 27B(4). If the intention of the Bill is to draw on article 8 of the ICESCR (as indicated in the Explanatory Statement), consideration could be given to amending clause 5 of the Bill so the source of section 27B(4) is listed as article 8 of the ICESCR. Similarly, consideration could be given to amending section 27B(4) to refer to 'trade unions' as well as 'work-related organisations.' The scope of work-related organisation will also capture employer associations and other bodies which are not trade unions. Including the term 'trade union' would more directly reflect the language of the ICESCR.

Proposed new section 27B(5) – Everyone has the right to protection against acts of anti-union discrimination in relation to their employment

Proposed new section 27B(5) would provide that 'Everyone has the right to protection against acts of anti-union discrimination in relation to their employment.' The Bill states that the source of this right is article 1 of the International Labour Organisation (ILO) Convention 98 - Right to Organise and Collective Bargaining Convention.

The ILO Convention 98 provides that: 'Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.' This article goes on to describe 'anti-union discrimination' as including, for example, making the employment of a worker subject to the condition they relinquish union membership or not join a union, or cause the dismissal or otherwise prejudice a worker because of union membership or participation in union activities.<sup>15</sup>

In addition to ILO Convention 98, protection against discrimination of union members is also implicit in the right to form and join trade unions under article 8(1)(a) of ICESCR, the right of unions to function freely under article 8(1)(c), and the right to enjoy ICESCR rights on a non-discriminatory basis, including article 8, under article 2(2) of ICESCR on the basis of 'political or other opinion' or 'other status'. The relevant treaty monitoring body, the United Nations Committee on Economic, Social and Cultural Rights, has routinely criticised discrimination against union members such as dismissals, harassment and blacklisting. The Committee has recommended that state parties take effective measures to ensure workers are protected from such activities.<sup>16</sup> It is noted that the Bill already contains protections that substantively reflect articles 8(1)(a) and article 2(2), but does not currently explicitly reflect article 8(1)(c).

If the intention is to ensure consistency with other aspects of the Human Rights Act, consideration could be given to amending the note about section 27B(5) and the ILO Convention 98 as well as Clause 5. These could also refer to the source of the right as article 8 and article 2(2) of ICESCR. The Explanatory Statement also identifies article 8 of ICESCR as the source of the right but this is not reflected in the Bill.

If the intention of the Bill (as indicated in the Explanatory Statement) is to reflect all of article 8 of the ICESCR, an alternative approach may be to consider capturing the wording and content of article 8(1)(c) of ICESCR, namely, the right of unions to function freely. This approach, together with

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<sup>15</sup> ILO supervisory mechanisms have described 'anti-union discrimination' as one of the most serious violations of the right to freedom of association': see ILO, Freedom of Association, Digest of Decisions and Principles.

<sup>16</sup> See, for example, UN Committee on Economic, Social and Cultural Rights, Concluding Observations: Costa Rica, E/C.12/CRI/CO/4 (4 January 2008); Brazil, E/C.12/BRA/CO/2 (12 June 2009); Poland, E/C.12/POL/CO/5 (2 December 2009).

references as to source, would ensure that the implied prohibition on anti-union discrimination is captured and more closely reflects the wording and scope of the rights under the ICESCR, maintaining consistency with the approach of the Human Rights Act in drawing rights from ICCPR and ICESCR rather than more detailed particularisations of rights.

#### Parliamentary Joint Committee on Human Rights consideration of workers' rights

At the federal level, workplace rights have come up for the PJCHR less frequently than other human rights and account for a comparatively small percentage of the PJCHR's human rights consideration. Workplace rights have arisen most frequently in relation to the regulation of trade unions including in relation to their internal affairs (freedom of association), restrictions on industrial action (freedom of association), restrictions on the content of enterprise agreements and bargaining outcomes (just and favourable conditions at work and freedom of association) and 'fit and proper' person tests (right to work).<sup>17</sup> Most of these issues relate to federal legislation that covers the field and may not arise to the same extent in the ACT context.

As noted above, the PJCHR has developed a consistent approach to human rights scrutiny and assessment of permissible limitations, drawing on evolving international jurisprudence on ESCR. The PJCHR applies the same methodology to assessing limitations of ESCR as to civil and political rights, examining whether the limitation is aimed at a legitimate objective, whether it is rationally connected (that is, effective to achieve) to the objective and whether limitations are proportionate. This approach would provide useful guidance for ACT compatibility scrutiny of ESCR, including whether any retrogressive measures are justifiable.

#### Implications for ACT law and practice

As set out above, many aspects of workers' rights are already subject to some protection in the Human Rights Act. Where there are new obligations, this will still have some implications for the ACT Government as an employer and in regulating particular professions and industries. As a public sector employer, the ACT Government takes a progressive, best practice approach and has a range of policies and procedures in place to ensure workers' rights are protected. Nevertheless, in settling its position on the Bill, the ACT Government will need to fully assess the risks and benefits of the proposal and whether there is a need for further clarity.

Notwithstanding this issue, the inclusion of workers' rights in the Human Rights Act has the potential to send a strong signal to the community regarding the value placed on workers rights, and to serve as a guide for the development of law and policy to progressively improve rights protections in the future.

As discussed above, the right to just and favourable conditions of work gives rise to an obligation of progressive realisation and this differs in scope from aspects of workers' rights that are immediately realisable. As such, the inclusion of the right may create increased expectations in the community and may be used for advocacy in employment situations. Expectations could potentially be managed through clear communications about the scope of the rights and what is and what is not covered.

Introducing the right to work in a form that is not limited to the immediately realisable aspects of the right (i.e. non-discrimination in the provision of the right) does contrast with the current

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<sup>17</sup> PJCHR, Annual Report 2018 (12 February 2019)

constraints on the right to education, which is the only ESCR currently protected in the Human Rights Act. The Bill may raise questions about whether current limitations on the right to education in the Human Rights Act should also be reconsidered. It is notable that the right to education is included without such restrictions in the Queensland *Human Rights Act 2019*.

The Bill also raises questions about potential protection of other ESCR noting there have been ongoing public campaigns for the inclusion of the right to housing in the Human Rights Act. The inclusion of the right to work may lead to renewed calls for the inclusion of the right to housing and other ESCR in the Human Rights Act which will require consideration.

The ACT Government would need to undertake further detailed consideration and consultation in relation to any further changes to the Human Rights Act.

Yours sincerely

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