LEGISLATIVE ASSEMBLY
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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Human Rights (Workers Rights) Amendment Bill 2019

This submission responds to the Committee's invitation to comment on the *Human Rights (Workers Rights) Amendment Bill 2019* (ACT).

Summary

In summary, there is value in amending the *Human Rights Act 2004* (ACT) to more clearly express economic, social and cultural rights that are articulated in the International Covenant on Economic, Social & Cultural Rights (ICESCR). In relation to workers rights that clarification is essentially symbolic, given the existing Act's interaction with Commonwealth law and its current express/indirect coverage of rights in relation to the workplace.

However, it is important to note that the proposed amendment enshrines worker's rights on the basis of the rights of individuals *per se*, in comparison to the Federal legislation, the *Fair Work Act 2009* (Cth), whereby worker's rights (in relation to certain matters such as unfair dismissal) are attainable on the basis of employment with a national system employer only.

This acknowledgment of worker's rights without reference to a corporate framework is commendable and in keeping with common law principles whereby employment rights are established via duties owed by parties to one another in a 'special relationship'.

Updating the ACT legislation is desirable as a response to the changing environment over the past two decades, including growth of precarious employment, offshoring and potential de-skilling through automation. However, as we discuss below, the opportunity to provide workers with protections in this changing environment may be lost in practice, unless Clause 27B(1) is interpreted to effectively address issues regarding independent contractors and other workers in the gig economy. The legislation for example needs to engage with redress regarding unjust and unfavourable terms, considering definition hurdles for 'gig economy' applicants before the Fair Work Commission in the context of unfair dismissal claims and the increasing reliance on the Fair Work Ombudsman under the sham contracting provisions of the Fair Work Act. The broadening of protections through the lens of 'workers rights' as human rights is worth further investigation but should not be at the expense of 'muddying the waters' of legal avenues for applicants. Clarity of legal avenues is an important consideration in relation to pathways to justice.

A holistic and bipartisan review of the Act is suggested. That review should not be restricted to the rights of workers. It should include consideration of the operational impact of the Act, as distinct from its symbolic value. Given the laudable commitment by the ACT Government to a legal system founded on human rights we consider that legislation regarding rights must be more than aspirational. It may require funding to assist individuals and cohorts to give effect to their rights.

Given the importance of day by day application of legislation it is also important that the Committee consider the interaction of the Territory's regime and the broader national

employment regime, including the operation of the *Fair Work Act 2009* (Cth) and the Fair Work Ombudsman.

We consider that amendment of the Act to expressly recognise the rights of workers is feasible; it will not impose disproportionate costs on employers, result in inappropriate litigation on the basis of uncertainty or be constitutionally invalid. The amendment should however be holistic and in giving effect to the ICESCR should not be restricted to rights in relation to employment.

The following pages address specific aspects of the Bill.

Basis

The submission is made by Bruce Baer Arnold and Jane Diedricks at the University of Canberra and Wendy Bonython at Bond University. It reflects their teaching of law and research regarding employment and human rights, evident in a range of peer-reviewed publications, practitioner resources and cited submissions to law reform bodies.

The submission does not represent what would be reasonably construed as a conflict of interest.

Please do not hesitate to contact us if you have any queries regarding the submission.

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Submission: *Human Rights (Workers Rights) Amendment Bill 2019*

Amendment of the *Human Rights Act 2004* (ACT) to protect the range of economic, social and cultural rights – including and not restricted to 'workers' rights' – is both socially useful and constitutionally viable. Amendment to specifically strengthen the rights of people who engage in remunerated work as contractors and employees on an ongoing or casual basis, often characterised as workers' rights, is of benefit to both the Australian Capital Territory community and people in other jurisdictions across the nation. Those people include citizens and non-citizens who potentially experience egregious exploitation on the basis of precarity (ie vulnerability on the basis of precarious, aka casual employment in fields where there is a significant disparity in power between employers and employees).

This submission accordingly comments on the *Human Rights (Workers Rights) Amendment Bill 2019* (ACT). The aim is to both inform the Standing Committee on Justice & Community Safety about specific aspects of the Bill and to identify issues regarding the broader *Human Rights Act.*

Derivation and importance

The Human Rights Act derives from international (aka universal) human rights agreements such as the 1948 Universal Declaration of Human Rights. It establishes the Australian Capital Territory as one of three 'human rights jurisdictions' in Australia, in other words a territory in which there is an explicit commitment to respect for human rights and in which the legislature is required to consider those rights in making law. The legislature is not bound by the Act, which can and on occasion has been disregarded by a Territory Minister, but the Act has informed the jurisprudence of the Territory's courts and tribunals.

Beyond any effect on the day by day practice of officials and non-government entities the Act signals that rights both reflect and reinforce community values regarding fairness and justice. Such signalling is an important function of law, irrespective of whether any articulation of rights and responsibilities is enforceable.

As such it is important that the Act clearly covers rights but is not unevenly detailed and prescriptive. (Later paragraphs highlight the importance of substantive rather than merely formal enjoyment of rights in what is often characterised as the casualised, precarious or gig economy.) It is axiomatic that rights are indivisible, which means on occasion policymakers and judicial bodies will need to grapple with striking a balance between different rights and to seek a principles-based balance between rights and responsibilities. (The latter is important given that rights and responsibilities are complementary rather than antithetical, although in public and private discourse many stakeholders appear to believe that rights are fictions, responsibilities are irrelevant or that rights trump responsibilities.)

Given that indivisibility it is fundamental that over-arching legislation such as the 2004 Act should not overtly or implicitly privilege some rights at the expense of others and thus signify that some stakeholders are more important than others or that some rights are necessarily disregarded on the basis that they are administratively inconvenient. It is also important that as a high-level enactment necessarily interpreted to address a wide range of situations it not be drafted (and amended) through an uneven specificity that fosters litigation or is misread as devaluing those rights that are not itemised in detail.

In considering the current Bill we endorse protection for workers as consistent with the International Covenant on Economic, Social & Cultural Rights (ICESCR) and International

Convention on Civil & Political Rights (ICCPR).[1] However we recommend that amendment of the Act should *not* be restricted to workers' rights and that the Committee in considering the Bill should look beyond advocacy by particular stakeholders. The legislation should not be determined by the eight core International Labour Organisation Conventions, which overlap with the ICESCR, may be understood in interpretation of workers' rights under the Act,[2] and if imported to the Act in the proposed s 27b are unnecessarily specific, given that the Act currently provides express and indirect protection for example freedom of association and assembly,[3] freedom from forced labour,[4] non-discrimination[5] and children's rights.[6]

We suggest that consideration should be given to other ICESCR rights such as affordable housing and readily accessible health care. That is for example of significance for ACT public administration and funding of such matters as community housing in a city that now has the highest residential rental prices in Australia.[7] We note the *Report of the ACT Economic, Social and Cultural Rights Research Project* in 2010 and suggest recommendations in that report should be revisited. The report correctly noted that the Act does not engage with economic, social and cultural rights apart from a circumscribed right to education under s 27A.

We note that for legislation to be effective rather than aspirational it must be enforceable without inordinate effort by entities seeking to invoke rights/responsibilities and that those entities should not experience a 'litigation thicket', ie an implicit barrier to justice through uncertainty and costs inherent in a need to proceed through a succession of tribunals and courts (one weakness of the national employment dispute regime under the *Fair Work Act 2009* (Cth)). Enforceability builds legitimacy in the minds of the community, offsetting perceptions that the rights regime in the Territory is a matter of lip service or of looking after particular interests on the basis of a privileged access to power.

If the amendment is passed it will accordingly be appropriate to provide assistance to small employers and employees (casual or otherwise) and advocacy bodies so that the Act serves to a practical rather than notional basis of rights. Implementation requires more than the customary community awareness campaign, although – given the above comments regarding the significance of the Act as a mechanism for signalling community values and thereby underpinning norms of behaviour – such campaigns are of value.

Interaction with national legislation

We note that the ACT legislature is restricted to making legislation for the Territory and may be overridden by the national Government. Strengthening the Act has a social value beyond the Territory, given that many entities assess legislation and practice through reference to the regimes in the ACT, Victoria and Queensland. That benchmarking may also encourage investment in the Territory as a jurisdiction that is attractive to families, businesses and non-commercial organisations because it is progressive.

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[1] The proposed section 27B is founded on article 6(1) of the ICESCR. We note the importance of the associated Article 7, 8, 9, 10(2) and 10(3) (respectively the right to just and favourable conditions of work, right to form and join trade unions and right to strike, right to social security, right to maternity leave and prohibition against child labour.

[2] *Human Rights Act 2004* (ACT) s 31.

[3] *Human Rights Act 2004* (ACT) s 15

[4] *Human Rights Act 2004* (ACT) s 26

[5] *Human Rights Act 2004* (ACT) s 8

[6] *Human Rights Act 2004* (ACT) s 11

[7] See for example Markus Mannheim, 'Bleak prospects for new tenants moving to Canberra, the city with Australia's highest rent' ABC News 19 January 2020 (https://www.abc.net.au/news/2020-01-20/rental-prices-rising-high-as-new-canberrans-scramble-for-leases/11825704)

In that respect we recognise that workers' rights are directly or implicitly engaged by Territory enactments such as the *Workplace Privacy Act 2011* (ACT), *Discrimination Act 1991* (ACT), *Work Health and Safety Act 2011* (ACT), *Workers Compensation Act 1951* (ACT) and *Long Service Leave Act 1976* (ACT).

It is important for the Committee to note however that the proposed amendments will not displace the Fair Work Act or supersede the national employment regime. The amended Human Rights statute will have a limited ambit rather than being an effective solution to all workplace problems and activity where people provide expertise, enthusiasm and the unwaged work that (as Bonython and Arnold have demonstrated in a succession of submissions regarding aged care and health) is fundamentally important for individual wellbeing and national productivity.[8] That is salient given the importance of the not-for-profit sector in the ACT and of unremunerated work by carers, inadequately recognised through Commonwealth initiatives such as the National Disability Insurance Scheme.

Comprehensiveness

Updating the ACT legislation is desirable as a response to the changing environment over the past two decades, including growth of precarious employment, offshoring and potential de-skilling through automation.

However, the opportunity to provide workers with protections in this changing environment may be lost in practice, unless Clause 27B(1) is interpreted as a mechanism by which 'workers' are able to challenge their 'forced' or 'encouraged' engagement as independent contractors, rather than 'workers' with employment rights. The legal definition of independent contractor and employee has become increasingly fraught. A plethora of case law has sought to establish and interpret indicia to provide guidance in relation to the definition of employee versus independent contractor. However, the lines remain generally blurred in relation to workers in the gig economy and their 'rights'.

Substantive protection in the gig economy

We note that the Bill provides at Clause 27B(2) that 'everyone has the right to the enjoyment of just and favourable conditions of work'. Perhaps this reference to the nature of the conditions (rather than reference to indicia as the defining factors) may provide individuals who are subject to unjust and unfavourable terms of engagement in the gig economy with an avenue for redress. As reflected by Deputy President Gostencnik in the 'Uber case' (*Mr Michail Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610

> The notion that the work-wages bargain is the minimum mutual obligation necessary for an employment relationship to exist, as well as the multi-factorial approach to distinguishing an employee from an independent contractor, developed and evolved at a time before the new "gig" or "sharing" economy. It may be that these notions are outmoded in some senses and are no longer reflective of our current economic circumstances. These notions take little or no account of revenue generation and revenue sharing as between participants, relative bargaining power, or the extent to which parties are captive of each other, in the sense of possessing realistic alternative pursuits or engaging in competition. Perhaps the law of employment will evolve to catch pace with the evolving nature of the digital economy. *Perhaps the legislature will develop laws to refine traditional notions of employment or broaden protection to*

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[8] See for example endorsement in the Australian Law Reform Commission reports on *Equal Recognition Before The Law And Legal Capacity For People With Disability* of submissions by Bruce Baer Arnold and Wendy Bonython, endorsement in the Senate Standing Committee on Community Affairs inquiry into Pelvic Mesh report of submissions by Bonython and Arnold and endorsement in numerous parliamentary committee reports on the Therapeutic Goods Administration.

> *participants in the digital economy.* But until then, the traditional available tests of employment will continue to be applied. (our emphasis)

Redress

The provision of an avenue for redress for these types of workers via the proposed Clause 27B(2) may be worthwhile, considering definition hurdles for 'gig economy' applicants before the Fair Work Commission in the context of unfair dismissal claims (as per the comments above) and the increasing reliance on the Fair Work Ombudsman to pursue such matters under the sham contracting provisions of the Fair Work Act.

The broadening of protections through the lens of 'workers rights' as human rights is worth further investigation, however this should not be at the expense of 'muddying the waters' of legal avenues for applicants to pursue, noting that there are currently a variety of mechanisms (Territory and Federal) that are available to aggrieved workers; clarity of legal avenues is an important consideration in relation to pathways to justice.

Definitions

Clarity of definition will be important. The term 'work' is not defined under the current Act or this Bill. Please see the comments above in relation to 'unwaged work'.

The recent introduction of the *Modern Slavery Act 2018* (Cth) has placed obligations on employers to address beyond their organisations and respond to the risk of modern slavery in its operations and supply chains. Clause 27B(1) and (2) would appear to complement this framework

The descriptor of Clause 27B is 'the right to work'. It is our understanding that the right to work is not currently covered by State or Federal legislation.[9] However, Clauses 27B(3), 27B(4) 27B(5) appear to duplicate rights that are available to individuals under other Territory and Federal legislation. It may be that Clauses 27B(3), 27B(4) and 27B(5) do not require recognition under this legislation – ie their inclusion may be redundant.

Implementation

It is axiomatic that the Territory's obligations under its human rights law encompass action to respect, protect and fulfil rights. A preceding paragraph noted the significance of fostering community awareness, something that must be underpinned by best practice in public administration given that the ACT government is both a major employer and a purchaser of contracted services and goods sourced within/outside the jurisdiction.

We note recommendations in the Law Reform Advisory Council 2018 *Canberra –becoming a restorative city* report. In giving effect to any amendments we suggest that the Government enhance funding of dispute resolution entities such as ACAT and foster complaints-handling by the Human Rights Commission regarding human rights concerns.[10]

Further, we suggest funding of entities that engage with both employers (in particular small and medium sized enterprises, increasingly significant in the ACT economy) and employees. That engagement will not obviate the need for litigation about the enforcement of worker

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[9] The Human Rights Act for example articulates a negative right (ie a prohibition on forced labour, consistent with the Commonwealth modern slavery regime) but does not provide a positive right. As noted elsewhere, Australian law does not recognise unremunerated activity as work, although the activity of carers and volunteers has both a fundamental impact on national productivity and – as we have recently seen with bushfires – is a foundation of public safety.

[10] A model is provided under the Queensland *Human Rights Act 2019* (Qld) pt 4.

rights under Commonwealth and Territory law but is useful in fostering shared understandings about rights/responsibilities. It is also useful in potentially providing the basis for alternative dispute resolution that is independent (in other words not biased towards employers) and non-adversarial.

Looking beyond the Bill

We note that the *Human Rights Act* draws on both ICCPR and ICESCR (rather than directly on the higher-level UDHR). Its express recognition of rights from those two international instruments has up till now been extremely uneven. It for example draws much more extensively on Civil and Political rights, with only the right to education recognised under Economic rights.

The legislature's review of the Bill provides a timely opportunity to examine the full suite of ICESCR rights and consider *all* of them for express inclusion in an updated Human Rights Act, thereby encouraging uniformity and addressing omissions in the Commonwealth regime.