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STANDING COMMITTEE ON ENVIRONMENT, CLIMATE CHANGE AND BIODIVERSITY
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Submission Cover Sheet

Inquiry into ACT's heritage arrangements

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Standing Committee on Environment, Climate Change and Biodiversity
ACT Legislative Assembly
GPO Box 1020
Via LCommitteeECCB@parliament.act.gov.au

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Dear Committee Secretary

ACT Human Rights Commission submission to Inquiry into ACT's heritage arrangements

The ACT Human Rights Commission wishes to provide some brief information about human rights principles relevant to heritage protection to support the Standing Committee's inquiry into the ACT's heritage arrangements.

The enclosed submission seeks to highlight relevant human rights, protected under the *Human Rights Act 2004*, and related principles that may usefully inform the Committee's examination of its terms of reference. Given the Commission's limited line of sight to heritage operations in the ACT, our submission does not express a view as to the effectiveness or adequacy of the ACT's existing heritage framework.

As this submission is intended primarily to provide relevant principles and information, the Commission would not seek to appear at a hearing before the Committee.

Yours sincerely

Dr Helen Watchirs OAM
President and Human Rights Commissioner

About the ACT Human Rights Commission

1. The ACT Human Rights Commission is an independent agency established by the Human Rights Commission Act 2005 (HRC Act). Its main object is to promote the human rights and welfare of people in the ACT. The HRC Act became effective on 1 November 2006 and the Commission commenced operation on that date. Since 1 April 2016, a restructured Commission has included:
 - i. the President and Human Rights Commissioner;
 - ii. the Discrimination, Health Services, Disability and Community Services Commissioner;
 - iii. the Public Advocate and Children and Young People Commissioner; and
 - iv. the Victims of Crime Commissioner.
2. Among her various functions, the President and Human Rights Commissioner is responsible for promoting community discussion, and providing education and information, about the HRC Act, the *Human Rights Act 2004* (ACT) (HR Act) and human rights generally. Amendments passed in November 2019 allow for the Human Rights Commissioner to request that the Conservator of Flora and Fauna review cultural resource management plans that govern access to land and resources for cultural use.¹ Although this ability offers a valuable means of prompting consideration of cultural access on Country and to natural resources (eg cultural fishing practices), the Commissioner has not yet been made aware of a reason to exercise this power.
3. Other than in cases of significant media interest, the Commission has not, in practice, had particular oversight of the operation of the ACT's heritage framework. The Commission also understands that the present inquiry is proceeding in parallel with a comprehensive review of ACT Heritage, which is being progressed by the Environment, Planning and Sustainable Development Directorate.² Consequently, the present submission sets out relevant human rights and related principles with a view to assisting the Committee's examination of its terms of reference. It does not, however, address the effectiveness or adequacy of existing heritage laws and operations, or recommend or oppose changes to this framework.

Relevant human rights in the ACT

4. The HR Act does not contain an explicit right to access to and enjoy cultural heritage, as exists in international human rights law (IHRL).³ Several human rights in the HR Act may, however, be relevant to the Committee's examination of its terms of reference.

Cultural rights of Aboriginal and Torres Strait Islander peoples and other minorities (s 27)

5. The HR Act has, since its enactment in 2004, guaranteed the right of anyone belonging to an ethnic, religious or linguistic minority to not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language.⁴ This right guarantees protection against barriers to ethnic, religious and linguistic minorities enjoying their own culture, professing and practising their own religion, and using their own language, in private and in public, with others. For this right, 'culture' is understood broadly and:

¹ *Nature Conservation Act 2014*, s 168I, as introduced in the *Fisheries Legislation Amendment Act 2019*.

² Rebecca Vassarotti MLA, *Statement regarding ACT Heritage Council and next steps for heritage reform* (Media release, 7 December 2022), available at: < https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/vassarotti/2022/statement-regarding-act-heritage-council-and-next-steps-for-heritage-reform >

³ Above 3.

⁴ *Human Rights Act 2004* ('HR Act'), s 27.

“... manifests itself in many forms, including a particular way of life associated with the use of land resources, specially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law 5/. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”⁵

6. The right to enjoy one’s own culture, as it has been known, also obliges governments to ensure the effective participation of members of minorities in decisions affecting them and limit the negative impact of the measures taken. This implies more than mere information or consultation; it entails meaningful participation and prior and informed consent of the community concerned.⁶
7. Section 27 of the HR Act was amended in February 2016 to expressly recognise the distinct cultural rights of Aboriginal and Torres Strait Islander peoples:⁷

27 Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities

- (1) Anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language.
- (2) Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied the right—
 - (a) to maintain, control, protect and develop their—
 - (i) cultural heritage and distinctive spiritual practices, observances, beliefs and teachings; and
 - (ii) languages and knowledge; and
 - (iii) kinship ties; and
 - (b) 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.

Note The primary source of the rights in s (2) is the United Nations Declaration on the Rights of Indigenous Peoples, art 25 and art 31.

8. Section 27(2) reflects Articles 25 and 31 of the United Nations Declaration on the Rights of Indigenous Peoples, and affirms the rights of Aboriginal and Torres Strait Islander peoples to control, practice and develop their culture. ‘Culture’ is not defined, for the purposes of s 27(2), and so should adopt its ordinary meaning, “which would encompass the language, spirituality, membership, arts, literature, traditional knowledge, customs, rituals, ceremonies, methods of production, among many other aspects of the life of Aboriginal and Torres Strait Islander peoples”.⁸ More information about the scope and content of the cultural rights of Aboriginal and Torres Strait Islander peoples and other minorities are available in factsheets published by the Commission and ACT Government.⁹

⁵ Human Rights Committee, *General comment No. 23(5) (art. 27)*, 50th sess, 1314th mtg, UN Doc. CCPR/C/GC/23 (26 April 1994), [7].

⁶ See for example, Human Rights Committee, *Decision: Communication No. 1457/2006*, 95th sess, UN Doc. CCPR/C/95/D/1457/2006 (24 April 2009) [7.6] (*‘Angela Poma Poma v. Peru’*).

⁷ *Human Rights Amendment Act 2016* (ACT), s 7.

⁸ ACT Legislative Assembly, *Parliamentary Debates – Presentation Speech, Human Rights Amendment Bill 2015*, 26 March 2015, 1190 (Simon Corbell MLA).

⁹ ACT Human Rights Commission, ‘Human Rights in Detail: Aboriginal and Torres Strait Islander Cultural Rights’, available at <<https://hrc.act.gov.au/humanrights/guides-and-publications/detailed-information-enshrined->

Other relevant rights and reasonable limits

9. Cultural heritage is also a fundamental *resource* for exercising other human rights protected in the HR Act, including the rights to freedom of expression¹⁰ and to freedom of thought, conscience, religion and belief,¹¹ and the right to education.¹²
10. Where the ACT's heritage framework, including the *Heritage Act 2004* (ACT) and other legislation, appears to somehow limit or curtail enjoyment of the human rights protected in the HR Act, international commentary on cultural heritage and human rights may be drawn on, as relevant, to guide their interpretation and an assessment of whether such limits are permissible. Public authorities, including Ministers, EPSDD and ACT Heritage, also have duties under the HR Act to act consistently with human rights and properly consider relevant human rights in decision making.¹³
11. To these ends, the HR Act recognises that few rights are absolute and that reasonable limits may be placed on most human rights, including those outlined above, as a means of balancing competing interests and/or rights. Limitations on rights must be authorised by law, pursue a legitimate objective and reflect a rational and proportionate way of achieving that objective. Assessment of any limits on rights arising from the ACT's heritage framework would need to satisfy the following cumulative criteria to conclude that a particular limitation is compatible with human rights:
 - (i) Whether the decision, practice or approach is authorised by law;
 - (ii) Whether the measure is aimed at achieving a legitimate objective;
 - (iii) Whether there is a rational connection between the measure and the objective; and
 - (iv) Whether the measure is proportionate to that objective.

Heritage and human rights

12. Though not expressly recognised in the HR Act, IHRL also recognises a right of access to, and enjoyment of cultural heritage.¹⁴ This is important because those human rights that are protected in the HR Act are able to be interpreted by reference to international law, including statements of United Nations (UN) treaty bodies and experts, and judgments of foreign and international courts and tribunals, to the extent that they are relevant to the human right in question.¹⁵
13. Reporting to the UN Human Rights Council in 2010, the Independent Expert in the field of cultural rights, Farida Shaheed, underscored that cultural heritage is a human rights issue; intrinsically linked to human dignity, identity and social cohesion. Her report characterised cultural heritage as:

...tangible heritage (e.g. sites, structures and remains of archaeological, historical, religious, cultural or aesthetic value), intangible heritage (e.g. traditions, customs and practices, aesthetic and spiritual beliefs;

[rights/aboriginal-and-torres-strait-islander-cultural-rights/](https://www.justice.act.gov.au/data/assets/pdf_file/0020/2072441/Fact-Sheet-T-s-27-Cultural-and-Minority-Rights-Human-Rights-Education.pdf) ; ACT Justice and Community Safety Directorate, 'Rights to Culture: Section 27 – Human Rights Act 2004', available at: <https://www.justice.act.gov.au/data/assets/pdf_file/0020/2072441/Fact-Sheet-T-s-27-Cultural-and-Minority-Rights-Human-Rights-Education.pdf>

¹⁰ HR Act, s 16(2).

¹¹ HR Act, s 14.

¹² HR Act, s 27A (noting the right to education in the ACT is limited to non-discrimination and the right of parents and guardians to ensure the religious and moral education of a child in accordance with their convictions).

¹³ HR Act, s 40B.

¹⁴ International Covenant on Economic, Social and Cultural Rights, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 15(1)(a).

¹⁵ HR Act, s 31.

vernacular or other languages; artistic expressions, folklore) and natural heritage (e.g. protected natural reserves; other protected biologically diverse areas; historic parks and gardens and cultural landscapes).

14. The UN Committee on Economic, Social and Cultural Rights, a source of authoritative commentary about the interpretation of human rights, has emphasised the importance of having access to one's own cultural heritage, including linguistic heritage, as part of the right to culture.¹⁶ It emphasises:

“the concept of culture must be seen not as a series of isolated manifestations or hermetic compartments, but as an interactive process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity”.¹⁷

15. The definition of cultural heritage should therefore not be limited to notions of outstanding universal value but must also reflect the meaning that ‘heritage’ can, and does, have for specific communities. Cultural heritage frameworks should respect the freedom of individuals and communities to contribute across multiple identities to the creation of ‘culture’, including by contesting dominant norms and values within their own communities and others’ communities.¹⁸
16. In addition, cultural heritage must not be conceived of as only objects or manifestations that people or communities take pride in; “in some instances, heritage recalls errors made in the past and actions reflecting the darker side of humanity, the memory of which also needs to be transmitted to future generations, albeit in a different manner.”¹⁹
17. Ongoing and diverse participation of individuals and communities in the identification and selection of cultural heritage is accordingly essential, as has been highlighted in the ACT in submissions and evidence to the Standing Committee on Economy and Gender and Economic Equality’s *Inquiry into memorialisation through public commemoration* in April and May 2022.²⁰ The ACT’s heritage framework should be suitably inclusive, accessible and account for power differentials that may impact the ability of individuals or groups to engage in the identification, development, promotion and interpretation of cultural heritage.

Relevance of the human right to a healthy environment

18. The Commission welcomes that the ACT Government has committed to introducing the human right to a healthy environment into the HR Act in this current term of Government.²¹ A clean, safe, healthy and sustainable environment is essential for the exercise and enjoyment of a range of other human rights, including the distinct cultural rights of Aboriginal and Torres Strait Islander peoples.
19. Aboriginal and Torres Strait Islander peoples’ cultural heritage and traditional practices are uniquely vulnerable to environmental impacts due to the close spiritual and cultural relationship that many Aboriginal and Torres Strait Islander peoples have with lands, waters and other natural resources. For many Aboriginal and Torres Strait Islander people, Country is understood holistically; as a living entity encompassing their

¹⁶ Committee on Economic, Social and Cultural Rights, *General Comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1(a), of the International Covenant on Economic, Social and Cultural Rights)*, 43rd sess, UN Doc. E/C.12/GC/21 (21 December 2009).

¹⁷ Ibid, [12].

¹⁸ UN Human Rights Council, *Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council*, 14th sess, Agenda item 3, UN Doc. A/HRC/14/36 (22 March 2010), [10].

¹⁹ Ibid, [8].

²⁰ ACT Human Rights Commission, Submission No. 014 to Standing Committee on Economy and Gender and Economic Equality, ACT Legislative Assembly, *Inquiry into memorialisation through public commemoration* (8 April 2022), [5]-[6]; Evidence to Standing Committee on Economy and Gender and Economic Equality, ACT Legislative Assembly, Canberra, 24 May 2022, 19-25 (Samantha Faulkner).

²¹ ACT Legislative Assembly, *Parliamentary Debates*, 29 November 2022, 3914 (Tara Cheyne MLA).

identity, knowledge, traditional practices, ancestors and kin.²² In these ways, respect for Aboriginal and Torres Strait Islander cultural heritage, effective protection of the environment, biodiversity and climate, and the health and wellbeing of the Aboriginal community are intrinsically linked.

20. It is accordingly vital that the views of Aboriginal and Torres Strait Islander peoples are actively sought and considered – both in implementing the right to a healthy environment and cultural heritage protections generally.²³ Subject to the advice of Aboriginal and Torres Strait Islander peoples, a healthy environment may accordingly be understood as one that respects the spiritual and cultural significance of place, flora and fauna, and that prioritises sustainable cultural resource management by traditional owners.
21. The human right to a healthy environment, in conjunction with the cultural rights protected under s 27(2), contemplates Aboriginal and Torres Strait Islander peoples being ensured reasonable access, use and rights in relation to the lands and resources with which they have a traditional connection. It intends that their free, prior and informed consent would be sought about any measures that might affect those lands or resources, and that traditional knowledge and practices regarding conservation and sustainability are respected and protected. Finally, the right to a healthy environment requires that governments ensure the benefits of activities relating to such lands or resources are fairly and equitably shared.²⁴

Questions relevant to human rights and cultural heritage

22. Further to the relevant human rights and principles outlined above, the Committee may be assisted by the following lines of inquiry emphasised by a human rights approach to cultural heritage:
- i) Who defines what cultural heritage is and its significance?
 - ii) Which cultural heritage merits protection?
 - iii) To what extent do individuals and communities (including Aboriginal and Torres Strait Islander peoples) participate in the interpretation and preservation of cultural heritage?
 - iv) To what extent are individuals and the community entitled and supported to access and enjoy their cultural heritage?
 - v) By what process are conflicts and competing interests in cultural heritage resolved?
 - vi) How are cultural heritage protections implemented and enforced in practice? What is the decision-making process for taking enforcement or compliance action?²⁵
23. The Commission acknowledges that such questions are presently addressed across various ACT laws, including the *Heritage Act 2004*, *Tree Protection Act 2005* (and, if passed, the *Urban Forest Bill 2022*) and other statutes that comprise the ACT's heritage protection framework. Should the Committee examine or recommend proposals for legislative change in the course of its inquiry, the questions outlined above may inform their consideration.

²² See, for example, Dr Ian Cresswell, Dr Terri Janke and Professor Emma Johnston, 'Country and connections' in *Australia: State of the Environment Report 2021*, available at: <<https://soe.dcceew.gov.au/indigenous/environment/country-and-connections>>

²³ ACT Human Rights Commission, Submission to public consultation on introduction of a right to a healthy environment in the *Human Rights Act 2004* (Policy submission, 9 September 2022), [58], available at: <<https://hrc.act.gov.au/wp-content/uploads/2022/09/20220909-HRC-submission-Right-to-a-Healthy-Environment-Discussion-Paper.pdf>>

²⁴ John H Knox (Special Rapporteur on Human Rights and the Environment), *Framework principles on human rights and the environment* ('Special Rapporteur Framework Principles'), UN Doc. A/HRC/37/59 (24 January 2018), [47].

²⁵ Above 17, [9].