



**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY**

**STANDING COMMITTEE ON JUSTICE  
AND COMMUNITY SAFETY**

(Reference: [Human Rights \(Workers Rights\) Amendment Bill 2019](#))

**Members:**

**MRS G JONES (Chair)  
MS B CODY (Deputy Chair)  
MR D GUPTA**

**TRANSCRIPT OF EVIDENCE**

**CANBERRA**

**THURSDAY, 6 FEBRUARY 2020**

**Secretary to the committee:  
Mr A Snedden (Ph: 620 50199)**

**By authority of the Legislative Assembly for the Australian Capital Territory**

Submissions, answers to questions on notice and other documents, including requests for clarification of the transcript of evidence, relevant to this inquiry that have been authorised for publication by the committee may be obtained from the Legislative Assembly website.

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## **Privilege statement**

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*Amended 20 May 2013*

**The committee met at 9.30 am.**

**ARNOLD, DR BRUCE BAER**, Assistant Professor, Canberra Law School,  
University of Canberra

**DIEDRICKS, MS JANE**, Lecturer, Canberra Business School, University of  
Canberra

**THE CHAIR:** Good morning, everyone. Today the committee is holding its first public hearing on the reference of the Human Rights (Workers Rights) Amendment Bill 2019 to the Standing Committee on Justice and Community Safety. The bill is a private member's bill which has been introduced to the Assembly by my colleague Ms Bec Cody MLA.

The committee has received and published four submissions, plus two which have not yet been published, on the committee website. These proceedings are public, are being recorded by Hansard for transcription purposes and are being webstreamed and broadcast live.

Can I remind witnesses of the protections and obligations afforded by parliamentary privilege and draw your attention to the pink privilege statement set out on the table in front of you. These are important. Before the committee starts the hearing part of our program, I ask that you state that you understand and acknowledge the privilege statement.

**Dr Arnold:** We understand.

**Ms Diedricks:** We understand and acknowledge it.

**THE CHAIR:** Thank you. Our first witnesses today are Dr Arnold and Ms Diedricks. Before we begin questioning, do you have any brief opening remarks that you would like to make?

**Dr Arnold:** We do. We would like to thank the committee for this opportunity to meet with you regarding the bill. Our submission, which you have received, is made by me, my colleague Jane Diedricks from the University of Canberra, and Dr Wendy Bonython, who is an academic at Bond University. Dr Bonython sends her apologies; she has teaching commitments today at Bond University and she could not make it down here.

Our submission reflects our expertise in human rights and employment law. It is made on a non-partisan basis. Overall, we commend the bill for engagement with questions about human rights in the workplace. Those questions are important because of ongoing structural changes in Australian employment, particularly the shift to the casualisation of blue and white-collar workers and the offshoring of services.

Our view is that all workers, irrespective of skill or the colour of their collar, are deserving of respect. The dignity of labour is the foundation of Australia's success as a harmonious and progressive society. It is something that is legitimately fostered by government.

In our submission we have highlighted concerns regarding the bill's focus on employment. It is important to recognise that the Australian employment regime involves both commonwealth and state-territory law, including contract law and the national Fair Work Act. It is also important to recognise that employment is only one aspect of human rights; human rights are indivisible and universal.

We consider that the Human Rights Act 2004 has been a success, and we consider that the Legislative Assembly should note that success and build on it through a review of the territory human rights regime that looks beyond employment in enshrining the range of rights articulated in various international agreements. Such progress is indeed achievable. We also suggest that the ACT government ensure adequate resourcing for ACAT and the Human Rights Commission to give effect to the objectives of the bill. We are now happy to answer the committee's questions.

**THE CHAIR:** Thank you very much for those opening remarks. There are two questions that I have for you on your understanding of human rights and how they work—how we work through this topic in the ACT. In another slightly different capacity I am the chair of the scrutiny committee; in fact, all members of this committee also comprise the scrutiny committee. We spend quite a bit of time engaging with the practicalities of the Human Rights Act in the ACT and how it pertains to legislation.

I am interested in your view because for some time it has been, in a sense, bothering me that there is probably a difference between the community's understanding of how human rights work and the realities of how human rights work within a parliamentary process. I was surprised to learn, as a non-lawyer coming into this place, that the model that we have is about a discussion; it is not actually about a guarantee. It is not about a tick-box that says, "Yes, you've achieved human rights compliance." It is about someone justifying it when they take away a human right.

Do you have any view on how, if and when this change was made, it could be made in a way that had a different outcome from that? I do not think it is well understood in the community that we do not necessarily have a human rights guarantee here; what we have is a discussion. In order to get a tick-off through our own processes you just have to show that you have thought about the human rights that you are taking away from people before taking them away in legislation.

**Dr Arnold:** I think we have an aspirational regime rather than one that, if you like, is truly enforceable—justiciable rights, rights that say that, if your rights have been disregarded or your rights are contested, you can actually do something with them rather than—

**THE CHAIR:** Tough luck.

**Dr Arnold:** Yes.

**THE CHAIR:** In the first paragraph of the submission that was put in, it says that in relation to workers rights the clarification is essentially symbolic. Can you please explain that a little more? Is that because of the way that we discuss these rights or is it because effectively you do not see any major changes occurring in the community

as a result? What did you mean by “essentially symbolic”?

**Dr Arnold:** We are not dismissing, if you like, the communication value or the symbolic value of an aspirational statement. But I think it needs to be recognised that ACT law has to work in with commonwealth law.

**THE CHAIR:** So that is the sense in which you see it as essentially a symbolic gesture rather than a huge change to the system that we have?

**Ms Diedricks:** As well as being a lecturer at the School of Business at the University of Canberra, I teach in the School of Law. It picks up on the comment that we made earlier about the idea that human rights would be considered. Can I have the right to request flexible work arrangements? That is not a guaranteed right per se under the legislation; it is a right to request. It is similar in this situation, looking at the human rights of workers as workers rights. It is a right to be, in this regard, considered rather than an actionable right, if I can put it that way.

**MS CODY:** I note some of the comments in your submission, and thank you very much. It is always good to have some feedback on things. I want to carry on a little bit from what Mrs Jones was talking about. You talk a lot about the gig economy. Can you expand on that for me a little bit, so that I am sure I am on the same wavelength as you?

**Ms Diedricks:** The gig economy is pretty much an unregulated environment at the moment. If you look at the industrial relations framework or workplace law framework that we have, it is pretty much a 19th century or 20th century framework.

**THE CHAIR:** Cash in hand.

**Ms Diedricks:** We won't go there! In terms of the 21st century, we have jobs that are not even on our radar yet that are being introduced. We do not really have laws that regulate them. We have workers that fall between the cracks of the Fair Work Act and relevant state and territory legislation. There is the added bonus of what actual right has been enforced, what kind of company we have, what kind of employer we have et cetera. IT is an area where people fall through the cracks; they are not covered by awards, generally speaking. They are sometimes not covered by enterprise agreements, depending on the organisation's desire.

**MS CODY:** There are a lot of contractors.

**Ms Diedricks:** Yes. You also have gig economies in terms of cleaning. Most importantly, you have a gig economy in relation to people interacting as consultants or contractors through a proprietary limited. Arguably, they are not businesses; they are usually employees. This is where the law is really grappling with it in that gig economy space.

**MS CODY:** Part of the reason for the amendment bill is to look at some of those things. The Fair Work Act has not caught up, and is not likely to at the moment. Here in the ACT I believe there are a lot of good things happening in the employment space, but more things could be done; hence trying to enshrine workers rights in the Human

Rights Act, for me, was about assisting with those gaps.

**THE CHAIR:** Can I just ask for your definition of the gig economy? It is not a term that is universally understood.

**Ms Diedricks:** No, it is not. It depends on which paper and which commentator you listen to as to what the gig economy is.

**THE CHAIR:** What is the breadth of it, then? I do not know what you are talking about exactly.

**Ms Diedricks:** The gig economy falls across numerous industries, first of all. The gig economy has been analysed by the Fair Work Ombudsman, in particular, into groups such as Foodora, the food delivery group, and a few of those other ones with their backpacks that deliver food, where people have been engaged as proprietary limited companies. Uber is another one. We had a lot of fun and games in relation to the Uber case that was recently decided by the Fair Work Commission where the person was determined to be an independent contractor even though there were high elements of control by an organisation, which would normally suggest that the person was an employee. It is that kind of individual worker that we are dealing with.

**THE CHAIR:** So basically, when you are talking about the gig economy, you are talking about people who are employed as contractors who, in the opinion of at least some, should be employed as employees.

**Ms Diedricks:** Yes. Also, there has been a rise in consultancy. These people may, indeed, be sole traders, and I accept that they decide to enter into a business structure and interact with businesses in the way they deliver their services. But sometimes it is questionable whether those people are consultants or businesses, and indeed they may look to be employees.

**THE CHAIR:** Just one final clarification: to your knowledge, does the human rights area that we are talking about here define people's freedom to choose the type of employment status they have, or is that a far too detailed matter that has come later? While I understand the intentions behind talking about consultancy that is not really consultancy, it may suit some people to prefer to be dealt with in that way.

**Ms Diedricks:** Yes, indeed it would.

**Dr Arnold:** Yes. If you are a member of the elite, if you are the sort of person who wears a \$2,000 suit and silk bow ties, and has a BMW, it is like being a superstar. In, say, the IT sector, people are happy to be casual. I have friends at the other end of the sector. They hope and pray that tomorrow morning they are going to get a call from an employer or some sort of entity saying, "Okay, come in to work." They literally do not know, day by day, week by week—

**THE CHAIR:** Shelf stackers and that sort of thing.

**Dr Arnold:** Yes. At the risk of sounding like an academic, Australian society has been built on the notion that there be a trade-off: that we would have a social safety

network but beyond that people would have some certainty. Unions have been significant, for example, because they have fought for many years. You have a sense that, if you work, your employer will look after you; there will be a relationship there. We have basically got rid of that. Many people out there, an increasing number of people out there, just do not know. “Will I have a job?” If you do not have that certainty, how can you plan? Will banks lend you money for a house? It is those sorts of things. There is superannuation. There are a whole range of questions. It is fairly fundamental.

**THE CHAIR:** Would it be fair to say that while we could, in a discussion or in a report, recognise that it does suit some people, there are clearly some people that it does not suit, and they are not necessarily getting the choice.

**Dr Arnold:** Yes. It is the old saying that rich and poor alike are free to sleep under a bridge, but, strangely enough, the rich choose not to. In this economy, some people are not being given that choice.

**THE CHAIR:** They may not see themselves as rich, but they do not live the same life as someone who is just surviving.

**Dr Arnold:** Yes. Some people at the wrong end, the disadvantaged end, of the employment spectrum are not really being given a choice.

**MR GUPTA:** What about the blue-collar people who usually work as contractors, and sometimes for cash in hand, who do not have that privilege of being able to apply for a bank loan, as you say? How are they covered?

**MS CODY:** Are you asking how this amendment will assist?

**MR GUPTA:** Yes.

**Ms Diedricks:** It may give them an avenue to enforce some form of right rather than having to go through, say, the Fair Work Ombudsman in relation to sham contracting arrangements under the Independent Contractors Act. This is a highly legalistic area for anybody to navigate, and that is one of the concerns that we have raised. I say “concerns”; it is just that we need some clarity as to what this framework is going to look like and how it is going to interact with various pieces of legislation in the federal arena as well.

**Dr Arnold:** Yes. This is one of the reasons why you have the recommendation to ask the ACT government to make sure that there is proper funding for a range of agencies. Sometimes what people need is just some information, some clarity. The information might be: “Sorry, you are really in trouble and there is no real remedy for you.” Or it might be: “Yes, you can go to court or you can go to the Fair Work Commission, but it is going to be expensive and painful so be prepared for that.”

**Ms Diedricks:** And if this is an enforceable right, if it is an actual right under legislation, it is about how I can action it. That is as opposed to another forum that I could go to in the commonwealth environment. How do I action that right? How is that enforceable? What are the costs associated with it? And what are the likely

outcomes? That is one of the key considerations here with this bill: what are the likely outcomes?

**Dr Arnold:** One of the points I would like to make is that when you look at, say, much of the industry and academic literature, there is a huge concentration on, for want of a better term, blue-collar people, or people with no collar, but we are increasingly seeing this process of casualisation bleeding into the white-collar area. It is not just people who do not have university degrees, who did not go to a private school or whatever, who do not have law degrees. It is many of the people out there in nice offices in Canberra.

**THE CHAIR:** Can you, on reflection or on notice, point us to any research about that change in the white-collar sector as well?

**Dr Arnold:** We can certainly take that on notice. There is large literature on this.

**THE CHAIR:** That would be great. I will put it on notice.

**MS CODY:** In your opening remarks—and I think you just reflected there a bit, Ms Diedricks, in particular—you spoke about the interaction between ACT and commonwealth legislation. I am not sure if you have had a chance to look at some of the other submissions that have been published.

**Ms Diedricks:** Not at this point, no.

**MS CODY:** One of the other submissions has quite openly mentioned that there is no compelling reason not to enshrine the proposed human rights protections within the act, given the number of workplace issues that fall within the jurisdiction of the ACT. The submission says:

We further note that the issue of overlapping jurisdiction arises in a number of areas of law, for example, in antidiscrimination legislation.

**Ms Diedricks:** Yes.

**MS CODY:** Agreed, there is a whole raft of commonwealth legislation and there is other ACT legislation, but currently in the ACT there is no pure right that says that workers rights should be human rights.

**Ms Diedricks:** No, there is not.

**MS CODY:** Does this amendment clarify that? Could it go further, or does it not quite cover it, in your view?

**Ms Diedricks:** In terms that it should go further?

**MS CODY:** Does it clarify that workers rights should be a human right? Should there be more about it?

**Ms Diedricks:** I think it clarifies that workers rights could be a human right. Again, it

is what kind of right. That is the question. And who is a worker? That is not clearly defined either. These are some of the questions that I think would need to be addressed. The queries I had about the bill were about what we are actually delivering on and whether the bill is about the right for everybody just to work. There are other rights that are promoted, I think within 4 and 5, in relation to right of association and things like that. Do we need those? Do we just need a broad right that says that human rights and workers rights are one and the same? We seem to go a bit beyond that. Again, I suppose that is the question of whether we are covering a field that we do not need to cover.

**MS CODY:** Seeing how the commonwealth legislation has come into play, I think there is a need for ACT laws to be a little more specific around that. I know that currently, with the ACT public service, part of the rules in the public service is that ACT public servants have a right to organise, have a right to be involved in a union, but there are a lot of federal public servants that work here in the ACT who have that right being removed.

**THE CHAIR:** Has it?

**MS CODY:** In their enterprise agreement bargaining.

**Ms Diedricks:** There are protections, though, under the Fair Work Act in relation to general protections.

**MS CODY:** General, yes, but not specific protections. If you do not work in the public service, it does remove the right for other workers, as you said. No-collar workers, blue-collar workers and white-collar workers that are contractors may not be able to access those same rights.

**Ms Diedricks:** When I say “general protections”, they are protections under section 342 of the act that deal with the discriminatory provisions.

**MS CODY:** Yes, correct.

**Ms Diedricks:** Just to clarify.

**MS CODY:** I have read all of the Fair Work stuff. I have been heavily involved in some of that stuff over the years.

**THE CHAIR:** Bec has done a lot of work in this space. I have a history in workers rights as well, but not everybody who will read the transcript or who will be engaging on this topic has that understanding, so I would like to draw out some definitions from people. Can you give an explanation of your view of sham contracting, how those provisions in the Fair Work Act work and how this change could assist?

**Ms Diedricks:** The sham contracting arrangements are under the Independent Contractors Act of the commonwealth. The idea behind it is that, where there is a triangular relationship, that triangular relationship is being used as a cloak for what is really a relationship of employee and employer.

**THE CHAIR:** A contractor who is a genuine contractor is independent in their decision-making or something.

**Ms Diedricks:** They are independent in the sense that they are a commercial entity, so they are a proprietary limited company.

**THE CHAIR:** If someone sets up a company but they are sitting in an organisation in a triangular structure, the argument is that they are not genuine contractors; is that what you are saying?

**Ms Diedricks:** It can be. Yes, that is exactly right. This is done a lot in cleaning companies. It is also done in some high level or highly expert contracting arrangements as well.

**THE CHAIR:** The downside is when someone is used, but the upside is when someone wants to be in that situation—wants to work a bit for this company and a bit for that company, and they set themselves up independently in order to be able to do that.

**Ms Diedricks:** This again goes to the knowledge and confidence of the worker to negotiate with their employer and be on a level playing field.

**THE CHAIR:** I wonder how you deal with the fact that one person's sham contracting is another person's independent lifestyle, and a low income worker may or may not be able to negotiate. You do not want to lump all of those people into one category, either. But someone who is being used in that situation is obviously in a very unfortunate position. Is there a mechanism that you have seen elsewhere or that you know about in other jurisdictions where some sort of definition is used to delineate between those two situations?

**Ms Diedricks:** The only area on which we have guidance at the moment is the common law. The common law is always used to interpret the relevant legislation. It goes through the definition of an employee versus an independent contractor. I have noted that in our submission, and talk about the recent Uber case and the comments from the deputy president about how this is a really fraught area to work out the differences. Indeed, proprietary limited companies could be one person who may have another employee on the side doing something else, but they are under the control and direction of that larger organisation.

**THE CHAIR:** The same person could be contracting to three companies for six months, then is doing a bigger job for one company and it looks like they are sitting in that environment as an employee, essentially, but, at their own discretion, when they want to change it, they go back to another scenario because it is all based on that freedom that they have.

**Ms Diedricks:** Again, it is similar to the recent Uber case. You had an individual take their matter forward because they said they were missing out on award conditions. You will have other people in positions where they are a proprietary limited company who engage with Uber and they are quite comfortable with that relationship because they feel it is of benefit to them; it may offer them the flexibility they need. The

framework cannot really cover that.

**THE CHAIR:** Possibly as additional work or as—

**Ms Diedricks:** We are really reliant on people making applications under the—

**THE CHAIR:** Yes, those who are unhappy, essentially.

**Ms Diedricks:** Absolutely, but we need a minimum framework, and that is what we are seeking to achieve through the bill; also, that is what awards seek to achieve.

**THE CHAIR:** A minimum framework that can be drawn on but that is not necessarily top-down enforced: would that—

**Ms Diedricks:** There are risks to organisations if they are engaging people in sham contracting arrangements. Some organisations have been penalised under the Fair Work Act by the Fair Work Ombudsman.

**MS CODY:** At the very beginning of the summary, you talk about there being value to amending the Human Rights Act to more clearly express economic, social and cultural rights that are articulated in the International Covenant on Economic, Social and Cultural Rights, and that, although workers rights are part of that, there are other rights. Can you, in the limited time we have left, express the other rights that should be included? Let's not worry about workers rights; let's only do others. What is your position on that?

**Dr Arnold:** Most of the rights that we are seeing are, if you like, negative rights. They are restrictions on discrimination. They are not positive rights in the sense that people will be enabled to do things. At the risk of being really pejorative, as Ms Diedricks and I were walking over here today, we walked past someone who is sleeping rough. There are people in Canberra sleeping rough. If someone discriminated against someone in terms of, say, rental accommodation, discriminated on the basis of ethnicity, gender, age or other attributes—things that are protected and recognised in the various human rights agreements—that person would be in trouble. We do not, however, necessarily adequately provide for rights in terms of, “I want decent housing and I should expect the ACT government, as a progressive and wealthy government, to look after me.”

**THE CHAIR:** Interestingly enough, we have had that discussion many times across this table about that exact issue, directed at ministers and various people. We are faced with the response that they have a right to choose to not engage with those services. I see what you are saying, though, that it is a positive—rather than just what you cannot do, what you ought to do. The whole human rights framework, in a way, is set up on the type of society that we want to be, but there is obviously a fine line between what something looks like and what something actually is, from a freedom perspective.

**MS CODY:** In the Australian Capital Territory economic, social and cultural rights research project document, on page 146 of that report, they suggest that we should provide a new section 27D, which provides the right to work. I am not sure if you

have had a chance to read that report. It clearly sets out ICESCR, which is what I have already mentioned—the International Covenant on Economic, Social and Cultural Rights—and just and favourable conditions of work. There is a lot of stuff that has been picked up in the amendment that is included in that research project that was done in 2010. You have not had a chance to read that particular article?

**Ms Diedricks:** It is not in front of me right now, but I have read it. We made the point in our submission that when I opened the bill, I was really happy to read that. The Fair Work Act is very much based on corporatisation. Coming back from where we were with the Conciliation and Arbitration Act and the Industrial Relations Act, it was very much the flavour of two parties, common-law parties pretty much, who worked together to achieve economic outcomes and improvements for individuals through employment.

We now have a framework at the commonwealth level that still seeks to retain that, but with the impact of not relying on the Conciliation and Arbitration Act anymore and moving to the corporations power. We have lost that flavour. What we have now in the bill is an actual emphasis on the human nature of the employment relationship as opposed to the commercial entity relationship. That is a positive.

**MS CODY:** That is good, because that is what I was trying to achieve.

**THE CHAIR:** As much as I would like to sit here and ask you questions all morning, we have people waiting. When available, a proof transcript will be forwarded to you to provide an opportunity to check the transcript and suggest any corrections. I think you took one question on notice for me.

**Dr Arnold:** Yes; we will get back to you.

**THE CHAIR:** That would be fantastic. On behalf of the committee, thank you very much for appearing today.

**WATCHIRS, DR HELEN**, President and Human Rights Commissioner,  
ACT Human Rights Commission

**THILAGARATNAM, MS RENUKA**, Director, Human Rights Law and Policy,  
ACT Human Rights Commission

**TOOHEY, MS KAREN**, Commissioner, Discrimination, Disability, Health and  
Community Services, ACT Human Rights Commission

**THE CHAIR:** As we only have half an hour, I will welcome you to the table and make sure that you all have seen and understand the pink privileges statement. Could you just state so for the record.

**Ms Toohey:** Yes.

**Dr Watchirs:** Yes, thank you.

**Ms Thilagaratnam:** Yes, thank you.

**THE CHAIR:** That is all three. Dr Watchirs, do you have any brief opening remarks? We only have half an hour, but you may have prepared something. Have you? Yes.

**Dr Watchirs:** Thank you for the opportunity to speak. I would like to acknowledge the traditional owners of the land on which we meet, the Ngunnawal people, and pay my respects to elders past, present and emerging.

The Human Rights Commission welcomes this bill and supports the extension of the Human Rights Act to cover economic, social and cultural rights, including workers rights in this case. They are derived from articles 7 and 8 of the International Covenant on Economic, Social and Cultural Rights—the ESCR covenant. As we said in our submission, human rights are indivisible and universal. That is why we do not accept the artificial division between economic, social and cultural rights and civil and political rights. The universal declaration gave them equal status, and that declaration is now 71 years old.

We have made a number of recommendations. We would like the right to education amended—section 27A—because it is limited to “immediately realisable”, and this bill does not do that. If we were to amend workers rights, we would like there to be parity in those provisions. The Queensland act does not have that kind of limitation, so it would be good to reflect the treaty rather than have an artificial limitation.

**THE CHAIR:** It might just be me, Dr Watchirs, but I am having trouble making out what you are saying. The microphones do not actually amplify.

**Dr Watchirs:** Sure. I will speak more loudly, sorry. The kinds of economic, social and cultural rights we would like included as well as workers rights would be housing, health and social security. They are the main three. The right to equality of health is already guaranteed in the Queensland Human Rights Act that came into force on 1 January this year.

If the committee decides, or the Assembly decides, not to have full workers rights and

other economic, social and cultural rights, we would recommend at least the federal system, where the full suite of treaties are inserted into the Human Rights Act for compatibility and scrutiny purposes. It would assist the Assembly debate to have the full suite of treaties and the full economic, social and cultural rights convention. That would be consistent with wellbeing indicators, which the ACT is moving towards comprehensively at the moment.

The benefit of this legislation is that economic, social and cultural rights allow for progressive realisation. It stops retrogressive action. To have a benchmark and a line in the sand through this provision would be very useful, in our view. We have referred in the submission to the incremental approach to improvements of human rights. In my view, the best amendment of the Human Rights Act, which would have a practical impact, would be to allow for complaints under the Human Rights Act in a similar way to discrimination complaints. The commission currently handles those, and my colleague Karen Toohey is here to answer any questions you may have about complaints handling.

The Law Reform Advisory Council made a recommendation in 2018 that was released last year, and that is now on the public record. That lengthy process ended with the recommendation that, rather than clogging up the courts with unrepresented litigants filing human rights actions, it would be better to have a complaint system. The Law Society and the ACT Bar Association are also in support of this. A right to complain to us and then go to ACAT would be much more practical than people going to the Supreme Court. There have been a very limited number of cases over the last 16 years.

We see value in having ACT legislation. We do have jurisdiction over things like workers health and safety, workers compensation, workplace privacy and long service leave for our own employees. We recommend that the economic, social and cultural rights convention be the standard, rather than ILO conventions. They are not binding on Australia because they have not been ratified.

**THE CHAIR:** Sorry, what is your preference?

**Dr Watchirs:** We prefer the economic, social and cultural rights, not specialist ILO conventions. You can bring them in via section 31 of the Human Rights Act. You can interpret general high-level treaties by more specific ones. So that is currently covered. I will leave it at that. Thank you.

**THE CHAIR:** Okay. There are a couple of quick questions I want to ask you. One is about enforcement and the second is about cultural rights. Do you have an operational definition of “cultural rights” at this point in time? I think it is not something that is necessarily well understood within the community.

**Dr Watchirs:** I would probably like to take that on notice, but we do have cultural rights of Aboriginal and Torres Strait Islanders under section 27(2) of the Human Rights Act.

**THE CHAIR:** I will just give you an example. The Assembly passed legislation last term which I was appalled by, which was about the service of alcohol in the home. In

my cultural background, for example, that is perfectly normal and reasonable, but a Western framework on how people should live in their own homes was passed by this Assembly. Can you see a way in which this sort of cultural right would extend to that scenario? At the moment it clearly does not. We basically have—

**Dr Watchirs:** Under section 27(1)—

**THE CHAIR:** a consensus view in a parliament which is being put onto various cultural groups out in the community and they have no recourse.

**Dr Watchirs:** Section 27(1) of the Human Rights Act says that each culture has the right to enjoy culture, to declare and practise religion, to use his or her own language, to enjoy his or her culture. I would have thought that that would fit squarely into that issue.

**THE CHAIR:** It is current.

**Dr Watchirs:** Certainly, cases about education have covered that. I will defer to Renuka on that one.

**THE CHAIR:** The ability to educate your own children within your own culture is another important one.

**Ms Thilagaratnam:** I might just add to that. I think the sort of example that you raised, Mrs Jones, would fall squarely within the scope of the right to privacy in the home. So a proposal like that should have been put through the usual analysis of limitations.

**THE CHAIR:** Yes. I mean, it was obviously assessed by the scrutiny committee, which I was on.

**Ms Thilagaratnam:** Yes.

**THE CHAIR:** But nobody picked up on that except me, and by that stage it was possibly too late. I say that just out of interest.

**Ms Thilagaratnam:** Yes. I think the scope of the existing right to privacy under the Human Rights Act would fairly easily cover those sorts of issues.

**THE CHAIR:** According to your understanding, would cultural rights and rights to religious freedom cover off on education being the parents' and the family's choice? It is another area that is quite contentious at the moment.

**Dr Watchirs:** Under section 27A(3):

(b) to ensure the religious and moral education of a child in conformity with the convictions of the child's parent or guardian ...

That is explicitly there.

**THE CHAIR:** Yes, okay. That is there already.

**Dr Watchirs:** Yes.

**THE CHAIR:** The other thing I want to ask is around enforcement. If this act is passed, what do you see as your role and how practically do you see that playing out?

**Dr Watchirs:** As I said, a complaints power would make it very enforceable. Now the benefit of the provision would be that any legislation that is considered by the Assembly would refer to this provision—

**THE CHAIR:** As I said to the previous witnesses, one of the problems that we have with our human rights system is that all we have to do is refer to the fact that we have thought about it, and that is considered acceptable. And we do not have a role—

**Dr Watchirs:** I take issue with that. Under section 40B of the Human Rights Act, there is an obligation on public authorities to act and make decisions consistent with human rights. There are limitations possible under section 28.

**THE CHAIR:** Well, the way that it has been set up through the Assembly does not achieve that, Dr Watchirs. I know because I am the chair of the scrutiny committee. I have been on the scrutiny committee for two terms and I have found incredible the number of times human rights are explained away, using what we are advised by our advisers is a discussion model around human rights. In fact, the community probably thinks that, in this jurisdiction, human rights are protected and yet they are not. They are able to be explained away. A balanced explanation is considered reasonable, and this has shocked me, as I have learned it. I think it would shock a lot of people in the community to find that out.

**Dr Watchirs:** Certainly, I am shocked about the child protection system and I gave evidence about that the day before yesterday.

**THE CHAIR:** Yes, yes.

**Ms Thilagaratnam:** I think there are two aspects to that. The international human rights regime does not actually have a great number of absolute rights.

**THE CHAIR:** That is right.

**Ms Thilagaratnam:** The Human Rights Act actually reflects that principle. The international human rights regime is actually meant to operate on the basis that states are able to put reasonable limits on rights to balance different rights. I would assume the scrutiny committee is actually better looking at the justifications that, in accordance with the criteria from section 28 of the Human Rights Act.

**THE CHAIR:** Yes, what constitutes “reasonable”.

**Ms Thilagaratnam:** Yes, so it is not simply a matter of: as long as there has been some fault given to a limitation, that is enough to say that the bill is compatible. It has to be evidence based. In certain circumstances, there can be provisions on the bill that

would be incompatible on its face—

**THE CHAIR:** I am sure that there is scope, even within our system, for the committee to write, “This appears to be incompatible.” But it is just not the way that it works. I do not recall that ever having happened here, and some would argue that that means that nothing has ever been proposed that is so awful.

**Ms Thilagaratnam:** Yes.

**THE CHAIR:** But others would argue it is just because it is not the way the system is set up to work.

**Ms Thilagaratnam:** No, absolutely. I think there are examples of scrutiny committees in other jurisdictions, although each jurisdiction, I suppose, has taken a slightly different approach to how it puts together its reports. You would probably be aware that the Commonwealth human rights committee has been pretty forthcoming about its views as to whether the bill is, or is not, compatible. It is making those sorts of conclusions which, I suppose, the traditional scrutiny committees have been less—

**THE CHAIR:** Inclined.

**Ms Thilagaratnam:** inclined to do.

**THE CHAIR:** Yes, okay. And so enforcement of this one—

**Dr Watchirs:** It might be an idea to have human rights expertise in the staff of the scrutiny committee; it might be valuable.

**THE CHAIR:** Yes, or competing views on the advice that we are given. It is something certainly worth having a conversation about. There is not actually a mechanism for the review of that method. Someone who had some power in this place would have to want to.

**Ms Thilagaratnam:** Yes, yes.

**THE CHAIR:** From your perspective over in the HRC, if this was passed, how would your daily workflow change? What would you be doing about these rights?

**Ms Thilagaratnam:** In terms of our role in the commission, because we play a part in scrutinising legislation before it is introduced into the Assembly, as part of the consultation processes that government would undertake prior to introduction this would be an additional right that we would expressly take into account in looking at legislative proposals, policy proposals. There has been a lot of thinking around the scope of these rights internationally, so these are not unknown rights.

There is a general comment on the various aspects of the right to work that sets out quite clearly what the scope of those rights is, what the related obligations might be. It is not uncharted waters. More close to home, the federal system, or the Parliamentary Joint Committee on Human Rights, has been, as a matter of rote, looking at workers rights and the whole suite of economic social and cultural rights for the last—

**Dr Watchirs:** Eight years, yes.

**Ms Thilagaratnam:** Yes. There is, I think, a lot of learning that we can draw on and we do not have to sort of reinvent the wheel as to how this applies.

**THE CHAIR:** I am not so much asking how you would manage to deal with this area. I am wondering what types of matters would come before you.

**Ms Thilagaratnam:** Yes. For example, if there was a proposal to amend the ACT workers compensation or the Work Health and Safety Act, having an express right to work would make it a lot simpler to focus attention on—

**THE CHAIR:** The human rights element of that bill.

**Ms Thilagaratnam:** Yes.

**THE CHAIR:** Right, I see. Would you see it more as a structural change about—

**Ms Toohey:** Can I just make one comment?

**THE CHAIR:** Please do.

**Ms Toohey:** I think the other way is that, while we do not have a formal complaint mechanism for human rights matters, certainly in the discrimination space and in the other complaint spaces that we work in and that we have jurisdiction for, we will always raise with public authorities how they have taken the human rights elements of that matter into account. Certainly, in employment matters with public authorities, we would be looking to these rights to see how they have considered that, if this were to come into effect. It is the same way we do, for example, education matters at the moment. In a discrimination claim we would be talking about what are the allegations to deal with discrimination, but, equally, we will also go to the right to education.

It does affect a broader lens than just at the scrutiny end. We see that as part of our responsibility in reminding the public authorities and the ACT agencies and directorates that, actually, these are obligations that they currently have, that they need to be taking into account. That is at a far more practical level.

**THE CHAIR:** Ms Toohey, from that practical side, you said you do not have a formal complaints mechanism, but people do raise concerns directly with the HRC—

**Ms Toohey:** Yes, they do.

**THE CHAIR:** for things that have gone on in their own private world.

**Ms Toohey:** Yes.

**THE CHAIR:** What do you mean that you do not have a complaints mechanism?

**Ms Toohey:** We do not have a complaint mechanism where people can bring an

individual human rights complaint, and that is what Dr Watchirs was referring to.

**THE CHAIR:** Right. Okay.

**Ms Toohey:** For our colleagues in Queensland, with their new bill, there is a formal complaint mechanism for alleged human rights breaches. The way we do it at the moment, because the only mechanism really available for enforcement is through the Supreme Court—

**THE CHAIR:** That is right; it is by making suggestions.

**Ms Toohey:** The way we do it at the moment is sort of a piggy-back model. Because we have got a discrimination complaint, that will often raise issues around the right to equality.

**THE CHAIR:** And then people ask for your opinion, or you keep yourself abreast of what those complaints are through other bodies.

**Ms Toohey:** Yes, yes.

**THE CHAIR:** Right. Sorry, I probably should fully know this, but—

**Ms Toohey:** No, no. We appreciate the opportunity to—

**THE CHAIR:** Yes. I think also that there are always people listening who do not know and understand the system, so it is good to just go back to basics sometimes.

**Dr Watchirs:** Can I just make one extra observation about the rule of the scrutiny committee?

**THE CHAIR:** Yes.

**Dr Watchirs:** Under section 38(1), the relevant standing committee must report to the Legislative Assembly about human rights issues raised by bills.

**THE CHAIR:** Yes.

**Dr Watchirs:** That would be the place to amend, if you wanted to—

**THE CHAIR:** No, no. I mean the report absolutely covers human rights, but it covers it in a discursive model, which says—

**Dr Watchirs:** But you could insert in that provision something different, if you wanted it not to be a discursive model.

**THE CHAIR:** I would like you to take on notice, if you do not mind, Dr Watchirs, a suggestion of how that can be better done, because I have found it quite disappointing. I think it is a good opportunity while we are talking about human rights and how they are dealt with in the territory.

**MS CODY:** I was just making sure Dr Watchirs had a chance to write that down. Thank you all for coming along today and also thank you for talking to me prior to me introducing the bill. I note in your submission that you talk about—and one of the terms of reference is—looking at how this bill would interact, for want of better terminology, with current federal legislation. You have stated that it is not, in itself, a rationale for non-inclusion of workers rights in the Human Rights Act. I was wondering if you could expand on that a little for me.

**Ms Thilagaratnam:** Yes, sure. I think this has been a fairly standard argument that has been raised across many different rights that—

**MS CODY:** And many different jurisdictions is what I understand.

**Ms Thilagaratnam:** Yes. The answer there, as it always has been, is that the ACT will only be responsible for those areas that it has competence in implementing and in legislating. No-one is suggesting that this is going to somehow reach across into the commonwealth and fix all the ills there might be in that sphere. This is purely what the ACT can do within the ACT, within its powers. There can be real benefits in addressing that squarely instead of assuming that just because we cannot cover the field then it is not worth doing anything.

**MS CODY:** That would be the case for many of our current human rights that are spelt out in the Human Rights Act as it stands?

**Ms Thilagaratnam:** Yes. Probably one of the examples of that would be national model laws, where an agreement would be made that all Australian jurisdictions have to enact a particular type of law. The ACT's ability to influence that process might be fairly limited, depending on what the issues might be. But, having said that, having an explicit right recognised in the Human Rights Act might be an additional factor that the ACT can use in negotiating those things with the commonwealth. I think there are clear benefits in expressly including ESC rights in the Human Rights Act.

**Dr Watchirs:** And that negotiation power is increased by there now being three human rights jurisdictions: the ACT, Victoria and Queensland.

**MR GUPTA:** On the cultural side of things, especially for people from a different culture—and there is a lot of work being done on flexibility of working arrangements—how do we deal with employees with some disability because of the language barrier or anything like that who want to work from home? How has their right been addressed?

**Ms Toohey:** I have got the perfect person to answer that.

**Ms Thilagaratnam:** We are already doing that in terms of discrimination law and discrimination protection.

**MR GUPTA:** It probably falls under discrimination law.

**Ms Thilagaratnam:** Yes, it does. It would be reinforced by having an express right to work. The element of non-discrimination is one of the core obligations of workers

rights and this would support existing discrimination law in addressing that example that you raised.

**MR GUPTA:** Would you know the numbers? Is that a very common complaint or is it—

**Ms Toohey:** We get complaints certainly in the employment space. It is one of the larger areas of complaint that we get under discrimination law. I cannot give you the exact numbers. I am happy to take that on notice. The circumstances you have talked about in terms of flexible work, accommodating disability or carer arrangements and in the broad—that is a common area of complaint for us. I certainly think the notion of being able to talk about just terms would be very helpful for people because there is a degree of inflexibility in how some employers go about their business.

Certainly from our perspective at a practical level, as Renuka said, while we mainly deal with these matters as discrimination complaints, as I indicated earlier, where it is appropriate for a public authority we will certainly bring these rights into play in dealing with a complaint. Again, it encourages a discourse with organisations in that space. I think it will be very valuable from that perspective. It is certainly not an uncommon occurrence for us to be dealing with employment complaints, particularly around flexible work arrangements.

**MS CODY:** I have spent a lot of time with the Human Rights Commission on this stuff, and your submission is extremely well thought out and of great use. Thank you all for everything that you have done.

**Dr Watchirs:** Thank you. We are delighted to perform this role. It is under the parliamentary agreement that we can advise private members on bills.

**THE CHAIR:** Yes, absolutely.

**MS CODY:** It is a wonderful opportunity for a private member to be able to access those services.

**THE CHAIR:** Our scheduled time has just about ended. You will be provided with a transcript to correct anything that is incorrect in the way it has been typed. I think you have got four questions on notice. We look forward to receiving those answers in a timely fashion. Thank you, Ms Toohey, Ms Thilagaratnam and Dr Watchirs for attending today.

**CAMPBELL, DR EMMA**, Chief Executive Officer, ACT Council of Social Service  
**MOLONEY, MS ELIZA**, Policy Officer, ACT Council of Social Service

**THE CHAIR:** I welcome Ms Moloney and Dr Campbell, representing ACTCOSS. Thank you for your submission. I will ask you to acknowledge the pink privilege statement that is on the table. It talks about your rights and freedoms under parliamentary privilege. Can you both state that you have understood and accept that?

**Ms Moloney:** I do.

**Dr Campbell:** Yes, I understand and accept it.

**THE CHAIR:** Do you have any brief opening remarks? We only have half an hour together, but if you have prepared something—

**Dr Campbell:** Yes, I would like to make some opening remarks. Firstly, I would like to acknowledge the Ngunnawal people, who are the traditional custodians of this land on which we are meeting, and pay respects to the elders of the Ngunnawal nation, both past and present.

Thank you for inviting ACTCOSS to the hearing today. I think you are familiar with ACTCOSS, so I will not give an explanation of the work that we do. I would like to say that, just as we want to see the right to work accompany the right to education and be included in the ACT Human Rights Act, we also believe that the Human Rights Act should affirm all human rights—the broader economic or ESC rights. That means recognising economic, social and cultural rights, such as the right to an adequate standard of living, including food security, the highest attainable standard of mental and physical health, and safety via environmental and industrial hygiene, emergency health care, preventable disease and participation in cultural life.

We want to expand our act to include these provisions because we firmly believe that without full inclusion of economic, social and cultural rights, civil and political rights cannot be realised. I think it is well recognised that human rights are interdependent and indivisible. We need to ensure that our Human Rights Act provides a coherent system to support the needs of the whole human being.

ACTCOSS have witnessed the inextricable relationship between economic, social and cultural rights and civil and political rights, through our work on poverty, which has often led to food security, housing and energy and transport disadvantage. We have found that poverty is isolating and is strongly related to disadvantage, discrimination, exclusion and stigma.

It can lead to entrenched social exclusion that infringes upon many of the civil and political rights currently included in our Human Rights Act. Our act currently provides the right to protection of the family or children, but housing and food insecurity may actually challenge someone's ability to secure this right for their family, regardless of their desire to do so.

Our submission to this inquiry builds upon the work that ACTCOSS has been doing

periodically since the inception of our Human Rights Act. In 2006 ACTCOSS and ACT Shelter launched the housing as a human right campaign, asserting its relationship to the civil and political rights to privacy, liberty and security. In 2011, with ATODA, Advocacy for Inclusion, MHCC, People with Disabilities ACT and Care Financial, our submission “Economic, social and cultural rights—a good idea for the ACT?” noted case studies from South Africa that show economic, social and cultural rights have held the government accountable when it has not ensured adequate access to health and shelter. In the same year our publication *Whose rights? Strengthening Human Rights for Aboriginal and Torres Strait Islander Peoples in the ACT* stated that economic, social and cultural rights would orient the legal system to respond to current gaps in human rights protection.

This inquiry is an important opportunity for the government to act on calls to strengthen our Human Rights Act that the community sector has been pushing for for over 15 years. Incorporating economic, social and cultural rights into our Human Rights Act would establish a positive obligation on the ACT government to secure the economic, social and cultural rights of all people in the ACT, but particularly people who face disadvantage. We hope that the standing committee will recommend that, just as we have included the right to education, all economic, social and cultural rights should be affirmed in the ACT.

**THE CHAIR:** Thank you. I want to go to page 4 of your submission, where you have listed what the Covenant on Economic, Social and Cultural Rights recognises. I want to go to the very specific area of non-coercive marriage. Does ACTCOSS have any idea about this issue within the ACT or nationally with the broader organisation? It is certainly something that comes up from time to time. Can you imagine how this change might assist in the process of dealing with coercive marriage?

**Ms Moloney:** Through ACTCOSS’s work on domestic and family violence, the issue of coercive marriage has come up. When we think of coercive marriage, it is important to think quite broadly about all of the factors that can go into coercion. A lot of our members work with people experiencing family violence from a range of perspectives. For example, the economic perspective of coercive marriage is something that some of our members have been really active on—Care Financial Counselling, the Women’s Centre for Health Matters and a lot of the women’s services and domestic violence specific services in the ACT. If we are talking about the broader Australian context, Emma might want to talk about her previous work.

**Dr Campbell:** Coercive marriage is a spectrum of different situations that women, and sometimes men, find themselves in. As Eliza alluded to, vulnerability to that is often heavily dependent on things such as your economic power, the situation that you are living in, your health and so on—and things like the ability to access information, particularly if English is your second language.

By affirming economic, social and cultural rights in legislation, you hold governments accountable to ensuring that their systems, information and policies provide circumstances so that people who are vulnerable to coercive marriage are made less vulnerable or have access to information and services that meet their needs. It is not a magic piece of legislation that will stop coercive marriage; it is part of a broader suite of policies that hold governments accountable for ensuring their policies do not

create—

**THE CHAIR:** What do you mean by “hold governments accountable”? We have heard this phrase several times, and not just from you, and I think it means different things to different people. What do you mean by “hold governments accountable”?

**Dr Campbell:** As we have seen, particularly in developing countries where people have relied on ESC rights, rather than simply relying on advocates and the political whim of governments to bring about policy, these issues can be justiciable. They can be taken through legal processes to—

**THE CHAIR:** What legal processes do you think we would have as a result of this change that we do not have now?

**Dr Campbell:** These are rights that would be able to be held up in courts, in the ACT legal system, to point out to the government that they have failed to meet these rights.

**THE CHAIR:** I am not a lawyer. We have heard from some lawyers today, and one of the things that concerns me is that changes like this can be made and not achieve that outcome. The reason that it concerns me is that this would fall under the jurisdiction of the Human Rights Commission, whose only recourse to court is the Supreme Court, which is obviously not a simple exercise. Generally, they do not get involved on a case-by-case basis, as they have explained to us this morning. Are you saying that the system would lend itself to better policies, because I am not actually sure that it will make us accountable—governments, if you know what I mean.

**Ms Moloney:** We have seen recently the ACT Auditor-General do the audit on human rights. I think that is a great example of how we do have oversight mechanisms for how our policy is being informed for our Human Rights Act and our commitment to being a human rights jurisdiction. If we included economic and social and cultural rights, bodies like the Auditor-General would have more of a mandate to ensure that our policies were being informed by these things, and that is so important. On the issue of coercive marriage, that is directly related to the right to freedom of movement, freedom of expression. Yes, I think it is really important to make sure that they are equally included.

**THE CHAIR:** It makes it more of a topic of discussion and something that we can assess, let’s say.

**Ms Moloney:** Absolutely. Yes, assessment is really important.

**MS CODY:** Thank you for your submission and for joining us today. You have outlined that workers rights are included in the economic and social and cultural rights as part of the international covenant and you have included them as a dot point in your submission. As a starting point, the act has been amended to include education. This bill is to amend it to include workers rights. Do you think this is a step in the right direction, to include economic, cultural and social rights?

**Dr Campbell:** It is not a step backwards. By including education and the right to

work, there is a recognition of the importance of this. If time and resources are going to be dedicated to strengthening our Human Rights Act, why not take this opportunity to enact a much broader range of human rights? If the intention is really to ensure that people are given the right to social security, the right to housing, that they have ways of calling for an adequate standard of living, why do it on a piecemeal basis?

**MS CODY:** Good question.

**THE CHAIR:** We ask the questions.

**Dr Campbell:** It is not a step backwards. You know, we are not against the inclusion of the right to work.

**Ms Moloney:** I also wonder about your time and resources. If we continue to come back every few years and just add the next ESC right and then the next one and then finally until we get down all the way to the bottom—

**THE CHAIR:** In fact, the rights that we are talking about here were agreed to by the majority of countries in the 1970s, I believe. It is not a new concept, is it?

**Dr Campbell:** This is a human rights jurisdiction. There has been a lot of work to enact human rights in the ACT to make it part of the system and structure of government here. It is something that I think we are all very proud of. As I said, it is not a backwards step, but because we are so proud of the ACT being a human rights jurisdiction that is why we do not quite understand why it is being done on a step-by-step basis, why we cannot—

**THE CHAIR:** I think internationally it has been done a step-by-step basis because of disagreements at the international level when these covenants were first agreed to.

**Dr Campbell:** But we are quite far along.

**THE CHAIR:** I hear that, but it is not just the ACT; it is the whole Western world.

**Dr Campbell:** Yes.

**Ms Moloney:** We do pride ourselves on being the first Australian place with the Human Rights Act and being quite innovative in our approach.

**THE CHAIR:** Yes.

**Ms Moloney:** I think this would just be a really great—

**THE CHAIR:** Addition?

**Ms Moloney:** Yes.

**Dr Campbell:** And it is our job here to advocate and push.

**MS CODY:** Absolutely.

**Dr Campbell:** The point that ACTCOSS made in this submission is that human rights are interdependent; they are indivisible. If you really want to be a true human rights jurisdiction it comes as a package, right? They cannot be enacted individually to achieve the outcome that I think we are all working to achieve.

**THE CHAIR:** The outcome presumably, whether explained or not, is a modern society in which people can live at the standard of living that we all would like to expect. There are various ways to come to that point, but this is clearly one of them.

**Dr Campbell:** And we feel very strongly that it is one of the more effective ways of holding governments to account, particularly for those who are the most vulnerable.

**THE CHAIR:** You deal with the issue of poverty in the ACT as part of your core business as ACTCOSS. Despite being a human rights jurisdiction, there are various pressures on lower income people in the ACT that are significant and possibly have been growing. Do you believe that this change could impact on them in any way or could allow a light to be shed on those who are on a marginal income or living under the poverty line essentially?

**Ms Moloney:** Yes, I do. I would go back to the point that, as a part of the commitment to being a human rights jurisdiction, our policies should align with what is included in our Human Rights Act. I note that if we do have a greater commitment to economic, social and cultural rights it would, ideally and with good oversight from the community, legal bodies and specific oversight agencies, ensure that our policies are working better to affirm people's economic rights.

**Dr Campbell:** I think where the ESC rights come in regard to poverty is that they create a perception amongst those who are disadvantaged and, more broadly, that things like housing, things like health are a right. The fact that you are living in poor housing or that you do not have proper access to health is not because you—

**THE CHAIR:** You are not worthy.

**Dr Campbell:** are a bad person or you are not worthy or it is acceptable for policy failures just to go on.

**THE CHAIR:** Do you think it gives people courage?

**Ms Moloney:** Absolutely.

**Dr Campbell:** It gives people courage and I think it—

**THE CHAIR:** It affirms self-worth, or something like that.

**Ms Moloney:** I would say it affirms their right to systemic change. It affirms their right to know that there are ways to recognise that there are barriers that have impacted current situations. What we have looked at in our long-term work on cost-of-living pressures in the ACT is that poverty is not an individual failing. It is due to a complex web of economic, social, cultural, civil and political policies and we

need to recognise that those things are all interconnected.

**MS CODY:** And by including some of—in your opinion all of—the social and cultural and economic rights within the human rights framework, we provide an opportunity for policies to be better reflective of a more just society?

**Ms Moloney:** Absolutely.

**Dr Campbell:** And to be challenged on a legal basis, albeit through whatever mechanism, which is different to challenging these views purely through political discussions and advocacy. We have seen this with general civil and political rights. These are not for discussion. Civil and political rights are not for discussion now.

**THE CHAIR:** No, not really; that is right.

**Dr Campbell:** They are enshrined in the fabric of everything we do. It is not to be debated through advocates and through the media. This is what we need for the things that impact people's lives so dramatically around work, housing, education. Even the right to benefit from science and culture, which I think is a really interesting right, given current discussions around climate change, for example, those rights need to be enshrined so that we are not beholden to the whims of—and I say this about all sides of politics—political debates and media direction.

**MR GUPTA:** On the points about domestic violence, coercive marriages and all your points on page 4, how will they benefit people from some ethnic backgrounds, especially with the English side of things? How are they going to benefit? I come across a lot of these issues. How will this help females, especially those with children, with their favourable work conditions, safety, education—all those things which are included here? How are you going to reach out to those people who are going through such trauma?

**Dr Campbell:** Reflecting on what we are saying, enshrining these types of rights—and I saw this in my previous work when I was at FECCA—means that departments, policymakers, even businesses every single day are required to consider some of these issues around the rights of individuals, the impact of their policy and how it might damage their right to work or their right to education.

As I said, this is not the response wholly to coercive marriage but it challenges people every day to think about the most vulnerable in our society when they are making policy. If you are making policy around marriage, for example, are all your pieces of information in languages other than English? There is a right, no matter who you are, to be able to access relevant information. If you need to flee a situation of domestic and family violence, is there appropriate housing for you, no matter your immigration status? You have the right to housing. These are the kinds of things that departments and policymakers will be forced to think about where economic, cultural and social rights are enshrined.

**Ms Moloney:** I just add that, on the point of ensuring that people know how to access their rights and that organisations and services know what the rights of their clients are, ACTCOSS has been working with the Human Rights Commission on an existing

basis in delivering education to community sector workers and employees in compliance with the Human Rights Act, and we did recommend in our submission that that form of training be extended in a broader way, using the existing model, to inform community members more broadly on what the Human Rights Act looks like for them, particularly if we include economic, social and cultural rights in it.

I think when we talk about how we would make sure that these rights about training are extended to culturally and linguistically diverse people in the ACT, collaboration with people who have expertise in those population groups would be really, really useful as a way of ensuring that community members have an understanding of what the Human Rights Act looks like for them.

**MS CODY:** This morning we heard evidence that the workforce—not just in the ACT, but we are focusing on the ACT, so I will use that as an example—is becoming less stable. Does including workers rights in human rights give people an opportunity, as you have just outlined, particularly around policy, to have a bit more faith in gaining more stable work?

**Dr Campbell:** I think the reason we feel very strongly about the inclusion of economic, social and cultural rights, including workers rights, is that general legislation cannot often keep up with the changes that we are seeing in society. Temporary work, insecure work, is a very good example of that. Absolutely I agree with you that it is not perfect and it does not change a system and a movement that are creating more insecure work, but it is a really important principle, high-level protection that will remain there in the face of huge changes to the way people are employed and the experiences of particularly the most vulnerable employees.

**Ms Moloney:** Especially if we look at what the international covenant describes, which is not only the worker's right to work but the right to just and fair work conditions, union membership. I think it is in the ACT where we see the importance of that.

**Dr Campbell:** But it also emphasises why the other rights are so important because, as people's work becomes more insecure and there is greater inequality, the importance of things like rights to housing and food security also become more important because an increasing number of Canberrans, because of insecure work and other reasons, are facing those kinds of challenges in their life as well.

**THE CHAIR:** Thank you so much for your input today. I know it must sound a little like we are ignoring you, but it is important for us and for the community to really get to the heart of any changes that this will achieve. When available, you will be provided with a proof transcript of this morning's evidence, and if there is anything that is inaccurate please let us know. I do not think there were any questions taken on notice. If we have any, we will come back to you. We thank you very much for your evidence this morning.

**TREVITT, MS SOPHIE**, Australian Lawyers for Human Rights (ACT Branch)  
**GOULD, MS NAOMI**, Australian Lawyers for Human Rights (ACT Branch)

**THE CHAIR:** Thank you for your submission. Do you have any opening remarks that you would like to make?

**Ms Trevitt:** We do. The Australian Lawyers for Human Rights is grateful for the opportunity to give evidence at the inquiry today. As you know, we are a national organisation of solicitors, barristers, academics and judicial officers who promote human rights in Australia. Naomi and I are part of the ACT branch.

Our submission to the inquiry largely endorsed the submission made by the ACT Human Rights Commission, whom we have already heard from this morning. The first of two areas that we would like to focus on is the case for including all economic, social and cultural rights in the ACT Human Rights Act. This is consistent with the Australian Capital Territory's economic, social and cultural rights research project that is referenced in the explanatory memorandum and the principle recognised in international law that human rights are equal and indivisible in nature. The second point that we would like to focus on, which has been the subject of much discussion this morning, is the practical implication of including these rights in the act and the ways in which we can make sure these rights are enforceable by individuals and so have a real practical impact.

We support the inclusion of the right to work, including the right to enjoy just and favourable work conditions, and the right to join work-related organisations. However, we do not believe that there is a justification for including this right above, in our view, other equally important social and economic rights such as the right to housing, the right to health, including food, water, social security and a healthy environment, the right to education and the right to take part in cultural life.

The bill's explanatory statement refers to the research project's endorsement of including most of these economic and social rights in the Human Rights Act. It also refers to the 2003 ACT Bill of Rights Consultative Committee recommendations, which again support the inclusion of most of these economic and social rights in the act. We know that the government's response to the recommendations included confirmation from the ACT Government Solicitor that it was possible to include most of these rights in the act without raising issues of constitutionality.

As the government's response to the research project acknowledges, economic and social rights are regarded as equal and indivisible because the enjoyment of one often requires the enjoyment of others. For example, in practice the right to work, including the right to choose your occupation or profession freely, often depends on having the right to adequate housing protected. It is extremely difficult to look for and secure work if you do not have anywhere to live. Similarly, the right to work is often contingent on the right to adequate social security so that a person is able to pay rent and afford food while looking for work.

While we acknowledge that an incremental, progressive approach may be taken with respect to incorporating economic and social rights in the Human Rights Act, we are

disappointed by the length of time that this approach takes. We note that it was an election commitment in 2008 to consider whether the Human Rights Act should be expanded to provide for the recognition and protection of economic, social and cultural rights. In our view, there is not a compelling reason not to provide as much recognition and protection of human rights as possible, particularly in a jurisdiction like the ACT that considers itself a human rights jurisdiction.

The second point is something that has been raised previously: an accessible complaints mechanism. In practical effect, what does including these rights in the act mean for Canberrans' lives? In our view, an accessible complaints mechanism is the only way to ensure that the Human Rights Act provides genuine protection to members of our community. We know that the research report discussed this point at recommendation 15, where it urged that consideration be given to empower the ACT Human Rights Commission to investigate and conciliate individual complaints regarding breaches of economic, social and cultural rights as well as the existing civil and political rights by a public authority.

The government's position at the time was not to support this recommendation, on the basis of resourcing demands. We strongly encourage the committee to reconsider this position, particularly in light of the fact that the rights that are protected under the act are being expanded.

The bill before the committee today is evidence of the genuine desire to protect the human rights of territorians, including their right to work, and we support this. For these rights to be genuinely protected, we believe there needs to be a mechanism that allows complaints to be made by individuals about breaches of the act.

Currently the only recourse is to bring a matter to the Supreme Court or to raise human rights in other legal proceedings. Action in the Supreme Court is prohibitive, costly and unnecessary. In our view, genuine access to justice can take the form of a mechanism that allows the complaint to be made to the Human Rights Commission for conciliation or mediation and a referral to the tribunal if the matter cannot be resolved. Without an accessible enforcement mechanism, the Human Rights Act can only offer limited protections. Naomi, did you want to add to that?

**Ms Gould:** That was our opening statement and I thought I might jump in, only because we have been listening to the evidence and questions today and we have some comments on some of the questions already asked. If it is appropriate I will spend a couple of minutes addressing some of those points.

**THE CHAIR:** Go ahead.

**Ms Gould:** Just to clarify, the Human Rights Act only applies to public authorities at the moment. When we are talking about workers rights and how that would impact workers in the ACT, we are talking about public authorities. The ACT Human Rights Act says public authorities must act in accordance with the Human Rights Act. In terms of individual rights, it is only going to be in respect of public authorities.

**THE CHAIR:** In the sense that we make legislation and a public authority employer behaves or—

**Ms Gould:** That is right. I thought I would quickly talk, a two-minute overview, about how the act works in practice. You used a few different words but there are different ways of discussing the dialogue model. What that is talking about is how our Human Rights Act affects future legislation as it is made. One of the important ways that introducing these rights will impact is that future legislation will need to be scrutinised against the existing Human Rights Act.

I have heard your concerns about that process, and something that we recommend and support is allowing external organisations such as ours to have some sort of input into that scrutiny process.

**THE CHAIR:** On that point—and I want to hear other suggestions and I am really glad you listened to the earlier part of the hearings because we come in here as politicians and we are not experts about every area of government and every area of legislation, how it operates, but we have to bring our own understanding to it—there are some jurisdictions where subject matter committees look at each piece of legislation, rather than a scrutiny committee. That means if someone is becoming a bit of an expert in the education sphere and is on the education committee then they look at any legislation for education. That is a more open process in a sense, because they seek advice from anybody to get a picture of what the legislation is.

But if you have got a scrutiny committee whose quick role is to get through a lot of legislation and a lot of subordinate legislation, have a view of what is in it, it is much harder and the time frames that are available, probably in most parliaments but certainly in ours, are not particularly wide. You would have to put more sitting weeks in between a bill being tabled and that bill being debated, which would frustrate governments, in order to get more into the process. I do not want to do myself out of a job, but there are other models. Anyway, that is really useful information.

**Ms Gould:** We are a volunteer organisation but we volunteer as experts in human rights and we would be happy to have a role in scrutinising future legislation. The ACT Human Rights Commission has our full support in the role they provide, but we are an extra voice if needed.

**THE CHAIR:** This is actually quite enlightening for me.

**Ms Gould:** The dialogue model is one way the Human Rights Act has impact. Another really important aspect of it that we have already discussed is the cultural impact and the way that agencies—

**THE CHAIR:** The confidence it gives people.

**Ms Gould:** I am talking about within agencies, within departments, within the ACT; it necessitates them having policies that conform with human rights legislation. Whether they do or not is debatable sometimes, but it does have a large cultural impact on the way those policies are implemented.

The two areas that I am not sure are fully understood are: when we are talking about a complaints mechanism how can individuals currently utilise the act in the context of

litigation or enforcement? If an individual has a complaint—workers rights, all the current rights at the moment—what can they do about that?

At the moment, if there are other legal proceedings on foot, they can bring up their human rights within those legal proceedings, but only if those legal proceedings are already on foot. That can be in the tribunal; that can be in a discrimination complaint. As we heard the discrimination commissioner earlier mention, she looks at human rights when she is considering complaints and that is because human rights can be raised in another form of legal proceeding.

But if an individual has a complaint that is freestanding, so to speak, the only way to do anything about that is to commence an action in the Supreme Court, and there are huge barriers to doing that. There is no complaint mechanism to the Human Rights Commissioner at the moment. The Human Rights Commissioner does have an audit function, and that is the other thing that we have not heard a lot of talk about, and that is also extraordinarily important. You will have seen that the Human Rights Commissioner has put out reports on things like Bimberi and other places.

**THE CHAIR:** Like the prison, women in the prison.

**Ms Gould:** That is using their own powers to investigate, but that is not a complaint raised.

**THE CHAIR:** It is on a case-by-case basis.

**Ms Gould:** It is not a complaint raised by an individual.

**THE CHAIR:** On that matter, can you envisage a way for any crossover where this change in an ACT sense can feed into a Fair Work action?

**Ms Gould:** I would like to premise the comment by saying neither myself nor Sophia are employment lawyers, so we have no expertise in the employment field.

**THE CHAIR:** I have far less expertise than you.

**Ms Gould:** But if it is in the commonwealth jurisdiction, this act plays no role.

**Ms Trevitt:** That is correct.

**Ms Gould:** It plays no role. So—

**THE CHAIR:** Ultimately, if there are various bodies suggesting that we start a new complaints mechanism within the ACT for these types of issues, you can see where there will be resistance when there is already quite a bit of money spent on a mechanism that exists. I guess there is the jurisdictional issue, of course, but it is not inconceivable that with a change at the ACT level and perhaps some in other states, eventually a federal government might include these rights as able to be brought in a Fair Work action.

**Ms Gould:** To be quite frank, I think that the impact of these new proposed

amendments will be in the cultural and legislative sphere mostly. In terms of any new legislation that is introduced by the ACT Legislative Assembly, it will need to be scrutinised against the Human Rights Act and, for example, if there is a future Assembly that wishes to limit the rights of workers to unionise within the ACT, something along those lines, then that would be scrutinised against—

**THE CHAIR:** But is that not protected federally at the moment?

**Ms Gould:** As I am saying, I am not an employer lawyer, so I cannot really speak to that and there are constitutional issues there as well. But when we are talking about the complaints mechanism, we are talking across the whole suite. The current existing act, against the rights that are in there at the moment, has no mechanism.

Another issue that is important to note is that a lot of these rights are toothless without access to representation. We are strong supporters of increased funding for places like community legal centres—and I acknowledge we are community legal centre lawyers in our day jobs, but we are not here in that capacity; we are here as volunteers with Australian Lawyers for Human Rights. Especially for our ethnic and non-English speaking communities and other vulnerable minority groups, people with disabilities, people with mental health issues, these rights do not mean very much without someone. We all have difficulty understanding it in this room here, but for an individual who is saying, “What are my rights? What can I do about them?” you really do need places that people can go to ask those questions.

**THE CHAIR:** The longer that I am in this role, the more I see that there are gaps everywhere and no-one has sat down and said, “What’s a comprehensive suite of laws that we need to cover everything that comes up and how we do that?”

**MS CODY:** I want to come back to one of the points you raised in your comments, Ms Gould, that the Human Rights Act only protects public authorities. Is that correct?

**Ms Gould:** And so only is—

**THE CHAIR:** Is demanding of public authorities.

**Ms Gould:** Yes.

**MS CODY:** Can you expand on that?

**THE CHAIR:** In the way that they operate.

**MS CODY:** It specifically states in part 2 that only individuals have human rights.

**Ms Gould:** It is who the rights are enforceable against.

**MS CODY:** I missed what you said when you made that point before.

**Ms Gould:** Yes, only individuals have rights, so I as an individual have a right to liberty or a right not to have my home interfered with arbitrarily. The question is, if the ACT government is the one doing that interfering, I have a right against that

person, but if it is a corporation doing it to me, unless they are acting in the role of a public authority—and certain private entities are public authorities; for example, community housing providers are public authorities—then you do not have recourse against that private entity. When you are talking about workers rights—

**MS CODY:** No, that is okay. I just missed the point you made. It did not quite gel in my brain and I just wanted to clarify it because I was going, “Hang on a minute.” I want to come back to your submission. You specifically—and, if you were listening, I may have quoted you this morning—raised a point about the possible overlap with Fair Work. In your submission you said:

It is our position that there is no compelling reason not to enshrine the proposed human right projections within the ACT.

We have a number of workplace laws that the ACT is bound to. Can you expand on that a little bit?

**Ms Trevitt:** I think perhaps the more important point with respect to that is: I do not think there is any incompatibility but because the Human Rights Act talks to the public authorities, as we have just discussed, that is the sort of specific import that the legislative changes have that do not interfere with things like the Fair Work Act, for example. The other element would be cultural, and the prospective role that the Human Rights Act plays that was discussed earlier. Distinct from the enforcement of individual rights, the way in which having—

**THE CHAIR:** Discussions occur.

**Ms Trevitt:** That is right.

**THE CHAIR:** And confidence amongst the people and that type of thing.

**Ms Trevitt:** Yes, and the way in which public authorities then consider what their roles and responsibilities are.

**MS CODY:** And, again, having the opportunity to develop policies and make legislation to work with the Human Rights Act as it stands to enshrine more economic, social and cultural rights builds on the ways our laws become more just and favourable?

**Ms Trevitt:** Yes. That is correct. Obviously, our position is that the preferred approach is to see those rights as a suite and the need—

**THE CHAIR:** We are hearing this message.

**Ms Trevitt:** Yes, great.

**MS CODY:** But there is no—

**Ms Trevitt:** There is no reason not to.

**MS CODY:** Yes. Thank you.

**MR GUPTA:** Just a quick one. We have talked about a lot of rights here—the right to work, education and all. I do not know if this falls under the ACT or if it is more of a federal issue regarding family union. I hear a lot from people in the migrant community about reunion of their families, especially the parents. The queue is really long.

**THE CHAIR:** With limited places, yes.

**MR GUPTA:** Yes. What are the rights there and how people individually can—

**Ms Gould:** This is well out of my area of expertise.

**Ms Trevitt:** Unfortunately, that is a commonwealth issue.

**MR GUPTA:** A commonwealth issue, yes.

**Ms Trevitt:** Australian Lawyers for Human Rights has recently made extensive submissions in support of a federal human rights act to a process that is going on at the moment at the national level—the conversation on human rights. We have been supporting the introduction of a federal human rights act or a bill of rights, or whatever it is called.

**THE CHAIR:** That would inform some of these decisions at a federal level.

**Ms Trevitt:** Yes, and whether they inform the immigration sphere or not is a whole separate question.

**MR GUPTA:** So you act as a referral to the federal agency for that?

**THE CHAIR:** Well, there is not one. That is the point.

**MR GUPTA:** There is not one at all?

**THE CHAIR:** No.

**Ms Gould:** There is a Human Rights Commission.

**THE CHAIR:** Yes.

**Ms Gould:** And it has made extensive comment on human rights, immigration and various aspects to do with these issues. But it is not something that the ACT government has jurisdiction over. We do have the ability, in being a welcoming refugee zone, to look at how our Human Rights Act applies to those living in our community.

**MR GUPTA:** Yes.

**Ms Gould:** We have seen this act—and the Discrimination Act—used and raised in

relation to people living the community. It is unlawful in the ACT to discriminate on the basis of immigration status, for example.

**THE CHAIR:** Yes. That is interesting, because a lot of those people are not actually able to work and that is a whole other discussion.

**Ms Gould:** Yes.

**THE CHAIR:** Can I ask a question about the word “favourable” in the recommended included rights regarding workers rights? To be honest, I would not mind some information about how that word works, and what that means. I will not put words in your mouth. Can you give me any information about how that operates in a human rights context or how that could operate?

**Ms Trevitt:** I think we will take that on notice, if that is all right.

**THE CHAIR:** Yes, please.

**Ms Trevitt:** I will talk to the employment division of Australian Lawyers for Human Rights.

**THE CHAIR:** Yes, please do, because I am sure there are many opinions about that statement. Obviously employment is, by nature, at least a two-party matter, and if you enshrine a right to whoever is defined as “the worker” having a favourable outcome, is that against—or in comparison to—the other party, or is that simply a positive outcome for that human being? I would just love to understand a little bit more about that. I think you are probably best placed, of anyone who has appeared today, to give us some information.

**Ms Trevitt:** Yes; we will take that on notice.

**THE CHAIR:** Thank you.

**MS CODY:** And that has been removed straight from the—

**THE CHAIR:** Yes.

**Ms Trevitt:** Yes, exactly.

**MS CODY:** social, economic and cultural rights in a just and favourable working—

**THE CHAIR:** And it is not a new thing, so there would be some experience around it. I guess I would like to be able to answer questions about that if I am asked, and at the moment I do not have a lot of information. Is there anything else that you want to raise while you are here, seeing as you are our last people for today?

**Ms Trevitt:** I do not have anything else.

**THE CHAIR:** Okay.

**Ms Gould:** No, that is all. Thank you.

**THE CHAIR:** Thank you, Ms Gould and Ms Trevitt, for appearing before us today. I remind you that you will be given a copy of the proof transcript to provide any corrections if anything has been incorrectly typed. You have taken one or two things on notice.

**Ms Trevitt:** One.

**THE CHAIR:** Just the one? Yes, thank you. If you can get that back to us when you have got time—

**Ms Gould:** Just for your own proceedings, we note the privilege statement.

**THE CHAIR:** Yes.

**Ms Gould:** Just in case you need it. I am assuming you do, too.

**THE CHAIR:** Is that right, Ms Trevitt?

**Ms Trevitt:** Yes, I do.

**THE CHAIR:** We will conclude. If witnesses undertook to provide further information or took questions on notice during the hearing, whilst the committee has not set a deadline for the responses, answers to them would be appreciated within two weeks from the date of this hearing, as we have a reporting date back to the Assembly. As I mentioned, a proof transcript will come to you for checking. I close the hearing. We have completed today's hearing. I will just add that there will be at least one more day of hearings on this topic. Thank you to all.

**The committee adjourned at 11.22 am.**