LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

(Reference: Human Rights Amendment Bill 2015)

Members:

MR S DOSZPOT (Chair)
DR C BOURKE (Deputy Chair)
MRS G JONES
MS M PORTER

TRANSCRIPT OF EVIDENCE

CANBERRA

THURSDAY, 8 OCTOBER 2015

Secretary to the committee:
Dr B Lloyd (Ph: 620 50137)

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

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Amended 20 May 2013

The committee met at 4.01 pm.

CORBELL, MR SIMON, Attorney-General, Minister for Health, Minister for the Environment and Minister for Capital Metro
FIELD, MS JULIE, Executive Director, Legislation, Policy and Programs, Justice and Community Safety Directorate

THE CHAIR: Good afternoon, everyone. Welcome to the first public hearing of the inquiry by the Standing Committee on Justice and Community Safety into the Human Rights Amendment Bill 2015. Today the witnesses appearing before us will be the Attorney-General and his officers, the human rights commissioner and the Aboriginal and Torres Strait Islander Elected Body. Good afternoon, attorney. Would you like to give us a preamble?

Mr Corbell: Thanks very much, chair. I thank you and your colleagues for the opportunity to appear this afternoon. I will make some opening comments, if I may.

THE CHAIR: Sure.

Mr Corbell: The bill that is before you today for inquiry is an important milestone in the growth of the ACT as a human rights jurisdiction. The bill, as members would know, makes changes across three aspects of the rights protection framework contained in the legislation. First of all, it recognises the cultural rights of Aboriginal and Torres Strait Islander peoples. Secondly, it expands the obligations on public authorities in relation to the right to education. And, thirdly, it clarifies the rights of children.

These changes flow from the review of the act conducted in late 2014 by the Justice and Community Safety Directorate and have also benefited from the input of the Human Rights Commission and the Aboriginal and Torres Strait Islander Elected Body. I would like to place on the record my appreciation of the efforts of the commission and the elected body in this regard.

During debate on this bill in the in-principle stage in the Assembly, it was clear that some members were primarily concerned about the scope and application of the proposed sections recognising the cultural rights of Aboriginal and Torres Strait Islander peoples, so I will focus on this aspect of the bill in my comments this afternoon. These issues were first raised by the scrutiny of bills committee in its report in April this year.

What will cultural rights mean? The bill inserts a new section 27(2) into the Human Rights Act to introduce recognition of the distinct and unique cultural rights of Aboriginal and Torres Strait Islander peoples, including the importance of their relationship to country. The wording of the amendments draws on decisions of the UN Human Rights Committee about the cultural rights of minorities generally, which are sourced from article 27 of the International Covenant on Civil and Political Rights. The wording also reflects the UN Declaration on the Rights of Indigenous Peoples, primarily articles 25 and 31. It is also similar to the provisions in section 19(2) of the Victorian Charter of Human Rights and Responsibilities.

Members have asked what this will mean in practice. In many respects our Human Rights Act is about establishing the tone and tenor of the relationship between the government and the Canberra community. The government is consistently working to improve its relationship with Aboriginal and Torres Strait Islander peoples in our community. We do this already through a range of ways, such as the Aboriginal and Torres Strait Islander agreement, the work undertaken for consultation with the Aboriginal and Torres Strait Islander Elected Body, and requirements for referral of development applications that may impact on Aboriginal cultural heritage values of an area to the ACT Heritage Council for an assessment, a process which involves the input of Aboriginal groups.

The government has supported work such as the ACT genealogy project, which has helped to fill a gap in the history and habitation of the region and, more significantly, was valuable in affirming for Aboriginal people and their families their own connection to place. The government has instigated other measures, such as the Aboriginal justice partnership and the establishment of the Galambany Circle Sentencing Court, and we have cultural awareness training and agency reconciliation plans within our own government organisation.

I am aware that the Victorian human rights commission have made a submission to the inquiry. They have listed a number of similar examples where cultural rights have been taken into account to deliver changes for the Aboriginal community. While the government already recognises the importance of valuing the cultural rights of Aboriginal peoples, we also believe that these unique and distinct cultural rights should be reflected in our Human Rights Act as an overarching guide to framing the actions and decision making of the government and its agencies.

Including cultural rights through section 27(2) will build on and give effect to the intent of the Aboriginal and Torres Strait Islander agreement signed by the government last year. It will help the government, the community generally and the Indigenous community to be accountable to each other about how we make a difference in the health and wellbeing of Aboriginal and Torres Strait Islander peoples.

Let me turn to the scope and content of the rights recognised by the bill. The scrutiny committee raised concerns about whether the provisions could have unintended legal consequences, in particular, in relation to intellectual property and land rights. As I noted in my response to the scrutiny committee, based on the opinions of the Government Solicitor:

> It is not anticipated that this amendment will have an impact on land rights in the ACT. It is likely that native title has been extinguished in the ACT through the operation of the *Native Title Act 1994* (in conjunction with *the Native Title Act 1993* (Cth)).

I note that in its submission the elected body has sought more information on the legal status of native title in the ACT, including the basis on which the explanatory statement described native title as extinguished. I can only confirm that the government's legal advice is clear: the amendments do not create any new property rights or affect any existing rights. The way native title is determined in the territory is through the relevant native title legislation, which is primarily the native title

legislation of the commonwealth. It would also be worth observing that to any extent that this Human Rights Act provision was inconsistent with commonwealth law, the commonwealth provision would prevail.

This amendment is instead a vehicle for demonstrating the contribution that Aboriginal people have made to the Canberra region as the first people and as citizens in our community. Our view and intention in introducing these amendments is that they will require public authorities to recognise and value the connection of Aboriginal groups with areas of land and water in the ACT. Given that culture manifests itself in many forms, it would not be appropriate for the government to narrowly prescribe how relationships with land and waters would be recognised or valued. How public authorities should recognise Aboriginal and Torres Strait Islander culture will depend on the context. For example, the measures that schools might adopt to recognise and value these rights may be different from the measures adopted by health professionals.

Keeping the provisions general is consistent with the expression of "other rights" in the act and allows for flexible and innovative means of recognition that can be developed in collaboration with Aboriginal and Torres Strait Islander people in the ACT.

I would like to stress to the committee why recognition of cultural rights is so important to Aboriginal people. In a speech for international Human Rights Day the Victorian Commissioner for Aboriginal Children and Young People, Andrew Jackomos, explained the importance of cultural rights through the lens of breaking the cycle of the abuse and incarceration of Aboriginal youth. He pointed to the disproportionate rate of Koori children in out of home care in Victoria—approximately 20 per cent of that cohort, while they make up only one per cent of the total population. He identified the many reasons for this troubling statistic as symptoms of intergenerational trauma resulting from disconnection from culture. He said:

> In communities where culture is strong, the force of identity and the knowledge of each other, the knowledge of our ancestors is a shield against racist remarks and negative stereotypes. Knowing family, community and connecting to culture, to land, to waters—these are the things that build up our young.

He went on to say:

> Cultural meaning comes from connections, relationships and socialisation with other Koori children and role models who will inspire and support the child as their life unfolds.
>
> Culture is not a 'perk' for an Aboriginal child—it is a life-line.

Section 10 of the Children and Young People Act here in the ACT also recognises the importance of culture for Aboriginal and Torres Strait Islander children by requiring their best interests to be upheld by taking into account the need for the child or young person to maintain a connection with the lifestyle, culture and traditions of their community, submissions made by or on behalf of Aboriginal and Torres Strait Islander peoples providing ongoing support services to the child or young person, and

the traditions and cultural values, including kinship rules, of the child or young person's family, kinship groups and community.

This act makes it clear that when placing Aboriginal and Torres Strait Islander children and young people in care, priority must be given to kinship carers, consistent with care plans that call for the preservation and enhancement of the identity of the child or young person as an Aboriginal or Torres Strait Islander person.

It is clear that already in ACT legislation there is recognition of the importance of culture. It is therefore appropriate that we send a symbolic message of the importance, again, of culture as a unique and distinct human right in what is our highest-level statement of human rights principles—our human rights legislation. As Mr Jackomos said:

> For Aboriginal and Torres Strait Islander peoples, Indigenous peoples, First Nations peoples, for Koories, this human right is crucial to our wellbeing, it is crucial to our sense of pride, to our sense of belonging. Culture is the most resilient factor protecting our children. Culture links us to our past so we can navigate our future.

Internationally and nationally, human rights law is moving towards recognition of the importance of culture in terms of opportunities for the development of relationships with Aboriginal peoples. There is, of course, the push for recognition of Aboriginal and Torres Strait Islander peoples in our national constitution.

The Parliamentary Joint Committee on Human Rights has moved towards using the UN Declaration on the Rights of Indigenous Peoples to inform its interpretation of human rights in the seven treaties that fall within its mandate under the Human Rights (Parliamentary Scrutiny) Act 2011 of the commonwealth. Equally, the Victorian charter was recently reviewed. The recommendation of the review team included that the Victorian government work with Victorian Aboriginal communities to promote, protect and respect self-determination and the empowerment of Aboriginal people.

Finally, it is worth highlighting that the Australian Human Rights Commission has released a series of discussion papers examining the UN Declaration on the Rights of Indigenous Peoples and the importance of cultural rights for Aboriginal and Torres Strait Islander peoples. It recommends that four principles underpin the dialogue of governments with Aboriginal communities. These are: respect for and protection of culture; participation in decision making, underpinned by free, prior and informed consent and good faith; equality and non-discrimination; and self-determination.

I am hopeful that including recognition of cultural rights will, in the long term, improve the ACT public sector's awareness of Aboriginal and Torres Strait Islander values, interpersonal relationships and styles of communicating, discussing ideas and making decisions. Improving understanding of Aboriginal culture will lead to the identification of new and better ways to reach out, engage with and involve Aboriginal people in policymaking and leadership processes.

Including recognition of the cultural rights of Indigenous people is, of course, not sufficient in and of itself to close the gap overnight, but it acts as another tool for helping to empower what is a highly marginalised and disempowered community. It

would be significant and symbolic. It would signal that the government and this Assembly are committed to improving relationships with Aboriginal and Torres Strait Islander peoples. As the Victorian Premier, Daniel Andrews, recently stated:

> At the moment, our definition of leadership is giving Aboriginal Victorians a seat at our table. But real leadership is about making it their table, too.

I note that all of the submissions that the committee has received support these amendments. I hope that the committee will also see the value in these changes. Thank you very much, Mr Chairman. I am happy to try to answer your questions.

THE CHAIR: Thank you. I neglected to ask at the beginning and I am obliged to ask you: are you familiar with the privilege statement on the table in front of you? And also you, Ms Field?

Mr Corbell: Yes.

THE CHAIR: I will ask the first question. Attorney-General, in relation to proposed section 27(2), which you have gone into a fair bit of detail on—and there are a couple of questions I will ask you on that—you have noted similarities between the form of words employed and those used in section 19(2) of the Victorian Charter of Human Rights and Responsibilities 2006. The words "recognised" and "valued" do not appear in the charter. Can I ask you (a) the specific reason each of these words was added and (b) what meanings do you anticipate these words may support in the future if the amendments were passed in their present form?

Mr Corbell: I would say their meaning is their common and ordinary meaning—nothing more than that. In terms of the reasons for their selection, I ask Ms Field if she could shed any light on that.

Ms Field: Thank you for your question. The words were developed based on the UN Declaration of the Rights of Indigenous Peoples and article 27 of the ICCPR. They were also developed in consultation with the Aboriginal and Torres Strait Islander Elected Body. When you look at the actual words of the particular articles in UN declarations there are also a whole lot of supporting documents, commentary and a special rapporteur's comments that go into them. We worked with the Human Rights Commission and with the elected body and looked at all those supporting documents as well. That is what informed them. In fact, it was a real, lived example of what the new rights stand for. It was a consultative process which also met the needs of the elected body.

THE CHAIR: I asked about each of the words—"recognised" and "valued".

Ms Field: The provisions are not attempting to give Indigenous people special or new rights. They are regulating the relationship of the existing human rights to this group of people. We do not see it as creating new rights; we see it as translating them for this particular group.

MRS JONES: Can I ask a supplementary?

THE CHAIR: Certainly.

MRS JONES: If the situation is that you are trying to codify a right, make it clearer, give them an avenue to have a voice essentially but there are not actually any new powers involved in that, is it an exercise in window dressing? Is there a change here? They are allowed to make a submission based on when someone wants to change how a piece of land is used, for example, but that submission does not have to be taken into account. Can you explain it a little?

Mr Corbell: As I said in my opening statement, this does not confer any new legal right in relation to title, land or property. Those provisions are governed by other legislation—notably, the commonwealth's native title law. If there was a view from an Indigenous group or individual that there was a claim to be made it would not rely on the exercise of any provisions put into our human rights legislation by this bill; it would rely on what commonwealth native title law says. And there are mechanisms for determining such applications through the Native Title Tribunal.

What does it do? This is our primary piece of human rights legislation. It is both a practical granter of rights that can be arbitrated upon by a court and also an educative tool to develop better practice, particularly within the public sector, around how the government respects the rights of its citizens. Clearly, one of those rights, in the same way that we say all people, all adults, have the right to franchise and the right to participate in democratic life, is also a right specifically recognised as occurring to indigenous peoples, to first peoples, because of their first occupation, ownership and connection with land. That is their culture.

The legislation provides for that right, the importance of their connection to country—not about ownership—their culture, to be something that is respected. That is what inserting this into legislation would do.

MRS JONES: In that vein, then, is that only cultural rights and views in relation to land and culture in relation to land or is it also in relation to other experiences within the ACT?

Mr Corbell: I think if you were to ask an Indigenous person, their culture is inherently bound up in their geographic identity and connection, so cultural—

MRS JONES: I understand that.

Mr Corbell: If I can answer your question—so cultural practice is inherently intertwined with place.

MRS JONES: I think we all understand that. However, my question is: if an Aboriginal person or group wanted to make a claim about something that was happening in the ACT that affected their culture but not specifically in relation to land, would this change make any difference for them?

Mr Corbell: What do you mean by a "claim"?

MRS JONES: Make a statement, make a request of the Human Rights Commission

to rule on something that was occurring to them that was not directly relevant to land. Perhaps the ACT government was enacting laws that they felt deprived them of something else that they had been experiencing in the past that then they would no longer be able to experience but it was not in relation to land. Does this change, affect or assist them in anyway?

Mr Corbell: It would certainly allow an Indigenous person to say that their rights were not being appropriately respected and that they would seek adjudication in some way in relation to those matters.

MRS JONES: Under this new provision?

Mr Corbell: Yes. That is no different to any other right that accrues to any other citizen under this legislation. If someone feels that their human rights have been breached or violated in some way there is avenue for those matters to be looked at, for example, by the commission or, in particular circumstances where it comes to the legal duties of public authorities, to have those adjudicated upon by the court. You have to remember that in the framework of our human rights legislation the court can only find that the operation of some other statute, some other power being exercised by the public authority, has been inconsistent with the operation of the Human Rights Act. We have not had and there is no capacity for the court to order any other form of relief or compensation other than that declaration that that particular legislative provision was incompatible with the rights outlined in the human rights law. Then it would be for the Assembly, the government and the Assembly, to determine whether they felt, we felt, that it was a matter that needed to be remedied.

THE CHAIR: I come back to one final question on this from me: what is the source for the words "recognised" and "valued" which you say do not appear in the charter? I was asking a couple of questions regarding these words. Can you elaborate on that?

Mr Corbell: As Ms Field indicated, they were drawn from our discussions and deliberations with stakeholders, principally the elected body.

THE CHAIR: So that is the full explanation for it?

Mr Corbell: Yes.

THE CHAIR: Dr Bourke.

DR BOURKE: Going to the discussion which we have gone through in quite a bit of detail, attorney, about native title and its application with this piece of legislation, you were very clear and explained to us again that it is commonwealth legislation and it is really up to a commonwealth tribunal to make those decisions whether native title is or is not extinguished in the ACT, regardless of what is in the explanatory statement. I note with interest that the Victorian Traditional Owner Settlement Act 2010 allows for alternative approaches to settling with traditional owners outside that native title process. In 2001 the ACT government reached a similar style of agreement with Ngunnawal people to create a joint management agreement around Namadgi. Does the ACT government intend to introduce legislation similar to the Traditional Owner Settlement Act?

Mr Corbell: There are provisions for Indigenous land use agreements to be registered in the ACT. These are alternatives to mechanisms set out under the native title law. There was, as you say, in 2001 an agreement between the territory and a range of Aboriginal parties in relation to a form of Aboriginal land tenure for Namadgi national park. My advice is that this agreement would probably satisfy the definition of an alternative agreement as set out under the native title legislation.

I should say that agreement resulted in the establishment of the interim Namadgi board of management. However, unfortunately, in 2006 the interim Namadgi board of management was abandoned due to disputes around traditional owner identity between Aboriginal members of the board which were not able to be resolved. So the statutory board of management was, therefore, never permanently constituted.

DR BOURKE: Also an issue raised by the elected body in their submission to the committee was around the discussion of Torres Strait Islanders as first owners and custodians of the Canberra region, which I see comes on page 6 of the explanatory statement. Their thought was that this was an oversight in the drafting of the explanatory statement, and I seek your clarification.

Mr Corbell: The purpose of recognition of Indigenous persons is twofold. Obviously it is very important that we recognise the connection to country that exists for the traditional owners—the Ngunnawal. But then, of course, there is the broader recognition of the connection to country of Indigenous first Australians generally, regardless of where their country is. We have many Indigenous people in the ACT who are not of the Ngunnawal but they still have their culture and their connection to country.

The purpose of providing for mention of Torres Strait Islander persons is in that context of saying there are Aboriginals and Torres Strait Islanders who reside in the ACT. Connection to country is important to them; it is part of culture for them. Whilst they are not directly connected to place here, they are connected to country more broadly and that requires a certain level of understanding and ways to engage with people who have that background. For example, having reasons to return to their country at particular times and that being respected in the way government agencies interact with such individuals, whether it is in the context of them as an employer or understanding some of the constraints and issues that arise from that connection to country.

DR BOURKE: My understanding of the elected body's paragraph was that they considered that this particular part of the explanatory statement referred to Torres Strait Islanders as first owners and custodians which is not true, of course.

Mr Corbell: In relation to what is now the ACT, yes. There may be a need to clarify that, if the elected body has raised that concern. But the intent is twofold—it is both in relation to the traditional custodians of the land which is now the ACT but also the importance of culture and connection to country generally that is shared by all Indigenous peoples.

THE CHAIR: Mrs Jones.

MRS JONES: Attorney-General, are you able to explain clearly how the deletion of 40B(3) will extend the right to education from its present status as an interpretational right to a more substantive right and what the substantive right entails? In that same vein, can you also clarify who will be required to respect this new right? In particular, has it been considered how the new right may affect people who home-school if there are any systems-wide changes as a result?

Mr Corbell: The obligations under the act accrue to public authorities. So they do not accrue to individuals. To the extent that the education department regulate home schooling, they would have to have relevance to that cognisant with their obligations as a public authority under the legislation.

The first part of your question is the changes. The changes relate to the capacity—that is to seek application to the court, is that correct?

MRS JONES: To extend the right to education from the present status as an interpretational right to a more substantive right.

Mr Corbell: Which section are you referring to?

MRS JONES: Section 40B(3).

Ms Field: The removal of the definition of human rights. Because human rights was only, at the time this was put, to apply to the ICCPR right, which does not include the right to education, and because we are now including the economic, social and cultural rights in part 3A, which impacts the right to education, that definition no longer applies. In fact, it was a drafting device that is no longer necessary.

MRS JONES: As to the more substantive right, now that we are actually voicing right to education, what is considered to be entailed in that, now that it is included? What changes do you envisage occurring in the way that public authorities operate?

Ms Field: We think the right to education is complied with now. The Education Act is very broad and mirrors the rights under the right to education. We do not expect it to make significant changes. What it means is that if there is anything in the act that could be challenged as being inconsistent with human rights, it could be challenged in the court. It also means that people can argue, run arguments that, in fact, decision makers have not acted consistently with human rights. That is what this one is about—decision makers have to act consistently with human rights.

Mr Corbell: The most significant safeguard is a much stronger protection around any arbitrary removal of a person's capacity to access education, for example, a decision on the part of a public authority to say, "No, we're not going to let your child attend a school, any school," not necessarily to say, "You can go to this school but not that school." There may be reasonable grounds to say that on capacity and location and relative priority. But if a public authority was simply to say, "Your child is not welcome in a government school," then that would be a breach of the right to education potentially. So the protection is in such arbitrary decision making and allows for such decision making to be subject to review.

MRS JONES: In relation to the inclusion of this new right, this newly recognised right, I wonder, minister, if you are able to clarify: are we following the decisions on rights by the UN? Is that the guiding list of rights? There are obviously competing rights becoming apparent now, and I wonder what the theoretical position is that underpins the changes that we are making now and what might come into the future as well.

Mr Corbell: Clearly international human rights law and developments in international human rights law are important considerations that help inform the government's decisions about which provisions and which rights should be reflected in our own legislation. First of all, it is not the case that there is a list of rights recognised by UN bodies or codified in international human rights law that mean you automatically introduce them into ACT law. For example, we have not fully recognised all the rights set out in the relevant UN instruments in relation to economic, cultural and social rights. We do not recognise all of those rights now. We have taken a very cautious approach to the adoption of some of those economic, cultural and social rights. The most obvious of those is education. But this is not a process that is a fait accompli on the part of the territory simply by referring to some list of resolutions from UN assemblies or other bodies. It is a process that is informed by that but is not driven by that.

MRS JONES: And are the choices about those rights predominantly driven by the ministry or is there some sort of a process that is engaged in when new thoughts or new rights are trying to be promoted by other bodies?

Mr Corbell: It is the case that other territory authorities that have a role in promoting and protecting rights express their view. I note Dr Watchirs is in the gallery this afternoon. As the human rights commissioner, she would have a view—does have a view and advocates that view as an independent commissioner—on how rights should be advanced and protected which are important in the ACT context. That is as it should be. Ultimately these are decisions made by government and put to the Assembly.

THE CHAIR: Attorney-General, is it true that the deletion as proposed of section 40B(3) will also mean that proposed section 27(2) would, if passed, impose greater obligations on public authorities than if section 40B(3) were to continue in its present form? If so, why has the explanatory statement not considered this?

Mr Corbell: At the moment, as members would appreciate, the government's approach has been an incremental one when it comes to the introduction of new rights. In the same way, when the human rights legislation was first introduced and established under statute, for a period there was no binding obligation on public authorities; there was only, if you like, an educative, informative guiding role for the legislation in informing public authorities of how they should act. But they were not bound by that and nor were they subject to potential review or challenge through the judicial process.

But as we built that dialogue within government around how rights needed to be taken into account in government decision making, the government took the view that there

was a sufficient level of knowledge and understanding of the rights framework to require those authorities to respect those rights and to be subject to review in relation to their decision making on them.

As we have introduced new rights into legislation, we have taken the same approach—first educative, first very much driven by dialogue and building understanding and capacity within government directorates and agencies about how these rights need to be taken into account, and then at a later point binding those authorities to adhere to those and to be subject to a formal review in relation to their decisions around those matters.

It is no different in relation to education; it is as it has been for any other right. It has been an incremental implementation process. Here we are moving from what is arguably not a new right already—already that exists and authorities are taking it into account. We are now providing for a more binding provision and a stronger level of accountability in relation to public authorities' decision making in relation to these matters.

THE CHAIR: Does it not mean that the explanatory statement may need to be expanded on?

Mr Corbell: I do not see how. I am open to the committee's views on that, but I do not see how, at this point in time.

DR BOURKE: Going back to where we were previously, minister, proposed section 27(2) stipulates that Aboriginal and Torres Strait Islander people must not be denied certain rights, rather than asserting that they have rights. What is the significance of the expression in the negative? It says "must not be denied" rather than that Aboriginal and Torres Strait Islander people have rights.

Ms Field: Dr Bourke, that is consistent with the Victorian language. We have based it on that. It is almost like recognising that the rights are so big and they are already there, and you just cannot say no. It is an emphasis thing, but it is something that the elected body and the Human Rights Commission were supportive of. I think it is reflecting the different language around a different group.

DR BOURKE: Thank you. I was curious about that.

Ms Field: It is different, yes.

DR BOURKE: Moving to the rights of children amendment, the Children and Young People Commissioner recommended a different set of words for section 11. I also note that we had a submission from the Victorian Equal Opportunity and Human Rights Commission, recommending that we further amend section 11(2) to include reference to a right to such protections as are in the child's best interests, in addition to the reference to the protection needed by the child because of being a child. What are your views on those suggestions, attorney?

Mr Corbell: In relation to your latter question, Dr Bourke, it is not a matter I have received any specific advice on, so I would not feel comfortable speculating on that.

In relation to the first part of your question, could you repeat that for me, please?

DR BOURKE: It was in regard to the recommendation of the Children and Young People Commissioner of a different form of words for the proposed note to section 11. He suggests that section 11 should be separated into two distinct parts, one recognising the rights of the family and the other the rights of children. It is on page 8 of the Human Rights Commission's submission.

Ms Field: That was examined in the last review of the Human Rights Act. We were aiming to increase the prominence of the rights of children. The proposed amendment says that children are people, too, so children have people rights. It is possibly a philosophical difference. I do not think it is a substantive difference. The best interests of the child are really throughout our legislation. I cannot think of a piece of legislation that does not have that in it. When you look at things like sentencing legislation, one of the elements you look at in that is the best interests of the child. That is the difference between children when they are being sentenced and adults. We have that all through our legislation.

We did not see that there was necessarily value in including it here. Really, we were making it clear that children have all the other human rights as set out. One of the things that the Children and Young People Commissioner had asked was that we put children explicitly in sections, and things like that. We thought that would make it more clunky and suggest that children did not come within "people". It was just a different approach.

DR BOURKE: Thank you.

THE CHAIR: Mrs Jones?

MRS JONES: No, I do not have any further questions.

THE CHAIR: It appears that we have exhausted the questions we wanted to ask you. Thank you very much for appearing today.

Mr Corbell: Thank you very much, Mr Chairman.

WATCHIRS, DR HELEN, ACT Human Rights and Discrimination Commissioner ACT Human Rights Commission

THE CHAIR: Good afternoon, and welcome to the first public hearing of the inquiry by the Standing Committee on Justice and Community Safety into the Human Rights Amendment Bill 2015. We have already heard from the Attorney-General and his officer. It is now the turn of the Human Rights Commission. We welcome Dr Helen Watchirs. I presume you are familiar with the privilege statement, but I am obliged to ask you about that. Do you wish to make a brief opening statement before we go to questions?

Dr Watchirs: Yes. I want to clarify that in my role as Human Rights and Discrimination Commissioner I have advocated for having section 27(2) based on the Victorian provision, but changed in accordance with consultation with the elected body, and having looked at the UN Declaration on the Rights of Indigenous Peoples. So that explains why there is a difference in wording.

In my view, at the moment all we have is a general provision in the preamble that talks about Indigenous peoples. This amending bill amends that by using the words "Aboriginal and Torres Strait Islander peoples". I think it will increase the awareness and understanding of cultural rights of Aboriginal and Torres Strait Islander peoples. I do not think it does more than existing laws. It replicates section 27, which applies to all minorities, but does it in a way that is very specific to Aboriginal and Torres Strait Islander people. It makes it specific and much more understandable; thereby it will be more of a focus of debate in the community and here in the Legislative Assembly.

Another idea that triggered this was not just the Victorian provision but the whole general movement of constitutional recognition. Recommendation 3 talks about doing that at the local level. That was certainly something we were driven by in suggesting this reform.

With respect to articles 25 and 31 of the UN declaration, some of those words have inspired the wording. I noted an earlier question about where the word "recognise" comes from. In article 31.2 it says:

> In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

I note that section 19(2) of the Victorian charter is negatively framed and that the substantive existing section 27 of the ACT act is also negatively framed. That is the only reason; it is a drafting convention that has been followed and replicated in the amending bill.

There was a suggestion in the committee's report that it may cut across other human rights, in particular section 8, the right to equality and non-discrimination. In my view that is not really a correct interpretation of what was intended and what will be achieved by the amendment. To have substantive human rights enjoyment, it is necessary for differential treatment to achieve equality of opportunity. Even our existing Discrimination Act under section 27 allows for special measures. In some

jurisdictions it is called affirmative action, particularly for people with special needs.

There is recognition that Aboriginal people have poorer health outcomes and over-representation in the justice system in the ACT. It is because of disconnection from country and cultural heritage. To recognise and value that distinctive and unique contribution will mean we are not breaching human rights; we are recognising human rights. If you look at section 28 of the Human Rights Act, you can limit rights if it is reasonable, necessary and proportionate to achieve a legitimate objective in balancing individual and community rights. In my view, having this explicit recognition which, as I said, does not change the law—it makes it more understandable and subject to conversations between all the arms of government and the community—is a good thing.

THE CHAIR: Thank you, Dr Watchirs. You have already touched on some elements of the question I had for you. I would like to ask you about a couple of points. The committee understands from the submission lodged by the commission that it was closely involved in the development of the Human Rights Amendment Bill 2015. Could you comment on why it was deemed necessary to include the phrase "recognised and valued" in proposed section 27(2) in contrast to the wording used in section 19(2) of the Victorian charter?

Dr Watchirs: As I said, we did look at article 31.2, which talks actively about the word "recognise". Usually UN instruments use the words "recognise, respect and protect". "Value" may have been an idea of the elected body. I am not sure about that second word. I do not think that a lot turns on it legally. They are educative words and it is a substantive provision of the act. That is the big change: from being just something general in the preamble of the act, it is in the substance of the act, in our recognising and valuing Aboriginal and Torres Strait Islander cultural rights.

THE CHAIR: You heard the attorney answer this same question from his perspective, and you are comfortable, in your role, that the statements that you have heard so far are appropriate?

Dr Watchirs: Yes, I am in agreement.

THE CHAIR: Dr Bourke.

DR BOURKE: We have had a bit of a discussion already around native title. It has possibly been enlivened as a result of discussing this bill. Do you have any comments that you would like to add in this space?

Dr Watchirs: Certainly, we are aware that the Attorney-General has sought expert advice from GSO. We have not seen that advice, but we understand that it confirms that it is likely that native title was extinguished back in 1994 by the Native Title Act (ACT), and that does not expand any existing claims or any intellectual property. My only addition would be that there has been no issue with the Victorian provision that has been in force for six years. The only case that I have seen is an exemption application by Land Victoria. They wanted to recruit Aboriginal workers as a result of affirmative action; they were going to be looking after lands and parks and it was very appropriate that they recruited Aboriginal and Torres Strait Islanders to those

positions. You could do that currently in the ACT under our Discrimination Act, but it makes it even more certain.

In terms of asking whether the law would make a difference if I had a discrimination case about advertising for Aboriginal-only staff in public authority positions, it may strengthen the stance taken by the public authority, particularly if they have asked for advice beforehand about whether this is a special measure under the Discrimination Act.

DR BOURKE: You have raised the Victorian situation. Have there been any other Victorian experiences that you could share with us?

Dr Watchirs: Not that I am aware of.

DR BOURKE: What stated benefits have Aboriginal and Torres Strait Islander people in Victoria enjoyed as a result of their Charter of Human Rights and Responsibilities inclusion?

Dr Watchirs: Certainly there are a lot more resources with the commission and the justice system generally in Victoria. Their law on human rights is more developed than in the ACT although, as a percentage, the ACT looks at more cases and our debate is much more informed by human rights than in Victoria. I would have to say it has been a benefit having that from the outset in the charter. The ACT act was drafted back in 2003, well before the Declaration on the Rights of Indigenous Peoples. It was chaired by Hilary Charlesworth and an eminent academic, Professor Larissa Behrendt, and the view of the community when it was drafted was that it was better to be in a preamble. Certainly, my view has changed over time, and that is why I advocated a change. The Victorian provision was a good start. The elected body had ideas about specific wording that would be more meaningful to them. I think that is a good idea and that is why it was developed.

THE CHAIR: Mrs Jones.

MRS JONES: Previous reports to this committee and its predecessors have argued for greater independence of the commission from the ACT government. Is it possible that the commission's close involvement in the development of this bill indicates less independence from the government than the committee had hoped for? Also, can you give examples of how this change may change a case that you might deal with in the ACT?

Dr Watchirs: Certainly I did advocate this independently and it was not initially recognised by the government for several years. It was only by working with the elected body that we were able to get the suggestion up. So I would have to say we independently pressured the government unsuccessfully and we found the elected body a much more effective partner. I would not say we worked closely with the government on that; we were in disagreement for several years about it.

MRS JONES: And then my supplementary to that was: how might this change a case that was before you? Can you give us an explanation? I am struggling to see the practical outworking of it.

Dr Watchirs: I may have said "change" but when I think of the example I gave you it would be more that it would reinforce a view that I already had. So it would strengthen a case by having something as a special measure in the Human Rights Act rather than just an ability to not be held to be discriminatory by having affirmative action for Aboriginal and Torres Strait Islander employees.

MRS JONES: Because their rights are recognised as being essentially equal to that of other people it justifies specific actions that draw those rights out and attempt to give an opportunity that may not be an opportunity available to others. Is that what you are saying?

Dr Watchirs: It would have to be a very good case for why a special measure was required. As I said, in that Victorian case—it was Parks Victoria—it was people attending to the traditional land and their connection with that country that was found to be special and that was why an exemption was given by the Victorian tribunal from the Discrimination Act. In the ACT those exemptions are given by the commissioner, not by the tribunal. So I would make that decision.

MRS JONES: In relation to your statements earlier about the fact that the statistics on Aboriginal health and so on show a worse state than statistics for the population as a whole and part of that is as a result of disconnection with country, have you had any thoughts how this change, other than those specific types of cases with regard to advertising for Aboriginal positions, might change the life of an Aboriginal child living in the suburbs of the ACT or how this might change over generations? If it is about connection to country and that is something that has been lost historically or is not that easy to access anymore, how can this change make a difference?

Dr Watchirs: I think the whole culture of human rights would make a difference and Aboriginal community is part of that. By specifying how the act applies to that minority, who are the first peoples here, I think that can only do good in terms of educating the whole community that those rights are special, unique, distinct and are something to be proud of, not to be ashamed of.

MRS JONES: But I am curious how that can happen practically.

Dr Watchirs: Sure. By making the right to education a substantive not just an interpretive right equal to other civil and political rights, you might have an Aboriginal child who may be going to be expelled from a school—

MRS JONES: Sure, but—

Dr Watchirs: That may make a difference in terms of—

MRS JONES: But the rights around Aboriginal people specifically will only strengthen their access to the other rights—is that what you are saying?—the other explanations of rights that are in the Human Rights Act?

Dr Watchirs: I think that is a fair comment. It does strengthen existing rights.

THE CHAIR: Dr Bourke.

DR BOURKE: I turn to the rights of the children amendment that we had a discussion about—which I saw you listening into—with the attorney before. Would you like to make any additional comments to what you have already made in your submission?

Dr Watchirs: Sure. Certainly we made a submission in 2014 when economic, social and cultural rights were being reviewed generally in the Human Rights Act that it was an opportune time in the view of the Children and Young People Commissioner that you should not have section 11 applying both to family and to children, even under subsections. He wanted separate provisions because of the International Covenant on Civil and Political Rights—they are articles 23 and 24—and he wanted them numerically separated. The government did not agree to that.

He also wanted the words "children and young people" inserted so that the situation of children over 12 and under the age of 18 was more inclusive and respectful and recognised their developed maturity. That is something reflected in his own title. I have to say at the federal level we do have a children's commissioner rather than a children and young people's commissioner. In the ACT we can change what our international and national standard is and make it more inclusive and reflective of what the ACT experience is.

DR BOURKE: I turn to the public authority obligations amendment. How common has it been for ACT residents to use the provision at section 40C to enable legal proceedings in relation to public authority actions since it was introduced in 2008?

Dr Watchirs: I would have to take that on notice in terms of actual cases. My understanding was that there were about 12 or 14 applications—certainly not a flood of litigation. What is important is not just what gets to court but, by having the direct obligation on public authorities to act consistently and make decisions that consider relevant human rights, that that is done at the outset rather than people having to litigate something that has not gone right. It is that whole educative and regulatory role of the act in making public authorities comply with the Human Rights Act which is very important.

DR BOURKE: Would you expect that that usage of that remedial avenue would significantly increase with the right to education?

Dr Watchirs: It is always hard to predict the use of legislation. I have to say that we are concluding our own-motion look at charging of fees for international students. Certainly there was a stage where asylum seeker children were charged fees and we were extremely concerned about that and that has been changed completely. For people who have a card saying they are an asylum seeker—and refugees have never been charged, is my understanding, school fees—if that was not the case, if fees were charged—

DR BOURKE: That is school fees in the ACT public education system?

Dr Watchirs: Exactly—then that may be a breach of this act that someone may want

to litigate. But I am saying that it has been changed because we have had an own-motion inquiry into the charging of fees for international students, which includes asylum seekers and refugees. If that was not the current practice, then yes, there may be court cases about that, but it has changed while we have been doing this review of the Education and Training Directorate. That is a specific example where, in my view, that would be a breach for an asylum seeker not to be receiving free primary school education.

DR BOURKE: But not for an international student who comes here to pursue—

Dr Watchirs: Not someone who has done it offshore.

MRS JONES: Could I ask a sup to that briefly?

THE CHAIR: Yes.

MRS JONES: Sorry to interrupt. Would the right to education, in this case for children, also interact with a child where their disability was not properly catered for in the classroom? If it became impossible for that child to access education because they could not manage within the classroom setting and there was not another school that was set up for their environment so that they were allowed to attend a school but they were not effectively getting an education, can this provision then assist those children?

Dr Watchirs: In my view, I hope it would. Certainly when I have advocated for having a right to housing, that is the example I have given: people who have a disability, and in public housing that disability is not being properly accommodated, that would be not only a discrimination case but a human rights action.

MRS JONES: And would that disability have to be officially diagnosed or can it be just demonstrated?

Dr Watchirs: It would be the ordinary meaning of disability. The Discrimination Act has a definition that could be used. I do not think it would be a problem. In section 5AA of the Discrimination Act there is a definition of disability. There is also a Disability Services Act which would have a relevant definition.

DR BOURKE: What practical effects on the activities of education staff and other relevant public authorities do you envisage the amendment to section 40B would have?

Dr Watchirs: It certainly was an intention of having the own-motion inquiry to look at whether it was acting consistently with human rights by charging international students. I am satisfied that the issues I had earlier have been changed. If they were not fixed, then certainly this amendment would make the government liable for legal action.

DR BOURKE: Did you envisage any other practical effects?

Dr Watchirs: I think, as I said earlier, it strengthens existing cases. I think children

with disability in the education area would probably be an example. We have seen in the media about the child who was contained in a school, which was contrary to human rights. That would be an example of a case.

DR BOURKE: Your submission says there is no sound reason for excluding part 5A, the obligations for the right to education. Would you be comfortable in principle with those obligations applying to other economic, social and cultural rights that might be legislated for in the future?

Dr Watchirs: Absolutely. Housing is something that we have consistently advocated for. On International Human Rights Day 2014 we had a link with the special rapporteur and members of the community and the Government Solicitor talked about a potential right to housing in the ACT. Although I do admit what the attorney has said consistently is that we have an incremental, cautious, step-by-step approach of having the quite careful interpretive provision apply before you get to a direct obligation on public authorities and the ability to go directly to the Supreme Court, my advocacy for quite some time and more recently has been to strongly advocate that it should be made clear that tribunals and lower courts also have a role in human rights cases.

THE CHAIR: Mrs Jones, do you have any further questions?

MRS JONES: Yes. Dr Bourke, in a sense, when Minister Corbell was here, mentioned that obviously there are things that have been pushed by international human rights law that have not necessarily been adopted in the ACT. In relation to these changes, are there other areas of change that you are promoting that have not yet been adopted and, if so, are you informed by the international debate? Is that your primary source of suggestions?

Dr Watchirs: Certainly it is always a changing landscape in human rights terms. I know there is a push to have an international convention or declaration on the rights of older people. That may be something that will come in the future. Certainly rights of people with disabilities were a long time coming—I think about 20 years, in my experience. I was a federal public servant and I did work on the Convention of the Rights of the Child, and that was another 20-year period of development.

MRS JONES: But are there specific changes that you are not finding are being welcomed by government at this point?

Dr Watchirs: Certainly the ACT Law Reform Advisory Council has done a report on the Discrimination Act recommending quite significant changes. That report has not yet been tabled in the Assembly. I am a member of that committee; I am not the chair; so I am not at liberty to reveal it but certainly that has some quite far-reaching changes that are based on international law.

THE CHAIR: Further to what Mrs Jones has asked you, are there any other observations or concerns that you may wish to raise with the committee at this point or have you covered all the points you wanted to cover?

Dr Watchirs: I just raise that there was something in the committee report about

being worried that the UN Declaration on the Rights of Indigenous Peoples is non-binding. I clarify that yes, it is not a treaty but it is, under the definition of international law in section 31 of the Human Rights Act, because under the dictionary, all that is required is that a declaration or standard be adopted by the UN General Assembly. Certainly it is a UN Declaration on the Rights of Indigenous Peoples.

When a declaration is sufficiently supported internationally, it can reach being customary international law—that is, a treaty, in effect, rather than a treaty in black-letter law. Certainly the UN Declaration of Human Rights after World War II was only a declaration, and it came into effect as customary international law. I think the UNDHR is very influential and authoritative and the elected body requested us to do training on that several years ago. We were ahead of the Australian Human Rights Commission in picking up that the community wanted that specific education. If they had not asked us, we would not have known. It was very important that we did that education and that the community knows what is in that declaration and how it can apply in the ACT in practice.

MRS JONES: I have a supplementary on that. What are your views on any changes that might be required to the protection of the right to conscientious or religious view or belief? My understanding is that Australia has absolutely no legislative framework to protect religious freedom. Do you see that as something which ought to be captured in human rights law?

Dr Watchirs: Certainly, yes. I am happy to advocate for that at the national level. There was a movement several years ago to look at the whole of federal anti-discrimination law, and that was one facet of it. But that whole project lost momentum.

MRS JONES: Are there any documents associated with that move or the loss of momentum for that move that you might be able to provide to the committee?

Dr Watchirs: Sure. I can do that on notice. But there is certainly a report at the federal level.

MRS JONES: It would be good to know which door to go knocking on to find more info.

THE CHAIR: Thank you, Dr Watchirs. I think we have reached the end of the questions that the committee would like to ask. But regarding the question that you have taken on notice, the committee asks that you provide a response within five working days of today's hearing. We would like to thank you very much for appearing before the committee today.

LITTLE, MR ROD, Chairperson, ACT Aboriginal and Torres Strait Islander Elected Body
COLLINS, MS DIANE, Member, ACT Aboriginal and Torres Strait Islander Elected Body

THE CHAIR: Good evening, Mr Little and Ms Collins. Welcome to the public hearing of the inquiry by the Standing Committee on Justice and Community Safety into the Human Rights Amendment Bill 2015. A privilege statement is on the table, for your benefit. Are you comfortable with the privilege statement?

Mr Little: Yes.

Ms Collins: Yes.

THE CHAIR: Thank you. Would either of you like to make a brief opening statement before we go to questions?

Mr Little: Mr Chairman, thanks for the opportunity. We welcome the opportunity to be witnesses at this hearing. This journey of work has been undertaken for a number of years with the community and with the human rights office. To have arrived at this point seems like a welcome position at this point in time. It gives us confidence that members of the Assembly are taking into account some of the concerns that we have. There are often quite a lot of conversations to clear up misunderstandings about interpretations of the declaration and what it might or might not actually mean. We got to a point where we thought that we would be having a conversation and there was a level of understanding to be able to say, "Okay, that's not too bad." We welcome this opportunity. I am not sure whether Ms Collins wants to make a comment.

Ms Collins: No, I just reiterate your words.

THE CHAIR: What do you see as the most important benefits that will flow from amendments in this bill that affect the rights of Indigenous people in the ACT, particularly those in proposed section 27(2) of the Human Rights Act?

Mr Little: Fundamentally, the thing is the recognition and the value. I heard earlier a question about the interpretation of "value"—what "value" is. For an individual, being valued as an individual and having their rights recognised as being equal to anyone else's is a fundamental starting point. Most of our people know that we have fundamental human rights. There is an international framework from which we have drawn these matters to promote, to explore and to educate. I think we have advocated that quite well. The fundamental thing is acknowledgement and recognition of the first peoples of this country. That is the primary thing that gives people confidence and value as human beings.

THE CHAIR: With respect to those values that have been described to you, you are comfortable with the definitions that have been given?

Mr Little: Absolutely. Being an Aboriginal person myself, I hold those cultural values very dear, as well as my cultural obligations to my people, not only my direct

people where I come from but universally across the country. One of the difficult things—it is part of a learning process also for me—is understanding that value for another individual. They might value it differently. They all have different lived experiences. They all have different cultural authority and so on. But understanding that that is a fundamental right is pretty special and it is something that most human beings feel they have a right to.

Ms Collins: I would like to add to what Rod has said around recognition. There is also respect, in terms of a respectful relationship, by acknowledging Aboriginal and Torres Strait Islander peoples as the first Australians or first nation people of this country. Again, as an Aboriginal person, to see those rights being articulated within the act is so significant, not only symbolically but coming from the heart. That is what it is about: it is about having our rights reflected. As an Aboriginal person, to pick that up and read it, it demonstrates the respect that is being displayed.

DR BOURKE: Your submission expresses some concern around the view put forward in the explanatory statement that native title had been extinguished in the ACT. Do you want to add anything more to those comments that you made in your submission, having regard to what you may have heard when the attorney was here earlier?

Mr Little: One of the reasons for that is not having the information and not understanding all of the circumstances. The elected body has been around only since 2008 but the native title process has been around since 1994. The supposed extinguishment of native title in the ACT is information that fundamentally we are not privy to. As traditional owners of the lands of the Ngunnawal peoples, we feel as though we do not have all the information. We do not understand the circumstances; hence there are some assumptions made by different groups. We think these are important questions to be asked for two reasons: one is to inform ourselves a whole lot more and the other is about being able to respond to questions asked of us as an elected representative group holding public office.

DR BOURKE: I raised with the Attorney-General the Victorian Traditional Owner Settlement Act, which sits outside the native title process—native title being a commonwealth piece of legislation and the Traditional Owner Settlement Act being a piece of Victorian legislation. We then had a discussion about Indigenous land use agreements—how the agreement around Namadgi was an example of that and the potential for perhaps more in the ACT. Does the elected body consider that there is a possibility for further native title issues or, indeed, Indigenous land use agreements?

Mr Little: My view, and my knowledge and experience of native title, is that generally land use agreements derive from a native title application or registration. That raises a critical question in the first place about land use agreements here in the ACT, if extinguishment has happened. But it is not, in my view, off the table to negotiate arrangements. If there were an arrangement and some amicable benefits coming to all parties in the negotiation, that should proceed, at least to a point of sharing information and gaining a level of respectful understanding of what these circumstances may or may not present.

Whenever land use agreements come up—I will go back to my earlier comment—the

first thing is that we are more informed. We are an avenue for people to seek information from the authorities or pertinent places so that our constituencies are more informed as well. That is fundamentally our role. If we are informed, we can appropriately inform them about where to pursue their knowledge and their information and/or be an advocate for them to enter into a process of negotiation or consultation.

DR BOURKE: Does the elected body have any particular opinion about the applicability of legislation like the Victorian Traditional Owner Settlement Act to the ACT?

Mr Little: Yes, I think we would be open to it, but under our legislation we are also required to consult with the United Ngunnawal Elders Council. We are also aware of other interested language groups in the ACT that are asking similar questions. We think we are a neutral body. We cannot be, in a way, listening to one and not to the others. That is our function under the act—to hear the views of our peoples and express those. But we are also open to the opportunity to facilitate a forum for that conversation. We do that often on topical matters. If this is one of those conversations that we could facilitate with the community, I think that is the thing to do. If the demand is there, that is what we will do. It is an opportunity to explore, and I think that is good.

Ms Collins: The elected body can play a critical role in the facilitation of that discussion, certainly with the United Ngunnawal Elders Council and also with the regional Aboriginal organisations, as part of ACT Heritage, and with the broader community, of course, around land use agreements. As Rod alluded to, it is about informing people what the issues are that those individuals have, and sharing that with everyone so that we can have a discussion and certainly an agreement on a way forward.

DR BOURKE: Speaking of heritage acts, the Attorney-General has advised that development applications which could impact on heritage-sensitive sites currently are referred to the Heritage Council for advice. That advice will include reference to Aboriginal connection to land or water within the site. Do you think this is a satisfactory mechanism?

Mr Little: I do, because there are mechanisms in place. With the Heritage Council, there are registered organisations that are consulted around land use, water and other resources in the ACT. I do not know how far the jurisdiction goes with respect to the local land council, which is located in Queanbeyan. I do not know whether they have any cross-jurisdiction in the ACT. There are some mechanisms in place to do exactly what you have suggested, starting with a process under the Heritage Council and those registered organisations, to explore those options.

MRS JONES: As a supplementary to something Dr Bourke was asking earlier—and I heard you mention a couple of times that access to information might not be as easy as it could be for you—what are the mechanisms for access to information that you have and how could that be improved so that you know what the status quo is?

Mr Little: Fundamentally we recently entered into a whole-of-government agreement

with the ACT government. That is a starting point. There is the framework for access to directorates and where we need to seek information from, including the human rights office.

MRS JONES: But if you write letters, are you getting what you need? Are you getting the full information that you seek?

Mr Little: It is a progressive thing. I think we are getting some of the answers. To get to this point over a number of years was quite a lengthy journey—was it not, Di?—and there were conversations to extend some clarity around the interpretation of the information and all the suggestions and the propositions that we put forward. I think that after many, many conversations we finally got there and the light bulb came on and it was: "Is that what you mean?" Yes, that is what we mean. There is no real problem with sharing this information.

Most members of the elected body are either current or ex-ACT or federal government bureaucrats and are fully aware of all of the constraints that people have in sharing information. But as we have a relationship and a formal relationship with the ACT government, I think that is an opportunity where we can—

MRS JONES: For example, in relation to information about the opinion of the government about the status of native title, are there things that you have not been told that you would like to know about?

Mr Little: Yes, there are. I do not think we have quite collected the kinds of questions, apart from those in our submission. I am not sure how we access that native title information, how we access that information about what transpired in the past, because we are not privy to that information. Generally, we are told those matters are confidential to the traditional owners or the applicants.

Ms Collins: I also think we have limited capacity in terms of research and resources to gather that information outside of government. That piece of work is certainly very important.

Mr Little: Huge.

Ms Collins: And it is huge. It is about the fact that we are part-time statutory holders, where is the capacity to do that on top of the other priorities, and how we fit that into our work schedule has to be considered.

MRS JONES: My substantive question was about the changes that have been made under these changes here with the recognition and so on within the processes that the Human Rights Commission will be able to now specifically consider your connection to country and cultural rights. Do you think that the changes go far enough?

Mr Little: Personally I think probably not. This is a long time coming in my lived experience. But we have in the forefront of our mind future generations and future societies, particularly here in the ACT, where we can create a society where there is respect for and value of individual rights, including cultural rights, because we are a very multicultural society, particularly here in the ACT. We have a growing

multicultural society across this country. Some level of understanding about the interpretations of the articles of the UN declaration opens up the door for a conversation and a level of understanding about what this actually means and its compatibility with the human rights convention at the international level.

MRS JONES: If you were in charge and you could make the decision about what you would do to go further, what would that be?

Mr Little: If I were in charge?

MRS JONES: Yes; and if Di were in charge.

Mr Little: I would be accepting these proposed amendments. I will share with you that some other human rights experienced people have looked at the ACT Human Rights Act. It really does not go far enough as it is, but we feel—I certainly feel—that it is a starting point. It is almost an international first where the state of Australia reiterated last year that it would commit to implementing in this country the UN Declaration of the Rights of Indigenous Peoples. Nowhere that I know of around the world has actually gone this far. So we feel quite privileged about that. The UN office is watching to see what the outcome of this will be, and it is quite exciting.

If I were in charge of making that decision I would say, "Let's be brave enough to give this a shot." I feel as though we here in the ACT and the Assembly do have some courage in that. I think there are a lot of conversations around or unanswered questions about whether these are special measures as an interpretation either from individuals or courts of what special measures may be. There also may be an interpretation that the declaration is not legally binding. But we need a conversation about those things. For us, there is a likelihood of a positive benefit to come out of this, and that is around recognition and valuing of equal rights for individuals, particularly Aboriginal peoples who have been oppressed in this country for a long time. If I were in charge, I would say, "Let's give it a go."

MRS JONES: And Di?

Ms Collins: I think it is about accepting these rights. I liken it to the national apology in terms of the changing of attitudes on that day was so significant across Australia. This would very much do the same thing but it also creates the impetus to keep moving forward. I applaud the ACT human rights office for working with us in terms of getting this to where we are today, let alone the next steps of that. Our conversations have already been had with the human rights office about where we go from here once these rights are embedded. It is significant, as Rod says, around recognition, but in regard to respect and relationships it is one step forward. Again, creating the impetus to keep moving on that will be very significant for the ACT. That is for all ACT people, not just Aboriginal and Torres Strait Islander peoples.

THE CHAIR: Dr Bourke.

DR BOURKE: Mr Little and Ms Collins, in a matter heard by the Victorian Civil and Administrative Tribunal, Parks Victoria—and you may know about the case—sought an anti-discrimination exemption which would enable the preferential hiring of the

Wurundjeri people to care for Wurundjeri country. Support to grant that exemption was on the basis that it would promote substantive equality and was drawn from the cultural provisions right of Victoria's Charter of Human Rights and Responsibilities. Do you have any suggestions about how the proposed ACT section 27(2) could be used to achieve those sorts of outcomes and promote substantive equality in the ACT?

Mr Little: My immediate response is that we have a framework already on how to commence the negotiations and move forward. One of the key principles in the recently signed agreement is about having respectful dialogue and conversations to commence to explore the opportunities, for instance. Often we have been presented with the barriers of policies or procedures or legislation to not enable us to progress. So our approach is, "Let's have a conversation first as to what this actually means to you." Then we work out together how we make this happen. That has been there and is an example of this.

I think the amendments to this act will enable those rights to be implemented, those rights to be exercised in a way that the individual values and cultural values are implemented, and they are more likely to be in pursuit of that positive outcome that they want to contribute not only to society but to their own cultural identity within the ACT. I think those kinds of things can happen.

Part of the UN declaration and the human rights covenant talks about non-discrimination. So if there is a process where non-discrimination is demonstrated in this conversational process, then I think it is more likely to derive out of that a positive outcome that is adequate to all of the parties in the discussion. It is all of the principles of having open, valuable and respectful relationships. That is what the basis of the agreement is. I think that is the basis of where you can go with a process like this.

We have recently had the review of the ACT Discrimination Act. On those kinds of things—coming back to the point about its being useful to inform people of what the processes are—they can inform themselves about processes that are available to them, and that gives them more courage and confidence to go forward and commence a process of negotiations.

DR BOURKE: Of course, that agreement is fruit of the relationship between the ACT government and the ACT Aboriginal and Torres Strait Islander community because of our unique situation with a democratically elected representative body, which Victorians do not have.

Mr Little: Exactly. That is why I am confident that we can work our way through this.

Ms Collins: I think the amendment is also, as has been previously highlighted, about strengthening the existing rights but also highlighting the significant place that Aboriginal and Torres Strait Islander people as first Australians hold on this country and all of Australia. Again, it is that respectfulness in relationships and possibly changing attitudes for everyone to understand and feel that way.

THE CHAIR: There are no further questions. Ms Collins, Mr Little, basically we have asked the questions that we wanted to ask, but I ask whether you have any other

observations or concerns that you may wish to add.

Mr Little: My final comment is that I certainly welcome an opportunity for a conversation as to whether there are any fears about how this might impact on the ACT government and any of the legislation and about what those fears may or may not be. We can work in that respectful manner to resolve something. As I said earlier, there are so many things that perhaps may be misinformation or whatever, but the more that we build a trusting relationship, the more we are going to create a better society for us.

One of the main things that was a driver for this proposition was that, particularly for Di and me who have been with the elected body since 2008, we have a vision for seven generations on. We want to create a society of Aboriginal and Torres Strait Islander peoples who live in Canberra and have that kind of positive vision and feel about the whole of the ACT community, recognising and supporting equal rights in the ACT. That would be my closing comment.

THE CHAIR: That, in fact, is what the basis of this hearing is about—to give you the opportunity. We are a bipartisan committee made up of both government and opposition members, and our task is to listen to the people who put submissions in, which we have done. And we have asked you the questions that we wanted to ask but we also wanted to leave it open to you to have the final word in case we missed any of the points that you would have liked us to ask you a question on. I think we have covered it in a fair amount of detail.

The committee will hold a second hearing, on Monday, 12 October, at 2 pm. The Victorian Equal Opportunity and Human Rights Commission will appear before us via a telephone link. The representatives of the Torres Strait Islander Corporation will appear in person. They are the final people who have presented submissions that we will be listening to.

We thank you both very much for joining us here this afternoon and giving us your own points of view. I thank all of the witnesses who have appeared today—that is, the Attorney-General and his officers, the human rights commissioner and the Aboriginal and Torres Strait Islander Elected Body that you represent. I thank all the witnesses who have appeared before us today. I now close today's meeting. Thank you.

The committee adjourned at 5.49 pm.