



19 August 2011

Human Rights Unit  
Legislation and Policy Branch  
Justice and Community Safety Directorate  
GPO Box 158  
Canberra ACT 2601

To the Human Rights Unit,

The Women's Legal Centre (ACT & Region) thanks you for the opportunity to make a submission in respect of your issues paper regarding whether Economic, Social and Cultural Rights should be included in the ACT *Human Rights Act 2004* ('the HR Act').

The Women's Legal Centre (ACT and Region) Inc ("the WLC") is a Community Legal Centre accredited by the National Association of Community Legal Centres. The Centre has been operating successfully in Canberra since 1996. Its objectives are to:

- provide accessible, timely and accurate information, advice and assistance on legal and related matters to women in the ACT and region;
- raise awareness in the community about the law and the legal system as it affects women; and
- identify and challenge barriers to women's access to justice.

The mainstay of the Centre's work is providing legal advice and assistance to women about individual matters. We work primarily in the areas of family law, domestic violence, discrimination, employment and victim's rights. As you might imagine, it is not uncommon for human rights issues to arise in these types of matters.

The Centre is also subject to the same obligations as a public authority under the HR Act pursuant to our request under Section 40D of that Act.

Below, we outline the WLC's recommendations in relation to inclusion of ESC in the HR Act. Specifically, we broadly support recommendations 1-15 outlined in the ACT Economic, Social and Cultural Rights Research Project Report (the Report). Below, we provide additional comments in relation to our position.

### **Why include ESCR?**

1. On principle, we believe that the human rights contained in the International Covenant on Civil and Political Rights should not be divided from the rights contained in the International Covenant on Economic, Social and Cultural Rights.
2. Regardless of whether ESCR protections already exist in individual pieces of legislation, it is essential that they are placed on par with the existing CPR in the HR Act, so there is a coherent legislative framework for ensuring that these protections are not eroded over time.
3. As discussed further below, including ESCR in the HR Act would also ensure that protection of these rights informs dialogue relating to the development of new policy and legislation.
4. ESCR such as the right to housing, the right to the highest attainable standard of health, the right to education, the right to take part in cultural life and the right to work in just and favourable conditions are essential to the creation of a well functioning community. It is only through the recognition of rights such as these that civil and political rights can have true meaning. For example, what good is the right to vote if you are too sick, due to a lack of access to basic health care, to attend a voting station? We believe that basic human rights are interconnected and indivisible and should be protected as such in the one HR Act.
5. Women in our society have a generally greater burden of caring and family responsibilities particularly in single parent households. As recorded in a report by the NSW Department of Women:

Nationally, 89% of sole parent families with dependent children are headed by a woman (488,000 families). Sole parent families are more likely to be renters (46%). One third of all female renters lived in public housing and a further 10% were on public housing waiting lists.<sup>1</sup>

6. As such, the Centre's believes women have the most to gain from the inclusion of ESCR in the HR Act. This is because these rights directly impact on education (particularly of children), public housing which is often required by single parent families, and the right to work, which is impacted by the competing priorities of child rearing.
7. Caring for others can also have significant adverse impacts on health, especially as the carer ages.<sup>2</sup> Accordingly, women would also benefit from the inclusion of a right to

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<sup>1</sup> Department of Women (NSW), *Issues of importance to women in NSW*, Sydney, 1998

<sup>2</sup> See, for example: Eagar, K et al, *Effective Caring: a synthesis of the international evidence on carer needs and interventions*, Centre for Health Services Development, University of Wollongong, 2007. Available at: <http://www.health.gov.au/internet/main/publishing.nsf/Content/ageing-publicat-effective-caring-v1.htm~ageing-publicat-effective-caring-v1-vol-one.htm>

the highest attainable standard of health care.

8. Further, research indicates that women from culturally and linguistically diverse backgrounds can be more isolated from the general community than men, and can have less opportunities to learn English.<sup>3</sup> Accordingly, if the HR Act also protected the right to enjoy cultural life, women would be likely to benefit at a proportionally higher rate than men. A practical example of such benefits may be the increased availability of material in their first language.
9. Analysis of the human rights cases brought to the Supreme Court since 2009 indicate that women are less likely to enforce their CPR under the HR Act. For example, 60% of the human rights cases brought before the Supreme Court related to criminal matters and women are proportionally less likely to be charged with a criminal offence. The Centre believes that the introduction of ESCR in the HR Act, along with giving the Human Rights Commissioner the power to conciliate human rights complaints, could increase the likelihood of women enforcing the human rights that are most often breached in their day-to-day lives.

### **Case Study**

*Our client is a single mother of a child with severe autism, who requires special needs transportation to school. Her child requires transportation from Gungahlin, where government housing was provided for our client and her child, to the school he attends in South Canberra. Our client requested that the existing special needs bus route between Gungahlin and South Canberra be extended to her child's school, not far from the end of the current route. This application was rejected. She was advised that if she required the special needs transportation service, she would have to move her child to another School. She does not want to do so because of the mental and emotional upheaval her child would experience in the context of such a change, due to his special needs.*

*As a result of this policy decision, our client's right to work has been impacted as she has to drop off and collect her child from school and is therefore not able to take up permanent part-time employment opportunities with her employer.*

### **Which ESCR should be included?**

10. We support recommendations 2 and 3 of the Report which state which ESCR should be included in the HR Act. Whilst it is not preferable to 'pick and choose' between certain ESCR, we support the view of the experts in relation to:
  - a. the lack of consensus on an international level on the precise scope and content of the right to intellectual property; and

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<sup>3</sup> For example, see Intouch Inc Multicultural Centre Against Family Violence, Victoria 'Family Violence, the Legal System and the Experiences of immigrant women' in 'Australian Domestic and Family Violence Clearinghouse, newsletter 44 Autumn 2011 at p9. Available at: [http://www.austdvclearinghouse.unsw.edu.au/PDF%20files/Newsletter\\_44.pdf](http://www.austdvclearinghouse.unsw.edu.au/PDF%20files/Newsletter_44.pdf)

- b. the fact that the right to protection of family and children is already recognised in section 11 of the HR Act.
11. We note that there is minimal information in the report as to why the right of peoples to self-determination should be excluded from the HR Act. We recognise that including this right in the HR Act would require detailed, specific analysis due to the particular nature of our Commonwealth.
12. Nonetheless, we refer the Human Rights Unit to recent research and writing relating the right to self-determination and how it could be protected in Australian law. As expressed by Amy McGuire:

The definition of self-determination under international law is necessarily flexible, as the right must be exercised in the particular circumstances, and for the benefit, of many distinct claimant groups. It has been recognised that self-determination is a right with many ‘faces’; rather than requiring the establishment of an independent state in all circumstances, self-determination may entail the exercise of group autonomy within the borders of an existing state. The claims to self-determination by Indigenous peoples around the world – and notably in Australia – take this form. They do not, therefore, pose a threat to Australian sovereignty. Rather, they demand recognition of the distinct status of Indigenous peoples, and their entitlement to determine their relationships with Australia as a state founded in colonialism.<sup>4</sup>

13. The WLC calls on the ACT Government to initiate discussion with the State, Northern Territory and Federal Governments regarding how the right of self-determination could be best protected in Australian law, including the option of including it in the HR Act.
14. Whilst the law must be concerned with the protection of the right of *all* peoples to self-determination, the WLC believes that the ACT Government, along with the ACT community, could do much more to promote the realisation of this right by Aboriginal and Torres Strait Islander peoples. We would be happy to discuss this further with the Unit, if appropriate.

### **How should ESCR operate?**

15. The WLC believes that the ESCR should operate in a similar way to the CPR currently protected by the HR Act. This includes the following aspects of operation.

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<sup>4</sup> Amy McGuire, ‘The Right of Self-Determination for Indigenous Peoples in Australia’ A submission to the National Human Rights Consultation, 15 June 2009. Available at: [http://www.humanrightsconsultation.gov.au/www/nhrcc/submissions.nsf/list/2FABBA695EA2296BCA2576070019F061/\\$file/Amy\\_Maguire\\_AGWW-7T26ZG.pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/submissions.nsf/list/2FABBA695EA2296BCA2576070019F061/$file/Amy_Maguire_AGWW-7T26ZG.pdf)

### ***Pre-legislative scrutiny of Bills***

16. Whilst there are many ESCR protections in *existing* ACT law and policies, the absence of ESCR in the HR Act means that *new* legislation is not required to include such protections. From an efficiency standpoint, this is problematic. For a community committed to upholding human rights, it is surely more efficient and effective to amend a bill in the process of its development to protect those rights and interests we consider most important.
17. Under the HR Act, all bills must be scrutinised for consistency with the rights set out in the Act. This framework could be considered a ‘preventative measure’ to ensure that the rights of those, particularly the marginalised and vulnerable, are taken into account in the legislative drafting process.
18. The ACT Government is to be commended on the fact that many existing laws and policies *are* compliant with ESCR. However, ensuring that the ESCR applies, like the CPR of the HR ACT, in the context of pre-legislative scrutiny of all Bills will provide the best chance of future-compliance with ESCR and CPR. It will also contribute to a political culture which puts human rights at the fore through direction consideration of how proposed changes to the law are likely to impact the rights of citizens.

### ***Human-Rights Consistent Interpretation: ensuring law is interpreted in a way that upholds Human Rights***

19. In a community where we value the human rights of all individuals, it makes sense that where there is uncertainty about the way a law should be interpreted, it is interpreted in a way that is consistent with human rights.
20. For this reason, we support recommendation 8 of the Report, that ESCR should be included as a standard for statutory interpretation.
21. Significantly, we note that the remedy currently available where such interpretation is *not* possible is not individually focused. For example, an individual who argues that a human right consistent interpretation is not possible cannot go on to claim damages. Rather, a declaration of incompatibility is made which requires the legislature to reconsider the relevant legislation, and determine whether it should be amended, or whether the exceptions available under the HR Act apply.
22. The WLC believes that this process provides a good balance between allowing individuals to raise the issue of human rights consistency in interpretation of laws, without providing an individual remedy where such inconsistency arises.
23. From a legal framework perspective, this process also offers an ongoing opportunity for review and revision of the laws on our books, in accordance with ever-evolving jurisprudence relating to human rights protection.

## Case Study

*Our client, a public housing tenant, was refused parole as the only property available for her to live in was the apartment she had lived in before she went to gaol and it was across the road from the business where she committed her crimes.*

### ***Binding Public Authorities: Protecting an individual's ability to enforce their human rights in the Supreme Court***

24. The WLC appreciates that legislation and government policies often incorporate ESCR protections. However, if ESCR are *only* contained in individual pieces of legislation, public authorities aren't obliged to uphold them in their day-to-day decision making. This represents a crucial gap in the ACT's human rights framework.
25. The WLC supports recommendation 7 of the Report which states that ESCR should apply, like the CPR of the HR ACT, to public authorities.
26. Legislative and policy changes occur on a daily basis. Whilst, in our proposal, future legislation will be scrutinised to ensure compliance with the ESCR in the HR Act, policy changes undergo no such scrutiny.
27. Although the ACT Government often undertakes broad-ranging consultation with stakeholders prior to changing law or policy, such consultation is always limited by resources. In reality, policy and legislative change undoubtedly occurs without consultation with all those who are, or will be, affected by such change. For example, those without children may be unlikely to participate in consultation about changes to primary education policy, but their lives may nonetheless be affected by it when they have school-age children.
28. Even taking account of formal or informal scrutiny that may occur prior to a Bill being passed or a policy being made, new legislation or policy cannot possibly foresee all the human rights implications relating to its operation.
29. Securing recognition of ESCR within the HR Act, and making such rights subject to a direct right of action, will ensure that individuals have the opportunity to call government authorities to account where legislation, policy or procedure, is not human rights compliant.
30. Nonetheless, many clients are understandably overwhelmed by the prospect of taking their matter to the ACT's highest court. In the WLC's experience, one of the most problematic aspects of the ACT's existing direct right of action is the marked absence of affordable legal assistance for individuals wishing to take their matter to the Supreme Court.
31. As discussed below, we believe that the most efficient and effective way to ensure that people are aware of, and make use of, their right to take action against public authorities is to provide the Human Rights Commissioner with a human rights complaints handling function.

## **Providing the Human Rights Commission with the power to conciliate human rights complaints**

32. The WLC strongly advocates for the introduction of a right to complain to the Human Rights Commissioner where it is alleged that a public authority has breached a human right recognised under the HR Act.
33. Complaints could be handled in a similar way to complaints of discrimination dealt with by the Commissioner under the *Discrimination Act 1991*. In our experience, this process has achieved positive results for both complainants and respondents.
34. At its most basic, this process involves the making of a written complaint which is investigated by an officer at the Human Rights Commission. The Commissioner has the discretion not to investigate trivial or vexatious complaints. If—after an investigation conducted on the basis of written material provided by all parties—the complaint appears to involve unlawful discrimination, the Commissioner will refer the complaint to conciliation.
35. In conciliation, both parties have the opportunity to explore opportunities for resolution of the complaint. Settlements of complaints often include an undertaking to change policy or to train staff in discrimination law, perhaps an apology or acknowledgement, and sometimes the payment of financial compensation. If a resolution cannot be reached through conciliation, the complainant has the right to ask the Commissioner to refer the complaint to the ACT Civil and Administrative Tribunal.
36. In the WLC’s experience, this process has the potential to achieve positive results for complainants and respondents in discrimination matters without the need to resort to a court process. Benefits of the conciliation process include the fact that:
  - a. self-represented complainants feel much more confident to present and discuss their matter in the relatively informal conciliation setting, compared to institute proceedings in a court or tribunal; and
  - b. conciliation allows a broad range of remedies to be sought and negotiated in the process of resolving a complaint.
37. Giving the Commissioner the power to investigate individual complaints about alleged breaches of human rights by public authorities could serve to empower complainants whilst allowing representatives from public authorities—often government officials— to engage with individuals seeking fulfilment of their rights. In the Centre’s view, the conciliation model offers a valuable opportunity to increase understanding on both sides about the difficulties involved in balancing and protecting human rights.

### *Equitable access to justice for self-represented litigants*

38. Much research attests to the fact that women are generally on lower incomes due to the gender wage gap, intermittent and part-time workforce attachments due to caring responsibilities, and occupational segregation in lower income industries.<sup>5</sup> As such,

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<sup>5</sup> For example, see: Cornelis Reiman, National Centre for Social and Economic Modeling, University of Canberra, ‘The Gender Wage Gap in Australia’ Discussion Paper no. 54 March 2001.

they are less likely to be able to afford the legal assistance necessary to instigate proceedings in the Supreme Court for breach by a public authority.

39. The Centre recognises that bodies such as the ACT Civil and Administrative Tribunal follow procedures which aim to promote accessibility and usability for self-represented litigants. In the Centre's opinion, this is not generally the case in the Supreme Court.
40. For many of the Centre's vulnerable clients, making an official complaint regarding breach of their legal rights is a watershed decision. In discrimination and sexual harassment matters there is almost always a sizeable power imbalance between the parties. This imbalance of power is generally replicated in the parties' unequal access to financial resources to fund legal advice and representation. As such, many clients only make a formal complaint because they know that they will have the opportunity to access conciliation. The majority of clients make it clear at the time of preparing their complaint that they intend to withdraw if conciliation fails, as they are not willing to represent themselves in tribunal proceedings against the respondent.
41. Whilst the WLC would welcome the opportunity to represent meritorious clients in court proceedings, we simply do not have the resources to do so. We know from experience that pro bono expertise and legal aid resources are also extremely limited in relation to human rights matters.
42. The WLC strongly believes that introducing a conciliation-based complaint mechanism for Human Rights matters would vastly improve the ACT's legal system. Whilst there would be additional costs for government in the form of funding for additional Commission staff, these costs would lead to a substantial increase in access to justice for all ACT citizens. A far more 'user-friendly' model of dispute resolution for human rights matters would promote efficient, effective resolution of complaints. This model also holds the promise of cost-savings in the long-term, due to avoidance of resource-intensive litigation involving government authorities.
43. We strongly commend the introduction of this model and would be happy to discuss our views with you in more detail, if appropriate.

#### *Conciliation of Human Rights matters – privatising Human Rights breaches?*

44. The WLC does have some concerns that directing complaints about breaches of human rights to conciliation may serve to privatise these matters. As the resolution of complaints through conciliation generally involves a confidential settlement, there is a limit to the impact that these complaints can contribute at a systemic level. This is also the case with the large numbers of discrimination complaints that settle privately and do not progress to determination in the Tribunal.
45. However, handling individual complaints of human rights breaches would also allow the Commissioner to more closely monitor the compliance of public authorities with the Act. The Commissioner would then be in a better position to provide feedback to the ACT Government about the interpretation and application of human rights, and systemic issues of concern, as provided for in section 14 of the HR Act.

## Case Study

*Our client states that she has experienced what she considers to be bullying and harassment in her workplace. She is a single mother, from the UK, who moved to Australia with her children. The harassment in the work place has lead to her isolation and feelings of frustration. She feels that this impacts on her right to work. The bullying and harassment does not relate to a ground protected under the Discrimination Act, and the client is completely overwhelmed by the idea of instituting proceedings in the Supreme Court as a self-represented litigant.*

## Managing community expectations

46. As stated in the consultation paper, we agree that it would be essential for the ACT Government to ‘manage’ community expectations regarding the content of specific ESCR rights. However, we also refer to the relatively low number of Human Rights cases brought before the courts since the introduction of the HR Act in 2004.
47. In the lead up to the introduction of the direct right of action in the Supreme Court 2009, there were significant concerns that these provisions would lead to overwhelming levels of litigation. However, this has not been the case.
48. Indeed, in the context of ‘managing’ community expectations regarding their human rights, we note that there are still very low levels of understanding in many parts of the community about what the HR Act means for individuals. The WLC continues to advocate for an increase in resources for the Human Rights Commissioner, our Centre and other organisations to:
  - a. inform individuals about their human rights through community legal education programs;
  - b. provide legal advice to clients regarding protection of their rights; and
  - c. ensure individuals can access free or affordable legal representation, including pro bono legal assistance from private firms, in preparing and appearing before ACAT and the Supreme Court (noting that demand for such assistance may fall if a conciliation model is introduced in the context of human rights complaints).

Once again, the WLC thanks the Human Rights Unit for the opportunity to comment on this important set of issues relating to the Territory’s ability to uphold the human rights of all its citizens, without distinction.

If you would like to discuss any aspect of this submission, please contact Heidi Yates, at the Women’s Legal Centre in Canberra on (02) 6257 4377 or [hyates@womenslegalact.org](mailto:hyates@womenslegalact.org)

Yours sincerely,  
Women’s Legal Centre (ACT & Region)