

Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Dear Committee Secretary

Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia

Introduction

1. The ACT Human Rights Commission (the 'ACT HRC') welcomes the opportunity to make a submission on the application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia.
2. The ACT Human Rights Commission is an independent agency established by the Human Rights Commission Act 2005 (HRC Act). Its main object is to promote the human rights and welfare of people in the ACT. The HRC Act became effective on 1 November 2006 and the Commission commenced operation on that date. Since 1 April 2016, a restructured Commission has included:
 - a. The President and Human Rights Commissioner;
 - b. The Discrimination, Health Services, Disability and Community Services Commissioner;
 - c. The Public Advocate and Children and Young People Commissioner;
 - d. The Victims of Crime Commissioner
3. As independent statutory office holders with key oversight responsibilities for the promotion of human rights and welfare of people in the ACT, the Commission is interested in ensuring that international human rights law norms and obligations, including those in the UNDRIP, inform the development of Territory law, policy and administrative decision making.
4. The ACT was the first Australian jurisdiction to legislate for a human rights statute – *the Human Rights Act 2004* (HR Act). The Act provides recognises a range of civil, political, economic, social, and cultural rights,¹ requires that all legislation be assessed for compatibility with those rights,² and that all public authorities have obligations to act compatibly with those rights and give them proper consideration when making decisions.³ Individuals may start a proceeding in the Supreme Court where they claim their rights have been breached or rely on their human rights in other legal proceedings where they are relevant to the outcome sought.⁴ The Act provides a framework for balancing the rights by stating that rights can be subject to reasonable limitations set by law that are demonstrably justifiable in a free and democratic society.⁵ Courts are required to interpret legislation in a way that is consistent with human

¹ *Human Rights Act 2004*, part 3.

² *Human Rights Act 2004*, s 37

³ *Human Rights Act 2004*, s 40B.

⁴ *Human Rights Act 2004*, s 40C.

⁵ *Human Rights Act 2004*, s 28.

rights and can have regard to international human rights instruments in understanding human rights, including the UNDRIP.⁶ Where laws are unable to be interpreted consistently with human rights, the Supreme Court may issue a declaration of incompatibility which triggers a process of Government reporting to the Legislative Assembly.⁷

5. These processes give effect to the 'dialogue' model of human rights protection where the courts, executive and Legislative Assembly have a role to play in protecting rights, but which ultimately upholds the ability of the parliament to make laws that are inconsistent with human rights.
6. Victoria and recently Queensland have followed to introduce human rights legislation that adopt a similar structure to that of the ACT legislation.
7. Relevantly for this inquiry, all three state and territory human rights instruments recognise the distinct cultural rights of Aboriginal and Torres Strait Islander peoples, and in doing so apply aspects of the UNDRIP into domestic law.
8. This submission provides a short history of the amendments to adopt recognition of indigenous cultural rights into s 27(2) of the HR Act and the impact that they have had on ACT government administration in support of the Committee's consideration of term of reference (f).

History of s 27(2) HR Act

9. Cultural rights are recognised in s 27 of the *Human Rights Act 2004* (HR Act) which states that:

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

(1) Anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language.

10. In 2015 the Human Rights Amendment Bill 2015 was introduced to introduce recognition of cultural rights of Aboriginal and Torres Strait Islander peoples in the ACT. This followed calls for greater acknowledgement of economic, social and cultural rights in the Territory's human rights framework. The expanded s 27(2) of the HR Act recognises:

(2) Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied the right—

(a) to maintain, control, protect and develop their—

- (i) cultural heritage and distinctive spiritual practices, observances, beliefs and teachings; and
- (ii) languages and knowledge; and
- (iii) kinship ties; and

(b) to have their material and economic relationships with the land and waters and other resources with which they have a connection under traditional laws and customs recognised and valued.

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

11. The wording of s 27(2), which built on the Victorian provisions in s 19(2) of the *Charter of Rights and Responsibilities Act 2006* (based on article 27 of the United Nations Declaration of the Rights of

⁶ *Human Rights Act 2004*, s 30; 31.

⁷ *Human Rights Act 2004*, s 32; 33.

Indigenous Peoples (UNDRIP),⁸ also reflects articles 25 and 31 which provide for the recognition and protection of unique and distinct first nations spiritual, material and economic relationships with land and waters and their cultural expressions of these relationships.

12. Culture is not defined in this provision and therefore takes its ordinary wide meaning, “which would encompass the language, spirituality, membership, arts, literature, traditional knowledge, customs, rituals, ceremonies, methods of production, among many other aspects of the life of Aboriginal and Torres Strait Islander peoples”.⁹
13. The exact form of this section was developed in consultation with both the ACT HRC and the ACT Aboriginal and Torres Strait Islander Elected Body, being the representative voice of the indigenous community in Canberra to the ACT government established under the *Aboriginal and Torres Strait Islander Elected Body ACT 2008*.¹⁰
14. The bill also included a change to the preamble of the HR Act to change a reference to the special significance of rights to ‘indigenous people’ to ‘Aboriginal and Torres Strait Islander peoples’ and change which recognised that Aboriginal and Torres Strait Islanders should not be represented as a homogenous group with a uniform cultural heritage and identity, but rather acknowledged and recognised as being a diverse group of peoples with differing histories, aspirations and relationships.¹¹
15. After presentation the Bill was referred to the Standing Committee on Justice and Community Safety for inquiry in part, because of concerns about:
 - a. whether specific mention of the rights of Aboriginal and Torres Strait Islanders cut across the right to equality and non-discrimination
 - b. whether it was appropriate to draw on the UNDRIP as a source for the provision, given its non-binding status
 - c. whether the provision could have unintended legal consequences in relation to intellectual property and native title.
16. The ACT HRC provided a submission to the inquiry addressing these concerns, including noting that all rights must be balanced through a process of justification of reasonable limits, and that special measures support equality. The submission detailed the importance of the UNDRIP as a declaration formalising other existing norms of international law or aspects of human rights provided for by other treaties which already applied to Australia.¹²
17. The submission noted that the benefits of explicit recognition would “provide a positive mechanism for meaningful and inclusive engagement with the Aboriginal and Torres Strait Islander community in the

⁸ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill, As sent - 16 June 2006, available at legislation.vic.gov.au, p 15.

⁹ ACT Attorney-General Simon Corbell, MLA, Presentation Speech – Human Rights Amendment Act 2015, 26 March 2015, available at Hansard - ACT Legislative Assembly

¹⁰ ACT Aboriginal and Torres Strait Islander Elected Body, Submission no 3, Inquiry into the Human Rights Amendment Bill 2015, 18 August 2015, available at [Sub-No.3-Aboriginal-and-Torres-Strait-Islander-Elected-Body.pdf \(act.gov.au\)](http://Sub-No.3-Aboriginal-and-Torres-Strait-Islander-Elected-Body.pdf(act.gov.au)), p 2.

¹¹ Revised Explanatory Statement, Human Rights Amendment Bill 2016, clause 4.

¹² ACT Human Rights Commission, Submission no 1, Inquiry into the Human Rights Amendment Bill 2015 (28 July 2015), available at Sub-No.1-ACT-Human-Rights-Commission.pdf.

ACT, and promote greater transparency and accountability for decision-making with regard to some of the most vulnerable people in our community”.¹³

18. The final questions in the inquiry were impacted by the challenges of the uncertainty between Commonwealth jurisdictions such as copyright and intellectual property laws and native title and the operation of Territory laws including s 27(2) HR Act. In this regard the ACT HRC acknowledge the value of a national approach to the adoption and realisation of UNDRIP by the Commonwealth Government which could more explicitly and conclusively deal with key issues relating to the control, maintenance, development and protection of Aboriginal and Torres Strait Islander cultural heritage than is possible in the Territory because of the division of legislative powers established under the Constitution.
19. The Victorian Equal Opportunity and Human Rights Commission also submitted that the value and significance of Aboriginal cultural rights is well documented. The Expert Mechanism on the Rights of Indigenous Peoples highlighted in its Study on the role of languages and cultures in the promotion and protection of the rights and identity of Indigenous peoples that 'languages and cultures will only flourish in environments when they are more broadly respected in their own right and for their contribution to an understanding of humanity'.¹⁴
20. The Committee ultimately took the view “that Indigenous rights would be a good and useful addition to the developing HRA, particularly noting the comments of the ATSIEB about their significance for the ACT’s Indigenous community”.¹⁵
21. The Bill was supported unanimously by each party in the Assembly and came into effect 26 February 2016.

Examples of how UNDRIP is being realised through s 27(2) HR Act

Litigation

22. The cultural rights of Aboriginal and Torres Strait Islanders are starting to be considered in litigation. For example, in the case of *Brown, Crowe* AJ of the ACT Supreme Court concluded that compatibility with s 27 of the HR Act requires that the access to regular detainee health checks should, for an Aboriginal or Torres Strait Islander person, be with a culturally appropriate medical service provider when it is possible.¹⁶
23. That is cultural rights recognised in s 27(2) must be taken into account in the interpretation of general legislative requirements - for example the requirement that a prisoner be provided with equivalent access to health care as generally available in the community would need to be interpreted to require

¹³ ACT Human Rights Commission, Submission no 1, Inquiry into the Human Rights Amendment Bill 2015 (28 July 2015), available at [Sub-No.1-ACT-Human-Rights-Commission.pdf](#), p 4.

¹⁴ Victorian Equal Opportunity and Human Rights Commission, Submission no 2, Inquiry into the Human Rights Amendment Bill 2015, 7 August 2015, available at [Sub-No.2-Victoria-Equal-Opportunity-and-Human-Rights-Commission.pdf \(act.gov.au\)](#) p 3 citing Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples: Study on the role of languages and cultures in the promotion and protection of the rights and identity of indigenous peoples, UN Doc A/HRC/EMRIP/2012/13 (2012), 21.

¹⁵ Standing Committee on Justice and Community Safety, Report 5 - Inquiry into the Human Rights Amendment Bill 2015, (November 2015) [2.272].

¹⁶ *Brown v Director-General of the Justice and Community Safety Directorate* [2021] ACTSC 320 (17 December 2021) [231]

that those equivalent services are culturally suitable and consistent with maintaining and protecting the cultural identity and kinship ties of Aboriginal and Torres Strait Islander people.¹⁷

24. While the Court held that the services provided to the plaintiff in this case met this standard and therefore that there was no breach of the section 27(2) rights, the case highlights the real impact and influence of reflecting the principles of UNDRIP in the HR ACT.
25. At a policy level ACT Corrective Services has acknowledged cultural rights in its ACTCS Aboriginal and Torres Strait Islander Policy Statement 2020 which outlines its vision to support Aboriginal and Torres Strait Islander detainees by adopting culturally appropriate model of care and working with Aboriginal community-controlled providers.¹⁸ In this case Winnunga Nimmityjah Aboriginal Health and Community Services (WNAHCS) had been contracted to provide access to culturally suitable health care within the correctional centre.

Advocacy around cultural rights

26. The ACT Human Rights Commissioner wrote to the Minister for the Environment and heritage in 2019 about the reported destruction of two Aboriginal scar trees in southern ACT in 2017.¹⁹
27. The letter outlined the clear breach of the destruction of those trees of the cultural rights of the local Ngunnawal custodians. In one case the responsible party was not identified, and in the other the destruction was attributed to the error of a contractor working for the Education directorate.
28. The letter noted that s40B of the HR Act requires public authorities, including all ACT Government ministers, agencies and entities that perform functions on their behalf, to act and make decisions consistently with human rights, including Aboriginal cultural rights. The removal of the trees suggested a lack of appropriate physical controls, such as signage and fencing, and community education to protect Aboriginal scarred trees from damage or destruction. The Commission stated that the Government's obligations under the HR Act will require it explore all reasonable options to prevent any further unauthorised felling of Aboriginal scarred trees in future.
29. The Commission called for the Government to explore appropriate options for enforcement, deterrent and education, in consultation with representative Aboriginal organisations, including introduction of an infringement notice scheme for destruction of Aboriginal cultural heritage.
30. Following this advocacy and community concern, the ACT government committed to strengthen enforcement mechanisms to improve compliance following those incidents.²⁰
31. The Government introduced the Heritage Amendment Bill 2019 "to make a range of amendments to strengthen the way damage to heritage places and objects can be dealt with to both deter people from doing damage in the first place and to make them responsible for repairing any damage to heritage places or objects".²¹ This Bill passed on 18 February 2020.

¹⁷ *Brown v Director-General of the Justice and Community Safety Directorate* [2021] ACTSC 320 (17 December 2021) [219;227].

¹⁸ ACT Justice and Community Safety Directorate, *ACTCS Aboriginal and Torres Strait Islander Policy Statement 2020*, available at [ACTCS Aboriginal and Torres Strait Islander Policy Statement 2020.pdf](#)

¹⁹ Jake Evans, ABC News, [Scar trees of significant value to Canberra's Indigenous community 'wrongly removed' - ABC News](#), 27 June 2017.

²⁰ *Legislative Assembly for the ACT: 2019 Week 10 Hansard (Thursday, 19 September 2019)* p 3608 (Minister for the Environment and Heritage)

²¹ Revised Explanatory Statement, Heritage Amendment Bill 2019, available at [\(act.gov.au\)](#)

Culturally appropriate services – ACT HRC Cultural Safety Charter

32. The ACT HRC has developed a cultural safety charter – Ngattai yeddung (Ngunnawal words for ‘listen good’) that is informed by s 27(2) of the HRC and the UNDRIP.²²
33. The ACT HRC decided it wanted to move beyond the Reconciliation Action Plan and committed to develop a cultural safety charter to embed s 27(2) cultural rights in the everyday operations of the ACT HRC.
34. The term ‘cultural safety’ was originally developed in the 1980s in New Zealand. The concept was proposed by Maori midwifery students in response to feeling unsafe within the predominantly Anglo educational setting that they were being trained in.
35. In developing the charter, the Commission engaged with all staff in the Commission to get their input, we also established a reference group of Aboriginal and Torres Strait Islander community members, to provide guidance through the development and implementation of the charter.
36. The Commission also talked to a number of people in the community and we also looked at what other organisations were doing like AIDA – Australian Indigenous Doctors Association, VACCHO – Victorian Aboriginal Community Controlled Health Organisation, CATSINaM – Congress of Aboriginal and Torres Strait Islander Nurses and Midwives, NATSIHWA – National Aboriginal and Torres Strait Islander Health Workers Association, that have cultural safety plans and frameworks in place, and the Australian Human Rights Commission.
37. The Charter states that the ACT Human Rights Commission provides our clients, staff and colleagues with a safe, nurturing and positive environment where Aboriginal and Torres Strait Islander peoples are respected. Cultural rights and spiritual values accepted by Aboriginal and Torres Strait Islander peoples, are supported by our values, processes and policies to ensure culturally safe services, as defined by people using the service.
38. The Charter acknowledges that Aboriginal and Torres Strait Islander peoples have a right to self-identity and respect for their cultural rights which derive from UNDRIP and are reflected in s 27(2).
39. Those rights require that our services be delivered in a welcoming way, that we engage with trust and respect and that the services we provide are culturally safe.

Public place names

40. The ACT Public Place Names (Naming of public places) Guidelines 2021 made under the *Public Place Names Act 1989* reflect that article 13 of the UNDRIP is a relevant consideration in naming a place. This article provides that ‘Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons’.
41. The UN Committee on Economic, Social and Cultural Rights has expressed the importance of culture as:

“the customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives. Culture shapes and

²² ACT Human Rights Commission, Cultural Safety Charter (2019) available at [HRC-Cultural-Safety-Charter-Plan-July-2019_web.pdf \(act.gov.au\)](https://www.act.gov.au/hrc/cultural-safety-charter-plan-july-2019-web.pdf)

mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities".²³

42. The broader s 27 HR Act rights are also relevant and must be considered as part of the naming of public places by the Minister having regard to the advice of the Public Place names committee. The terms of reference for the committee support the realisation of s 27 rights, by requiring the appointment of defined members including an Indigenous representative and a person with a background in Aboriginal and/or Torres Strait Islander cultures.
43. The Guidelines are legislative and set out mechanisms by which Aboriginal place names should be retained or reinstated. The Commission considers these guidelines could be strengthened by explicitly setting out processes for consultation with 'the relevant Aboriginal community' and how places names can be supported by public education and awareness of the cultural heritage that grounds the traditional place name. This might look like interpretative materials, such as signs or public awareness campaigns, developed in consultation with relevant Aboriginal communities, that explain the origin, stories and heritage of Aboriginal names to further maintain and develop the cultural heritage associated with Territory landmarks as required by s 27 (2).
44. The Commission is hopeful that a current inquiry of the ACT Legislative Assembly,²⁴ will find that there should be systems in place that support the greater use of dual place names where there are landmarks or geographical features which have been named, but which have significance to local Aboriginal people, as recognised in section 14 of the Public Place Names Guidelines. The Commission considers that this work to reflect the original names of places be proactively conducted on an ongoing basis by the committee in order that the right to have Aboriginal cultural heritage and language protected is upheld.

Enforceability of cultural rights

45. Empowering the community to exercise cultural rights by making a complaint to the ACT HRC and participating in conciliation is one way that these rights could be better realised.
46. The Commission, along with a wide range of community organisations, advocacy groups and members of the public for the ACT Government to introduce a human rights complaints pathway. That petition is currently the subject of a current inquiry of the ACT Legislative Assembly.²⁵
47. One of the main barriers to the exercise and application of cultural rights to realise UNDRIP in domestic law is the lack of an accessible pathway to challenge breaches of cultural rights. Currently the HR Act requires an individual to start a human rights civil proceeding in the Supreme Court or to raise human rights in other legal proceedings. This is both inaccessible and adversarial and the range of outcomes that can be obtained as a remedy through this process is limited.
48. As noted in our submission to the inquiry the ACT HRC believes that a human rights complaints pathway would provide an efficient, informal and accessible forum for people to seek resolution of their human rights complaints.²⁶ It would also significantly enhance the restorative potential of the HR Act and

²³ UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21

²⁴ ACT Legislative Assembly, Standing Committee on Economy and Gender and Economic Equality, *Inquiry into memorialisation through public commemoration*, [Inquiry into memorialisation through public commemoration - ACT Legislative Assembly](#).

²⁵ ACT Legislative Assembly, Standing Committee on Justice and Community Safety, *Inquiry into Petition 32-21 (No Rights Without Remedy)*, [Inquiry into Petition 32-21 \(No Rights Without Remedy\) - ACT Legislative Assembly](#).

²⁶ ACT Human Rights Commission, Submission no 6, *Inquiry into Petition 32-21 (No Rights Without Remedy)*, available at [ACT Human Rights Commission](#).

support several wellbeing indicators across several domains. A human rights complaints pathway would provide the opportunity for parties to meet in a relatively informal setting outside of court where power imbalances would be less pronounced; where parties could more directly communicate with and listen to each other; and, where they could be better supported to resolve the complaint and prevent the issues reoccurring in the future.

49. Remedies negotiated outside the court process have more potential to be innovative and tailored to the situation, further enhancing the restorative potential of the process. The Commission has both the expertise in human rights law and alternative dispute resolution to conduct conciliation for human rights disputes between public authorities and individuals affected by their actions and decisions.
50. The Queensland *Human Rights Act 2019* includes such a complaints process. We note that their Annual Report includes a case study of how a complaint about a breach of Aboriginal cultural rights was resolved in relation to traditional owners who were protesting on a pastoral lease against a mine and who were told to move on by Queensland Police in a way that was incompatible with their cultural rights and responsibilities. Following conciliation, the Queensland Police Service provided a public statement of regret and took action to better consider cultural rights in future responses.²⁷
51. Such a right of access to and prompt decision through just and fair proceedings for the resolution of conflicts and disputes, as well as to effective remedies, is required by article 40 of UNDRIP.

Conclusion

52. The ACT HRC strongly supports the Federal Parliament introducing legislation to give effect to UNDRIP in national law and considers that it is a regrettable that no concrete steps have been taken at a Federal level to give effect to the UNDRIP which the Federal Government ratified over a decade ago. We note that the UNDRIP may be considered informally in the human rights scrutiny processes of the Parliamentary Joint Committee on Human Rights, but it is not one of the seven defined international human rights instruments that establishes the rights and freedoms which are to be taken into account in the scrutiny of legislation by the committee under its legislation.²⁸
53. Ideally the new Federal Government would pick up work started with the National Human Rights Consultation to introduce a national bill of rights for Australia that could incorporate direct protections not only of the rights realised in UNDRIP but other civil, political, economic, social and cultural rights set out in treaties to which Australia is a party. In the interim, amending the definition of 'human rights' to incorporate the UNDRIP under the *Human Rights (Parliamentary Scrutiny) Act 2011* would be one simple way of realising UNDRIP through the scrutiny of federal Australian laws.
54. The introduction of recognition of Aboriginal and Torres Strait Islander cultural rights in s 27(2) of the HRA (modelled in part on the provisions of UNDRIP) are beginning to shape government policy and decisions in the ACT courts. These rights are not only symbolic but will continue to influence the way in which government supports, recognises and values Aboriginal and Torres Strait Islanders in the ACT.

²⁷ Ibid, p 162.

²⁸ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cwlth) s 3(1).

55. While this is a modest first step, the ACT HRC has observed the benefits that could flow from explicitly recognising international human rights norms through application of UNDRIP in domestic law. The ACT HRC considers that further reform to fully implement the suite of rights under UNDRIP, nationally, will be vital to supporting Aboriginal and Torres Strait islander sovereignty, self-determination and true equal inclusion in Australian society.

We thank the Committee for the opportunity to provide this submission.

Yours sincerely

Dr Helen Watchirs OAM

President and Human Rights Commissioner