

# **PRICELESS: THE RIGHT TO EDUCATION?**

**CHARGING FEES FOR CHILDREN & YOUNG PEOPLE ATTENDING ACT PUBLIC SCHOOLS**

**A REPORT BY THE ACT HUMAN RIGHTS AND DISCRIMINATION  
COMMISSIONER**

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## **Executive Summary**

The Human Rights and Discrimination Commissioner has previously raised concerns with the ACT Education and Training Directorate (ETD) about its policies to charge certain international students on various visa subclasses to attend ACT public schools (K-12).

There are various international students affected by these policies. These range from students who actively choose to enrol offshore and pay fees, after receiving 'marketing' information about the benefits of studying in ACT public schools, to those who seek to enrol onshore, and may not be provided with the same level of information. These can include children and young people granted refugee status, and those seeking asylum status while living in Canberra.

According to the ETD, families enrolling offshore are advised by the Department of Immigration and Border Protection that there may be a cost for education, however those who enrol onshore may not be aware of the specific cost of education in each Australian jurisdiction. Some students have limited options as to which country, and how, they obtain school education.

The various circumstances of these students are relevant to the reasonableness and proportionality of the ETD's policies under human rights and discrimination law.

The Commissioner and her staff worked with the ETD over a period of two years to develop new policies and procedures that better met the Directorate's human rights and discrimination law obligations, and ensure improved communication between students, families and schools.

The Commissioner would like to thank the ETD for its constructive approach to this dialogue and reform. The Commissioner believes these new policies and procedures are a significant improvement and provide a fairer opportunity for international students to access ACT public schools. Coupled with further practice improvements, the ETD is likely a leading jurisdiction in this area in Australia.

## **Summary of Legal Framework**

### ***Human Rights Act***

The ACT *Human Rights Act 2004* ('HR Act') applies to all individuals who are present on ACT territory and subject to the ACT's jurisdiction, regardless of their immigration status.

Section 8(3) of the HR Act enshrines the right to equal protection of the law without discrimination. It prohibits discrimination in law or in practice in any field regulated by public authorities. The term 'discrimination' means any distinction, exclusion, restriction or preference, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

Section 27A of the HR Act specifically guarantees (among other things) the right to access free school education without discrimination.

The rights in the HR Act may be subject to reasonable limits in accordance with s 28 of the HR Act. In short, limitations on rights must be reasonable, necessary and proportionate to a legitimate objective. The ACT Government (and not the Commissioner) bears the onus of demonstrating that a limitation is justifiable.

Under s 31 HR Act, it is appropriate to interpret the rights in the HR Act consistently with international law. Article 13(2)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 28(1)(a) of the Convention on the Rights of the Child (CRC) both state that primary education shall be compulsory and available free to all. In addition, secondary education must be 'generally available and accessible', with the expectation that steps are taken towards the progressive introduction of free secondary education. Tertiary education must be equally accessible, relative to a state's capacity.

Therefore, the following minimum threshold requirements must be satisfied in order to achieve compatibility with the right to education:

- primary education must be free and compulsory for all; and
- access to public educational institutions and facilities must be provided on a non-discriminatory basis.

### ***Discrimination Act***

Under s 18 of the ACT *Discrimination Act 1991*, it is unlawful for the ETD, as an education authority, to discriminate against a person in the terms or conditions on which they are admitted as a student. Protected grounds under the Discrimination Act include race and disability. Discrimination can take the form of both direct and indirect discrimination. The charging of students based on their immigration status raises issues of indirect discrimination in particular. Indirect discrimination can only be lawful if it can be shown to be reasonable.

### **Summary of Outcomes**

As a result of collaborative work between the Commissioner and the ETD, the Directorate has created a more nuanced, and simpler approach to the charging of tuition fees. These new policies emphasise that public school is **free for all students**, with a smaller number of exceptions for temporary residents. Students that the Government now makes clear will receive **free** schooling include:

- dependents of Australian citizens or permanent residents. Refugee, Humanitarian and Permanent Protection visa holders are permanent residents of Australia
- asylum seekers on bridging visas and those on temporary protection visas
- diplomats
- Australian government scholarship holders
- Commonwealth assisted students or dependants of students whose tuition fees are fully paid by a publicly funded Australian higher education provider
- students enrolled post graduate studies at a publicly funded Australian higher education provider
- professional academics visiting Australia to observe or participate in established research projects or employment at the invitation of an Australian tertiary institution or research organisation operating in the ACT
- officers involved in government-to-government exchanges or reciprocities
- exchange students under organisations that are on the Registration of Secondary Student Exchange Organisations in the ACT as detailed in the Guidelines for International Secondary Student Exchange Programs.

The only students that *may* pay for school are dependents of temporary residents on certain visa subclasses in the 100, 300, 400, 500, 600, 800 and 900 visa subclass series. The ETD will maintain an accurate and frequently updated list on its website.

As discussed below, in order for a limitation on rights to be lawful, that limitation must be shown to be proportionate. This requires the limitation to be the least restrictive limitation on that right and be rationally connected to a legitimate purpose. The new criteria for the ETD charging students is clearly and arguably more proportionate than the former policy. Even for those students who may be charged, the ETD has implemented a more comprehensive appeals system. In summary, these policies ensure a simple message at the school and community level, and make the scheme more reasonable under law.

These changes ensure the ETD is complying more comprehensively with its obligations under human rights and discrimination law. It is also likely to save considerable administrative costs in the current scheme of waiver applications and confusion at the school level about entitlements to enrol.

## **Background**

In November 2009, the Commissioner raised concerns about draft policies concerning the charging of fees by the then ACT Department of Education and Training. In particular, the Commissioner expressed concerns that the policies may unreasonably limit the human rights contained in the *Human Rights Act 2004* (HR Act), and could also constitute unlawful discrimination under the *Discrimination Act 1991* (Discrimination Act).

The Education and Training Directorate made some changes to these policies. However, in the subsequent period, members of the community continued to raise these issues with the Commissioner, and the charging of certain members of the community has been the subject of Review by other bodies interstate.<sup>1</sup>

The Commissioner has the power under s 41 of the HR Act to review the impact on human rights of ACT law, and under the Discrimination Act and the *Human Rights Commission Act 2005* to undertake Commission-initiated considerations of matters relevant to her functions. In 2013, the Commissioner elected to use these powers to undertake Human Rights and Discrimination Act Reviews of the impact of the ETD's *International Fee Paying Students and the Enrolment of non-Australian Citizens or non-Permanent Residents – Charging policies*.

## **Consideration in Other Jurisdictions**

Organisations in other jurisdictions have considered these issues. In 2012, the Victorian Equal Opportunity and Human Rights Commission released the Report, *'In the Best Interests of the*

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<sup>1</sup> See for example 'In the best interests of the child? Costs of primary education for dependents of international students and other visa holders in Victoria - Aug 2012', Victorian Equal Opportunity and Human Rights Commission, August 2012, <http://www.humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/reports/item/149-in-the-best-interests-of-the-child-costs-of-primary-education-for-dependents-of-international-students-and-other-visa-holders-in-victoria-aug-2012>

*Child?* Like the ACT, Victoria has a human rights charter, as well as anti-discrimination legislation covering race discrimination. The Report concluded:

*'The provision under the Education and Training Reform Act to charge school fees for dependents of some international students is inconsistent with the positive duty to eliminate discrimination under the Equal Opportunity Act 2010, and sections 8 and 17 of the Charter of Human Rights and Responsibilities Act 2006, and with Australia's obligations under Article 28(1)(a) of the Convention on the Rights of the Child.'*

However, it should be noted that there are differences between the ACT and Victorian legislation in this area:

- The Victorian *Charter of Rights and Responsibilities Act 2006* does not contain the 'right to education' as is the case in s 27A of the ACT HR Act.
- The Victorian *Education and Training Reform Act 2006* does not provide any discretion in the charging of international students, but rather mandates such fees be charged, with students who do not pay automatically expelled.
- The Victorian *Equal Opportunity Act 2010* places a positive obligation on Victorian Government agencies to eliminate discrimination.

## **Human Rights Obligations**

The HR Act was the first legislative bill of rights to be introduced in any State or Territory in Australia, and came into effect on 1 July 2004. The HR Act applies to all individuals in the ACT, and protects a range of human rights, primarily drawn from the International Covenant on Civil and Political Rights (ICCPR).<sup>2</sup> In 2012, the HR Act was amended to introduce the right to education, the first right drawn from the International Covenant on Economic Social and Cultural Rights (ICESCR),<sup>3</sup> with effect from 1 January 2013.

The rights under the HR Act are given effect in the ACT through a number of mechanisms. Under s 30 all Territory laws must be interpreted by all decision-makers (not just courts) in a way that is compatible with human rights, so far as it is possible to do so consistently with the purpose of the law.

Section 40B of the HR Act places certain obligations on ACT Government directorates, including the Education and Training Directorate, and states in part that:

*(1) It is unlawful for a public authority—*

*(a) to act in a way that is incompatible with a human right; or*

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<sup>2</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>3</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).



*(b) in making a decision, to fail to give proper consideration to a relevant human right.*

Section 40B(2) provides an exception where the law requires a public authority to act in a particular way or the law cannot be interpreted to be consistent with human rights.

In previous submissions on the issue, the Commissioner raised concerns that the charging of fees for particular international students could engage the right to equality before the law (s 8), and protection of family (s 11(1) and children (s 11(2)) of the HR Act. Further, on 1 January 2013 section 27A commenced, enshrining the new right to education, but this right can only currently be used to interpret ACT legislation (ie there is no direct application to public authorities like other existing rights). There are amendments currently before the ACT Legislative Assembly to extend public authority duties to the right to education as well.

## **Discrimination Act Obligations**

The Discrimination Act prohibits discrimination in areas of public life in relation to a range of attributes including sex; sexuality; gender identity; relationship status; status as a parent or carer; age; pregnancy; breastfeeding; race; religious or political conviction; and disability.

Discrimination may be direct, where a person is treated unfavourably because of the attribute; or indirect, where a condition or requirement is imposed that has, or is likely to have, the effect of disadvantaging people because they have an attribute, and the condition or requirement is not reasonable.

Under s 18 of the Discrimination Act, it is unlawful for the ETD, as an education authority, to discriminate against a person in the terms or conditions on which they are admitted as a student. These obligations are complementary and additional to those under Federal law, including under the *Racial Discrimination Act 1975* and *Disability Discrimination Act 1992*. However, the focus of this Report is on the application of the ACT Discrimination Act.

## **Methodology**

In preparing this Report, the Commissioner has drawn upon:

- Former complaints and enquiries made by individuals to the Commission;
- Engagement with Refugee and Asylum networks, non-government organisations and support agencies who have informed us of particular situations they have dealt with;
- Interviews with several families about their experience in relation to the ETD's fee charging policies and practices;
- Input and responses from the ETD throughout.

The Commissioner acknowledges the assistance of the ETD in preparing this Report, and is grateful for the time organisations and families took to speak to us about their experiences.

## Legal Authorisation to Charge

Section 26 of the ACT *Education Act 2004* allows the ETD to charge temporary visa holders under s 30(2) of the Commonwealth *Migration Act 1958*. Section 30(2) of the Migration Act provides that:

(2) A visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a temporary visa, to remain:

- (a) during a specified period; or
- (b) until a specified event happens; or
- (c) while the holder has a specified status.

The ETD developed policies and related information to provide guidance on how this power will be utilised. These are based on the Directorate's distinction between two categories of international students:

- Those who enrol offshore to receive tuition at government schools on a full, or partial, cost recovery basis. Students in the first category are usually primary visa holders under the Commonwealth's student program (subclass 571).
- Those who enrol onshore, have already obtained a right to remain in Australia. The ETD suggests that this includes those who are dependents of family members who have entered Australia to enter the market for education services at a tertiary level or gain employment in occupations for which demand may be limited.

The Commissioner is mindful that much of the complexity in this area is due to Australia's migration law, and the changing policy context and numbering of visa subclasses by the Australian Government.

## Former Policy: Enrolment of Non-Australian Citizens Or Non-Permanent Residents – Charging Policy

The ETD had a policy entitled '*Enrolment of Non-Australian Citizens or Non-Permanent Residents – Charging Policy*' ('The Charging Policy'). A wide range of visa holders are automatically exempted from payment under para 1.4 of this Policy, including:

- Dependents of Diplomats;
- Australian Government scholarship holders;
- Commonwealth assisted students or dependent students whose tuition fees are fully paid by a publicly funded Australian higher education provider;
- Professional academics visiting Canberra;
- Officers involved in government-to-government exchanges or reciprocities;

- Exchange students;
- Holders of humanitarian or protection visa ('refugees'); and
- Holders of visa subclasses 457 and 475 ('skilled migrants').

The Charging Policy further provides in considering a fee waiver, ETD will consider:

- The nature of the temporary visa;
- Any visa conditions in relation to the payment of tuition fees;
- The circumstances of the applicant;
- Any changes in the applicant's circumstances since the applicant first arrived in Australia; and
- Any other relevant factor.

However, the Charging Policy was silent on which visa subclasses may apply for a waiver, as the changing policies at the Australian Government level around the numbering and type of visa subclasses makes this unviable.

The ETD advised that it directed applicants to the Charging Policy for details of appeal rights if their application was refused. Clause 5.2 required that an appeal must be in writing. The ETD further advised that this was not translated into other languages. The ETD noted that if interpreter services are required, the ETD will contact the Translating and Interpreting Services (TIS) for assistance, but that 'most temporary residents prefer to bring their own interpreter who is usually also an advocate for them.' However, it was reported to the Commission that generally interpreting services were not sufficiently utilised by ACT public schools, leading to confusion amongst families that were not proficient in English across a range of areas beyond fee charging.

As a result of this feedback, the ETD has agreed to encourage telephone interpreter use in schools and examine translating relevant information into other languages. This includes new arrangements allowing anyone requiring translation assistance to call the Directorate through the Translating and Interpreting Service free of charge.

This former Policy also refers to another ETD Policy, the '*International Fee Paying Students Policy*' (International Students Policy).

## **International Fee Paying Students Policy**

The International Students Policy provided 'a framework for action when dealing with international fee paying students enrolling in ACT public schools'. The Policy provides school staff with the applicable procedures for the administration and management of the program. This Policy only applies to students who enrol in an ACT public school from overseas. This Policy is retained under the framework.

This Policy largely deals with how the ETD, Principals and school staff should support such students.

## ACT Services Access Card for Asylum Seekers

The ACT Government Community Services Directorate administers the Services Access Card for asylum seekers living in Canberra. The website suggests the purpose of the card:

*'The ACT Government is committed to providing the fairest society possible for all Canberra residents, and that is no less the case for asylum seekers. The ACT Government appreciates that asylum seekers have had to endure tremendous emotional hardship and we want to provide you with help as you continue to adjust to your new lives. That is why the ACT Government has made a pledge to provide asylum seekers with the same services as it does to refugees, wherever possible and have made this easier through the ACT Services Access Card.'*

There was some confusion during the development of this Report as to the status of Asylum Seekers in relation to the payment of tuition fees. In response, the new policy confirms that **public education is free** for Asylum Seekers upon presentation of the Access Card.

### Key Data

The ETD provided the Commissioner with the following information on which visa subclass holders actually paid tuition fees in 2011 and 2012 for years K to 12. This data demonstrated that 10 'asylum seekers' were charged in these years. These students will not be charged under the new Policy and have been exempt from the payment of tuition fees since 2013.

- 10 Asylum Seekers (including Bridging Visa A holders)
- 59 Business (Long Stay) subclass (including 457 skilled migrants)
- 4 State/Territory Sponsored Business Owners
- 2 Prospective Marriage
- 6 Foreign Government Agency
- 2 Visiting Academic (now covered by Temporary Work subclass)
- 3 Occupational Trainee (now covered by Training and Research)
- 5 Independent ELICOS (English Language Intensive Courses for Overseas Students) Sector
- 20 Vocational Education and Training
- 59 Higher Education Sector
- 21 Postgraduate Research Sector
- 21 Tourist Visa
- 2 Regional Skilled Migration Scheme

The ETD further advised the following waivers for the 2013/14 year were as follows.

- 21 Bridging Visas A, General and Protection Visa Applicants (subclass 10, 50 and 51)
- 23 Partner (Provisional) (subclass 309)
- 25 Training and Research (subclass 402)
- 8 Temporary Work (subclass 403)
- 3 Dependent child (subclass 445)
- 95 Skilled (subclasses 457 and 475)
- 1 Temporary Graduate (subclass 485)
- 2 Skilled – Regional (Provisional) (subclass 489)
- 3 Higher Education Sector (subclass 573)
- 14 Postgraduate Research sector (subclass 574)
- 190 Foreign Affairs or Defence Sector (subclass 576)
- 1 Electronic Travel Authority (subclass 601)
- 5 Partner (subclass 820)
- 1 Status of Forces Agreement (subclass 945)
- 17 No visa recorded

According to the ETD's annual school census, at February 2011 there were 39,010 students in ACT public schools. At February 2012 there were 40,074 students in ACT public schools.

The ETD advised the Commissioner that the fees charged are 'set at a level that is reasonable in the circumstances.'

**TABLE 1: FEE STRUCTURE: TEMPORARY RESIDENTS INCLUDING THOSE ON BRIDGING VISAS**

<b>Students Studying</b>	<b>Amount (A\$)</b>	<b>Payable with</b>
Application Fee (non-refundable)	\$240 (GST Inclusive)	Initial Application
Preschool	\$3,800*	Acceptance of offer of place
Years K-6	\$9,900*	Acceptance of offer of place
Years 7-10	\$13,300*	Acceptance of offer of place

Years 11-12	\$14,800*	Acceptance of offer of place
Primary Introductory English Centre	\$10,500*	Acceptance of offer of place
Secondary Introductory English Centre	\$14,800*	Acceptance of offer of place

\* Fees are current as of 1 September 2013, and are subject to change.

\* This fee covers school tuition plus Parental Voluntary Contribution, textbook hire and consumable charges. It does not include the cost of materials used by students to make items which they take away from school, non-curriculum excursion costs, and the support and service fees that may be incurred by students with special needs.

## **The Experiences of Families**

Many of the families Commission staff spoke to raised concerns with both the process and ultimate decision-making of the ETD in charging international students to attend years K-12 in ACT public schools. Many were already suffering some form of disadvantage, prior to the ETD seeking to charge fees.

The Commissioner would like to acknowledge that the ETD has undertaken significant improvements to its practice in this area since the commencement of this review. Efforts have also been undertaken to improve understanding of these policies at the school-level.

The Commissioner remains hopeful that the change in policy and practice, implemented as a result of this work, will prevent families in future experiencing such issues.

## **Application of Human Rights and Discrimination law to the Policy and its implementation**

The historic issues identified by the Commission raised procedural and substantive fairness questions under both discrimination and human rights law.

### **Human Rights Law**

The Human Rights Act is relevant to these issues, both in terms of the process and substantive obligations it places on the ETD. Human rights protected in the HR Act are not absolute, as in some situations they must be weighed against competing rights and community interests. However human rights cannot be limited arbitrarily. Under s 28 of the HR Act, human rights may only be subject to reasonable limitations, authorised by law, that are demonstrably justifiable in a free and democratic society. Section 28(2) provides a proportionality test so that in deciding whether a limit is reasonable, all relevant factors must be considered, including the following:

- (a) The nature of the right affected;*
- (b) The importance of the purpose of the limitation;*
- (c) The nature and extent of the limitation;*

*(d) The relationship between the limitation and its purpose;*

*(e) Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.*

### **Relevant Rights**

As detailed above, several rights may be engaged by these policies and practices. Under s.31 of the HR Act, courts can utilise international and comparative law to interpret human rights in the HR Act.

#### *Rights of the Child*

Section 11 (2) of HR Act enshrines the protection of children into ACT law. It states that every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind. Further details of what protection of the child means is contained in the United Nations Convention on the Rights of the Child. Article 3 requires that the interest of the child is the primary consideration in all actions affecting children. Article 28 requires that children should be provided free primary education:

*'States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all.'*

Achieving universal primary education was also one of the UN Millennium goals. United Nations Children's Fund (UNICEF) has noted that the benefits of education are:

- Both immediate and intergenerational, and span the economic, social and even environmental dimensions of development;
- Reduce the incidence of poverty and infant mortality rates;
- Improved national economic growth, improved health, and an increase in female leaders.<sup>4</sup>

In fact, the ETD's own Strategic Plan 2014-2017 notes:

- The value of education to learners is beyond question; the value of education to the learner's community is beyond price; and
- Every child in the ACT deserves the opportunities provided through excellent education irrespective of where they live, their circumstances, or the school they attend.

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<sup>4</sup> UNICEF, 'Sustainable Development Starts with Safe, Healthy and Well-Educated Children', May 2013, <http://www.unicef.org/education/index.php>

## *Right to Equality*

Section 8 of the HR Act states that everyone has the right to recognition as a person before the law, and that everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind. Further, under s 8(3) everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground. Examples in section 8 include because of a person's race. The House of Lords has held that the equivalent provision of the UK *Human Rights Act 1998* includes protection for 'immigration status'.<sup>5</sup> However, the extent of this protection will depend on the circumstances. While there is a range of authorities at both the UK and European Court of Human Rights level with varying applications of this protection, the most relevant decision is *Ponomaryov v Bulgaria*. The European Court found a breach of the right to equality by the Bulgarian Government in charging secondary school fees to non-Bulgarian nationals and those who were not permanent residents.<sup>6</sup> The Court suggested that it may be reasonable for governments to curtail other public resources such as welfare benefits to immigrants who may only be present for a short time, but this was not the same for education, which served broader societal functions. Seventeen states of the European Council provide primary and secondary education free of charge and accessible to all persons living or residing in the country regardless of their immigration status or the immigration status of their parents. These include United Kingdom, Netherlands, Belgium, Cyprus, the Czech Republic, Estonia, Germany, Italy, France, Latvia, Luxembourg, Portugal, Russia, Slovenia, Spain, Switzerland, Macedonia.

In the United States, the Supreme Court found that a requirement for 'illegal aliens' to pay fees for elementary classes in Texas was contrary to the 'equal protection' right in the US Constitution.<sup>7</sup>

The right to equality includes the right to be free from discrimination, and so the issues raised below in relation to the ACT Discrimination Act also engage this right. The obligation on the ETD to act and make decisions consistently with this right would include consideration of the communication and translation issues that this culturally and linguistically diverse population group may face, particularly as the visa subclasses involved are likely to come from areas of the world where the population do not speak English as a first language. The ETD has advised that it is currently addressing this issue.

Article 2 of the UN Convention on the Rights of the Child emphasises that governments should not discriminate against children on the grounds of race, colour, language or national, ethnic or social origin, or property.

Overseas courts have interpreted the right to equality as including socio-economic status,<sup>8</sup> and extends to situations in which Government is treating individuals unfairly, albeit indirectly, for example through the impact of policies on particular groups.

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<sup>5</sup> See for example *A v Secretary of State for the Home Department* [2004] YKHL 56 involving different criminal laws applying to non-nationals.

<sup>6</sup> App No 5335/05, June 2011.

<sup>7</sup> *Plyer v DOE*, 245 US 202 (1982)

<sup>8</sup> *R (Hurley and Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) para 29.



### *Rights of the Family*

Section 11(2) of the HR Act states that the family is the natural and basic group unit of society and is entitled to be protected by society. In addition, Articles 16 and 9 of the Convention on the Rights of the Child oblige Governments not to subject children to arbitrary interference with their family.

The Commissioner was concerned by some of the information she received regarding ETD's policies and procedures. In particular, she was concerned the costs of education may be a disincentive for families to attend ACT public schools.

### *Right to Education*

Currently, the right to education is not included in those rights that the ETD must consider in acting and making decisions, and is only applicable to the interpretation of legislation under s 30 of the HR Act. Discussed below is whether the ETD can justify its actions by reference to relevant defences under the HR Act and Discrimination Act. However, amendments before the Legislative Assembly would make the right to education a 'full right', meaning ETD would have to consider it, along with other rights, in its actions and decisions.

### ***Decision-making Process Obligation***

The HR Act obliges the ETD to consider human rights in its decision making process. However, the Commission was concerned that in formulating the relevant policies, procedures and forms under s 26 of the Education Act that the ETD had not adequately considered its human rights obligations. Further, the Commission was unable to find any reference to the ETD's obligations to take into account human rights (either broadly, or by identifying specific rights) in the application of its Policies, supporting information to individual applications and waiver decisions. Information the ETD provided to the Commission for this Report did not refer to any specific application or consideration of human rights in decision making.

### ***Substantive Obligation***

The HR Act also requires the ETD to act in a manner that is compatible with human rights. The Commissioner was concerned about claims that

- Explanatory material and forms were not available in different languages. This risks a breakdown in communication at the school level, which can result in children spending time out of school because of confusion about the duty to pay fees; and
- If fees are levied, the resultant costs and flow-on effects, such as families either not sending children to school, and the financial costs to the families concerned.

While the Commissioner had some historic concerns about compliance with these obligations, as a result of the collaborative work during this review process, she is satisfied that the ETD is working towards full compliance with its obligations.

## Discrimination Law

### *Direct Race Discrimination*

In order for conduct to constitute unlawful direct discrimination, it must involve a person (in human rights jurisprudence, referred to as a 'duty holder') treating someone unfavourably because of a protected attribute. The ETD is such a duty holder as an education authority under s 18 of the Discrimination Act.

The Commissioner had some concerns that the ETD's previous treatment of families and students may have constituted unfavourable treatment.

The ACT Discrimination Act defines 'race' to include 'nationality'. Professors Rees, Rice and Allen note that:

*'There is ample authority for the proposition that 'nationality' means citizenship when used in anti-discrimination legislation'.<sup>9</sup>*

An example is the case of *SUPRA v Minister for Transport Services*,<sup>10</sup> which concerned the policy of the NSW Government to charge international, fee-paying university students a higher rate to use public transport compared to domestic students. The NSW Administrative Decisions Tribunal found the practice constituted direct race (nationality) discrimination. The Tribunal stressed that the conduct was still unlawful, notwithstanding that the Department may not have intended to harm or disadvantage university students who were not of Australian nationality. The Tribunal stated that 'the absence of discriminatory motive or intention is not relevant when considering whether the differential treatment occurred because of nationality'. Of particular note in relation to the ETD's policies, is the following statement from the Tribunal:

*'The primary argument advanced by the respondents was that "full fee paying overseas students" were denied concessional travel on public transport because people in this category had been permitted to enter Australia on a temporary student visa only after declaring that they had sufficient funds to support themselves whilst in Australia...By adopting a policy which specifically referred to "full fee paying overseas students" as a category of students who were denied the benefit of concessional travel which was granted to similarly placed students of Australian nationality, and bearing in mind the finding that to be an "overseas student" a person must be of a nationality other than Australian, it is self-evident that the applicants received differential treatment because of their nationality. The reason why they were denied concessional travel was because they were "full fee paying overseas students" and that is a categorisation which ultimately turns, primarily, upon nationality.'<sup>11</sup>*

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<sup>9</sup> Neil Rees, Simon Reece, Dominique Allen, Australian anti-discrimination law, 2<sup>nd</sup> Edition, The Federation Press, Sydney, 2014 at page 205

<sup>10</sup> *Sydney University Postgraduate Representative Association (SUPRA) & ors v Minister for Transport Services & ors* [2006] NSWADT 83

<sup>11</sup> *ibid* at Para 74-75

The ETD's former policies and practices regarding international students also raised indirect discrimination issues. The visa subclasses chosen, and the experiences reported to the Commission, suggest that they are more likely to be held by students and families of certain nationalities, particularly those that speak languages other than English.<sup>12</sup>

Indirect discrimination must be unreasonable to be unlawful. The ETD's response to these issues is discussed further below.

## **The ETD's Response**

The Commissioner notes how seriously the ETD took the matters raised by the Commissioner, and over the life of this review made continued improvement to its policies and practices. During the course of this review, the ETD took significant steps to improve communication, particularly in the information available on its website and to schools. Some of this confusion was due in part to Australia's complex immigration system, but the Directorate worked with the Commissioner to simplify its policies and communication channels.

The ETD is also working to develop translations of key documents into appropriate languages, particularly for new arrivals. The Commissioner appreciates the ETD's action in providing TIS assistance numbers on its website.

### **New Policy**

The Commissioner welcomes the new ETD policy in this area, and believes it is simpler, clearer and more compliant with human rights and discrimination law. A greater number of Canberra residents will receive free education as a result of this policy.

However, any policy that still charges students based on visa status raises concerns under discrimination and human rights law. Arguably, both require that free primary school education is provided to all. The Commissioner is nonetheless more comfortable with the amended draft policy, as it puts in place a more transparent appeals process for those that may still be charged (such as 457 visa holders), including the ability for the ETD to take into hardship factors.

### **Future Reporting**

The Commissioner also welcomes ETD's commitment that in future it will include statistics in its Annual Report on the numbers of International Students that are charged, and their visa status.

The Commissioner looks forward to working further with the ETD on these issues, but welcomes the engagement and reform that is already underway

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<sup>12</sup> 2012 Face the Facts, <https://www.humanrights.gov.au/publications/face-facts-2012/2012-face-facts-chapter-3#fn242>

## Conclusion

In the Commissioner's opinion, it is possible that the charging of certain non-permanent residents to attend ACT public schools (K-12) may be unlawful under the Human Rights Act and Discrimination Act. This is in relation to both the relevant policies, and their implementation by the ETD.

However, the Commissioner is satisfied that the new ETD Policy developed in consultation with her, ameliorates these concerns significantly. This new policy emphasises the human rights obligations on the ETD to provide free education for a greater number of students. They contemplate only a few exceptions to this principle, and in particular, confirm that ACT public education is free for asylum seekers. Coupled with commitments to improve practice in related areas, the Commissioner believes these changes will increase access to education for international students, and provide related benefits for the broader community. Such changes include:

- Consulting on this new policy with key organisations such as Companion House and Canberra Refugee Support Group;
- Increasing the use of telephone interpreters; and
- Translating information into a number of different languages, particularly those spoken by new arrivals, based on feedback from key non-government organisations.

The Commissioner looks forward to continuing to work with the ETD on these reforms, and in particular while there are reasons why the ETD is continuing to charge certain visa holders, that work continues on examining whether this should continue indefinitely. For example, in relation to dependents of those holding 457 and related skilled migrant visas. The Commissioner is also open to working with ETD about how it documents its consideration of human rights in its day-to-day decision making.