

2015

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

HUMAN RIGHTS AMENDMENT BILL 2015

EXPLANATORY STATEMENT

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HUMAN RIGHTS AMENDMENT BILL 2015

Outline

Purpose of the Bill

This Bill gives effect to the conclusions of the 2014 review of the *Human Rights Act 2004* (HRA) – ‘*Economic, social and cultural rights in the Human Rights Act 2004*’ (the 2014 review) which the Attorney-General tabled in the Legislative Assembly on the 27 November 2014.

This Bill makes amendments to the HRA to:

- a) extend the application of part 5A of the HRA to the right to education, thereby imposing an obligation on public authorities to comply with the right to education in s 27A; and
- b) include a note in s 11 to indicate that children have all rights in the HRA in addition to the right to protection under s 11.

This Bill also makes a number of amendments to introduce Aboriginal and Torres Strait Islander cultural rights in the HRA. These amendments give effect to a decision of the ACT Government to incorporate cultural rights for Aboriginal and Torres Strait Islander people in a similar form to s 19 of the Victorian *Charter of Rights and Responsibilities 2006* (the Charter). At that time amendments were delayed following feedback from the Aboriginal and Torres Strait Islander Elected Body (the Elected Body) which advocated for a more expansive set of cultural rights based on those contained in article 31 of the *UN Declaration of the Rights of Indigenous People* (UNDRIP). The Elected Body has agreed to revised words which have been incorporated in the Bill.

Human rights considerations

This Bill will strengthen the human rights culture of the Territory, by extending part 5A obligations on public authorities to act and make decisions consistent with the right to education. It also includes an explicit recognition of the distinct cultural rights of Aboriginal and Torres Strait Islander peoples.

Human Rights Amendment Bill 2015

Detail

Clause 1 Name of Act

This is a technical clause that names the title of the Act. The name of the Act will be the *Human Rights Amendment Act 2015*.

Clause 2 Commencement

This clause commences the Act on the day after it is notified on the ACT Legislation Register.

Clause 3 Legislation amended

This clause identifies the legislation amended by the Act as the *Human Rights Act 2004*.

Clause 4 Preamble, clause 7

This clause amends the preamble to the HRA by changing a reference to ‘Indigenous people’, to ‘Aboriginal and Torres Strait Islander peoples’. This amendment acknowledges a concern of the Elected Body that Aboriginal and Torres Strait Islander peoples 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.

Clause 5 Protection of the family and children

Section 11 (2), new note

This clause implements a conclusion of the 2014 review of the HRA, and a proposal of the Children and Young People Commissioner that an explanatory note be included in section 11 - protection of the family and children to indicate that a child also has the other human rights set out in the HRA. This note will alert the reader to the fact that the HRA applies equally to children, and that children are entitled to enjoy all rights guaranteed in the HRA in their own right and not only by virtue of their membership in the family unit, which must be protected by society.

It is clear from UN Committee comments on the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC) that children, as individuals, benefit from all of the civil rights enunciated in the ICCPR and have rights distinct from the rights to be protected as part of a family.¹ In accordance with this, the HRA requires measures to be adopted with a view to affording children greater protection than adults in the criminal process and in criminal trial proceedings.²

Clause 6 Rights of minorities

Heading

This clause is a minor amendment to the heading of s 27 of the HRA from ‘Rights of minorities’ to ‘Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities’. This change is required to reflect changes in the content of this section made by clause 7, which introduces cultural rights of Aboriginal and Torres Strait Islander peoples into s 27.

Clause 7 New section 27 (2)

This clause inserts new subsection (2) into section 27 which introduces Aboriginal and Torres Strait Islander cultural rights into the HRA. New paragraph (a) provides that Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied the right to maintain, control, protect and develop their cultural heritage and distinctive spiritual

¹UN Human Rights Committee (HRC), *CCPR General Comment No. 17: Article 24 (Rights of the Child)*, 35th Session, 7 April 1989.

² s 20; s21(3);s 22(3) *Human Rights Act 2004*.

practices, observances, beliefs and teachings, languages and knowledge, and kinship ties. This amendment takes s 19 of the Victorian Charter as a starting point.

Including express reference to the cultural rights of Aboriginal and Strait Islander peoples establishes and recognises a right which is conferred on individuals belonging to such peoples and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the HRA.³

Although the additional, specific and distinct cultural rights of Aboriginal and Torres Strait Islander peoples will be recognised in a separate subsection of s 27, Aboriginal and Torres Strait Islander peoples are not precluded from claiming or enforcing their right to enjoy their culture, to declare and practice their religion, or to use their language with other members of a minority group, generally.

Section 27(2)(a) reflects the aspirations of article 31 of UNDRIP, which recognises the right of Indigenous peoples to maintain, control and develop their cultural heritage and traditional knowledge, but does not intend, and is not designed, to confer or create real or intellectual property rights over the expressions or manifestations of that cultural heritage, as regulation of those property rights is a matter for the Commonwealth. If such rights are claimed they must be claimed and exercised in accordance with the processes set out under the relevant Commonwealth laws.

Section 27(2)(a) acknowledges that the cultures of Aboriginal and Torres Strait Islander peoples are a defining part of their identity. Other rights in the HRA including the right to recognition and equality before the law and the rights to freedom of thought, conscience, religion and belief, and freedom of expression already support the right to hold and develop these distinct cultural identities – s 27(2)(a) properly provides formal recognition of the existence, and continuing contribution of the cultural heritage of these first peoples to the Canberra region. Culture is not defined and takes its ordinary broad meaning. The Expert Mechanism on the Rights of Indigenous People in the UN Human Rights Council has provided a non-exhaustive definition of what elements could comprise the cultural heritage of Indigenous peoples including Aboriginal and Torres Strait Islander peoples -

Indigenous peoples' cultures include tangible and intangible manifestations of their ways of life, achievements and creativity... Indigenous cultures is a

³ Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), p 1.

holistic concept based on common material and spiritual values and includes distinctive manifestations in language, spirituality, membership, arts, literature, traditional knowledge, customs, rituals, ceremonies, methods of production, festive events, music, sports and traditional games, behaviour, habits, tools, shelter, clothing, economic activities, morals, value systems, cosmovisions, laws, and activities such as hunting, fishing, trapping and gathering.⁴

This clause also inserts s 27(2)(b) which provides that Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied the right 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.

Section 27(2)(b) also reflects the aspirations of article 25 of UNDRIP, which further acknowledges the distinctive spiritual, material and economic relationships that Indigenous peoples, including Aboriginal and Torres Strait Islander peoples, have with the land and waters and other resources with which they have a connection under traditional laws and customs.

Section 27(2)(b) provides for the recognition and valuing of these relationships as a separate clause, to indicate that the HRA does not and cannot confer property rights or other rights to maintain, control, protect and develop, over these relationships with the environment and resources, as this is a matter for the Commonwealth. If such rights are claimed they must be claimed and exercised in accordance with the processes set out under the relevant Commonwealth laws.

As with the rights of minorities provided for by s 27 generally, the enjoyment of these rights does not prejudice the sovereignty and territorial integrity of the Australian state.⁵ At the same time, the cultural rights of Aboriginal and Torres Strait Islander individuals protected under s 27(2) – “for example, their right to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources”.⁶

⁴Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, Fifth session 9-13 July 2012, *Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples*, A/HRC/EMRIP/2012/3, paras. 51-52, accessed at http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Session5/A-HRC-EMRIP-2012-3_en.pdf

⁵ Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), p 3.2.

⁶ *Ibid.*

The intention behind the amendments to insert s 27(2)(b) is not to confer property rights through the recognition of native title (which has been extinguished in the ACT), but to require the ACT Government to recognise the prior and continuing relationships of Aboriginal and Torres Strait Islander peoples with the Canberra region and environment as first owners and custodians and to value the importance of those relationships as an integral part of the history, cultural heritage and ongoing protection of the Canberra region and environment.

This right is reflected in existing laws such as the *Heritage Act 2004* which makes provision for the protection of Aboriginal objects, places and traditions, and for Aboriginal and Torres Strait Islander representation and consultation in the heritage and land planning and development system to achieve appropriate conservation of the ACT's natural and cultural heritage places and objects, including Aboriginal places and objects.⁷

This clause also includes a note to indicate that the primary source of the rights in s 27(2) is the United Nations Declaration on the Rights of Indigenous Peoples, article 31.

As with the other rights in the HRA, the cultural rights of Aboriginal and Torres Strait Islander peoples are not absolute and can be subject to such limitations as are demonstrably justifiable in a free and democratic society.

In particular, this means that arguments of 'cultural relativism' cannot be used as a justification for criminal conduct, or as a potential defence against criminal charges.

Cultural rights are already necessarily limited at the point where they might infringe on the enjoyment of other rights in the HRA supporting community safety, such as the right to life and the right to of liberty and security of person.

These limitations are established via legislative provisions that create offences for a gamut of criminal conduct, in a whole range of statutes, and which apply across the whole community, regardless of culture.

⁷ See e.g. ss 9, 13, 14, 17 18(c), 31, 45 and part 8 of the *Heritage Act 2004*.

Clause 8 Public authorities must act consistently with human rights

Section 40B (3), definition of *human rights*

This clause makes an amendment to omit the definition of *human rights* from s 40B(3).

This definition – that human rights do not include the economic, social and cultural rights in part 3A, operated to limit the right to education in section 27A to an interpretational right only, with the obligations on public authorities in part 5A of the Act not extending to the right to education.

This amendment has the effect of providing the right to education (an economic, social and cultural right derived from the International Covenant on Civil and Political Rights) with the same ‘status’ as the civil and political rights in part 3. It imposes an obligation on public authorities to comply by acting and making decisions in accordance with the right to education in s 27A.

Clause 9 ICCPR source of human rights

Schedule 1, item 30

This clause makes a supplementary minor amendment to schedule 1 of the HRA which lists the international human rights law source of the rights contained in the HRA. The amendment makes changes to the listing of s 27, to note that the first subsection derives from s 27 of the ICCPR, while s 27(2) is included in the schedule, and a note included to indicate that the primary source of the rights in s 27 (2) is the United Nations Declaration on the Rights of Indigenous Peoples, articles 25 and 31.