

2012

**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

HUMAN RIGHTS AMENDMENT BILL 2012

EXPLANATORY STATEMENT

Presented by the
Attorney-General
Mr Simon Corbell MLA

HUMAN RIGHTS AMENDMENT BILL 2012

This explanatory statement relates to the Human Rights Amendment Bill 2012 as introduced into the Legislative Assembly.

Overview of Bill

The main purpose of this bill is to expand the *Human Rights Act 2004* (HRA) to include the right to education.

The key elements of the existing ACT human rights framework include:

1. The requirement for government bills to be subject to pre-legislative scrutiny for consistency with human rights, including the requirement for compatibility statements for Government bills and the requirement for the Assembly's Scrutiny Committee to report on the consistency of all bills with human rights.
2. The requirement for laws to be interpreted consistently with human rights so far as it is possible to do so consistently with the law's purpose, and the ability of the Supreme Court to make a declaration of incompatibility if a law cannot be interpreted consistently with human rights.
3. The requirement for public authorities to act in a way that is consistent with human rights. This extends to consideration of relevant human rights when making a decision. This is limited to the extent that the act or decision is made in accordance with a law in force in the Territory.

This bill primarily operates to include the right to education into the HRA through an incremental approach. This means the first two elements will apply, but not the third.

The right to education will reflect the corresponding article in the International Covenant of Economic, Social and Cultural Rights (ICESCR) in respect to immediately realisable aspects only. Progressive realisation aspects of the right are excluded.

Section 28 clarifies that the HRA applies to all laws applicable to the Territory and not only laws passed in the ACT Legislative Assembly.

Human Rights

Amendments are based on the recognition that all human rights are universal, indivisible, interdependent and interrelated; and that civil and political rights (CPR) as well as economic, social and cultural rights (ESCR) are integral to human freedom and dignity. It is intended for both categories of rights in the Act to be interpreted and given effect to in a manner that is mutually reinforcing.¹ This view has been repeatedly highlighted by the United Nations and research specific to the ACT human rights framework.

Both ESCR and CPR appear in the *Universal Declaration of Human Rights*.² Further the *Vienna Declaration and Program of Action*³ specifically recognises human rights as

¹ Australian Capital Territory Economic, Social and Cultural Rights Research Project Report.

² <http://www.un.org/en/documents/udhr/>.

³ [http://www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en)

universal, indivisible, interdependent and interrelated. Australia has adopted this Declaration.⁴

Article 5 of the Vienna Declaration reads as follows:

“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”⁵

Within the context of the ACT, the ACT Bill of Rights Consultative Committee stated ‘by identifying the deep connections between the two Covenants in the HRA, the simplistic distinctions often drawn between ESCR on the one hand and CPR on the other will be seen to have no substance’.⁶ This is reiterated in the ACT Economic, Social and Cultural Rights Research Project Report.⁷

The amendments will work in conjunction with the existing CPR in the HRA to strengthen the underlying protection of human rights in the Territory by reinforcing, and potentially expanding, the current protected rights. For example, the right to education helps facilitate a person exercise their right to vote.

The ACT Economic, Social and Cultural Rights Research Project Report provides background information regarding the scope and application of ESCR, including various international legislative approaches. The Report is available at http://acthra.anu.edu.au/escr_res_proj.php.

The ACT Government response provides a comprehensive overview of the envisaged operation of the amendments. The response is available at www.justice.act.gov.au.

Notes on Clauses

PART 1 PRELIMINARY

Clause 1 Name of Act

The bill, once enacted, will be known as the *Human Rights Amendment Act 2012*.

Clause 2 Commencement

The Act will commence on 1 January 2013.

Clause 3 Legislation amended

The Bill amends the *Human Rights Act 2004*.

⁴ http://www.aph.gov.au/house/committee/jfadt/dialog/dial_ch7.pdf, and [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.24+\(PART+I\).En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.24+(PART+I).En?OpenDocument).

⁵ World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (1993)

<[http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument)>.

⁶ Para 5.32 p 96

⁷ Australian Capital Territory Economic, Social and Cultural Rights Research Project Report.

PART 2 HUMAN RIGHTS

Clause 4 Section 5

Section 5 is expanded to include the right to education in part 3A of the Bill. This clause explains that the primary source of the right to education is ICESCR. Australia ratified ICESCR without reservation in 1975.

Clause 5 Rights apart from this Act Section 7, new example

Section 7 expands the existing examples of rights not included in the Act to include a reference to those not specifically listed in the ICESCR.

PART 3A ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Clause 6 New part 3A and part 3B heading

Clause 27A inserts new section 27A Right to education, which gives express recognition to the right to education. The primary source of this right is the ICESCR.

The right to education is expressed in the same terms as the Covenant except where some adjustments to language were necessary to reflect that the Act only recognises the immediately realisable obligations of the right. The progressive realisation aspects of the right are not within the scope of the Act.

The note recognises that the right to education has been expressed in the core human rights treaties and customary international law. These sources are relevant for the purpose of interpreting the scope and application of a part 3A right.

Subsection (3) lists those aspects of the right that constitute the immediately realisable obligations. The subsections are not intended to be limited to the extent that they are immediately realisable, but rather form a list of the immediately realisable obligations for the purposes of the Act.

Clause 7 Human rights may be limited Section 28 (1)

This amendment clarifies that the *Human Rights Act 2004* applies to all laws applicable to the Territory and not only laws passed in the ACT Legislative Assembly. This enables proportionality to be factored into public authority conduct that is referable to legal sources other than Territory laws.

A new heading is created for section 28 of the Act, entitled 'Part 3B Reasonable limits on human rights'. This amendment is consequential following the creation of new part 3A and reflects that the section is intended to apply in the same way to rights contained within part 3 and part 3A.

Clause 8 Public authorities must act consistently with human rights Section 40B (3), new definition of *human rights*

Section 40B(3) is amended to include a separate definition of the scope of 'human rights' for the purpose of part 5A of this Act.

This amendment excludes the right to education from the operation of part 5A of the Act.

Clause 9 Section 43

Clause 43 imposes an obligation on the Attorney-General to review the operation of the human rights in part 3A of the Act and present a report to the Assembly by 1 January 2015.

It is a requirement that the review consider the possible inclusion of additional economic, social and cultural rights, the potential application of part 5A of the *Human Rights Act 2004* to the rights within part 3A and the potential inclusion of progressive realisation obligations.

Clause 10 New schedule 2

The table in schedule 2 is amended to include reference to the right to education, and the corresponding article in ICESCR.

Clause 11 Dictionary, new definition of ICESCR

This clause inserts a definition of ICESCR is inserted into the dictionary.