

2024

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

EXPLANATORY STATEMENT OF AMENDMENTS

HUMAN RIGHTS (HEALTHY ENVIRONMENT) AMENDMENT BILL 2023

AMENDMENTS TO BE MOVED BY ANDREW BRADDOCK MLA

This explanatory statement related to amendments (the Amendments) to the Human Rights (Healthy Environment) Amendment Bill 2023 (the Bill) presented to the Legislative Assembly for the Australian Capital Territory (ACT) to amend the Human Rights Act 2004 (the Act). It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form a part of the bill and has not been endorsed by the assembly.

Signed: _____

Andrew Braddock MLA

___ / ___ / 2024

Overview of the Amendments.

These amendments shorten the time frames for statutory review of the Act, and place a sunset on the non-justiciability clauses, thereby creating a presumption of future justiciability and requiring the Assembly to make a positive decision should it in future wish to proceed differently.

Background on past expansions of Human Rights

The Act was notified in 2004. At the time, the Act considered only civil and political rights derived from the International Covenant on Civil and Political Rights (ICCPR).

In 2012, the Act was amended with effect from the 1st of January 2013 to incorporate a new category of human rights – economic, social and cultural rights, sourced from the International Covenant on Economic, Social and Cultural Rights (ICESCR). The first of these rights, incorporated at the time with the introduction of Schedule 2, was the right to education from article 13 of the ICESCR. Included in the 2012 Act¹ were the following provisions:

- Preclusion of economic social and cultural rights, meaning the new right to education, from the obligations of public authorities to act consistently with human rights. This had the same practical effect as the provisions proposed in section 7 of the Bill.
- Requiring a review of the new right, including whether the other economic, social and cultural rights should be included in the Act, whether part 5A should apply to economic, social and cultural rights, and whether these rights should be subject to progressive realisation.
 - This would have the same practical effect to review the Act for justiciability as in section 8 of the Bill; however
 - The review was required to be tabled in the Assembly no later than 1 January 2015, precisely two years after the 2012 Act's commencement, as distinct from the five years proposed in the Bill.

The non-justiciability provisions referred to above would be later omitted in a 2016 Act², which also added cultural and other rights of Aboriginal and Torres Strait Islander people into the provisions of section 27 of the Human Rights Act. This means that, in effect, it was just over three years between the introduction of the right to education and its justiciability in law.

By contrast, the cultural rights of First Nations people referred to above became justiciable immediately. The right to work and other work-related rights would be added to the list of economic, social and cultural rights in a 2019 Act³, and was also immediately justiciable.

Precedent and consistency

Interpretation of the above precedents indicates that where a new category of human rights is introduced, it is reasonable to presume that a period of non-justiciability is appropriate to allow the courts and other government organisations to prepare for the new category of rights. Whereas, where an existing category of human rights is expanded upon, it should be safe to allow immediate justiciability of that right.

¹ <https://www.legislation.act.gov.au/a/2012-41/>

² <https://www.legislation.act.gov.au/a/2016-5/default.asp>

³ https://www.legislation.act.gov.au/b/db_61325/

While the right to a healthy environment is not strictly an economic, social or cultural right, it does draw upon some similar principles. This is recognised in the Bill, which expands the Territory's definition of economic, social and cultural rights beyond that of the ICESCR to also include resolution of the United Nations General Assembly, *The human right to a clean, healthy and sustainable environment*, A/RES/76/300 (28 July 2022).

In its submission to the JACS Committee's inquiry into the Bill, the Environmental Defender's Office (EDO) recommended that the Notes to Part 3A of the Act should also refer to the ICCPR and that references to progressive realisation should be removed accordingly as such rights should be immediately realisable.⁴ Adopting such a recommendation could require further consequential amendments to the Act, and is therefore beyond the scope of the Amendments, which are targeted to achieving straightforward and practical improvements to the bill. For this reason, the Amendments ensure that a re-examination of how the Right to a Healthy Environment is categorised and defined shall be a relevant consideration in the scheduled statutory review by virtue of placing the entirety of the Bill into the scope of the statutory review.

The Amendments provides legislative certainty to the community by scheduling the non-justiciability provisions to sunset three years after commencement. This period of time enables the supporting mechanisms to be established and aligns with the past precedent of the time elapsed to reach justiciability on the Right to Education.

Under the Amendments, future justiciability of the Right to a Healthy Environment is thereby presumed to occur rather than not occur, and the review will empower the Assembly to act on any recommendation that it should not proceed or proceed in an amended form, rather than asking the Assembly to in the future consider from first principles whether justiciability should occur at all. This guarantees that the Right to a Healthy Environment will become enforceable, subject to any active and positive decisions that the Government of the Day may make concerning the Human Rights Act.

The Amendments shortens the time frame for conduct of the review from five years to no later than three years after commencement – that is, no later than the time when the non-justiciability clauses are to be scheduled to sunset. This reflects that the ACT will be the first jurisdiction in Australia to legislate this right, and it will be within the Government's ability to bring the review forward should it wish to use this to justify any further changes ahead of justiciability commencing.

Human Rights Compatibility

Both the Act and the Amendments advance the Right to a Healthy Environment. This is a fundamental and significant advancement of human rights. Please refer to the explanatory statement to the Bill for further information.

The Amendments also reduce the limitations on other rights that are not discussed in the explanatory statement to the Bill. Specifically, the right to recognition and equality before the law in section 8 of the Act emphasises that everyone has the right to equal and effective protection against discrimination on any ground. This right is limited by the non-justiciability provisions in the Bill, which prevents people from accessing the legal avenues available to them for other rights under the Act. The amendments plan for a future where this limitation is removed, enhancing human rights compatibility in the long term.

⁴ See https://www.parliament.act.gov.au/data/assets/pdf_file/0007/2357485/Submission-012-Environmental-Defenders-Office.pdf

Consultation

In addition to consultation undertaken associated with the JACS inquiry into the Bill, additional consultation has occurred with the Environmental Defender's Office and Green Law. These organisations have argued for immediate justiciability. The amendments have been designed to strike a balance between a clear and justified interest in ensuring the right to a healthy environment is immediately enforceable and the need for government processes to plan for and accommodate the reform.

CLAUSE NOTES

Clause 1 – Replacement for Clause 7 on non-justiciability

This constructs a new section 40CA which has the same practical effect as the Bill's proposed new sections 40C(5A) and (5B), except that it will also insert a sunset on the non-justiciability provisions, scheduled for three years after commencement.

Clause 2 – Replacement for Clause 8 on statutory review

This has the same practical effect as the Bill's clause 8, except that:

- The statutory review will now consider all elements of the Bill, inclusive of matters concerning the source and categorisation of the Right to a Healthy Environment, rather than only the matters contained in sections 6 and 7 of the Bill;
- the statutory review must be tabled in the Assembly no later than three years after commencement, rather than after five years after commencement;
- the section will accordingly expire four years after commencement rather than six years after commencement.