

2016

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**GOVERNMENT RESPONSE TO THE
STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY'S
*INQUIRY INTO THE HUMAN RIGHTS AMENDMENT BILL 2015***

Presented by
Mr Simon Corbell MLA
Attorney-General

Introduction

The Attorney-General introduced the *Human Rights Amendment Bill 2015* (the ‘Bill’) into the Assembly on 26 March 2015.

On 7 May 2015, members of the Legislative Assembly gave in-principle support to the Bill but referred the Bill to the Standing Committee on Justice and Community Safety (the Committee) for inquiry. The terms of reference for the Committee were the Bill itself.

The Chair of the Committee, Mr Doszpot MLA, tabled the Committee’s report on the *Inquiry into the Human Rights Amendment Bill 2015* in the Assembly on 29 October 2015.

At the time of tabling this response, an electronic copy of the report is available at:

http://www.parliament.act.gov.au/_data/assets/pdf_file/0012/788529/J-And-CS-Report-on-the-Human-Rights-Amendment-Bill-2015.pdf

Overview of the Government's response

The ACT Government welcomes the report by the Standing Committee on Justice and Community Safety, *Inquiry into the Human Rights Amendment Bill 2015*.

The Government notes and appreciates the engagement of key stakeholders in contributing to the response to the Committee's Inquiry.

The ACT Government has considered the 8 recommendations and Agrees to one recommendation, Notes six recommendations and Disagrees with one recommendation.

A table providing a snapshot of the recommendations and the Government's response is provided below:

Recommendation	Theme	Response	Financial Implication of Response
1	Assembly support clauses 4,6, 7 & 9	Noted	None
2	Explanatory statements	Agree	None
3	Table summary of legal advice – March 2016	Disagree	None
4	Consideration of Traditional Owner Settlement Act 2010 legislation	Noted	None
5	Assembly support clause 8	Noted	None
6	Assembly support clause 5	Noted	None
7	Amend HRA to refer to children and young people	Noted	None
8	Amend HRA to separate rights of children and families	Noted	None

Recommendation 1

The Committee recommends that the Legislative Assembly vote in support of Clauses 4, 6, 7 and 9 of the *Human Rights Amendment Bill 2015*.

Response: Noted

The *Human Rights Act 2004* ('HRA') represents an important part of the ACT legal system. The Government notes the Committee's recommendations that the Assembly vote in support of all clauses in the Bill (recommendations 1, 5, and 6).

The Government thanks the Committee for this recommendation which, if adopted by the Assembly, will see the Bill pass into law and allow the HRA to take on a new relevance and special significance for Aboriginal peoples with a connection to the Canberra region, and the Aboriginal and Torres Strait Islander peoples who now call Canberra home.

In the view of the Committee, "extensions to rights proposed in the bill—Indigenous rights, the right to education, and children's rights—were measures which would extend rights in useful ways".¹

The Committee Chair noted that "on the basis of representations made to the committee, and as a result of its deliberations, the committee recommended that all of the clauses in the bill be supported by the Assembly".²

The Government is committed to improving the protection of rights in the ACT including through a process of careful and considered amendments to the HRA. The Committee's report notes the "orderly development of the *Human Rights Act 2004*, in which the initial HRA has been incrementally extended over time, thus maintaining an appropriate relationship between the HRA and broader societal expectations in the ACT".³ The ACT Government believes the Bill represents an important step in this process.

Recommendation 2

The Committee recommends that all proposers of Bills to be considered by the Legislative Assembly, particularly those with the resources of government, provide full, well-reasoned and substantiated Explanatory Statements for the Bill in question, to support the deliberations of the Legislative Assembly.

Response: Agreed

The Government agrees that all proposers of bills to be considered by the Legislative Assembly, particularly those with the resources of government, provide full, well-reasoned and substantiated Explanatory Statements for bills.

¹ Mr Steve Dospot MLA, Hansard, Legislative Assembly for the ACT, 29 October 2015, p 3908.

² Ibid.

³ Standing Committee on Justice and Community Safety, *Inquiry into the Human Rights Amendment Bill 2015*, Report 5, 29 October 2015, para 1.14.

The Government also acknowledges the important role of explanatory statements in guiding the Assembly and the public through the application and interpretation of complex human rights concepts as they arise in legislation. In setting out the human rights implications and justifications for a particular policy, explanatory statements support the deliberations of the Legislative Assembly and foster a constructive dialogue about the impact of rights in the HRA and broader societal expectations. The Government agrees with the recommendation of the Committee that proposers of bills provide full, well-reasoned and substantiated Explanatory Statements for bills (recommendation 2) – the Government already does this.

The Government considers that the Explanatory Statement provided Members of the Assembly with guidance about the intent and operation of legislative provisions contained in the Bill.

The Government intends to table a revised explanatory statement to clarify some clause explanations dealing with the issue of Torres Strait Islander peoples' connection to the ACT and the status of native title in the ACT.

Recommendation 3

The Committee recommends that the ACT Government table in the Assembly, by the end of Assembly sittings of March 2016, either:

- a copy of the advice reportedly sought from and provided by the Government Solicitor's office on the status of Native Title in the ACT; or
- a document prepared by the ACT Government which accurately reflects the key elements of the advice provided by the Government Solicitor.

Response: Disagreed

The Government disagrees with this recommendation and declines to provide a copy of its legal advice, or summary of its key elements, on the basis that to do so risks waiver of client-legal privilege, and harm to the interests of the Territory, in relation to an area of law which has not yet been finally settled.

In relation to Explanatory Statements for complex amendments such as those in the Human Rights Amendment Bill involving the interpretation of international law principles in the context of Australian constitutional law, or where amendments are supported by legal advice, there is a balancing act between providing sufficient detail about the amendments and providing so much information that the utility of the explanatory statement is diminished.

The Government believes the explanatory statement struck that balance correctly. The Government will continue to work at improving the quality of explanatory statements as a key interpretational aid for members of the Assembly and the general public.

As a matter of course, advice from the Government Solicitor's Office on relevant legal questions that supports policy development is accurately reflected in documentation supporting legislation.

The Government considers that the explanatory statement provided as concise a summary of the legal situation relating to native title in the ACT as is possible to provide without

disclosing the advice in full – noting that it is not possible to ever be completely certain about the outcome of potential legal disputes until such matters are definitively resolved in the Courts.

As noted above, the Government intends to table a revised explanatory statement to clarify some clause explanations dealing with the issue of Torres Strait Islander peoples' connection to the ACT and the status of native title in the ACT.

Recommendation 4

The Committee recommends that the ACT Government investigate and consider legislation similar to the *Traditional Owner Settlement Act 2010* (Vic) for the ACT.

Response: Noted

The Government notes the recommendation that the government will investigate and consider legislation similar to the *Traditional Owner Settlement Act 2010* (Vic) for the ACT. The ACT Government is engaged in ongoing work in the area of Aboriginal and Torres Strait Islander rights, including work to support increased participation and consultation with Aboriginal groups in land use and management.

The Government notes this recommendation, because any work on facilitating out of court settlements of native title should look both at the model adopted in Victoria, but also beyond, to the approaches taken in other Australian jurisdictions, and should acknowledge the unique characteristics of the ACT as both a relatively recently established Territory but also as a meeting place and home to many Aboriginal and Torres Strait islander people from all over Australia.

Existing projects conducted by the Office of Aboriginal and Torres Strait Islander Affairs are contributing to a better understanding of the relationships of different Aboriginal peoples to the Canberra region. This work will form a solid basis for future consideration of ways to improve the accessibility of forums for hearing and resolving land use and native title claims. The Government agrees with the view that there is value in legislation that will facilitate solid outcomes for claimants without requiring them to climb the legal mountain of establishing native title.⁴

In relation to the Traditional Owner Settlement Act, there are four settlements that have been reached with different traditional owner groups in Victoria comprising different types of land use, access and management agreements.⁵ Two of these agreements have been reached under the Traditional Owner Settlement Act.

⁴ Dr Bourke MLA, Hansard, Legislative Assembly for the ACT, 29 October 2015, p 3909.

⁵ Victorian Government, Environment, Land, Water and Planning, *Agreements with Traditional Owners*, available at <http://www.depi.vic.gov.au/forestry-and-land-use/managing-land/indigenous-land-management/agreements-with-traditional-owners>

The Traditional Owner Settlement Act is legislation that provides for out-of-court settlement of native title through the recognition of traditional owners and rights in Crown land by the Victorian Government, in exchange for agreement by traditional owners to withdraw and forego any native title claim under the *Native Title Act 1993*(Cth).

Under the Act, a settlement package can include:

- a Recognition and Settlement Agreement to recognise a traditional owner group and certain traditional owner rights over Crown land
- a Land Agreement which provides for grants of land in freehold title for cultural or economic purposes, or as Aboriginal title to be jointly managed in partnership with the state
- a Land Use Activity Agreement which allows traditional owners to comment on or consent to certain activities on public land
- a Funding Agreement to enable traditional owner corporations to manage their obligations and undertake economic development activities
- a Natural Resource Agreement to recognise traditional owners' rights to take and use specific natural resources and provide input into the management of land and natural resources.⁶

Under the Act negotiations follow a set framework but the Act does not prescribe any particular fixed outcome. A traditional owner group seeking to enter into an agreement must lodge threshold statements with the Native Title Unit in the Department of Justice and Regulation. In these statements the “traditional owners present information about their traditional and cultural association to country, and the basis for their group description and proposed agreement area. They also describe their group decision-making processes and their agreement-making with neighbouring traditional owner groups”...and demonstrate “their readiness to negotiate a settlement package, including nomination of a corporate entity and strategic planning”.⁷ These threshold statements are evaluated by the Native Title Unit. The evaluation includes having the traditional and cultural association to country threshold statement being subject to review and consultation with the wider Victorian traditional owner community.

Following resolution of threshold matters, a second negotiation stage takes place that may lead to agreement about, and execution of, a settlement.⁸ The Minister can enter into an overarching recognition and settlement agreement with the traditional owner group, on behalf

⁶ Victorian Government, Justice and Regulation, *Traditional Owner Settlement Act*, accessed at <http://www.justice.vic.gov.au/home/your+rights/native+title/traditional+owner+settlement+act>

⁷ Victorian Government, Justice and Regulation, (2015) *Threshold Guidelines* available at <http://www.justice.vic.gov.au/home/your+rights/native+title/threshold+guidelines>

⁸ *Ibid*

of the state, through an incorporated traditional owner entity, comprising one or more of the other types of settlement agreements in relation to an area of public land.⁹

The Victorian Tradition Owner Settlement Act represents a landmark piece of legislation that builds on significant consultation with Victorian traditional owner groups, and also pre-existing Victorian frameworks and resourced programs to allow traditional owner groups to resolve boundary and identity disputes – a process undertaken in Victoria, through its Right People for Country Program.

Similar preliminary work has occurred in the ACT through the ‘Our Kin, Our Country’ project, completed in 2012 in which research was undertaken to compile genealogies of families with association to the ACT and surrounding region (irrespective of the traditional identity or no traditional identity) to identify the likely cultural area, and spatial location and organisation of the Aboriginal populations that occupied what is now the ACT and surrounding region at the time of European settlement.¹⁰

The report concluded that the “the main population finding from the genealogical data is unmistakable: a surprisingly resilient regional population maintained through a distinct web of family networks in the immediate region surrounding the ACT”.¹¹

Today, Aboriginal and Torres Strait Islander groups living in the ACT are represented by a range of bodies including the Aboriginal and Torres Strait Islander Elected Body (Elected Body), the United Ngunnawal Elders Council (UNEC) and four representative Aboriginal organisations declared under the *Heritage Act 2004*. Under a Victorian style model, there is broad consultation and review of threshold claims to connection to country, requiring a framework for interaction of various traditional owner groups.

Significantly, the *ACT Aboriginal and Torres Strait Islander Elected Body Act 2008* is being reviewed. A review report is due to be delivered in early 2016. The Elected Body provides a key strategic role in providing advice to the ACT Government on matters of importance to Aboriginal and Torres Strait Islander peoples. The review process may provide insight into the workings of the Elected Body and linkages to all traditional owner groups in the ACT, including changes that could improve communication and consultation between Aboriginal groups in the ACT region.

The Government notes that any work to investigate options for alternative native title settlement mechanisms would need to be broad in focus, and consider the specific circumstances and context of the ACT. It would also need to look at other approaches and work being undertaken in other states and territories to streamline, expedite and improve access to forums for negotiated settlement of native title claims. Tasmania for example, has enacted the *Aboriginal Lands Act 1995* which vested particular areas in trust for Aboriginal

⁹ Section 4, *Traditional Owner Settlement Act 2010 (Vic)*

¹⁰ ACT Government, Genealogy Project, *Our Kin Our Country*, August 2012 Report, available at http://www.communityservices.act.gov.au/data/assets/pdf_file/0005/394385/CSD_GSR_web.pdf, p4.

¹¹ *Ibid*, p5.

people in perpetuity, managed by an elected Aboriginal Land Council, subject to the provisions of the legislation which provide for public access rights.

Other relevant considerations would include impacts on existing mechanisms for protection of cultural rights and consultation with Aboriginal groups, and resourcing implications. This work would be complex and require significant community consultation.

Therefore the Government notes the recommendation that the Victorian Traditional Owner Settlement Act would be a relevant example of a model for out- of-court settlement of native title claims, but considers that work on such a policy position for the ACT should look at other state and territory approaches and developments along with the Victorian Traditional Owner Settlement Act.

Recommendation 5

The Committee recommends that the Legislative Assembly vote in support of Clause 8 of the *Human Rights Amendment Bill 2015*.

Response: Noted

The Government notes this recommendation that the Legislative Assembly vote in support of clause 8 of the Bill that omits the definition of ‘human rights’ from s 40B(3) thereby extending the part 5 obligations on public authorities to the right to education.

The Government thanks the Committee for its support of the proposal to make the right to education binding and enforceable.

Recommendation 6

The Committee recommends that the Legislative Assembly vote in support of Clause 5 of the *Human Rights Amendment Bill 2015*.

Response: Noted

The Government notes this recommendation that the Legislative Assembly vote in support of clause 5 of the Bill which includes a note in section 11 of the HRA to indicate that a child has the other human rights set out in the HRA, not just the right to protection of families and children.

The Government thanks the Committee for its support of the proposal to make the rights of children clearer.

Recommendation 7

The Committee recommends that the ACT Government introduce in the Legislative Assembly a Bill that would, if passed, amend the *Human Rights Act 2004* such that

references to ‘child’ would read ‘child or young person’ and references to ‘children’ would read ‘children or young people’.

Response: Noted

The Government notes the Committee’s recommendation that the ACT Government introduce the amendments to the HRA to change references to child and children to include also young people.

The Government notes that the *Children and Young People Act 2008* is the predominant legislation affecting the rights of children and young people and its title reflects the distinction in legal status and rights on the basis of a person being a child (under 12 years of age) or a young person (aged 12 or older but not yet 18).

However, the definition of ‘child’ in the *Legislation Act 2001* ‘means an individual who is under 18 years old’. This definition is consistent with the traditional conception of the age of maturity, and with the International Covenant on Civil and Political Rights (‘ICCPR’) and the definition of child in the Convention on the Rights of the Child (‘CRC’) which refers to a child as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier” (article 1).

The 2014 *Economic, social and cultural rights in the Human Rights Act 2004: Section 43 review* (the ‘2014 review’) noted that “as the HRA and the relevant international instruments do not differentiate between the rights of children by reference to their age, adding ‘young people’ into the formulation of the right in section 11 is likely to lead to confusion and diminish the ease with which international instruments and materials relating to the rights of the child, can be applied in the ACT”.¹²

The Victorian *Charter of Human Rights and Responsibilities Act 2010* does not distinguish between a child and young person.

The Government’s policy position is that references to child in the HRA remain inclusive of all individuals under the age of 18 consistent with international law.

Recommendation 8

The Committee recommends that the ACT Government investigate and consider whether the *Human Rights Act 2004* should be amended to provide that children and families have separate rights.

Response: Noted

The Government notes the Committee’s recommendation that the ACT Government investigate and consider separating the right to protection of families and children in section 11.

¹² ACT Government, *Economic, social and cultural rights in the Human Rights Act 2004: Section 43 review*, November 2014, available at http://cdn.justice.act.gov.au/resources/uploads/JACS/ACT_Government_s_43_Review_Report.pdf, page 22.

The Government examined the case for and against separating the rights of children from family in the 2014 review of the HRA. It noted arguments for and against separating the rights into two sections, but did not propose that the rights in section 11 be separated on the basis that “the rights of children and the rights of families are separate and distinct rights, but also closely linked. A proper consideration of the best interests of the child must necessarily take in to account the child’s family context, and the importance of maintaining linkages and relations between the child and family”.

Although the ICCPR contains separate rights of family (article 23) and children (article 24) these contain wider statements of rights than are contemplated in the existing section 11, including the right to marry and found a family and the right of a child to acquire a nationality.

In contrast, section 17 of the Victorian Charter aligns with the ACT provision and does not substantially separate the rights of family and children – the only difference being the requirement to ‘such protection as in his or her best interests’.¹³

The ACT Government does not consider that the Victorian Equal Opportunity and Human Rights Commission submitted that the rights should be separated. Rather they submitted that the right of a child to protection in his or her best interests could be added, allowing principles found in the Convention on the Rights of the Child to inform the right.¹⁴ This in turn may assist in a broader and more nuanced understanding of what could improve protection of the child.

The ACT Government believes that the best interests principle is “clearly reflected in section 8 of the *Children and Young People Act 2008* (CYP Act)... The best interests of the child will be a relevant consideration in the content of the right of children to protection as is currently worded in section 11 of the HRA. The best interests of the child will also be an important consideration in the interpretation of legislative provisions that may affect the rights and interests of children under section 31 of the HRA”.¹⁵

The ACT Government does not consider that it is necessary to split the rights to protection of family and children.

¹³ Section 17, *Charter of Human Rights and Responsibilities Act 2006* (Vic)

¹⁴ Ms Catherine Dixon, Proof of Transcript, 12 October 2015, p 32, cited in Standing Committee on Justice and Community Safety, *Inquiry into the Human Rights Amendment Bill 2015*, Report 5, 29 October 2015, para 4.35-4.36.

¹⁵ ACT Government, *Economic, social and cultural rights in the Human Rights Act 2004: Section 43 review*, November 2014, available at http://cdn.justice.act.gov.au/resources/uploads/JACS/ACT_Government_s_43_Review_Report.pdf, page 21.