Inquiry into the Human Rights Amendment Bill 2015

Standing Committee on Justice and Community Safety

November 2015

Report 5

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Resolution of appointment

At its meeting of 27 November 2012 the Assembly passed a resolution which, among other things provided that there would be a Standing Committee on Justice and Community Safety to:

perform a legislative scrutiny role and examine matters related to community and individual rights, consumer rights, courts, police and emergency services, corrections including a prison, governance and industrial relations, administrative law, civil liberties and human rights, censorship, company law, law and order, criminal law, consumer affairs and regulatory services.[[1]](#footnote-1)

Terms of reference

At its meeting on Thursday 7 May 2015 the Assembly passed the following resolution:

“That the Human Rights Amendment Bill 2015 be referred to the Standing Committee on Justice and Community Safety for inquiry and report, with a reporting date not later than the last sitting day in September 2015.”[[2]](#footnote-2)

At its meeting on Tuesday 11 August 2015 the Assembly agreed to amend the resolution by omitting the words “the last sitting day in September 2015” and substituting the words “the last sitting day in November 2015”.[[3]](#footnote-3)

Table of contents

[Committee membership i](#_Toc433283453)

[Resolution of appointment ii](#_Toc433283454)

[Terms of reference ii](#_Toc433283455)

[Recommendations v](#_Toc433283456)

[1 Background 1](#_Toc433283457)

[Introduction 1](#_Toc433283458)

[Conduct of the inquiry 1](#_Toc433283459)

[Structure of the report 2](#_Toc433283460)

[Development of the *Human Rights Act 2004* 3](#_Toc433283461)

[Committee comment 6](#_Toc433283462)

[2 Amendments concerning Indigenous rights 7](#_Toc433283463)

[Introduction 7](#_Toc433283464)

[Amendments proposed in the Bill 8](#_Toc433283465)

[Summary of effect 8](#_Toc433283466)

[Comparison with *Charter* provisions 9](#_Toc433283467)

[Explanatory Statement 11](#_Toc433283468)

[Attorney-General’s presentation speech 14](#_Toc433283469)

[Scrutiny Report No.31 17](#_Toc433283470)

[Assembly debate 22](#_Toc433283471)

[Attorney-General’s response to the Scrutiny Report No.31 33](#_Toc433283472)

[Attorney-General 42](#_Toc433283473)

[ACT Human Rights Commission 47](#_Toc433283474)

[Victorian Equal Opportunity and Human Rights Commission 55](#_Toc433283475)

[ACT Aboriginal and Torres Strait Islander Elected Body 60](#_Toc433283476)

[ACT Torres Strait Islander Corporation 68](#_Toc433283477)

[Committee comment 70](#_Toc433283478)

[3 Amendments concerning the right to education 73](#_Toc433283479)

[Introduction 73](#_Toc433283480)

[Amendments proposed in the Bill 73](#_Toc433283481)

[Summary of effect 74](#_Toc433283482)

[Explanatory Statement 75](#_Toc433283483)

[Scrutiny Report No.31 75](#_Toc433283484)

[Attorney-General’s response to Scrutiny Report No.31 77](#_Toc433283485)

[Attorney-General 80](#_Toc433283486)

[ACT Human Rights Commission 81](#_Toc433283487)

[Victorian Equal Opportunity and Human Rights Commission 85](#_Toc433283488)

[Committee comment 87](#_Toc433283489)

[4 Amendment concerning childrens’ rights 89](#_Toc433283490)

[Introduction 89](#_Toc433283491)

[Amendment proposed in the Bill 89](#_Toc433283492)

[Summary of effect 89](#_Toc433283493)

[Explanatory Statement 90](#_Toc433283494)

[Attorney-General 90](#_Toc433283495)

[ACT Human Rights Commission 91](#_Toc433283496)

[Victorian Equal Opportunity and Human Rights Commission 94](#_Toc433283497)

[Committee comment 97](#_Toc433283498)

[5 Committee comment 99](#_Toc433283499)

[Indigenous cultural rights 99](#_Toc433283500)

[Right to education 101](#_Toc433283501)

[Childrens’ rights 102](#_Toc433283502)

[Appendix A — Human Rights Amendment Bill 2015 103](#_Toc433283503)

[Appendix B — Explanatory Statement 107](#_Toc433283504)

[Appendix C — Articles 25 and 31, UN Declaration on the Rights of Indigenous Peoples 117](#_Toc433283505)

[Appendix D — Article 27, UN International Covenant on Civil and Political Rights 119](#_Toc433283506)

[Appendix E — Submissions 121](#_Toc433283507)

[Appendix F — Witnesses 123](#_Toc433283508)

Recommendations

[Recommendation 1](#_Toc433283509)

[5.11 The Committee recommends that the Legislative Assembly vote in support of Clauses 4, 6, 7 and 9 of the Human Rights Amendment Bill 2015.](#_Toc433283510)

[Recommendation 2](#_Toc433283511)

[5.14 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.](#_Toc433283512)

[Recommendation 3](#_Toc433283513)

[5.16 The Committee recommends that the ACT Government table in the Assembly, by the end of Assembly sittings of March 2016, either:](#_Toc433283514)

[ 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](#_Toc433283515)

[ a document prepared by the ACT Government which accurately reflects the key elements of the advice provided by the Government Solicitor.](#_Toc433283516)

[Recommendation 4](#_Toc433283517)

[5.19 The Committee recommends that the ACT Government investigate and consider legislation similar to the *Traditional Owner Settlement Act 2010* (Vic) for the ACT.](#_Toc433283518)

[Recommendation 5](#_Toc433283519)

[5.22 The Committee recommends that the Legislative Assembly vote in support of Clause 8 of the Human Rights Amendment Bill 2015.](#_Toc433283520)

[Recommendation 6](#_Toc433283521)

[5.26 The Committee recommends that the Legislative Assembly vote in support of Clause 5 of the Human Rights Amendment Bill 2015.](#_Toc433283522)

[Recommendation 7](#_Toc433283523)

[5.27 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’.](#_Toc433283524)

[Recommendation 8](#_Toc433283525)

[5.28 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.](#_Toc433283526)

Recommendations

# **No table of contents entries found.**

# Background

* 1. Introduction

There are three areas in which the Human Rights Amendment Bill 2015 would, if passed, amend the *Human Rights Act 2004* (from this point referred to as the ‘HRA’)*.*

These are in the areas of:

* rights accorded Aboriginal and Torres Strait Islander people in the ACT;
* a right to education; and
* children’s rights, in that the Bill would add a note stating that childrens’ rights provided for in the HRA are rights enjoyed in addition to those accorded all people covered by the Act.

On 26 March 2015 the Attorney-General presented the Human Rights Amendment Bill 2015 to the Legislative Assembly.[[4]](#footnote-4) Debate on the question that the Bill ‘be agreed to in principle’ was adjourned, resumed on 7 May 2015.[[5]](#footnote-5) Immediately after a motion was moved, and carried, to refer the Bill to the Standing Committee ‘for inquiry and report’.[[6]](#footnote-6)

* 1. Conduct of the inquiry

In the course of the inquiry the Committee wrote seeking submissions to the inquiry. Three submissions were received in response to the Committee’s invitation. These were submissions by:

* the ACT Human Rights Commission;
* the Victorian Equal Opportunity and Human Rights Commission; and
* the ACT Aboriginal and Torres Strait Islander Elected Body.

These are considered below in the body of the report.

The Committee also conducted a public hearing, on 8 October 2015. The Attorney-General and his officers, the ACT Aboriginal and Torres Strait Islander Elected Body, and the ACT Human Rights Commission appeared.

Testimony from these witnesses is also considered below in the body of the report.

* 1. Structure of the report

This report considers the effect if the Bill is passed in its present form.

Chapters are as follows:

* Chapter 1 is the present chapter, which sets out the background of the inquiry and a timeline of the development of the *Human Rights Act 2004*, including amendments to the Act since 2004;
* Chapter 2 considers amendments proposed in the Human Rights Amendment Bill 2015 which would, if passed, affect the rights of Aboriginal and Torres Strait Islander people in the ACT, drawing on various documentary sources, including submissions and witness testimony, which put forward views on amendments proposed;
* Chapter 3 considers amendments proposed in the Bill which would affect the right to education, and relevant parts of the documents, submissions, and testimony considered in Chapter 3;
* Chapter 4 considers a proposed amendment which would affect childrens’ rights, and relevant parts of documents, submissions and testimony; and
* Chapter 5, which presents the views of the Committee on the Bill, drawing on Committee comment made at the close of Chapters 2, 3, 4 and 5.
	+ - * 1. Appendices

The full text of the Bill is attached at Appendix A, and the *Explanatory Statement* to the Bill is attached at Appendix B.

Appendix C provides the text of Articles 25 and 31 of the *UN Declaration on the Rights of Indigenous Peoples*, and Appendix D the text of Article 27 of the *UN International Covenant on Civil and Political Rights*.

Appendices E and F provide detail submissions made to the inquiry and witnesses who appeared before the Committee in public hearings.

* 1. Development of the *Human Rights Act 2004*
		+ 1. Time-line

Significant events in the development of the HRA in the Legislative Assemblyinclude:

Early references to human rights in the Legislative Assembly

* **June 1989** —debates in the Assembly make substantial reference to human rights in connection with *Report of the National Inquiry into Youth Homelessness* , also known as the Burdekin Report;[[7]](#footnote-7)
* **November 1989** — significant debate in the Assembly regarding Australia’s proposed signing of the UN Convention on the Rights of the Child,[[8]](#footnote-8) and events in China relating to Tiananmen Square;[[9]](#footnote-9)
* **March 1990** — references to the absence of an office of the (federal) Human Rights and Equal Opportunity Commission in the ACT, including in Discussion of Matter of Public Importance on Human Rights;[[10]](#footnote-10)
* **May 1990** — questions in Assembly regarding a proposal by the ACT Government to ‘set up its own human rights office’;[[11]](#footnote-11)

First attempt to propose a Human Rights Bill

* **September 1990** — Human Rights Bill 1990 introduced in the Assembly as a Private Members Bill,[[12]](#footnote-12) and is subsequently set aside on grounds that it ‘has the object or effect of disposing or charging any public money of the Territory’ and therefore contravenes Standing Order 200 and Section 65 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth);[[13]](#footnote-13)

Discrimination made unlawful and creation of an anti-discrimination framework

* **October 1991** — draft Discrimination Bill introduced in the Assembly;[[14]](#footnote-14)
* **October 1991** — Human Rights and Equal Opportunity Bill 1991 presented in the Assembly, which, having been passed is subsequently entitled the *Discrimination Act 1991*;[[15]](#footnote-15)
* **September 1992** — reference to the ACT Government’s establishment of the ACT Human Rights Office,[[16]](#footnote-16) ‘run on a cooperative basis with the Federal Human Rights and Equal Opportunity Commission’;[[17]](#footnote-17)
* **April 1993** — tabling of the first annual report from the ACT Discrimination Commissioner under the *Discrimination Act 1991*;[[18]](#footnote-18)

Another human rights bill introduced

* **December 1993** — presentation in the Assembly of a discussion paper titled ‘A Bill of Rights for the ACT’;[[19]](#footnote-19)
* **May 1995** — presentation in the Assembly of the Bill of Rights Bill 1995;[[20]](#footnote-20)

Preparation, introduction, and passage of the Human Rights Bill 2004

* **April 2002** — presentation in the Assembly of Terms of Reference for a ‘Committee to inquire into an ACT bill of rights’;[[21]](#footnote-21)
* **October 2003** — report of Committee tabled in the Assembly;[[22]](#footnote-22)
* **November 2003** — Human Rights Bill 2003 presented to the Assembly, subsequently enacted as the *Human Rights Act 2004*;[[23]](#footnote-23)

Amendments and review of the Human Rights Act 2004

* **December 2007** — presentation in the Assembly of the Human Rights Amendment Bill 2007, introducing a ‘direct right of action’ in connection with the *Human Rights Act 2004* and imposing a duty such that ‘[a]ll public authorities will be required to act in a way that is compatible with human rights unless the incompatible conduct is required by law’;[[24]](#footnote-24)
* **August 2009** — presentation in the Assembly of a paper on the ‘Human Rights Act 2004—The First Five Years of Operation’;[[25]](#footnote-25)
* **December 2009** — presentation in the Assembly of the Human Rights Commission Legislation Amendment Bill 2009, including introduction of terms ‘gender identity’ and ‘industrial activity’;[[26]](#footnote-26)

Human Rights Act 2004 becomes regular part of Assembly discussion of new legislation

* **June 2010** — significant debate on human rights aspects of the Road Transport (Alcohol and Drugs) (Random Drug Testing) Amendment Bill 2009;[[27]](#footnote-27)
* **October 2010** — significant debate on human rights aspects of the Discrimination Amendment Bill 2010,[[28]](#footnote-28) and the Corrections Management (Mandatory Urine Testing) Amendment Bill 2010;[[29]](#footnote-29)

Further amendment and development of the Human Rights Act 2004

* **November 2010** — introduction in the Assembly of the Justice and Community Safety Legislation Amendment Bill 2010 (No 4), proposing changes to procedures for handling complaints and conciliation under the *Human Rights Commission Act*;[[30]](#footnote-30)
* **December 2010** — presentation in the Assembly of a paper, being the report of the ‘Australian Capital Territory Economic, Social and Cultural Rights Research Project’;[[31]](#footnote-31)
* **March 2012** — presentation in the Assembly of the Human Rights Amendment Bill 2012, which proposed a change the wording of s 28(1) so that limitations to human rights could be considered in relation to laws of other jurisdictions in addition to those of the ACT, and asserting a right to education, meaning ‘access to education without any discrimination that prevents that access’, thus introducing first statutory protections of economic, social and cultural rights;[[32]](#footnote-32)
* **March 2015** — presentation in the Assembly of the Human Rights Amendment Bill 2015, proposing to extend statutory protections of economic, social and cultural rights in relation to Aboriginal and Torres Strait Islander persons.[[33]](#footnote-33)
	1. Committee comment

In the Committee’s view, the timeline presented above displays a trend of orderly development of the ACT’s *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.

The pattern of the development of the ACT rights framework, including anti-discrimination legislation and the HRA, reminds us that there is more to rights than the HRA alone. It also accords with the fact that it is anti-discrimination legislation that is more often used when rights grievances arise in the ACT.

In many ways, the HRA comes into its own when avenues for remedies on discrimination are exhausted. This, in the Committee’s view, is a right and proper pattern of activity which supports a practical approach to rights grievances and results in a sensible application of the Territory’s resources.

The Committee also notes that the incremental introduction of enhancements, new rights and powers in the HRA has allowed the ACT to avoid what many feared prior to the enactment of the HRA: that it would result in undue litigation. In the Committee’s view it is important to continue with this measured, consistent, and careful approach to ensure that any litigious activity in relation to the HRA is warranted and proportionate to grievance which may arise.

Due diligence by the proposers of amendments to the HRA will ensure that this remains the case. Certainly, in the Committee’s view, the experience in Victoria since the enactment of the *Charter of Human Rights and Responsibilities Act 2006* confirms that this is both possible and desirable.

# Amendments concerning Indigenous rights

* 1. Introduction

This chapter of the report considers all amendments proposed in the Human Rights Amendment Bill 2015 which would, if passed, affect the rights of Aboriginal and Torres Strait Islander peoples.

In this chapter the Committee considers:

* a summary of amendments proposed in the Bill
* a summary of their effect if passed in their present form; and
* a consideration of sources for provisions in the Bill for rights in proposed HRA s 27(2), most particularly s 19(2) of the *Charter of Human Rights and Responsibilities Act 2006* (VIC). This section includes a table comparing the wordings of proposed HRA s 27(2) and *Charter* s 19(2).

The Committee then considers key contributions and comment on these aspects of the Bill, in chronological order, as follows:

* the Explanatory Statement to the Bill, tabled with the Bill on 26 March 2015;
* the Attorney-General’s speech of 26 March 2015 on presenting the Bill to the Assembly, speaking to the motion ‘that the Bill be agreed to in principle’, which was then adjourned;
* Scrutiny Report No.31 of 28 April 2015, in which the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) made comment on the Bill;
* further contributions to the debate in the Assembly on the question ‘that the Bill be agreed to in principle’ on 7 May 2015, including the Attorney-General’s reply at the end of debate; and
* the Attorney-General’s response to comments on the Bill in Scrutiny Report No.31, as published on 11 May 2015 in Scrutiny Report No.32.

Following this, the Committee considers contributions to its inquiry on the Bill, including testimony and submissions by:

* the Attorney-General;
* the ACT Human Rights Commission;
* the Victorian Equal Opportunity and Human Rights Commission;
* the ACT Aboriginal and Torres Strait Islander Elected Body; and
* the Torres Strait Islander Corporation.
	1. Amendments proposed in the Bill

 Amendments proposed in the Human Rights Amendment Bill 2015 in relation to Aboriginal and Torres Strait Islander people would, if the Bill were passed by the Assembly in its present form:

* Amend item 7 of the Preamble to the HRA so that it would refer to ‘Aboriginal and Torres Strait Islander people’ rather than ‘Indigenous people’, as at present, by virtue of Clause 4 of the Bill;
* alter the heading of s 27 of the HRAso that it would read ‘Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities’ rather than ‘Rights of Minorities’, as at present, by virtue of Clause 6 of the Bill;
* insert a new s 27 (2), by virtue of Clause 7 of the Bill, which would read:

“(2) Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied the right—

 (a) to maintain, control, protect and develop their—

 (i) cultural heritage and distinctive spiritual practices, observances, beliefs and teachings; and

 (ii) languages and knowledge; and

 (iii) kinship ties; and

 (b) 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”

* add a note to new s 27 (2), also by virtue of Clause 7, stating that ‘The primary source of the rights in s (2) is the United Nations Declaration on the Rights of Indigenous Peoples, art 25 and art 31’; and
* amend an entry in Schedule 1 so that ‘*ICCPR sources of human rights*’ would no longer show an entry for Section 27 of the *Human Rights Act 2004,* instead creating two entries for the newly-numbered Section 27 (1) (the former Section 27) and for the newly-created Section 27 (2) , by virtue of Clause 9 of the Bill.
	1. Summary of effect

If passed in its present form these elements of the Bill would amend the HRA so as to:

* effect a change in terminology from ‘Indigenous people’ to ‘Aboriginal and Torres Strait Islander people’;[[34]](#footnote-34)
* raise the status of Aboriginal and Torres Strait Islander people, as they are referenced by the Act, to give them a greater prominence than other minorities in the titling of Section 27;[[35]](#footnote-35)
* assert that Aboriginal and Torres Strait Islander people ‘hold distinct cultural rights’ which ‘must not be denied’, to ‘maintain, control, protect and develop’ their ‘cultural heritage’, ‘spiritual practices, observances, beliefs and teachings’; ‘languages and knowledge’; ‘kinship ties’;[[36]](#footnote-36)
* assert that Aboriginal and Torres Strait Islander people have ‘material and economic relations’ with ‘the land and waters and other resources with which they have a connection under traditional laws and customs recognised and valued’;[[37]](#footnote-37) and
* assert the ‘primary source’ of these rights in the United Nations Declaration on the Rights of Indigenous People, and have this reflected in detail in Schedule 1 of the Act.[[38]](#footnote-38)
	1. Comparison with *Charter* provisions

The most significant amendments to Aboriginal and Torres Strait Islander rights in the ACT would, if the Human Rights Amendment Bill 2015 were passed in its present form, be introduced by Clause 7 of the Bill. These amendments would, if passed, make changes to the present s 27 of the HRA to create a new s 27(2).

The Explanatory Statement to the Bill indicates that the proposed new form of Section 27 is intended to follow Section 19 of the *Charter of Human Rights and Responsibilities Act 2006* (VIC), particularly Section 19(2) of that Act.[[39]](#footnote-39)

The table below compares the text of Section 19 of the *Charter* with the text of an amended s 27 of the HRA as proposed in the Human Rights Amendment Bill 2015.

Table 1. Comparison of *Charter of Human Rights and Responsibilities Act 2006* (VIC) Section 19 and proposed Section 27 of the *Human Rights Act 2004* (ACT) as *per* Human Rights Amendment Bill 2015

|  |  |
| --- | --- |
| S 19 of the *Charter of Human Rights and Responsibilities Act 2006* (VIC) | Proposed S 27 of the *Human Rights Act 2004* (ACT) *per* Human Rights Amendment Bill  |
| 19. Cultural rights | 27. Rights of minorities  |
| (1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.  | (1) Anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language. |
| (2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community— (a) to enjoy their identity and culture; and (b) to maintain and use their language; and(c) to maintain their kinship ties; and(d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.[[40]](#footnote-40) | (2) Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied the right— (a) to maintain, control, protect and develop their— (i) cultural heritage and distinctive spiritual practices, observances, beliefs and teachings; and(ii) languages and knowledge; and (iii) kinship ties; and (b) 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. |
| [See] Section 3, Definitions(1) In this Charter— "Aboriginal" means a person belonging to the indigenous peoples of Australia, including the indigenous inhabitants of the Torres Strait Islands, and any descendants of those peoples; | [Add] Note The primary source of the rights in s [27] (2) is the United Nations Declaration on the Rights of Indigenous Peoples, art 25 and art 31. |

* + 1. Other sources

The Explanatory Statement also cites[[41]](#footnote-41) the following as sources for rights that would be created by Clause 7 of the Bill, if passed:

* Articles 25 and 31of the United Nations Declaration on the Rights of Indigenous Peoples; and
* Article 27 of the UN International Covenant on Civil and Political Rights (ICCPR).
	1. Explanatory Statement

The *Explanatory Statement* addresses provisions of the Bill as follows.

* + - * 1. change of terminology

Regarding Clause 4 of the Bill, a change of terminology from ‘Indigenous people’ to ‘Aboriginal and Torres Strait Islander people’, the Explanatory Statement stated that:

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.[[42]](#footnote-42)

* + - * 1. Change of heading for section 27

Regarding Clause 6 of the Bill, a change of wording for the heading of s 27 from ‘Rights of minorities’ to ‘Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities’, the Explanatory Statement stated that 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.[[43]](#footnote-43)

* + - * 1. Distinct cultural rights for Aboriginal and Torres Strait Islander people

Regarding Clause 7 of the Bill, asserting ‘distinct cultural rights’ for Aboriginal and Torres Strait Islander people, the Explanatory Statement made a number of points, including:

* that proposed s 27(2) had been based on s 19 of the Victorian [*Charter of Human Rights and Responsibilities Act 2006*];[[44]](#footnote-44)
* that the rights to be conferred by the Bill, if passed, would be ‘additional’ to those rights held by Aboriginal and Torres Strait Islander people as individuals under the HRA:

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;[[45]](#footnote-45)

* that this part of the Bill reflected the influence of article 31 of the *United Nations* *Declaration on the Rights of Indigenous Peoples*:

Section 27(2)(a) reflects the aspirations of article 31 of UNDRIP [*United Nations Declaration on the Rights of Indigenous Peoples*] which recognises the right of Indigenous peoples to maintain, control and develop their cultural heritage and traditional knowledge … [[46]](#footnote-46)

* that the proposed amendments did not seek to ‘confer or create real or intellectual property rights’:

[The Bill] 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;[[47]](#footnote-47)

* that while the HRA, as at present, provided rights to Aboriginal and Torres Strait Islander people with connection with their distinct cultural identities, this part of the Bill would provide ‘formal recognition’ of ‘existence and continuing contribution’:

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 quality 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;[[48]](#footnote-48)

* that part of the purpose of proposed s 27(2)(b) was to acknowledge:

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 … [and] 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;[[49]](#footnote-49)

* that the intention of the proposed section was :

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;[[50]](#footnote-50)

* that this right was already ‘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;[[51]](#footnote-51) and

* that, as with the other rights set out in the HRA*,* the cultural rights of Aboriginal and Torres Strait Islander peoples were not absolute, but could be ‘subject to such limitations as are demonstrably justifiable in a free and democratic society’ and, ‘in particular’ this meant that ‘arguments of “cultural relativism” cannot be used as a justification for criminal conduct, or as a potential defence against criminal charges’.[[52]](#footnote-52)
	1. Attorney-General’s presentation speech

The Attorney-General presented the Human Rights Amendment Bill 2015 to the Legislative Assembly on 26 March 2015 and spoke to the motion that ‘this bill be agreed to in principle’.[[53]](#footnote-53)

Debate was adjourned on that day and resumed on 7 May 2015. At the end of the debate the Bill was agreed to in principle and was then referred to the Standing Committee for the present inquiry.

As the proposer of the Bill the Attorney-General was first speaker to the motion and, as provided for under the Legislative Assembly’s Standing Orders,[[54]](#footnote-54) also spoke in reply when this debate concluded on 7 May 2015.[[55]](#footnote-55)

In his speech he told the Assembly that the Bill marked ‘another significant step in the protection and promotion of human rights in the ACT’, and that the Bill had been developed following ‘the 2014 review of the Human Rights Act 2004 and consultation with the human rights commissioner and the Aboriginal and Torres Strait Islander Elected Body’.[[56]](#footnote-56)

Turning to amendments proposed in the Bill that affected Aboriginal and Torres Strait Islander rights, the Attorney told the Assembly that:

One of the factors that influence the poorer outcomes for Aboriginal and Torres Strait Islander people, including in terms of health and overrepresentation in the justice system, is the impact of disconnection from country and cultural heritage. The government is therefore taking action with this bill to provide for recognition of Aboriginal and Torres Strait Islander peoples and their cultural rights, including the importance of relationship to country, in the *Human Rights Act*. [[57]](#footnote-57)

In response to this, he told the Assembly:

The bill … inserts a new section 27(2) into the *Human Rights Act* to provide 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 practices, observances, beliefs and teachings, their languages and knowledge, and their kinship ties. This includes the right of Aboriginal and Torres Strait Islander peoples 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.[[58]](#footnote-58)

‘Culture’, he told the Assembly, was not defined in the proposed amended Act, but:

takes its ordinary broad meaning, which would encompass the language, spirituality, membership, arts, literature, traditional knowledge, customs, rituals, ceremonies, methods of production, among many other aspects of the life of Aboriginal and Torres Strait Islander peoples.[[59]](#footnote-59)

These amendments, he told the Assembly, were:

supported by a further amendment to the preamble of the *Human Rights Act* to change a reference to Indigenous people to Aboriginal and Torres Strait Islander peoples, acknowledging that Aboriginal and Torres Strait Islander peoples are not a homogeneous group with a uniform cultural heritage and identity but rather a diverse group with differing histories and aspirations.[[60]](#footnote-60)

The Attorney-General went on to speak about what he regarded as the significance of the proposed amendments. He told the Assembly that:

At present the text of the *Human Rights Act* makes no reference to Aboriginal and Torres Strait Islander peoples, nor does it acknowledge their distinct culture, heritage and relationships which form the basis for their continuing contribution to the Canberra region.[[61]](#footnote-61)

Moreover, he said:

At a time when the movement for the recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution is gathering support right across Australia, it is important that the government here in the ACT take action so that its own key legal documents acknowledge the unique and distinct culture of the first owners and traditional custodians of the ACT region.[[62]](#footnote-62)

Speaking to the wider context for the Bill, the Attorney-General told the Assembly that:

Including the cultural rights of Aboriginal and Torres Strait Islander peoples in the ACT's *Human Rights Act* acknowledges the importance of the *United Nations Declaration on the Rights of Indigenous Peoples* as a template for relationships between the government of the ACT and Aboriginal and Torres Strait Islander peoples in the broader community.[[63]](#footnote-63)

In connection with this, the Attorney-General told noted that that the UN Declaration ‘was the culmination of decades of work of indigenous peoples and rights institutions from around the world’, and that the Australian government had ‘pledged its support to the declaration in April 2009’. [[64]](#footnote-64)

In practical terms, he told the Assembly:

A basic acknowledgement that the cultural rights of Aboriginal and Torres Strait Islander peoples are and will continue to be observed, respected and upheld is an essential gesture that will facilitate Aboriginal and Torres Strait Islander peoples taking a greater leadership role in building stronger communities and improving relationships with the broader community and the government. An acknowledgement of the ancient and enduring Aboriginal and Torres Strait Islander cultural connections and relationships will help to generate engagement and investment in initiatives aimed at realising and giving effect to the equal inclusion of Aboriginal and Torres Strait Islander peoples in the ACT. [[65]](#footnote-65)

The Attorney-General also told the Assembly that the amendments insofar as they affected Aboriginal and Torres Strait Islander rights were already implicit in other rights created in the HRA. The Government’s intention in proposing the amendments was to ‘properly provide formal recognition of the existence and continuing contribution of the cultural heritage of these first peoples to the Canberra region’: that is, to make these rights explicit.[[66]](#footnote-66)

He went on to say that:

Making this amendment to our own *Human Rights Act*, one of the foundational documents of the ACT legal and justice system, will therefore greatly support the ACT government's reconciliation action plans and the Aboriginal and Torres Strait Islander justice partnership.[[67]](#footnote-67)

* 1. Scrutiny Report No.31
		+ - 1. Introduction

In its *Scrutiny Report No. 31* the Scrutiny Committee noted that:

the notion of “human rights” is employed to mean the civil and political rights in Part 3 of the Act and the economic, social and cultural rights in Part 3A. Clause 7 of the Bill proposes to add to the Part 3 rights by the insertion into section 27 of a new subsection 27(2).[[68]](#footnote-68)

* + - * 1. Whether ‘any provisions of the Bill amount to an undue trespass on personal rights and liberties’

The Committee considered the question of whether ‘any provisions of the Bill amount to an undue trespass on personal rights and liberties’, as the Committee is obliged to do under paragraph (3)(a) of its Resolution of Appointment.[[69]](#footnote-69)

In considering this question, the ScrutinyCommittee noted that its answer would hinge on whether rights created by the Bill ‘[cut] across existing HRA rights to an extent that is unacceptable’.[[70]](#footnote-70)

In particular, the Committee considered the following points:

* that ‘the primary right’ was asserted in HRA s 8(3), that:

“Everyone is equal before the law and is entitled to the equal protection of the law without discrimination”,[[71]](#footnote-71) and that the right of equality before the law ‘is often regarded as one of the most fundamental of the rights upon which our constitutional system is founded’;[[72]](#footnote-72)

* that a ‘law which confers on certain persons rights not afforded to others cuts across the right to equal protection of the law’ and may also ‘in a particular situation … cut across any of the other rights stated in Part 3 of the HRA’;[[73]](#footnote-73)
* that the insertion of this provision into the Act may be:

supported by argument that the right in subsection 8(3) (as any other HRA right) is not absolute (as HRA section 28 contemplates). There are circumstances where some group of persons defined by some characteristic (in this case, race), may, by reason of certain circumstances, be accorded certain rights not available to other persons;[[74]](#footnote-74) and

* that the insertion of proposed subsection 27(2) was:

based on argument that Aboriginal and Torres Strait Islander peoples hold distinct cultural rights, and have “distinctive spiritual, material and economic relationships ... with the land and waters and other resources with which they have a connection under traditional laws and customs” (Explanatory Statement at 5) [and that these] rights require protection in the manner provided for in proposed subsection 27(2).[[75]](#footnote-75)

* + - * 1. Weighing-up limitations of rights

The Committee noted that it was a matter for Members of the Legislative Assembly to consider whether the limitations of rights implied by the proposed section 27(2) were ‘an acceptable limitation to equal protection of the law [and] other rights stated in HRA Part 3’.[[76]](#footnote-76)

The Committee made three points to support such deliberations. These were:

* First, that the:

proposed subsection 27(2) is not an absolute right, but may be limited by a law, or by an administrative action, where that limitation is “proportionate” according to the test stated in HRA section 28.[[77]](#footnote-77)

* Second, that ‘subsection 27(2) will not “trump” any or all of the other rights stated in HRA Part 3’: that is, the right enclosed in the provision will in any particular instance be balanced against other rights set out in the Act, without those rights being derogated by the insertion of s 27(2).[[78]](#footnote-78)
* Third, that there remained questions as to ‘just how extensive are the rights in proposed subsection 27(2)’.[[79]](#footnote-79)

In relation to this last question, the Committee proposed that it was reasonable to pose, in relation to this part of the Bill, questions that had been raised in relation to the *Declaration on the Rights of Indigenous Peoples* prior to it being adopted. These were as follows:

* [W]ill the right to have “material and economic relationships with land” “recognised” apply to interests in land now lawfully held by third parties? [[80]](#footnote-80)
* Will the right to protection of Aboriginal and Torres Strait Islander peoples’ “knowledge” lead to the recognition of new types of intellectual property? [[81]](#footnote-81)
* Will the right to protection of cultural heritage … be a basis to argue that a rule or a practice warranted by customary law should be recognised notwithstanding its incompatibility with the general law applicable to all persons? [[82]](#footnote-82)
	+ - * 1. Scrutiny Committee’s consideration of *Explanatory Statement* in relation to these questions

At this point the Committee went on to consider whether the *Explanatory Statement* to the Bill shed light on questions of the scope of rights conferred by proposed Section 27(2).

Noting that parts of the *Explanatory Statement* had addressed such questions, the Committee stated that there was, however, a question as to ‘whether the Explanatory Statement [had understated] the potential legal effect of proposed subsection’.[[83]](#footnote-83)

The Committee indicated parts of the *Explanatory Statement* where it was suggestedthat:

proposed subsection 27(2) “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”.[[84]](#footnote-84)

Regarding this the Committee suggested:

* that:

The Commonwealth Constitution confers power on the Commonwealth Parliament to make laws with respect to “copyrights, patents of inventions and designs, and trade marks” (paragraph 51(xviii)) [but that this was] not however a power exclusive to the Commonwealth and a Territory law is operative so long as not inconsistent with a Commonwealth law;[[85]](#footnote-85)

* that:

This a very complex matter, but it must be allowed that the particular assertion of a right, for example, to protection of “languages and knowledge” (subparagraph 27(2)(a)(ii)) may not be inconsistent with a Commonwealth law;[[86]](#footnote-86)

* and that:

whether such an assertion could be said to be classified as an assertion of a copyright, a patent or a trade mark (or any other such interest that has been recognised to fall within this Commonwealth power).[[87]](#footnote-87)

Demarcation between ACT and Commonwealth law on environment and resources

In its report the ScrutinyCommitteenoted similar views put forward in the Explanatory Statement on the demarcation between ACT and Commonwealth statute, in connection with the proposed Section 27(2)(b). The *Scrutiny report* quoted the *Explanatory Statement* as follows:

Section 27(2)(b) provides for the recognition and valuing of these [material and economic] 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.[[88]](#footnote-88)

In response the Scrutiny Committee stated that:

It is difficult to follow this argument, perhaps because there may be words omitted from the first sentence. But the general point seems incorrect. The Commonwealth Parliament does not have legislative power over “environment and resources”, and much less so concerning “property rights”. It has some discrete powers that are employed to regulate some aspects of these matters, but again these powers are not exclusive. There are several Territory laws that also regulate some such aspects, and it is not unrealistic to view proposed subsection 27(2) as another such law.[[89]](#footnote-89)

In so stating, the Scrutiny Committee reiterated its argument, made in relation to intellectual property that these were matters, potentially, which lay within the jurisdiction of the ACT and that, consequently, the ACT should conduct due diligence on the implications of amendments in this area.

Proposed Section 27(2)(b) — stated intent

The Scrutiny Committee’s report noted that the *Explanatory Statement* to the Bill stated that ‘the intention behind paragraph 27(2)(b)’ was:

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.[[90]](#footnote-90)

Scope of proposed Section 27(2)(b)

In its report the Scrutiny Committeesuggested:

* that proposed paragraph 27(2)(b) did ‘not however require the Territory Government or the Legislative Assembly to do anything’; [[91]](#footnote-91)
* that, rather, the section provided ‘that Aboriginal and Torres Strait Islander peoples must not be denied the right to recognition of these relationships’; [[92]](#footnote-92)
* that it was ‘arguable that these relationships must be recognised as [already] existing at the present time, and be relied upon in any appropriate legal forum’; [[93]](#footnote-93) and that ‘Just what are “material and economic relationships” with land, waters and other resources will of course be a matter for debate and clarification’.[[94]](#footnote-94)
	1. Assembly debate
		1. Introduction

As noted above, the Attorney-General presented the Human Rights Amendment Bill 2015 to the Legislative Assembly on 26 March 2015 and spoke to the motion ‘That this bill be agreed to in principle’. Debate was adjourned on that day and resumed on 7 May 2015.

Speakers to the question ‘That this bill be agreed to in principle’ were:

* the Leader of the Opposition, Mr Jeremy Hanson MLA;
* the Minister for Aboriginal and Torres Strait Islander Affairs, Ms Yvette Berry MLA;
* the Opposition Spokesperson for Aboriginal and Torres Strait Islander Affairs, Mr Andrew Wall MLA;
* Mr Shane Rattenbury MLA, speaking as a representative of the ACT Greens;
* Dr Chris Bourke MLA, a member of the Committee and himself an Indigenous man; and
* the Attorney-General, Mr Simon Corbell MLA, who spoke in reply as provided for under Standing Orders[[95]](#footnote-95) when the debate on the question concluded that same day, 7 May 2015.[[96]](#footnote-96)

Once the Bill was agreed to in principle and it was then referred to the Standing Committee for the present inquiry.

Contributions to the debate are considered below.

* + - 1. Mr Hanson MLA

The Leader of the Opposition, Mr Hanson MLA also spoke when debate was resumed on the motion ‘That this bill be agreed to in principle’ in the Assembly on 7 May 2015.[[97]](#footnote-97)

Mr Hanson told the Assembly ‘at the outset’ that there was ‘no doubt this bill addresses some very important issues that we as a party certainly support’. The Opposition, he told the Assembly, in particular supported proposed amendments relating to rights to education and rights of children, which are considered elsewhere in this report.[[98]](#footnote-98)

Mr Hanson went on to state that the Opposition acknowledged ‘the intent of these provisions’, particularly section 27(2), ‘which recognises, for example, that their right to enjoy a particular culture may consist in a way of life that is closely associated with territory and use of its resources’ and representations in the Explanatory Statement that the intention attached to this proposed subsection was ‘not to confer property rights through the recognition of native title’.[[99]](#footnote-99)

‘However’, he told the Assembly:

we must also take note of the extensive comments that have been raised by the scrutiny of bills committee. The committee has noted several potential difficulties with this provision, and omissions and uncertainty, both in the legislation and in the explanatory statement.[[100]](#footnote-100)

Mr Hanson went on to quote questions raised by the Scrutiny Committee in Scrutiny Report No.31, regarding third party interests in land, intellectual property, and customary law, [[101]](#footnote-101) and questioning aspects of the legal reasoning employed in the Explanatory Statement to the Bill, regarding the scope of proposed provisions, matters of legislative jurisdiction, and the difference between an ‘interpretational’ right and other rights in the HRA.[[102]](#footnote-102)

Mr Hanson went on to say that:

Even though we accept, endorse and support the intent of the clauses in this bill, as individuals and legislators we must look at the actual terms and the potential ramifications, particularly those issues that have been raised by the scrutiny of bills committee. Before we as an Assembly agree to pass the bill in detail we want to refer those specific concerns to an Assembly committee that can explore them and recommend any modifications that may or may not be required. That is the point. It is about clarification. No amendments may be required to this bill, but these issues and questions that have been raised by the scrutiny of bills committee need to be addressed.[[103]](#footnote-103)

He also told the Assembly that it was the Opposition’s view that:

We should give very careful consideration to the issues raised by this Assembly's scrutiny committee, which is a bipartisan committee, before we pass this law. We can do something proactive to address it. We do not want issues of this sort being resolved subsequently in the Supreme Court or in other courts of the territory or Australia.[[104]](#footnote-104)

In light of this, Mr Hanson told the Assembly:

I say again that we support the bill in principle, but let us make sure it reflects our shared commitment to equality for all and a workable, sound law that will serve all the people of the ACT. We support this bill in principle but recommend a committee review prior to debate at the detail stage.[[105]](#footnote-105)

* + - 1. Ms Berry MLA

Ms Yvette Berry MLA, Minister for Aboriginal and Torres Strait Islander Affairs, also spoke to the motion.[[106]](#footnote-106)

Ms Berry told the Assembly that:

For the first time in Australia this is a bill that acknowledges Aboriginal and Torres Strait Islander people as having economic, social and cultural rights.[[107]](#footnote-107)

She also told the Assembly that:

The proposed amendment to the preamble of the *Human Rights Act 2004* to replace “Indigenous people” with reference to “Aboriginal and Torres Strait Islander peoples” may be only a minor change but it is significant and it is supported by the elected body because it acknowledges that Aboriginal and Torres Strait Islander peoples are not a homogeneous group with a uniform culture and heritage and identity but, rather, they are a diverse group with differing histories and aspirations, even here in the ACT and surrounding regions. [[108]](#footnote-108)

Noting the cooperation given by the ACT Aboriginal and Torres Strait Islander Elected Body,[[109]](#footnote-109) Ms Berry went on to tell the Assembly that the signing of a recent agreement was significant in relation to the Bill:

The recent signing of the ACT Aboriginal and Torres Strait Islander agreement by the ACT government and the ACT Aboriginal and Torres Strait Islander Elected Body further strengthens the importance of this bill. The ACT government occupies a unique position in Australian governments, being the only jurisdiction to have a whole-of-government agreement with an independent elected body of Aboriginal and Torres Strait Islander community representatives.[[110]](#footnote-110)

The aim of the Agreement, Ms Berry told the Assembly, was:

to achieve realistic, practical and equitable outcomes for Aboriginal and Torres Strait Islander Canberrans. It provides a framework for sustaining better relations between the ACT government and the Aboriginal and Torres Strait Islander people, articulating the ACT relationship principles of respect, collaborative communication, improved partnerships and improved service delivery.[[111]](#footnote-111)

Ms Berry also told the Assembly of the wider significance of the Bill in terms of Aboriginal and Torres Strait Islander affairs:

The proposed changes in the Human Rights Amendment Bill 2015 I hope will embed the principle of inclusion of Aboriginal and Torres Strait Islander cultural rights into the way we do business, supporting the strategic and community priorities of the ACT Aboriginal and Torre Strait Islander agreement. This bill is a positive progression in the ACT rights dialogue which continues to build the foundation for meaningful, respectful and inclusive engagement with the Aboriginal and Torres Strait Islander community.[[112]](#footnote-112)

* + - 1. Mr Andrew Wall MLA

Mr Andrew Wall MLA, Shadow Minister for Indigenous Affairs, also spoke to the motion.[[113]](#footnote-113)

Mr Wall stated that his contribution to the debate would focus on proposed s 27(2). In connection with the proposed section, he expressed concern regarding:

* questions over interaction the proposed section with the principle of equality before the law, as had been raised in Scrutiny Report No.31;[[114]](#footnote-114)
* the possibility of changes being made to the Australian Constitution regarding recognition of Aboriginal and Torres Strait Islander peoples, and that as a result ‘prematurely legislating in this space without the constitutional changes is fraught with danger‘;[[115]](#footnote-115) and
* questions over the meaning of “material and economic relationships” with ACT lands and waters being “recognised and valued”, as had been raised in Scrutiny Report No.31.[[116]](#footnote-116)

Mr Wall also told the Assembly that while the *Victorian Charter of Human Rights and Responsibilities Act 2006* had been ‘highlighted as an example of this right already in action’, the *Charter* stopped short of ‘going so far as to require the right to be “valued and recognised”’.[[117]](#footnote-117)

In practice, he asked, whether this right could:

possibly give rise to a compensation claim if the government sought to develop a parcel of greenfield land to which the local Indigenous community was able to demonstrate a connection under “"traditional law or custom”? [[118]](#footnote-118)

In closing, Mr Wall reiterated earlier comments by Mr Hanson MLA that the Bill should be considered by this Committee, ‘in an effort to better inform members of this Assembly of what impact this legislation will have in practice and to explore the potential for unintended consequences’.[[119]](#footnote-119)

* + - 1. Mr Shane Rattenbury MLA

Mr Shane Rattenbury MLA, a Minister in the ACT Government and an ACT Greens Member of the Assembly, also spoke to the motion.[[120]](#footnote-120)

In speaking to the motion, Mr Rattenbury told the Assembly that:

The changes made in this bill originated from a 2010 report by the University of New South Wales and the Australian National University which examined the potential for the ACT's Human Rights Act to be extended to include economic, social and cultural rights. The overall conclusion of the report was that the inclusion of these rights is desirable and feasible. It recommended that the act should be amended to include most of the economic, social and cultural rights contained in the international covenant on economic and social rights, to which Australia is a party.[[121]](#footnote-121)

He went on to say that:

The 2010 report recommended adding a suite of rights to the Human Rights Act. That would have been a major step. The government has decided to take a minor step instead. That approach has, I think, left the authors of the report frustrated, and it has been of some frustration to the Greens. We would have liked to see a full suite of economic, social and cultural rights incorporated into the ACT's human rights regime.[[122]](#footnote-122)

In relation to the proposed expansion of rights in the Act, Mr Rattenbury told the Assembly that although concerns had been raised about ‘the potential flood of litigation and the “lawyers’ picnic” that apparently could result from extending a legislative protection to human rights’, this had ‘not been the case in the ACT since this jurisdiction first legislated to protect civil and political rights’.[[123]](#footnote-123)

Mr Rattenbury quoted the 2009 review report of the first five years of the operation of the HRA to support this:

Although critics predicted a surge in litigation and an undermining of the elected government by an unaccountable judiciary, the experience of the HRA is that its impact on policy-making and legislative processes has been more extensive and arguably more important than its impact in the courts.[[124]](#footnote-124)

Based on this, Mr Rattenbury went on to say that he did not believe that there would be:

a “floodgates” problem with the addition of economic, social and cultural rights either. It is worth noting in any case that the government has taken a very slow and cautious approach to introducing these rights. As I have touched on, it has actually caused frustration to many who wish to see human rights recognised and protected. It seems to me that the last thing that could happen under this approach is an opening of the litigation floodgates.[[125]](#footnote-125)

Mr Rattenbury went on to assert:

* that a relationship with land and waters was ‘core to the notion of culture for Aboriginal and Torres Strait Islander people’;
* that Aboriginal and Torres Strait Islander people had ‘at least a 40,000-year-old history in Australia’;
* that ‘we as a society have a responsibility to support the ongoing essence of the oldest continuing culture in the world’; and
* that the amendments before the Assembly were ‘a step—just a small step—in working with the local Aboriginal and Torres Strait Islander community’ to support the continuation of that culture.[[126]](#footnote-126)

Speaking further to possible concerns about amendments proposed, Mr Rattenbury told the Assembly that he was ‘pleased that there is support across the chamber for this addition to our Human Rights Act’:

It is important for the Assembly to show leadership because even in this day and age there are some in our community who might fear—and I do believe it is an irrational fear—that the consequences of recognising the rights of Indigenous people, such as mentioning “land” and “rights”, are translated in some people’s minds into a fear of some sort of “land grab” or other description in a similar vein. I would like to think that we have moved, and we certainly need to move, beyond this kind of fear and reaction.[[127]](#footnote-127)

‘In any case’, he went on to say, ‘to express this view in the ACT’ was ‘stranger than ever’ because:

We have no big mining corporations lobbying in the background and no need for some of the skulduggery we see in the west and the north. We have instead a wealth of natural space, managed with a sense of growing partnership with the local Aboriginal people, and these rights will only enhance this partnership approach. To suggest that the addition of these rights will in some way negatively impact non- Aboriginal and Torres Strait Islanders is simply wrong. The relevant sections amended will provide the right to maintain, control, protect and develop their culture. This is a culture that I believe we all respect and seek to support.[[128]](#footnote-128)

In relation to the particular wording of proposed s 27(2), Mr Rattenbury told the Assembly that:

When it comes to land, waters and other resources, the amendments before us are similarly clear and consistent with the intent of the preamble. Clause 7 states, I believe with little ambiguity, that Aboriginal and Torres Strait Islanders must not be denied the right to have their continuing connection to the land “recognised and valued”. With respect to the phrase “recognised and valued”, I believe there is nothing to fear there, and I believe there is a lot to celebrate in making this part of the ACT Human Rights Act.[[129]](#footnote-129)

* + - 1. Dr Chris Bourke MLA

Dr Chris Bourke MLA also spoke to the motion.[[130]](#footnote-130) Dr Bourke is an Indigenous man and is Assistant Speaker and Government Whip in the Assembly.

In speaking to the motion Dr Bourke told the Assembly that:

These amendments, as we have heard, acknowledge the unique and distinct culture of Aboriginal and Torres Strait Islander peoples. The wider Canberra area was part of the range of the Ngunnawal people and was also visited by adjacent peoples, including the Gundungurra, Wiradjuri, Wolgalu and Ngarigo. The extensive Aboriginal occupation of the area is reflected in the more than 3,500 known Aboriginal heritage sites across the ACT. The diversity and number of Aboriginal heritage places and objects attest to that relationship between Ngunnawal people and the land of the ACT. [[131]](#footnote-131)

He went on to say that:

Traditional owners and the ACT Heritage unit mark the importance of lowland hills such as Black Mountain as well as the mountain ranges surrounding the ACT, including Tidbinbilla and Gibraltar ranges for lore, initiation and ceremony. The Birrigai rock shelter in the Tidbinbilla nature reserve has strong evidence, both cultural and scientific, of continuous occupation of the southern tablelands by people for almost 20,000 years.[[132]](#footnote-132)

In light of this he told the Assembly:

The amendments in this bill are about recognising and valuing Indigenous cultural heritage. They are special measures that formally recognise the real significance of human rights for Aboriginal and Torres Strait islander peoples, the first owners of this continent, members of its most enduring cultures and individuals for whom the issue of rights protection has continuing and great importance.[[133]](#footnote-133)

However, he told the Assembly, the amendments did not ‘provide the right to own land, nor [did they] aim to create or confer new property rights or impact existing property rights’.[[134]](#footnote-134)

Rather, he told the Assembly:

it simply formalises and clearly acknowledges those relationships making up the great cultural heritage of Aboriginal and Torres Strait islander people.[[135]](#footnote-135)

‘In practice’, he told the Assembly:

the amendments will require consultation with and collaboration between public authorities and Aboriginal peoples about matters to do with the management and custodianship of cultural artefacts, heritage sites, areas of land and water holding traditional or enduring importance to the Aboriginal community of the ACT.[[136]](#footnote-136)

He went on to say that:

These amendments formalise mechanisms by which the government already consults and respects the Aboriginal community, and in doing so recognise and value the relationships that they have with the land, water and resources to which they have a traditional connection. Currently, the *Heritage Act 2004* makes provision for the cultural significance of land of Aboriginal and Torres Strait Islander peoples and consultation with their community representatives. Under the Heritage Act all Aboriginal places and objects in the ACT are protected and are recorded in a centralised database maintained by the ACT Heritage unit. ACT Heritage makes provision for the declaration of representative Aboriginal organisations after consulting with Aboriginal peoples with traditional affiliation with land.[[137]](#footnote-137)

An important effect of the amendments, he told the Assembly, would be that if they were passed ‘policy development, scrutiny of bills and interpretation of laws [would] all be undertaken with reference to Aboriginal and Torres Strait Islander rights’, and that this would ‘increase awareness of policy issues that affect Aboriginal and Torres Strait Islander peoples’.[[138]](#footnote-138)

This was, he told the Assembly, part of a broader approach to Indigenous matters initiated in the ACT:

Recognition of Aboriginal and Torres Strait Islander peoples’ right to express their identity and culture, maintain kinship ties and maintain a material and economic relationship with the land and waters is a part of moving forward towards national reconciliation. Making this amendment to the *Human Rights Act* is one of the foundations underpinning the ACT legal and justice system that will recognise the special relationship of traditional owners to this land, and it will reflect the spirit of the ACT government's reconciliation action plans, the whole-of-government agreement and the Aboriginal and Torres Strait Islander justice partnership.[[139]](#footnote-139)

* + - 1. The Attorney-General, Mr Simon Corbell MLA, in reply

As mover of the motion, the Attorney-General, Mr Corbell MLA, closed the Assembly’s 7 May 2015 debate on the question ‘that the Bill be agreed to in principle’.[[140]](#footnote-140)

Among other things, the Attorney-General told the Assembly that he noted comments made members of the Opposition ‘about whether these new rights to be integrated into the Human Rights Act will create unintended consequences’, in particular those of Mr Wall and Mr Hanson, ‘who both asked whether the rights will have material and economic relationships with land recognised and apply to interests in land now lawfully held by third parties’.[[141]](#footnote-141)

 Noting that this was the same question that was asked by the Scrutiny of Bills Committee,[[142]](#footnote-142) the Attorney-General told the Assembly that, as he had written to the Scrutiny of Bills Committee in reply, it was ‘not anticipated that this amendment will have an impact on land rights in the ACT’. [[143]](#footnote-143)

He also told the Assembly that it was in any case ‘likely that native title has been extinguished in the ACT through the operation of the *Native Title Act 1994* in conjunction with the *Native Title Act 1993* of the Commonwealth ‘ .[[144]](#footnote-144)

The Attorney-General noted that the *Heritage Act 2004* currently made provision ‘for the cultural significance of land for Aboriginal and Torres Strait Islander people’ and that it was:

already a routine requirement that any development application that may impact the heritage values of an area or object registered or provisionally registered under the *Heritage Act* is referred to the ACT Heritage Council for advice.[[145]](#footnote-145)

The Attorney-General went on to say, in support of this aspect of the Bill, that ‘a relationship with land and water’ was central ‘to the notion of cultural for Aboriginal and Torres Strait Islander people’. The amendment, he told the Assembly, did not ‘provide any right to own land’, but ‘simply the right to maintain the connection with significant areas of land and water’. [[146]](#footnote-146)

In support of this he quoted the UN Human Rights Committee as saying that certain aspects:

of the rights of individuals protected under that article—for example, to enjoy a particular culture—may consist in a way of life which is closely associated with territory and use of its resources.[[147]](#footnote-147)

And that:

With regard to the exercise of the cultural rights protected under article 27 [of the *Declaration of the Rights of Indigenous Peoples*], the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[[148]](#footnote-148)

Regarding questions over whether proposed s 27(2) could give rise to ‘new types of intellectual property’, the Attorney-General told the Assembly:

* that ‘the right to protection of Aboriginal and Torres Strait Islander peoples’ knowledge’ would not ‘will lead to the recognition of new types of intellectual property’;
* that proposed section 27(2) ‘requires that public authorities refrain from denying the rights of Aboriginal and Torres Strait Islander peoples to maintain, control, protect and develop their cultural heritage’;
* that ‘Aboriginal and Torres Strait Islander peoples are not prevented from enforcing their rights within the scope and process of existing intellectual property law’;
* that the ‘proposal in this bill is that public authorities must not impede enjoyment of those rights’; and
* that proposed section 27(2) did ‘not require the ACT government to take positive action to introduce mechanisms for the recognition of those rights’.[[149]](#footnote-149)

On the basis of these points, the Attorney-General told the Assembly that it was his view that ‘the recognition of cultural rights as drafted will not lead to the recognition of new types of intellectual property’.[[150]](#footnote-150)

* 1. Attorney-General’s response to the Scrutiny Report No.31
		+ - 1. Introduction

Where the Scrutiny Committee makes, in its reports, substantive comment on proposed legislation, it finishes each comment with the form of words:

The Committee draws these matters to the attention of the Assembly and recommends that the Minister respond.[[151]](#footnote-151)

Ministers’ responses are published as attachments to subsequent Scrutiny reports. In this case the response by the Attorney-General, as Minister responsible for the Bill, was published in *Scrutiny report* *No.32* on 11 May 2015.[[152]](#footnote-152)

* + - * 1. Does section 27(2) cut across other Human Rights Act rights unacceptably?

The Attorney-General first addressed the question:

Does proposed subsection 27(2) cut across existing HRA rights to an extent that is unacceptable?

The Attorney-General noted the Committee’s observation that ‘a law which confers on certain persons rights not afforded to others cuts across the right to equal protection of the law’ under s 8(3) of the *Human Rights Act 2004*.[[153]](#footnote-153)

In his response the Attorney-General stated that:

Recognition of Aboriginal and Torres Strait Islander cultural rights is consistent with recommendation 3 of the Report of the Expert Panel on Constitutional Recognition of Indigenous Australians (the Report), which recommends Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution.

That recommendation proposes that a new section be inserted into the Australian Constitution “acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters and respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples”.

The Expert Panel also recommended that the Government not “preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group”.

The Report argues that “recognition of the cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples would declare an important truth in Australian history, and assist in sustaining their cultures and languages into the future”.[[154]](#footnote-154)

Moreover, the Attorney-General stated, relation to the ACT specifically, that:

Aboriginal and Torres Strait Islander cultures are a crucial part of the ACT’s cultural identity and must be recognised and valued. Aboriginal peoples have inhabited the Canberra region for over 20,000 years. Central to the notion of culture for Aboriginal and Torres Strait Islander people is a relationship with land and waters.[[155]](#footnote-155)

The proposed s 27(2), he stated, ‘recognises these distinctive and unique relationships’.[[156]](#footnote-156)

* + - * 1. Current protections for the rights of Aboriginal and Torres Strait Islander people

The Attorney-General then went on to consider the present level of rights protection provided for Aboriginal and Torres Strait Islander people under the *Human Rights Act 2004*.

First, he noted that:

Clause 7 of the preamble to the *Human Rights Act* states that “although human rights belong to all individuals, they have a special significance for Indigenous people – the first owners of this land, member of its most enduring cultures, and individuals for whom the issue of rights protection has great and continuing importance.” [[157]](#footnote-157)

‘Despite this acknowledgement in the preamble’, however, the Attorney-General stated that ‘the Act does not presently contain substantive protections of the right to culture for Aboriginal and Torres Strait Islander people’.[[158]](#footnote-158)

* + - * 1. Focusing on the human rights of a particular group or category of persons

In considering the advisability of providing specific rights protections for a particular group or category of persons, the Attorney-General quoted Professor Mick Dodson’s view that:

It is because Indigenous rights encompass both categories [citizenship rights and distinct Indigenous rights] that a comprehensive recognition of Indigenous rights requires a balancing act; holding in one hand the principle of equality or equity, and in the other the principle of difference.[[159]](#footnote-159)

The Attorney-General then went on to advise that:

Special measures to achieve equality of opportunity or to provide members of a relevant class of people access to opportunities to meet the special needs they have as members of the relevant class are recognised as legitimate and non-discriminatory in Australian anti-discrimination laws including the *Discrimination Act 1991*.[[160]](#footnote-160)

This principle, he stated, had been upheld in case-law. Noting that the proposed s 27(2) was based on the Victorian *Charter of Human Rights and Responsibilities 2006*, the Attorney-General asserted that:

In the Charter case of *Parks Victoria (Anti-Discrimination Exemption)* [2011] VCAT 2238 (28 November 2011), Parks Victoria applied to the Victorian Civil and Administrative Tribunal for an exemption from certain provisions of the Victorian Equal Opportunity Act 2010 to allow it to advertise for and employ only Indigenous people working to care for and protect Wurundjeri country. The Tribunal found that this measure was proportionate and appropriately targeted to “provide opportunities of connection and care for the Wurundjeri country by its traditional owners and also for the maintenance of the culture associated with the country”. The Tribunal found that those purposes had the broader purpose of realising substantive equality for Indigenous people and was satisfied that it would be undertaken in good faith.[[161]](#footnote-161)

Further, the Attorney-General advised:

The Member also concluded that having regard to the “legislative means by which the connections to country and culture have been recognised and the Charter right created by section 19, it is apparent that the purpose of the proposed conduct is to realise substantive equality for Indigenous applicants for the field and office based positions and more broadly for Indigenous people...is a special measure ... shown to be necessary, genuine, objective, and justifiable.” [[162]](#footnote-162)

Regarding this, the Attorney-General went on to advise that:

This case illustrates the interplay of rights to equality and non-discrimination and special measures to improve opportunities to members of groups that have been disadvantaged. It also highlights a practical example of how Aboriginal and Torres Strait Islander cultural rights might be relied on to maintain and develop connections between Aboriginal and Torres Strait Islander peoples and the land.[[163]](#footnote-163)

* + - * 1. Recognition of relationships with land and third party interests

The Attorney-General then went on to consider the question, posed in *Scrutiny Report* *No.31*:

Will the rights to have material and economic relationships with land “recognised” apply to interests in land now lawfully held by third parties? [[164]](#footnote-164)

In relation to this the Attorney-General asserted that:

It is not anticipated that this amendment will have an impact on land rights in the ACT. It is likely that native title has been extinguished in the ACT through the operation of the *Native Title Act 1994* (in conjunction with the *Native Title Act 1993* (Cth)).[[165]](#footnote-165)

The Attorney-General also asserted that:

Currently the *Heritage Act 2004* makes provision for the cultural significance of land for Aboriginal and Torres Strait Islander people. It is already routine that any development application that may impact the heritage values of an area or object registered or provisionally registered under the *Heritage Act 2004* is referred to the ACT Heritage Council for advice. Heritage Council advice will include reference to Aboriginal connections to the area of land or water where appropriate.[[166]](#footnote-166)

In view of these elements, he advised that it was ‘not anticipated that formal acknowledge­ment of cultural rights in the *Human Rights Act* will give rise to any new claims of native title in the ACT’ and that where any claims were to arise, they would ‘continue to be dealt with under the *Native Title Act*’.[[167]](#footnote-167)

Further to this, the Attorney-General advised that while ‘a relationship with land and waters’ was ‘[c]entral to the notion of culture for Aboriginal and Torres Strait Islander people’, the proposed amendment did not ‘provide a right to own land, but to maintain a connection with significant areas of land and water’.[[168]](#footnote-168)

* + - * 1. International background

At this point the Attorney-General considered the international background to principles inherent in proposed s  27(2).

First, he noted that:

The United Nations Human Rights Committee has stated that “one or other aspect of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources”.[[169]](#footnote-169)

Second, he noted that:

The Committee … stated that “with regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, [e]specially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them”.[[170]](#footnote-170)

* + - * 1. Implications in practice

The Attorney-General then went on to consider the implications of this kind of provision in practice.

First he advised the Committee that:

The Victorian Charter Guidelines explain that decisions have been made by the UNHRC to extend article 27 to protect the cultural rights of Indigenous peoples and that these decisions have informed the drafting of section 19(2). They also note that “in the context of international human rights law, the protection of the cultural rights of indigenous peoples under article 27 has often arisen in the context of economic development”. [[171]](#footnote-171)

An example of this, the Attorney-General advised, was *Mahuika v New Zealand* (2000), in which:

the UN Human Rights Committee found in favour of the Government, which had acknowledged its duty to ensure recognition of the Maori right to culture, and appropriately given the Maori population an opportunity to contribute to the decision-making process concerning regulation of the fishing industry.[[172]](#footnote-172)

* + - * 1. New types of intellectual property?

The Attorney-General then went on to consider the question, posed in *Scrutiny Report* *No.31*:

Will the right to protection of Aboriginal and Torres Strait Islander peoples’ “knowledge” lead to the recognition of new types of intellectual property? [[173]](#footnote-173)

In responding to this question the Attorney-General noted that intellectual property rights may be asserted under the following Commonwealth Acts:

* the Plant Breeders Rights Act 1994;
* the Copyright Act 1968;
* the Designs Act 2003; and
* the Trade Marks Act 1995.[[174]](#footnote-174)

The Attorney-General quoted a source to suggest:

* that [these Acts provide] mechanisms which are available to Indigenous people in order to assert intellectual property rights;
* that case-law in ‘over the past decades’ (particularly in connection with the *Copyright Act* ) had extended the reach of these mechanisms in protecting Indigenous intellectual property; and
* that this case-law had also ‘emphasised the conceptual gaps between western notion of intellectual property and Aboriginal and Torres Strait Islander peoples’ perspectives, derived from their cultural systems’.[[175]](#footnote-175)

The Attorney-General also advised, in relation to the implications of proposed section 27(2), that the section:

requires that public authorities refrain from denying the rights of Aboriginal and Torres Strait Islander peoples to maintain, control, protect and develop their cultural heritage. Aboriginal and Torres Strait Islander peoples are not prevented from enforcing their rights within the scope and processes of existing intellectual property rights law. Public authorities must not impede enjoyment of those rights. Proposed section 27(2) does not require the ACT Government to take positive action to introduce mechanisms for the recognition of these rights (notwithstanding the limited scope – if any – for the Territory to make such laws beside those existing laws of the Commonwealth).[[176]](#footnote-176)

He then went on to advise that:

The recognition of cultural rights as drafted will not lead to the recognition of new types of intellectual property.[[177]](#footnote-177)

* + - * 1. Tensions between customary law and general law

The Attorney-General then went on to consider the question, posed in *Scrutiny Report* *No.31*:

Will the right to protection of cultural heritage, (which the Explanatory Statement acknowledges may embrace laws—see at 4-5) be a basis to argue that a rule or a practice warranted by customary law should be recognised notwithstanding its incompatibility with the general law applicable to all persons? [[178]](#footnote-178)

In responding to this question the Attorney-General stated that:

There is no intention that Aboriginal and Torres Strait Islander peoples be able to use cultural rights to justify specific criminal conduct on the basis that the act or practice is part of their culture.[[179]](#footnote-179)

He went on to advise the Scrutiny Committee that:

As the Human Rights Committee has stated, none of the cultural rights protected under article 27 [cultural rights of minorities] of the international Covenant may be legitimately exercised in a manner or to an extent inconsistent with the other provisions of the Covenant”. That statement would equally inform the application of the rights under proposed section 27(2) as set out in the Bill.

UN Secretary-General Ban Ki-moon said in June 2012 that “no custom or tradition, no cultural values or religious beliefs, can justify depriving a human being of his or her rights.” [[180]](#footnote-180)

In summary, the Attorney-General advised the Committee that:

Cultural rights are not unlimited and are necessarily curtailed at the point where they might infringe on other rights, such as the right to security of person – the right to be safe.

This limitation is achieved via legislative provisions that create offences in a whole range of statutes, applicably across the whole community, regardless of culture.[[181]](#footnote-181)

* 1. Attorney-General
		1. Appearance before the Committee in public hearings

The Attorney-General did not provide a submission to the inquiry, but appeared before the Committee, with his officers, in public hearings of 8 October 2015.

* + - * 1. Opening statement

In his opening statement the Attorney-General told the Committee:

* that ‘[i]ncluding cultural rights through section 27(2) will build on and give effect to the intent of the Aboriginal and Torres Strait Islander agreement signed by the government last year. It will help the government, the community generally and the Indigenous community to be accountable to each other about how we make a difference in the health and wellbeing of Aboriginal and Torres Strait Islander peoples’;[[182]](#footnote-182)
* that it was ‘not anticipated that this amendment will have an impact on land rights in the ACT’, and that it was ‘likely that native title has been extinguished in the ACT through the operation of the *Native Title Act 1994* in conjunction with the *Native Title Act 1993* (Cth)’;[[183]](#footnote-183)
* he noted that ‘in its submission the elected body has sought more information on the legal status of native title in the ACT, including the basis on which the explanatory statement described native title as extinguished’, and that in response he could ‘only confirm that the government’s legal advice is clear: the amendments do not create any new property rights or affect any existing rights. The way native title is determined in the territory is through the relevant native title legislation, which is primarily the native title legislation of the commonwealth’; [[184]](#footnote-184)
* that the amendment was, ‘instead’, a ‘vehicle for demonstrating the contribution that Aboriginal people have made to the Canberra region as the first people and as citizens in our community’; [[185]](#footnote-185)
* that the ACT Government’s ‘view and intention in introducing these amendments is that they will require public authorities to recognise and value the connection of Aboriginal groups with areas of land and water in the ACT’; [[186]](#footnote-186)
* that ‘[g]iven that culture manifests itself in many forms, it would not be appropriate for the government to narrowly prescribe how relationships with land and waters would be recognised or valued; [[187]](#footnote-187) and
* that ‘[k]eeping the provisions general is consistent with the expression of “other rights” in the act and allows for flexible and innovative means of recognition that can be developed in collaboration with Aboriginal and Torres Strait Islander people in the ACT’. [[188]](#footnote-188)

In other comments in his opening statement the Attorney-General quoted the Victorian Commissioner for Aboriginal Children and Young People, Andrew Jackomos, on the importance of culture for the well-being of Indigenous people:

In communities where culture is strong, the force of identity and the knowledge of each other, the knowledge of our ancestors is a shield against racist remarks and negative stereotypes. Knowing family, community and connecting to culture to land, to waters, these are the things that build up our young.

…

Cultural meaning comes from connections, relationships and socialisation with other Koori children and role models who will inspire and support the child as their life unfolds.

Culture is not a ‘perk’ for an Aboriginal child—it is a life-line.[[189]](#footnote-189)

The Attorney-General went on to quote Mr Jackomos further on the importance of cultural rights for Indigenous people:

For Aboriginal and Torres Strait Islander peoples, Indigenous peoples, First Nations peoples, for Koories, this human right is crucial to our wellbeing, it is crucial to our sense of pride, to our sense of belonging. Culture is the most resilient factor protecting our children. Culture links us to our past so we can navigate our future.[[190]](#footnote-190)

* + - * 1. Terminology

The Committee noted that while proposed s 27(2) of the HRA had been likened to s 19(2) of the Victorian *Charter of Human Rights and Responsibilities Act 2006*, the words ‘recognised and valued’ did not appear in that section of the *Charter.* Itasked the Attorney-General why the words had been used in the proposed amendment and what possible construction could be placed upon them if they were voted into law.[[191]](#footnote-191)

In response the Attorney-General told the Committee that ‘their meaning … is their common and ordinary meaning—nothing more than that’.[[192]](#footnote-192)

The Executive Director, Legislation, Policy and Programs also responded to the question. She told the Committee that:

The words were developed based on the UN Declaration of the Rights of Indigenous Peoples and article 27 of the ICCPR. They were also developed in consultation with the Aboriginal and Torres Strait Islander Elected Body. When you look at the actual words of the particular articles in UN declarations there are also a whole lot of supporting documents, commentary and a special rapporteur’s comments that go into them. We worked with the Human Rights Commission and with the elected body and looked at all those supporting documents as well. That is what informed them. In fact, it was a real, lived example of what the new rights stand for. It was a consultative process which also met the needs of the elected body. [[193]](#footnote-193)

In response to further questioning, the Attorney-General told the Committee that the words ‘recognised and valued’ were ‘were drawn from our discussions and deliberations with stakeholders, principally the elected body’, and answered in the affirmative when asked if this were the ‘full explanation’ for the use of these terms.[[194]](#footnote-194)

As part of her response to questions about the use of these terms, the Executive Director told the Committee that:

The provisions are not attempting to give Indigenous people special or new rights. They are regulating the relationship of the existing human rights to this group of people. We do not see it as creating new rights; we see it as translating them for this particular group.[[195]](#footnote-195)

The Attorney-General also told the Committee that the provision did not:

confer any new legal right in relation to title, land or property. Those provisions are governed by other legislation—notably, the commonwealth’s native title law. If there was a view from an Indigenous group or individual that there was a claim to be made, it would not rely on the exercise of any provisions put into our human rights legislation by this bill; it would rely on what commonwealth native title law says. And there are mechanisms for determining such applications through the Native Title Tribunal.[[196]](#footnote-196)

* + - * 1. Effect of provision

When asked about the effect of the provision the Attorney-General responded in this way:

What does it do? This is our primary piece of human rights legislation. It is both a practical granter of rights that can be arbitrated upon by a court and also an educative tool to develop better practice, particularly within the public sector, around how the government respects the rights of its citizens. Clearly, one of those rights, in the same way that we say all people, all adults, have the right to franchise and the right to participate in democratic life, is also a right specifically recognised as occurring to indigenous peoples, to first peoples, because of their first occupation, ownership and connection with land. That is their culture.

The legislation provides for that right, the importance of their connection to country— not about ownership—their culture, to be something that is respected. That is what inserting this into legislation would do.[[197]](#footnote-197)

* + - * 1. Land use agreements

The Committee noted the use of Land Use Agreements in Victoria in connection with the Traditional Owners Settlement Act 2010, and arrangements for a similar kind of arrangement in the ACT in connection with an agreement with the Ngunnawal people in 2001 to create a joint management agreement for Namadgi National Park.[[198]](#footnote-198)

In response, the Attorney-General told the Committee that there were ‘provisions for Indigenous land use agreements to be registered in the ACT’, which were ‘alternatives to mechanisms set out under the native title law’.[[199]](#footnote-199)

In relation to an agreement with the Ngunnawal people, he told the Committee that:

There was, as you say, in 2001 an agreement between the territory and a range of Aboriginal parties in relation to a form of Aboriginal land tenure for in Namadgi national park. My advice is that this agreement would probably satisfy the definition of an alternative agreement as set out under the native title legislation.[[200]](#footnote-200)

However, he went on to tell the Committee:

However, unfortunately in 2006 the interim Namadgi board of management was abandoned due to disputes around traditional owner identity between Aboriginal members of the board which were not able to be resolved. So the statutory board of management was, therefore, never permanently constituted. [[201]](#footnote-201)

* + - * 1. Relationship to lands and waters by Torres Strait Islanders

The Committee asked to Attorney-General for clarification on the implications of recognition of a cultural relationship to ACT lands and waters for Torres Strait Islander people.[[202]](#footnote-202)

In response, the Attorney-General told the Committee that:

The purpose of recognition of Indigenous persons is twofold. Obviously it is very important that we recognise the connection to country that exists for the traditional owners—the Ngunnawal. But then, of course, there is the broader recognition of the connection to country of Indigenous first Australians generally, regardless of where their country is. We have many Indigenous people in the ACT who are not of the Ngunnawal but they still have their culture and their connection to country. [[203]](#footnote-203)

He went on to tell the Committee that:

The purpose of providing for mention of Torres Strait Islander persons is in that context of saying there are Aboriginal and Torres Strait Islanders who reside in the ACT. Connection to country is important to them; it is part of culture for them. Whilst they are not directly connected to place here, they are connected to country more broadly and that requires a certain level of understanding and ways to engage with people who have that background. [[204]](#footnote-204)

In practical terms, he told the Committee that Torres Strait Islander people would have ‘reasons to return to their country at particular times’ and the provision would support:

that being respected in the way government agencies interact with such individuals, whether it is in the context of them as an employer or understanding some of the constraints and issues that arise from that connection to country.[[205]](#footnote-205)

In summary, the Attorney-General told the Committee:

the intent is twofold—it is both in relation to the traditional custodians of the land which is now the ACT but also the importance of culture and connection to country generally that is shared by all Indigenous peoples.[[206]](#footnote-206)

The Attorney-General also agreed that there ‘may be a need to clarify’ this point its treatment in the Explanatory Statement had given rise to concerns, such as those voiced by the ATSIEB in its submission, that the effect of the provision was to attribute to Torres Strait Islander people status as ‘traditional custodians of the land which is now the ACT’.[[207]](#footnote-207)

* 1. ACT Human Rights Commission

The ACT Human Rights Commission made a submission to the inquiry and later appeared before the Committee in public hearings.

These are considered below.

* + 1. Submission

The Human Rights Commission’s submission to the inquiry told the Committee:

* that the Commission ‘strongly’ supported the amendments to the HRA;
* that the Human Rights and Discrimination Commissioner had ‘advocated for several years that the HR Act should include explicit recognition of Indigenous cultural rights’;
* that the Commissioner’s ‘staff and officers from the JACS Directorate worked collaboratively with the Aboriginal and Torres Strait Islander Elected Body to seek agreement on the new cultural right’; and
* that the proposed expansion of the right to education ‘to give effect to the Government’s 2014 review of the HR Act’ was ‘also very welcome’.[[208]](#footnote-208)

The submission first considered proposed amendments which would affect the rights of Aboriginal and Torres Strait Islander peoples. It noted that the amendments would ‘include specific recognition of Indigenous cultural rights’, although Aboriginal and Torres Strait Islander people already enjoyed ‘some protection under the existing s27, and are generally mentioned in the preamble’. [[209]](#footnote-209) The new s 27(2) would provide that Aboriginal and Torres Strait Islander peoples would ‘hold distinct cultural rights’, which they ‘must not be denied the right to maintain, control, protect and develop’, and noted the areas in which this would be protected under an amended Act, including 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’. [[210]](#footnote-210)

The submission noted, as had other sources such as the Explanatory Memorandum, that this provision:

* had been modelled on s 19(2) of the Victorian Charter of Rights and Responsibilities Act 2006; and
* drew on articles 25 and 31 of the UN Declaration on the Rights of Indigenous Peoples. [[211]](#footnote-211)

It also noted that Section 19(2) of the Victorian *Charter* was in turn:

* ‘based on the interpretation given to the right to culture in article 27 of the *International Covenant on Civil and Political Rights* (ICCPR) by the UN Human Rights Committee – specifically that article 27 of the ICCPR encompasses the obligation to protect the cultural rights of Indigenous peoples’; and
* was also ‘informed by article 25 of the UN *Declaration on the Rights of Indigenous Peoples*’. [[212]](#footnote-212)

The submission then went on to consider three questions which, it suggested, had been raised by the Scrutiny Committee. These were:

* whether proposed 2 27(2) cut ‘across existing HR Act rights to an extent that [was] unacceptable’;
* whether the UN Declaration on the Rights of Indigenous People was an appropriate reference for the provision, ‘given that the Declaration is a non-binding instrument’; and
* ‘the provision could have unintended legal consequences, in particular in relation to intellectual property and land rights’. [[213]](#footnote-213)

In relation to these questions the submission asserted that:

In identifying these concerns, the Committee surprisingly made no mention of the fact that a comparable provision has been fully operational in Victoria since 2009 without any apparent difficulty. [[214]](#footnote-214)

* + - * 1. Whether the provision unacceptably may cut across other rights

In addressing the question of whether the provision unacceptably may cut across other rights, the submission first presented arguments as to the benefits of adopting the provision.

First, it stated that there were:

clearly objective and reasonable justifications for expressly protecting Indigenous cultural rights in the HR Act. Culture holds a unique significance for Aboriginal and Torres Strait Islander peoples, who as a group are particularly vulnerable to losing their traditional customs, knowledge and language. [[215]](#footnote-215)

Second, it noted elements of the Attorney-General’s speech in the Assembly on the question that the Bill be agreed to in principle, where he stated:

* that Aboriginal and Torres Strait Islander cultures were ‘a crucial part of the ACT’s cultural identity’;
* that ‘Aboriginal peoples have inhabited the Canberra region for over 20,000 years’; and
* that relationships with land and waters were ‘[c]entral to the notion of culture for Aboriginal and Torres Strait Islander people’. [[216]](#footnote-216)

The submission stated, in light of these points, that there would be ‘[n]umerous benefits’ that would ‘flow from explicit recognition’, including:

* ‘correcting the current omission in the HR Act’;
* ‘bringing ACT law into line with community expectations’;
* providing, through express recognition, ‘a positive mechanism for meaningful and inclusive engagement with the Aboriginal and Torres Strait Islander community in the ACT’; and
* promoting ‘greater transparency and accountability for decision-making with regard to some of the most vulnerable people in our community’. [[217]](#footnote-217)

The submission then went on to consider possible risks arising from the provision.

In relation to points which, it suggested, were made in Scrutiny Report No.31, the submission argued that:

The Committee’s concerns that new s 27(2) could override other rights in the HR Act – including by giving rise to arguments of ‘cultural relativism’ being used as a potential defence against criminal charges – [were] manifestly unfounded. [[218]](#footnote-218)

This was the case, the submission suggested, because:

The existing operational framework of the HR Act means that Indigenous cultural rights cannot trump or sit above any of the other rights in the Act. As with all rights in the HR Act, these cultural rights would be equally subject to justifiable limits, where it can be shown that such limitations are reasonable, necessary and proportionate to a legitimate objective. [[219]](#footnote-219)

S 28 of the HRA reads:

28 Human rights may be limited

 (1) Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

 (2) 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.[[220]](#footnote-220)

Moreover, the submission argued, there would be times when s27(2) would, rather than detracting from rights, ‘complement other rights in the HR Act, including the right to equality’, and in support of this the submission indicated a decision by the Victorian Civil and Administrative Tribunal in *Parks Victoria (Anti-Discrimination Exemption)*, in which a ‘special measure’ was considered by the Tribunal not to place limits on the right to equality because it sought to remedy a disadvantage ‘caused by past and continuing direct and indirect discrimination. [[221]](#footnote-221)

The submission also asserted:

* that ‘special measures’ were provided for under the Victorian *Charter* at s 8(4), which provided that ‘special measures will not constitute discrimination’;
* that this approach was ‘generally understood to be also part of the protection under international human rights law, upon which both the Victorian and ACT rights to equality [were] based’; and
* that ‘Section 27 of the ACT *Discrimination Act 1991* also explicitly [protected] special measures’. [[222]](#footnote-222)
	+ - * 1. Legal status of the UN Declaration on the Rights of Indigenous People (DRIPS)

The submission made comment on the Scrutiny Report’s observations on the legal status of the UN *Declaration on the Rights of Indigenous People* (DRIPS).

It agreed that the *Declaration* did not ‘have the status of a treaty’[[223]](#footnote-223), but asserted that it was ‘not simply an aspirational document’[[224]](#footnote-224), as under s 31 of the HRA ‘international law relevant to a human rights may be considered in interpreting the human right’ and noted that such declarations were referenced in the Dictionary of the HRA. [[225]](#footnote-225)

In addition, the submission asserted:

* that the ‘*Declaration* [provided] a relevant standard for analysing human rights issues affecting Aboriginal and Torres Strait Islander peoples’;
* that the ‘Parliamentary Joint Committee on Human Rights [had] noted that the *Declaration* [was] widely accepted as elaborating many of the details of relevant obligations under the human rights treaties to which Australia is already a party’;
* that the ‘Federal Government [had] also acknowledged that the *Declaration* “provides some useful elaboration on how human rights standards under the international treaties apply to the particular situation of Indigenous peoples” ‘; and
* that the ‘*Declaration* [was] also considered to represent customary international law binding on Australia in many respects’. [[226]](#footnote-226)

‘Therefore’, the submission asserted:

the *Declaration* is an influential and authoritative source of guidance that should be drawn on in policymaking and the development of legislation, 9 and it would have been imprudent not to have taken its standards into account when developing these provisions. [[227]](#footnote-227)

* + - * 1. Intellectual property and land rights

The submission made comment on the Scrutiny Report’s observations regarding intellectual property and land rights, in particular whether:

the right to have ‘material and economic relationships with land’ would apply to interests in land now lawfully held by third parties; and whether the right to protection of Aboriginal and Torres Strait Islander peoples’ ‘knowledge’ would lead to the recognition of new types of intellectual property. [[228]](#footnote-228) (p.6)

In response to questions raised on these matters, the submission noted the Attorney-General’s statement in the Assembly that ‘the government has looked very closely and carefully at the issues arising from title and intellectual property’ and had ‘reached the conclusion that it can have a high level of confidence that the recognition of these rights does not expand into [these] areas’. [[229]](#footnote-229)

In light of this the submission stated that it did not ‘consider that these amendments would give rise to the types of issues identified by the Scrutiny Committee for the reasons explained by the Attorney-General’, nor had ‘such issues arisen under comparable provisions in the Victorian Charter, which have been in operation for more than six years now’. [[230]](#footnote-230)

* + 1. Appearance before the Committee in public hearings

The ACT Human Rights Commission appeared before the Committee in public hearings of 8 October 2015. The ACT Human Rights and Discrimination Commissioner represented the Commission.

* + - * 1. Effect of provision

The Commissioner for Human Rights was asked to comment on the effects of the provision.

In response, she told the Committee that it would:

increase the awareness and understanding of cultural rights of Aboriginal and Torres Strait Islander peoples. I do not think it does more than existing laws. It replicates section 27, which applies to all minorities, but does it in a way that is very specific to Aboriginal and Torres Strait Islander people. It makes it specific and much more understandable; thereby it will be more of a focus of debate in the community and here in the Legislative Assembly.[[231]](#footnote-231)

A further effect she later told the Committee, with reference to the case of *Parks Victoria*,[[232]](#footnote-232) was that on the basis of the provision:

it would strengthen a case by having something as a special measure in the Human Rights Act rather than just an ability to not be held to be discriminatory by having affirmative action for Aboriginal and Torres Strait Islander employees. [[233]](#footnote-233)

She went on to tell the Committee that:

It would have to be a very good case for why a special measure was required. As I said, in that Victorian case—it was Parks Victoria—it was people attending to the traditional land and their connection with that country that was found to be special and that was why an exemption was given by the Victorian tribunal from the Discrimination Act. In the ACT those exemptions are given by the commissioner, not by the tribunal. So I would make that decision. [[234]](#footnote-234)

The Committee also asked the Commissioner whether the inclusion, as proposed, of Indigenous cultural rights would have the effect of strengthening the access of Indigenous people to other rights created in the HRA, to which the Commissioner responded that she thought this a ‘fair comment’, and that proposed s 27(2) did ‘strengthen existing rights’ in ACT statute.[[235]](#footnote-235)

* + - * 1. Terminology

In her opening statement the Commissioner made reference to questions which had previously been asked about the use of the terms ‘recognised and valued’ in proposed s 27(2).

In relation to the use of ‘recognise’ told the Committee that Articles 25 and 31 of the UN Declaration on the Rights of Indigenous People had ‘inspired’ the wording,[[236]](#footnote-236) and noted that Article 31(2) it was stated that :

In conjunction with Indigenous peoples states shall take effective measures to recognise and protect the exercise of these rights.[[237]](#footnote-237)

The Committee asked the Commissioner further questions about the inclusion of these terms ‘valued’ in proposed s 27(2).[[238]](#footnote-238)

In response, the Commissioner told the Committee that:

“Value” may have been an idea of the elected body. I am not sure about that second word. I do not think that a lot turns on it legally. [[239]](#footnote-239)

She went on to say that:

They are educative words and it is a substantive provision of the act. That is the big change: from being just something general in the preamble of the act, it is in the substance of the act, in our recognising and valuing Aboriginal and Torres Strait Islander cultural rights. [[240]](#footnote-240)

* + - * 1. Native title

The Committee asked the Commissioner if she wished to make comment on questions of Native Title that had been raised in connection with proposed s 27(2).[[241]](#footnote-241)

In response she told the Committee that:

Certainly we are aware that the Attorney-General has sought expert advice from GSO. We have not seen that advice, but we understand that it confirms that it is likely that native title was extinguished back in 1994 by the *Native Title Act* (ACT), and that does not expand any existing claims or any intellectual property.[[242]](#footnote-242)

* 1. Victorian Equal Opportunity and Human Rights Commission

The Victorian Equal Opportunity and Human Rights Commission made a submission to the inquiry and also appeared before the Committee in public hearings of 12 October 2015.

* + 1. Submission

With regard to proposed amendments in the Human Rights Bill 2015 that would affect the rights of Aboriginal and Torres Strait Islander people, the submission stated that the Commission supported ‘the explicit protection of Aboriginal and Torres Strait Islander cultural rights under the proposed section 27(2)(a) of the HRA’. [[243]](#footnote-243)

The submission went on to note that the Victorian *Charter* recognised the Victorian Aboriginal community in two ways:

* First, in that the Preamble to the *Charter* stated that human rights had ‘a special importance for the Aboriginal people of Victoria, as descendants of Australia’s first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and water’. [[244]](#footnote-244)

Second, in that Aboriginal cultural rights were ‘explicitly protected’ under section 19(2) of the *Charter*, which stated that:

Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community -

 a) to enjoy their identity and culture;

 b) to maintain and use their language;

 c) to maintain their kinship ties; and

 d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs. [[245]](#footnote-245)

In connection with these provisions, the submission noted that the ‘value and significant of Aboriginal cultural rights’ was ‘well documented’:

The Expert Mechanism on the Rights of Indigenous Peoples highlighted in its Study on the role of languages and cultures in the promotion and protection of the rights and identity of Indigenous peoples that ‘languages and cultures will only flourish in environments when they are more broadly respected in their own right and for their contribution to an understanding of humanity’. Therefore, the Commission considers that it is important to protect Aboriginal and Torres Strait Islander peoples’ culture under domestic law. [[246]](#footnote-246)

The submission then went on to provide three examples which, it stated, demonstrated ‘some of the ways that Aboriginal cultural rights have been used in a practical way to achieve positive outcomes for the Victorian Aboriginal community and the Victorian Government’. [[247]](#footnote-247)

The first of these was the establishment of the Wulgunggo Ngalu Learning Place. In connection with this, the submission stated, Aboriginal cultural rights had been ‘a key consideration’ in the establishment this residential diversion program for Koori males operated by Corrections Victoria’, in which ‘the importance of culture in the rehabilitation of Koori men interacting with the justice system’ was recognised. [[248]](#footnote-248)

The second example was the development of the *Traditional Owner Settlement Act 2010* (Vic). Section 19(2) of the *Charter* had been a ‘key consideration’ in developing this Act, which provided for ‘an out-of-court settlement of native title in Victoria’. [[249]](#footnote-249) The submission went on to state that:

A positive outcome of this law was the settlement agreement for the Dja Dja Wurrung people. In this agreement the Victorian Government acknowledges the continuing rights of the Dja Dja Wurrung people, including to enjoy their culture and identity, to maintain their distinctive relationship and connection with their ancestral land and to access, use and protect it. [[250]](#footnote-250)

The third example provided by the submission was a case heard by the Victorian Civil and Administrative Tribunal, which ‘considered Aboriginal cultural rights when it granted Parks Victoria an exemption from the Equal Opportunity Act 2010 to employ Indigenous persons to care for and protect Wurundjeri country’. (p.4) Regarding this case, the submission stated that the applicant had ‘argued that this would “provide opportunities for traditional owners and Indigenous communities to realise their rights and aspirations and to have real involvement and input in caring for country though active park management”, and that the Tribunal had subsequently found that ‘that the nature of the roles and the work were “closely aligned” with the rights in section 19(2) of the *Charter’*. [[251]](#footnote-251)

In addition, the submission noted that it had ‘commenced a project on Aboriginal cultural rights in Victoria’, the aim of which was to ‘to increase the awareness, understanding and use of Aboriginal cultural rights under section 19(2) of the *Charter*’. [[252]](#footnote-252) To this end, the Commission would ‘develop a range of resources about Aboriginal cultural rights’:

* to assist public authorities to comply with their obligations under the *Charter* by acting compatibly with Aboriginal cultural rights; and
* to increase awareness, understanding and use of Aboriginal cultural rights under the *Charter* by Aboriginal peoples as a tool to engage with public authorities. [[253]](#footnote-253)

In connection with this, the submission stated that:

The Commission has commenced consultation with government departments and the Victorian Aboriginal community to inform the development of the resources. Both government and the community have embraced the project and the need to develop practical resources and case studies to bring about greater understanding, use and respect for Aboriginal cultural rights. [[254]](#footnote-254)

* + 1. Appearance before the Committee in public hearings

The Victorian Equal Opportunity and Human Rights Commission appeared before the Committee in public hearings of 12 October 2015. The Director of the Office of the Commissioner, Ms Catherine Dixon, represented the Commission by telephone link.[[255]](#footnote-255)

In her opening statement the Director told the Committee that:

* ‘The Victorian charter explicitly protects Aboriginal cultural rights in section 19(2) and also acknowledges in the preamble the principle that human rights have special importance for Aboriginal people as our first people’;[[256]](#footnote-256)
* ‘In terms of the value and significance of these rights in Victoria, we see [these rights] as central to reconciliation and resilience and, indeed, the survival of Aboriginal communities’, and noted comments to this effect by Andrew Jackomos, the Victorian Commissioner for Aboriginal Children and Young People;[[257]](#footnote-257)
* examples of the use and effect of Indigenous cultural rights in Victoria included the advent of the *Traditional Owners Settlement Act 2010* (Vic); the development of an Aboriginal diversionary program which used Indigenous culture in its rehabilitation program for Indigenous offenders; and instances where the cultural rights of children had been raised in child protection cases, as noted in the Commission’s submission;[[258]](#footnote-258)
* a further example of the use and effect of such rights was the *Parks Victoria* case, which provided for ‘special measures’ in relation to Indigenous cultural rights created by the Charter;[[259]](#footnote-259) and
* that the Commission ‘would highly recommend the explicit recognition of these rights, just based on our experience of their relevance and value here’.[[260]](#footnote-260)
	+ - * 1. Affect on the relationship between Indigenous people and government

The Committee asked the Director to comment on the effect of the advent of Indigenous cultural rights in Victoria on the relationship between Indigenous people and government.[[261]](#footnote-261)

In response the Director told the Committee that:

From our perspective it has been in a positive way. When I look at the Aboriginal heritage legislation—including, for example, the Traditional Owner Settlement Act—these are all acts that are quite empowering when it comes to protecting Aboriginal cultural heritage and culture, and place Aboriginal people at front and centre of being able to make decisions in relation to those matters. I think that is positive from both points of view.[[262]](#footnote-262)

An example of this, she told the Committee was the advent of settlement agreements with the Dja Dja Wurrung people under the *Traditional Owners Settlement Act*. She noted that noted Indigenous leader Mick Dodson had commented on this agreement in the following terms:

What it delivers to the Dja Dja Wurrung People is the transfer title of two culturally significant properties, the granting of “Aboriginal title” over a number of parks and reserves to enable joint management, access to flora and fauna and other natural resources for traditional and limited commercial purposes, and a system that gives the Dja Dja Wurrung a significant say over future land use activities on public lands in their region.[[263]](#footnote-263)

This, the Director told the Committee, was ‘an example of someone that has come in and look at one of the positive outcomes of that piece of legislation’. She went on to say that she knew of ‘similar outcomes [that had] been positive in the Aboriginal heritage area’, [[264]](#footnote-264) and that:

Those pieces of legislation obviously give effect to cultural rights, so I think it is a positive enhancement of the relationship between government and the community.[[265]](#footnote-265)

* + - * 1. Identifying Indigenous entities with which to deal

The Committee noted evidence provided by the Attorney-General which showed difficulties in identifying Indigenous groups with which to negotiate regarding alternative land use agreements, and asked if Victoria had experience and solutions which could help such negotiations in the ACT.[[266]](#footnote-266)

In response, the Director told the Committee that:

I know in the Aboriginal heritage area and in the traditional owner settlement area we have tried to get a better sense of all traditional owners for a particular area, whether that is an area for the protection of cultural heritage or an area for which an agreement can be made under the Traditional Owner Settlement Act. I think that inclusiveness is really important. I know under the Traditional Owner Settlement Act it is perceived as important because it can give some certainty and finality about the resolution of native title.

Under that act, for example, settlements are available only to groups that can show that they include all traditional owners for an agreement area. Having that framework has been really important. In the Aboriginal heritage legislation it has been about having registered Aboriginal parties who are the traditional owners for particular areas as well, and mapping that and getting better certainty about that.[[267]](#footnote-267)

When asked whether there were strong incentives in the Victorian legal framework for groups to settle differences in order to negotiate with government, the Director agreed. She noted that the Commission did not directly deal with that legislation, but that this appeared correct judging from her experience from within the Commission.[[268]](#footnote-268)

* 1. ACT Aboriginal and Torres Strait Islander Elected Body

The ACT Aboriginal and Torres Strait Islander Elected Body provided a submission to the inquiry and also appeared in hearings of 8 October 2015.

These are considered below.

* + 1. Submission

The submission to the inquiry by the ACT Aboriginal and Torres Strait Islander Elected Body (ATSIEB) opened with a brief description of the ATSIEB which, it stated, had been:

established through legislation by the ACT Government to provide a representative voice for Aboriginal and Torres Strait Islander people in the ACT, and support the development of government policies to meet community needs and priorities.[[269]](#footnote-269)

The submission stated that ATSIEB’s strategic plan sought ‘to focus ACT Government policy and services under the COAG Indigenous Reform Agenda framework’s strategic areas for action’, which were: health; schooling; safe communities; governance and leadership; economic participation; healthy homes; and early childhood. [[270]](#footnote-270)

* + - * 1. Terminology

The submission first addressed questions of terminology.

It stated that the diversity of cultures of Aboriginal and Torres Strait Islander people had been noted by the Aboriginal and Torres Strait Islander Social Justice Commissioner, and asserted that there was ‘not one cultural model’ that would fit ‘all Aboriginal and Torres Strait Islander’ people.[[271]](#footnote-271)

In light of this, the submission stated that the use, as proposed, of the term ‘Aboriginal and Torres Strait Islander peoples’ (rather than ‘people’) in the HRA would reflect a recognition that ‘Aboriginal peoples and Torres Strait Islanders have both a collective and individual dimension to their lives’, and added that this was ‘affirmed by the United Nations Declaration on the Rights of Indigenous Peoples.’ [[272]](#footnote-272)

The submission went on to note that there was ‘strong debate about the appropriate terminology to be used when referring to Aboriginal and Torres Strait Islander peoples’, and that there was ‘strong support’ in the Indigenous community for different terminologies, including ‘Aboriginal and Torres Strait Islander peoples’, ‘First Nations’ and ‘First Peoples’. [[273]](#footnote-273)

* + - * 1. Involvement in drafting of proposed amended s 27 of the HRA

The submission stated that the Elected Body had met with officers from the Justice and Community Safety Directorate and the Human Rights Commission on 6 February 2015 and had ‘sought advice from the ACT Solicitor-General on a set of words to give effect to cultural rights’, and at which meeting there had been agreement ‘to support the inclusion of cultural rights’ in the HRA, and agreement on a form of words. [[274]](#footnote-274)

It stated that amendments to the HRA to reflect this were drafted by Parliamentary Counsel ‘with some changes to the structure of the provision to be consistent with best drafting practice’, and was agreed to by Cabinet on 23 March 2015 before being introduced in the Assembly on 26 March 2015.[[275]](#footnote-275)

* + - * 1. Status of native title in the ACT

The submission drew attention to representations made in the Explanatory Statement for the Human Rights Amendment Bill 2015, which suggested that native title ‘had been extinguished in the ACT’.[[276]](#footnote-276)

The submission went on to reference the *Native Title Information Handbook, Australian Capital Territory* published by the Australian Institute of Aboriginal and Torres Strait Islander Affairs (AIATSIS),[[277]](#footnote-277) which stated that:

* The ACT enacted the *Native Title Act 1994* (ACT) on 1 November 1994 to validate past acts invalidated because of the existence of native title (s 3(a)) and to confirm existing rights to natural resources and access to waterways and public places (s 3(b)). [[278]](#footnote-278)
* The *Native Title Act 1994* (ACT) confirms Crown ownership of all natural resources, rights to use, control and regulate the flow of water and existing fishing access rights; as well as existing public access to and enjoyment of waterways, beds, banks and foreshores of waterways and areas that were public places as at 31 December 1993.[[279]](#footnote-279)
* The ACT Government has not enacted any legislation confirming extinguishment of native title by particular types of tenure. [[280]](#footnote-280)

In relation to native title, the submission stated that the ATSIEB sought ‘clarification on the following questions’:

* Does the ACT consider native title a property right?
* When and how was native title extinguished over the whole of the ACT?
* What does Part 3 Confirmation of Rights and Access in the Native Title Act (ACT) 1994 mean if native title has been extinguished in the ACT?
* If native title was extinguished in the ACT, on what basis was the ACT in mediation with Native Title claimants up until 2008?
* What is meant by the term Canberra region? How extensive is the region referred to? [[281]](#footnote-281)

 In relation to traditional owner status, the submission suggested that:

The statement that the intention of s 27(2)(b) of the Bill is “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 relationship as in integral part of the history, cultural heritage and ongoing protection of the Canberra region and environment” suggests that the ACT contemplates that there were and continue to be ‘traditional owners’ or ‘custodians’ of the Canberra region. [[282]](#footnote-282)

In light of this, the submission asked:

* Does this statement intend that were it not for ‘extinguishment’ of native title, there are identified groups of Aboriginal people, who would satisfy the native title requirement of a local descent group with continuing law and custom associated with the ACT?
* Why is there discussion of ‘Torres Strait Islanders’ as first owners and custodians of the Canberra region? Perhaps the inclusion of ‘Torres Strait Islanders’ is an oversight in the drafting of the explanatory statement. [[283]](#footnote-283)
	+ 1. Appearance before the Committee in public hearings

The ACT Aboriginal and Torres Strait Islander Elected Body (ATSIEB) appeared before the Committee in public hearings of 8 October 2015.

* + - * 1. Benefits and effect of provisions

In hearings, the Committee asked the ATSIEB to say what would, in its view, the effects and benefits of having Indigenous cultural rights created in law if proposed s 27(2) were passed by the Assembly.[[284]](#footnote-284)

In response, the Chair of the ATSIEB told the Committee:

Fundamentally, the thing is the recognition and the value. I heard earlier a question about the interpretation of “value”—what “value” is. For an individual, being valued as an individual and having their rights recognised as being equal to anyone else’s is a fundamental starting point. Most of our people know that we have fundamental human rights. There is an international framework from which we have drawn these matters to promote, to explore and to educate. I think we have advocated that quite well. The fundamental thing is acknowledgement and recognition of the first peoples of this country. That is the primary thing that gives people confidence and value as human beings.[[285]](#footnote-285)

In relation to this, the Chair told the Committee that:

Being an Aboriginal person myself, I hold those cultural values very dear, as well as my cultural obligations to my people, not only my direct people where I come from but universally across the country.[[286]](#footnote-286)

He went on to say that:

One of the difficult things—it is part of a learning process also for me—is understanding that value for another individual. They might value it differently. They all have different lived experiences. They all have different cultural authority and so on. But understanding that that is a fundamental right is pretty special and it is something that most human beings feel they have a right to.[[287]](#footnote-287)

The Deputy Chair of the ATSIEB agreed and made further comment on this:

I would like to add to what Rod has said around recognition. There is also respect, in terms of a respectful relationship, by acknowledging Aboriginal and Torres Strait Islander peoples as the first Australians or first nation people of this country. Again, as an Aboriginal person, to see those rights being articulated within the act is so significant, not only symbolically but coming from the heart. That is what it is about: it is about having our rights reflected. As an Aboriginal person, to pick that up and read it, it demonstrates the respect that is being displayed.[[288]](#footnote-288)

At a later point in hearings the Deputy Chair added to these statements. She told the Committee:

I liken it to the national apology in terms of the changing of attitudes on that day was so significant across Australia. This would very much do the same thing but it also creates the impetus to keep moving forward. I applaud the ACT human rights office for working with us in terms of getting this to where we are today, let alone the next steps of that. Our conversations have already been had with the human rights office about where we go from here once these rights are embedded. It is significant, as Rod says, around recognition, but in regard to respect and relationships it is one step forward. Again, creating the impetus to keep moving on that will be very significant for the ACT. That is for all ACT people, not just Aboriginal and Torres Strait Islander peoples.[[289]](#footnote-289)

Further, she told the Committee, the proposed amendment was:

about strengthening the existing rights, but also highlighting the significant place that Aboriginal and Torres Strait Islander people as first Australians hold on this country and all of Australia. Again, it is that respectfulness in relationships and possibly changing attitudes for everyone to understand and feel that way.[[290]](#footnote-290)

* + - * 1. Native title

The Committee noted that the ATSIEB’s submission to the inquiry had expressed concern at assertions made by the Attorney-General that Native Title was extinguished in the ACT.[[291]](#footnote-291)

In responding, the Chair referred to ‘not having the information and understanding of all of the circumstances’ regarding this assertion.[[292]](#footnote-292) He told the Committee that:

The supposed extinguishment of native title in the ACT is information that fundamentally we are not privy to. As traditional owners of the lands of the Ngunnawal peoples, we feel as though we do not have all the information. We do not understand the circumstances; hence there are some assumptions made by different groups. We think these are important questions to be asked for two reasons: one is to inform ourselves a whole lot more and the other is about being able to respond to questions asked of us as an elected representative group holding public office. [[293]](#footnote-293)

Later in the hearing the ATSIEB was asked further questions on this matter.[[294]](#footnote-294)

In response, the Chair told the Committee that:

I do not think we have quite collected the kinds of questions, apart from those in our submission. I am not sure how we access that native title information, how we access that information about what transpired in the past, because we are not privy to that information. Generally, we are told those matters are confidential to the traditional owners or the applicants.[[295]](#footnote-295)

To this the Deputy Chair added the observation that the ATSIEB had ‘limited capacity in terms of research and resources to gather that information outside of government’; that this was ‘very important’; and agreed that there was a ‘huge’ amount of work to be done. [[296]](#footnote-296)

She also noted that this was also related to the members of the ATSIEB being part-time statutory office-holders, which posed questions about their ‘capacity to do that on top of the other priorities’ and ‘how we fit that into our work schedule’. [[297]](#footnote-297)

* + - * 1. Relevance of the *Traditional Owners Settlement Act 2010* (Vic)

The Committee asked the ATSIEB to comment on the relevance of the Victorian *Traditional Owners Settlement Act 2010* to matters in the ACT.[[298]](#footnote-298)

In response the Chair of the ATSIEB told the Committee that:

My view, and my knowledge and experience of native title, is that generally land use agreements derive from a native title application or registration. That raises a critical question in the first place about land use agreements here in the ACT, if extinguishment has happened.[[299]](#footnote-299)

The Chair went on to say, however, that it was not, in his view:

off the table to negotiate arrangements. If there were an arrangement and some amicable benefits coming to all parties in the negotiation, that should proceed, at least to a point of sharing information and gaining a level of respectful understanding of what these circumstances may or may not present. [[300]](#footnote-300)

He told the Committee that:

Whenever land use agreements come up—I will go back to my earlier comment—the first thing is that we are more informed. We are an avenue for people to seek information from the authorities or pertinent places so that our constituencies are more informed as well. That is fundamentally our role. If we are informed, we can appropriately inform them about where to pursue their knowledge and their information and/or be an advocate for them to enter into a process of negotiation or consultation.[[301]](#footnote-301)

In response to further questions, the Chair and Deputy Chair told the Committee that they were receptive to the concept that the principles of the *Traditional Owners Settlement Act 2010* were applicable to the ACT. In so doing, they noted the role of the ATSIEB in consulting with Indigenous entities in the ACT and facilitating discussion on heritage and land use agreements.[[302]](#footnote-302)

* + - * 1. Whether the provision would support substantive equality in the ACT

The Committee asked the ATSIEB whether, in its view, proposed s 27(2) of the HRA could be used to achieve similar outcomes, and promote substantive equality, as had arisen in the case of *Parks Victoria.[[303]](#footnote-303)*

In response the Chair told the Committee:

My immediate response is that we have a framework already on how to commence the negotiations and move forward. One of the key principles in the recently signed agreement is about having respectful dialogue and conversations to commence to explore the opportunities, for instance. Often we have been presented with the barriers of policies or procedures or legislation to not enable us to progress. So our approach is, “Let’s have a conversation first as to what this actually means to you.” Then we work out together how we make this happen. That has been there and is an example of this.

I think the amendments to this act will enable those rights to be implemented, those rights to be exercised in a way that the individual values and cultural values are implemented, and they are more likely to be in pursuit of that positive outcome that they want to contribute not only to society but to their own cultural identity within the ACT. I think those kinds of things can happen.

Part of the UN declaration and the human rights covenant talks about non discrimination. So if there is a process where non-discrimination is demonstrated in this conversational process, then I think it is more likely to derive out of that a positive outcome that is adequate to all of the parties in the discussion. It is all of the principles of having open, valuable and respectful relationships. That is what the basis of the agreement is. I think that is the basis of where you can go with a process like this.[[304]](#footnote-304)

* 1. ACT Torres Strait Islander Corporation
		1. Submission

The submission to the inquiry by the ACT Torres Strait Islander Corporation advised the Committee that the Corporation supported the Human Rights Amendment Bill 2015.[[305]](#footnote-305)

* + 1. Appearance before the Committee in public hearings

The ACT Torres Strait Islander Corporation appeared before the Committee in public hearings of 12 October 2015, at which the Chairperson represented the Corporation.

* + - * 1. Characteristics of the Torres Strait Islander population in the ACT

The Committee asked the Chairperson to provide some background on the Torres Strait Islander community in the ACT.[[306]](#footnote-306)

In response, the Chairperson told the Committee:

I will start with the population statistics. As at 30 June 2011 Torres Strait Islander people in the ACT numbered about 326. That number varies from time to time, with a lot of people moving down to study and to work. I think the winter weather catches up with a lot of people, who do head back north to Queensland quite a bit.[[307]](#footnote-307)

More broadly, in Australia, she told the Committee:

The majority of the population—63 per cent—live in Queensland, including the Torres Strait, and 37 per cent live in jurisdictions other than Queensland; 63,700 people live in Australia—10 per cent of the total Indigenous population. Sixty per cent—38,100—were of Torres Strait Islander origin only, and 40 per cent, or 25,600, were both Torres Strait Islander and Aboriginal.[[308]](#footnote-308)

Regarding the ACT community in particular, she told the Committee:

In terms of the experiences and circumstances, there are young people who live here, young children who go to school, young families, and we are very fortunate to have quite a number of elders here as well. [[309]](#footnote-309)

* + - * 1. Effects and benefits of provisions

The Committee asked the Corporation to comment on the effects and benefits of proposed s 27(2) of the HRA for Torres Strait Islander people in the ACT. [[310]](#footnote-310)

In response she told the Committee that it was in her view ‘very important’. [[311]](#footnote-311) In addition, she told the Committee, the Torres Strait Islander community was ‘because of our low numbers of population, sometimes we are overlooked, and the provision would increase visibility for the ACT Torres Strait Islander community. [[312]](#footnote-312)

In her comments to the Committee, the Chairperson emphasised the importance of the ‘recognition and representation’[[313]](#footnote-313) she anticipated from the advent of Indigenous cultural rights in the HRA:

Torres Strait Islanders have been a part of the Canberra community for many years, even before the ACT Torres Strait Islander Corporation came into being. In terms of the opportunities and benefits, I think there is the visibility, because obviously there is an absence right now in terms of the legislation not clearly stating that, even though we do participate in festivals—NAIDOC Week, the Multicultural Festival at times, too—where the capacity and skills allow us to do so.[[314]](#footnote-314)

* 1. Committee comment

In the Committee’s view, representations made by the proposer, and some supporters, of the Bill have, in their comments on proposed amendments that would affect Indigenous rights, largely focused on the perceived benefits of including these rights in the HRA. This is useful to some degree, but is only one part of what should be put forward when changes to legislation are proposed.

As with any formal view or argument, those arguing in support of legislative changes should also anticipate, take seriously, and respond to those aspects which may increase risk. This part of the dialogue regarding the Human Rights Amendment Bill is has, in the Committee’s view, not been addressed with sufficient energy and focus.

For example, the Explanatory Statement to the Bill and representations by the Attorney-General asserted that Native Title is extinguished in the ACT. If this were true it would be a significant legal fact. However no representations have been made to the Committee to support this assertion.

Moreover, the Committee notes that the one reported decision of the Native Title Tribunal in relation to applications by parties in the ACT to register as Native Title Claimants makes no reference to Native Title being extinguished in the ACT. In fact, the Tribunal found against the claimants because they sought to exclude another related group from the group seeking registration, thus failing one of the tests created by the *Native Title Act 1993* (Cth).[[315]](#footnote-315)

Similarly, as noted in the submission to the inquiry by the ATSIEB,[[316]](#footnote-316) there is no reference to extinguishment of Native Title in the ACT in the *Native Title Information Handbook: Australian Capital Territory* published by the Australian Institute of Aboriginal and Torres Strait Islander Studies.[[317]](#footnote-317)

 Representations made on intellectual property were another area where arguments made in support of the Bill were not made with due rigour. In the Committee’s view these arguments tended to suggest that Indigenous intellectual property was a relatively settled matter under Australian law and that, in any case, it would fall to the jurisdiction of the Commonwealth if any further matters were to be decided after the enactment of the Bill. Although the Committee does not view the creation of new Indigenous intellectual property rights as either likely or a matter of concern, these were not arguments that were well made, and this was an indicator of the generally modest quality of argument put forward in support of the Bill.

The Committee also notes a third area were the quality of arguments in support of the Bill were wanting. This concerns the interaction of Clauses 7 and 8 of the Bill. It is clear, from reflection on the Bill, that the deletion of s 40B(3) by Clause 8 would elevate rights created by proposed s 27(2) of the HRA to that enjoyed by the civil and political rights in Part 2 of the HRA.

In other words, the deletion of s 40B(3) means that s 40B and 40C could be engaged in relation to grievances under s 27(2). Simply put, this means that there is a ‘right of action’ and grievances in relation to public authorities may be heard by the ACT Supreme Court which may, under s 40C(4) ‘grant the relief it considers appropriate except damages’.[[318]](#footnote-318)

In noting this, the Committee does not seek to argue that this should not be the case. Rather, it is the Committee’s strong view that such matters should be clearly and explicitly raised in Explanatory Statements and any other representations made by proposers of Bills.

A fourth example of this absence of due diligence concerns the wording of proposed s 27(2). More precisely, it concerns differences in wording between the Victorian *Charter* s 19(2) and proposed s 27(2) of the HRA.

As table 1 shows above, the only potentially substantive differences between the two provisions are the words ‘recognised and valued’, which appear at the end of proposed s 27(2).

The history of litigation in Victoria which has engaged s 19 of the *Charter* shows that this provision has not generated undue litigation, nor has it resulted in consequences that could be considered perverse or unanticipated.

However the addition of novel wording in proposed s 27(2) of the HRA reduces the degree to which the Committee can be confident that this would also be the case in the ACT if the provision were passed by the Assembly.

Representations in support of the Human Rights Amendment Bill 2015 have not directly addressed this issue. In light of this it appears that the proposer of the Bill is asking this Committee, and the Legislative Assembly more broadly, to take it on trust that there will not be any unanticipated outcome from the addition of these words. This makes it difficult for the Committee to be entirely confident that this wording is consistent with, and only with, the stated aim of the provision.

This, in the Committee’s view, is another example of where due diligence by the proposer of the Bill is less than the Committee had hoped. The Committee notes that, in its view, this is largely the import of the Scrutiny Committee’s *Report No.31*. Although widely misinterpreted, the thrust of *Scrutiny Report No.31—* in particular the questions it posed regarding Native Title, intellectual property, and customary law—was to urge proposers of Bills to create a better quality of argument so as to inform the Assembly more effectively about the implications of legislative change. The Committee also notes that the Scrutiny Committee also made strongly critical comment on the quality of Explanatory Statements in two other recent Scrutiny Reports, and that this is an area where significant improvement is needed if Members of the Assembly are to be properly supported in their role as legislators.[[319]](#footnote-319)

Returning to the Bill at hand, the Committee is of the view that Indigenous rights would be a good and useful addition to the developing HRA, particularly noting the comments of the ATSIEB about their significance for the ACT’s Indigenous community. As noted, the Committee expected to be briefed more comprehensively regarding the implications of certain aspects of the Bill, and this is reflected in comments and recommendations made in the final chapter of this report.

# Amendments concerning the right to education

* 1. Introduction

This chapter considers amendments proposed in the Human Rights Amendment Bill 2015 that would, if passed, affect the right to education.

The chapter begins by setting out the amendments proposed which would affect the right to education, and the effects of these amendments, if passed.

The Explanatory Statement, Scrutiny Report No.31 and the Attorney-General’s response to Scrutiny Report No.31 are then considered, followed by the Committee’s comment on these sources.

Although the Assembly debate on the motion ‘that the Bill be agreed to in principle’ did refer to these clauses of the Bill, Members who spoke to the motion were in broad agreement about this aspect of the Bill and therefore contributions to the debate are not discussed in detail in this chapter.[[320]](#footnote-320)

* 1. Amendments proposed in the Bill

Amendments proposed in relation to a right to education would, if the Bill were passed by the Assembly in its present form:

* by virtue of Clause 5 of the Bill, add a note to the effect that a ‘child also has the other human rights set out in this Act’; and
* by virtue of Clause 8 of the Bill, omit Section 40B (3), which currently reads:

“(3) In this section:

***human rights*** do not include the economic, social and cultural rights in part 3A.

***public authority*** includes an entity for whom a declaration is in force under section 40D.” [emphasis as per original]

* 1. Summary of effect

The *Human Rights Act 2004* already makes provision for a right to education, in part 3A, s 27A:

27A Right to education

 (1) Every child has the right to have access to free, school education appropriate to his or her needs.

 (2) Everyone has the right to have access to further education and vocational and continuing training.

 (3) These rights are limited to the following immediately realisable aspects:

 (a) everyone is entitled to enjoy these rights without discrimination;

 (b) to ensure the religious and moral education of a child in conformity with the convictions of the child’s parent or guardian, the parent or guardian may choose schooling for the child (other than schooling provided by the government) that conforms to the minimum educational standards required under law.

As the Act currently stands this is not expressed as statute due to the form of words employed in the current section 40B (3), which states that:

***human rights*** do not include the economic, social and cultural rights in part 3A.

This prevents the provisions in s 27A from having force, since the Act is specifically concerned with *human rights*.

The Bill would, if passed in its present form, put the provisions of s 27A into force by removing s 40B (3).

Removal of s 40B (3) also removes the provision that:

***public authority*** includes an entity for whom a declaration is in force under section 40D.

This will not alter the operation of the HRA because s 40C (6), which provides that ‘public authority includes an entity for whom a declaration is in force under section 40D’ will still stand. Section 40D provides that ‘Other entities may choose to be subject to obligations of public authorities’: that is, entities other than those defined as a public authority under s 40 of the HRA may apply to the relevant Minister (that is, the Attorney-General) to be considered as having the HRA obligations of public authorities imposed upon them.

This is to say that s 40B (3) is a redundant provision in that it is repeated elsewhere in the HRA, hence its deletion will not alter the operation of the Act.

* 1. Explanatory Statement

Regarding Clause 8 of the Bill, which omits the definition of human rights in s 40B(3), the *Explanatory Statement* to the Bill states that:

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.[[321]](#footnote-321)

* 1. Scrutiny Report No.31

In considering the implications of the removal of s 40B (3) of the *Human Rights Act 2004*, the Scrutiny Committee noted that under the present form of the Act, s 27A ‘states a quite limited right to education’.[[322]](#footnote-322)

The Scrutiny Committee’s report quoted s 27A in full:

27A Right to education

 (1) Every child has the right to have access to free, school education appropriate to his or her needs.

 (2) Everyone has the right to have access to further education and vocational and continuing training.

 (3) These rights are limited to the following immediately realisable aspects:

 (a) everyone is entitled to enjoy these rights without discrimination;

(b) to ensure the religious and moral education of a child in conformity with the convictions of the child’s parent or guardian, the parent or guardian may choose schooling for the child (other than schooling provided by the government) that conforms to the minimum educational standards required under law.[[323]](#footnote-323)

The Committee then went on to comment that:

By reason of HRA section 30, every administrative power conferred by a Territory law must be exercised, so far as possible, in a way that does not limit the rights stated in subsection 27A(3). A challenge to the exercise of such a power on the basis that the decision-maker had not appreciated that the power was limited by reference to an HRA right might be by way of application to the Supreme Court for an ADJR Act or “common law” remedy, or might arise collaterally in any other legal proceeding before a Territory court or tribunal (such as ACAT). Furthermore, a law might be called into question in a Supreme Court proceeding by means of an application for a declaration of incompatibility.[[324]](#footnote-324)

At present, the Committee noted:

HRA Part 5A does not permit a person to rely on its provisions—in particular section 40B—imposing obligations on public authorities to act consistently with HRA rights, nor to start a proceeding in the Supreme Court for relief (except damages) in respect of a contravention of these obligations. This is the consequence of subsection 40B(3), which defines “human rights” as employed in section 40B so that it does apply to Part 3A rights. (At present, the only Part 3A rights are those stated in section 27A.)[[325]](#footnote-325)

The Committee went on to note that:

Clause 8 of the Bill proposes to omit subsection 40B(3). The Explanatory Statement states that [t]his definition ... 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.[[326]](#footnote-326)

However, the Committee stated an ‘interpretational right’ remained ‘significant’, and this context the Committee put the view that ‘what section 40B adds to the effect of HRA section 30 [was] not clear’.[[327]](#footnote-327)

Seeking clarification the Committee quoted the *Explanatory Statement* to the effect that:

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.[[328]](#footnote-328)

Commenting on this, however, the Scrutiny Committee states that:

The amendment does much more than this. It would enable a person who is or would be a victim of a contravention of the obligation stated in section 40B(1) to start a proceeding in the Supreme Court on this basis (subsection 40C(2)), and to seek relief as the Court “considers appropriate (except damages)” (subsection 40(3)). Just what the extent of this relief might be is yet to be determined, but on the face of it, it will be more extensive than existing relief available in analogous proceedings.[[329]](#footnote-329)

In other words, the proposed changes to the Act would introduce a ‘right of action’ for the right to education.

In light of these considerations, the Committee drew these matters to the Attention of the Assembly and recommended that:

the Minister respond, in particular to explain (a) what subsection 40B(1) adds to the effect of HRA section 30, and (b) the potential consequences of the adoption of a clause so far as concerns the availability of Supreme Court relief under subsection 40C(4).[[330]](#footnote-330)

* 1. Attorney-General’s response to Scrutiny Report No.31

The Attorney-General’s response to this question was entitled ‘What does subsection 40B (1) add to the effect of HRA section 30?’.

Responding to this question, he advised the Committee that:

Section 30 (1) of the HRA introduces a rule of statutory construction. The purpose of this section is to recognise, to the maximum extent possible, the human rights set out in part 3 in the application and implementation of all other Territory statutes and statutory instruments.

This rule requires that legislation be interpreted in a manner consistent with human rights set out in the HRA, subject to the general rule set out in section 139 (1) of the *Legislation Act 2001* that Territory laws must be interpreted in a way that best achieves the purpose of the Act.

[s 40B (2)] clarifies that if an interpretation that is consistent with human rights would have the affect of defeating the obvious purpose of the statute or statutory instrument, the interpretation that is consistent with human rights will not prevail.[[331]](#footnote-331)

The effect of these arrangements, he advised the Committee was as follows:

The intention of the interpretation provisions in section 30 is that the courts, tribunals, decision makers and others authorised to act by a Territory statute or statutory instrument must take account of human rights when interpreting the law.

A statutory discretion must be exercised consistently with human rights unless legislation clearly and expressly authorises administrative action regardless of the application of human rights.[[332]](#footnote-332)

Under current settings, he advised the Committee:

Section 40B(1) extends this interpretational rule and imposes a binding obligation on public authorities to act compatibly with, and make decisions that properly consider the human rights in part 3.

This provision and section 40(C) open an avenue for an individual to start proceedings in the Supreme Court against a public authority if the person claims that they are a victim of a contravention of this obligation (under s 40B) to act in a way that is compatible with the right to education, or make a decision that takes the right to education into consideration.[[333]](#footnote-333)

However, he advised, ‘[t]his avenue is currently not open with respect to the right to education’. The Human Rights Amendment Bill would:

remove this restriction by omitting the qualifier in section 40B (3) that “human rights do not include the economic social and cultural rights in part 3A”. [[334]](#footnote-334)

The Attorney-General advised that under the *Human Rights Act 2004* this was not an unqualified right. The Act provided that the ACT Assembly could create arrangements in statute that were not consistent with rights set out in the Act:

As with section 30(2) there are provisions that would disapply the obligations on public authorities if the act or decision is made under a law in force in the Territory and the law expressly requires an act or decisions to the made in a way that is inconsistent with a human right or if the law cannot be interpreted in a way that is consistent with a human right.

Section 30(2) and s 40B(2) of the HRA preserve the ability of the legislature to make laws that are contrary to human rights with clear and express provisions that constrain the discretion of a public authority by requiring actions or decisions to be made regardless of whether those actions or decisions are compatible with human rights. In such a circumstance, the Supreme Court may make a declaration that the law is not consistent with a human right (s 32 HRA).[[335]](#footnote-335)

At this point the Attorney-General considered the second of the Scrutiny Committee’s questions on this part of the Human Rights Amendment Bill 2015: ‘potential consequences of the adoption of a clause so far as concerns the availability of Supreme Court relief under subsection 40C(4)’.[[336]](#footnote-336)

In response to this question the Attorney-General advised the Committee that:

extending the obligations on public authorities to the right to education will mean that where a person is able to prove in proceedings in the Supreme Court that they are a victim of an action or decision made which is incompatible with their right to education, the Supreme Court may grant the relief it considers appropriate (except damages).

Remedies might include an injunction to stop or prevent conduct from occurring, or a declaration that the decision was unlawful, requiring the original decision to be reconsidered in a human rights consistent manner.

Section 40C(5) provides that existing rights under other legislation or the common law are not removed or curtailed by a claim for relief under the HRA. Arguments that a person’s rights have been contravened by a public authority could enhance a concurrent claim for damages for on the basis of tort law or discrimination.[[337]](#footnote-337)

* 1. Attorney-General

The Attorney-General did not make a submission to the inquiry. He appeared before the Committee with his officers in public hearings of 8 October 2015.

This is considered below.

* + 1. Appearance before the Committee in public hearings

In hearings, the Committee asked the Attorney-General to outline the effect of the proposed deletion of s 40B(3) of the HRA, as provided for in Clause 8 of the Human Rights Amendment Bill 2015, and on whom the resulting obligations would fall.

In responding, in particular to questions on the effect of the amendment on home schooling, the Attorney-General told the Committee that ‘obligations under the act accrue to public authorities’, and that this would only affect home schooling inasmuch as the public authorities which oversee home schooling were bound by the provision.[[338]](#footnote-338)

The Attorney-General told the Committee that the deletion of s 40B(3) would result, in practice, to:

a much stronger protection around any arbitrary removal of a person’s capacity to access education, for example, a decision on the part of a public authority to say, “No, we’re not going to let your child attend a school, any school,” not necessarily to say, “You can go to this school but not that school.” There may be reasonable grounds to say that on capacity and location and relative priority. But if a public authority was simply to say, “Your child is not welcome in a government school,” then that would be a breach of the right to education potentially. So the protection is in such arbitrary decision making and allows for such decision making to be subject to review. [[339]](#footnote-339)

The Executive Director, Legislation, Policy and Programs, also responded to the question. She told the Committee that:

We think the right to education is complied with now. The Education Act is very broad and mirrors the rights under the right to education. We do not expect it to make significant changes. What it means is that if there is anything in the act that could be challenged as being inconsistent with human rights, it could be challenged in the court. It also means that people can argue, run arguments that, in fact, decision makers have not acted consistently with human rights. That is what this one is about—decision makers have to act consistently with human rights. [[340]](#footnote-340)

The Executive Director also told the Committee that:

The removal of the definition of human rights. Because human rights was only, at the time this was put, to apply to the ICCPR right, which does not include the right to education, and because we are now including the economic, social and cultural rights in part 3A, which impacts the right to education, that definition no longer applies. In fact, it was a drafting device that is no longer necessary.[[341]](#footnote-341)

* 1. ACT Human Rights Commission

The ACT Human Rights Commission made a submission to the inquiry and appeared before the Committee in public hearings of 8 October 2015.

These are considered below.

* + 1. Submission

With regard to amendments which would affect the right to education, the submission stated that the Commission welcomed ‘the proposal to extend the public authority obligations in Part 5A of the HR Act to the right to education’.[[342]](#footnote-342)

It noted that Scrutiny Report No.31 had ‘noted that these changes will directly require public authorities to act consistently with the right to education (s 40B, HR Act), and will enable a person to commence proceedings in the Supreme Court for relief (except damages) in respect of a contravention of these obligations (s 40C, HR Act)’. [[343]](#footnote-343)

The submission asserted that Scrutiny Report No.31:

appeared to take exception with the factual description in the explanatory statement that the HR Act presently ‘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’. [[344]](#footnote-344)

And noted the statement in the Report that:

An “interpretational right” is however significant, and what section 40B adds to the effect of [the interpretive provision in] HRA section 30 is not clear. The Committee assumes that there is some difference. [[345]](#footnote-345)

The submission went on to state that:

The Attorney-General addressed the interaction between the interpretive provision in s 30 of the HR Act and the duty on public authorities to comply with human rights in s 40B of the HR Act in some detail in his response to the Committee’s report on the bill. The Commission agrees with the Attorney-General’s comments and considers that they amply address the Committee’s concerns. [[346]](#footnote-346)

At this point the submission provided some further background on the development of these aspects of the HRA:

The HR Act was amended in 2008 to introduce express duties on public authorities to comply with human rights. Prior to that, the HR Act applied directly to legislation only. It did not impose direct duties on public authorities, and it did not apply directly to administrative decision-making or conduct, except through its effect on the interpretation of legislation. Human rights issues could only be raised in the context of existing litigation, and, except for the ability of the Supreme Court to issue a declaration of incompatibility, only existing remedies, which were already available, applied in cases where a human rights argument was raised. [[347]](#footnote-347)

Further, the submission stated:

The Government’s 12-month Review of the HR Act, which recommended that the HR Act be amended to expressly apply to public authority conduct, noted that there may be scope for the HR Act to indirectly deal with conduct of public authorities and to provide remedies through the operation of the interpretive provision within the HR Act’. However, that report concluded that the indirect operation of the interpretive provision to achieve such outcomes was potentially limited to the exercise of statutory powers, unnecessarily complex, and could restrict the growth of a broad rights dialogue. As a result, the report recommended that the HR Act be amended to expressly apply to public authority conduct and those recommendations were eventually given effect to by the Human Rights Amendment Act 2008. [[348]](#footnote-348)

With regard to this, the submission stated that:

The Scrutiny of Bills Committee’s remaining concerns with regard to this issue are therefore perplexing, given that the applicable provisions have been in operation since 1 January 2009. While this concern may have been relevant to raise during the passage of the original amendments in 2008, they appear to be extraneous to the amendments that are currently before the Assembly. Indeed to exclude the application of public authority obligations for just the right to education, when such obligations already apply for the rest of the rights in the HR Act, would entrench a two-tier system of rights protection within the HR Act for no sound reason. [[349]](#footnote-349)

Moreover, it suggested:

The Committee’s concerns about the ‘potential consequences of the adoption of [such] a clause so far as concerns the availability of Supreme Court relief under subsection 40C (4)’ would also appear to be unwarranted, given that the right to education contained in s 27A of the HR Act is essentially a right to non-discrimination with regard to access to education, which, for all relevant purposes, is already covered by the equality rights in s 8 of the HR Act. Given the limited content of the right to education recognised in the HR Act, there is no risk that these amendments would give rise to any of the uncertainties that are usually (even if incorrectly) associated with the justiciability of economic, social and cultural rights. [[350]](#footnote-350)

* + 1. Appearance before the Committee in public hearings

The ACT Human Rights Commission appeared before the Committee in public hearings of 8 October 2015, at which the Human Rights and Discrimination Commissioner represented the Commission.

In hearings, the Committee asked the Commission how many times s 40C of the HRA had been used as a basis on which to initiate legal proceedings since it was introduced in 2008.[[351]](#footnote-351)

In response, the Commissioner told the Committee that she would take the question on notice in order to provide accurate figures on the number of cases, but that there were ‘about 12 or 14 applications’ and that this ‘[c]ertainly was not a flood of litigation’.[[352]](#footnote-352)

However, what was important was:

not just what gets to court but by having the direct obligation on public authorities to act consistently and make decisions that consider relevant human rights that that is done at the outset rather than people having to litigate something that has not gone right. It is that whole educative and regulatory role of the act in making public authorities comply with the *Human Rights Act* which is very important.[[353]](#footnote-353)

The Committee also asked whether a right to education, as amended under Clause 8 of the Bill, could be engaged in an instance where a child with a disability was not properly catered for in the classroom.[[354]](#footnote-354)

The Commissioner responded to this question by saying:

In my view, I hope it would. Certainly when I have advocated for having a right to housing, that is the example I have given: people who have a disability and in public housing that disability is not being properly accommodated, that would be not only a discrimination case but a human rights action.[[355]](#footnote-355)

A subsequent response to the question taken on notice on numbers of cases arising from the obligation on public authorities to act consistently with human rights stated that 16 cases had been considered in this regard by the ACT Supreme Court, and 6 by the ACT Civil and Administrative Tribunal (ACAT).[[356]](#footnote-356)

* 1. Victorian Equal Opportunity and Human Rights Commission

The Victorian Equal Opportunity and Human Rights Commission lodged a submission to the inquiry and also appeared before the Committee in public hearings.

These are considered below.

* + 1. Submission

With regard to amendments proposed in the Human Rights Amendment Bill 2015 that would affect the right to education, the submission noted:

* that the amendments would impose ‘an obligation on public authorities to comply with the right to education in section 27 A’;
* that ‘requirement of public authorities to act compatibly with human rights and to give proper consideration to human rights in section 408(3) has previously not applied to the right to education, as this has been an ‘interpretational right’ that has not imposed a duty’. [[357]](#footnote-357)

The submission noted that:

In practice, this would mean that public authorities must consider how their decisions, actions, policies and procedures impact on the right to education in the same way as the civil and political rights contained in the HRA, and there would be the same legal consequences for a breach. [[358]](#footnote-358)

In connection with this the submission noted:

* that ‘Victoria does not have an equivalent *Charter* provision, however, in principle the Commission would support broadening the scope of the obligation on public authorities to comply with the right to education’; [[359]](#footnote-359)
* that the United Nations High Commissioner for Human Rights had noted ‘that the right to education is fundamental to exercising other human rights’, and that ‘individuals who are not literate may struggle to take part in political activity, vote or enjoy freedom of expression’; [[360]](#footnote-360) and
* that the Commission supported ‘reforms to the HRA that would strengthen protection of rights, including important rights contained in the I*nternational Covenant on Economic Social and Cultural Rights 1966* such as the right to education’. [[361]](#footnote-361)
	+ 1. Appearance before the Committee in public hearings

When the Commission appeared before the Committee in public hearings of 12 October 2015, via telephone link, the Committee asked whether the absence of avenues for redress, such as those proposed for the right to education in the Human Rights Amendment Bill 2015, had been a hindrance to the advancement of human rights in Victoria.[[362]](#footnote-362)

In response, the Director of the Commissioner’s Office told the Committee that:

Our submission to the eight-year review was that the lack of accessible and enforceable remedies in our charter does have an impact on ability for our charter to fully protect and promote human rights. Also, we said in our submission to the independent reviewer that it limits the development of a human rights culture. We think accessible and enforceable remedies are critical, and that is something that we have advocated for strongly. [[363]](#footnote-363)

* 1. Committee comment

From the outset, the Committee notes that proposed amendments affecting the right to education have attracted less controversy than those which would affect Indigenous rights. In fact, debates in the Assembly up to this point have raised little disagreement in relation to this aspect of the Bill.[[364]](#footnote-364)

The main comment the Committee wishes to make in relation to the proposed amendment contained in Clause 8 of the Bill is to note, again, a lack of due diligence on the part of the proposer of the Bill, in that the Explanatory Statement did not set out, in clear terms, exactly how the deletion of s 40B(3) would extend the right to education. While this was set out in subsequent representations on the Bill,[[365]](#footnote-365) it would have been helpful, both to this Committee and to the Assembly, if this had been done in the Explanatory Statement.

In putting this view, the Committee wishes to note that in its view this was also the intent of the Scrutiny Committee when it suggested that ‘what section 40B adds to the effect of HRA section 30 [was] not clear’.[[366]](#footnote-366) While it has been misunderstood, its purpose was to encourage the proposers of Bills to state the effect of Bills, clearly and explicitly, in Explanatory Statements; a view with which the present Committee comprehensively agrees.

# Amendment concerning childrens’ rights

* 1. Introduction

This chapter considers a proposed amendment that if passed would affect childrens’ rights. It considers the amendment and summarises its anticipated effect, then statements in the Explanatory Statement regarding the amendment.

The Committee notes that although this has been the least controversial of the amendments proposed in the Human Rights Amendment Bill 2015 two submissions considered in the following chapter, chapter 5 (those of the ACT Human Rights Commission and the Victorian Equal Opportunity and Human Rights Commission[[367]](#footnote-367)), propose significantly different legislative provisions for the rights of children than those currently proposed in the Bill.

* 1. Amendment proposed in the Bill

The Bill, if passed, would add a new note to s 11 (2) of the *Human Rights Act 2004*.

Clause 5 of the Bill would, if the Bill were passed, after examples for s 11 (2), insert the note:

Note 1 A child also has the other human rights set out in this Act.

* 1. Summary of effect

The effect of this clause of the Bill would, if the Bill were passed in its present form, be to indicate that while there are some provisions of the *Human Rights Act 2004* which specifically provide protection for the rights of children, this does not imply that the rights of children are not inferior or a sub-set of the rights the Act provides to all persons under the scope of the Act, or that a child with a grievance could not seek relief under arrangements set out for all other persons covered by the Act.

* 1. Explanatory Statement

The *Explanatory Statement* for the Human Rights Amendment Bill 2015 states that:

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.[[368]](#footnote-368) 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.[[369]](#footnote-369)

The Scrutiny Committee did not make comment on the proposed note, nor did The Attorney-General in his response to *Scrutiny Report No.31*.

* 1. Attorney-General

When the Attorney-General and his officers appeared before the Committee in public hearings of 8 October 2015, the Committee asked whether s 11 of the HRA should be amended so that childrens’ rights and the rights of families were provided for separately under the Act.[[370]](#footnote-370)

The Executive Director, Legislation, Policy and Programs, responded to the question. She told the Committee:

That was examined in the last review of the Human Rights Act. We were aiming to increase the prominence of the rights of children. The proposed amendment says that children are people, too, so children have people rights. It is possibly a philosophical difference. I do not think it is a substantive difference. The best interests of the child are really throughout our legislation. I cannot think of a piece of legislation that does not have that in it. When you look at things like sentencing legislation, one of the elements you look at in that is the best interests of the child. That is the difference between children when they are being sentenced and adults. We have that all through our legislation.

We did not see that there was necessarily value in including it here. Really, we were making it clear that children have all the other human rights as set out. One of the things that the Children and Young People Commissioner had asked was that we put children explicitly in sections, and things like that. We thought that would make it more clunky and suggest that children did not come within “people”. It was just a different approach.[[371]](#footnote-371)

* 1. ACT Human Rights Commission

The ACT Human Rights Commission lodged a submission to the inquiry and appeared before the Committee in hearings of 8 October 2015.

These are considered below.

* + 1. Submission

The submission by the ACT Human Rights Commission made comment on a proposed amendment that would affect children’s rights.[[372]](#footnote-372)

It noted that the amendment would add an explanatory note to s 11 of the HRA ‘to indicate that a child also has the other human rights set out in the HRA’, and that this note would:

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. [[373]](#footnote-373)

This amendment, the submission asserted, did not ‘adequately reflect the suggestion made by the ACT Children & Young People Commissioner (CYP Commissioner) during the 2014 review’. ‘At that time’, the submission stated that:

the CYP Commissioner noted his concerns that the current wording of section 11 may inadvertently give the impression that the rights of children and young people are limited solely to the ‘right to protection’, rather than many other rights, including, importantly, the right to participate in decisions affecting their lives. [[374]](#footnote-374)

‘To address these concerns’, the submission stated:

the CYP Commissioner proposed the inclusion of a note at section 11 indicating that the right ‘to protection’ does not in any way limit the application of other rights applicable to children and young people, including those rights contained elsewhere in the HR Act. The Commissioner remains of the view that this wording would be preferable. [[375]](#footnote-375)

The submission stated that the Commissioner had at the time proposed two other amendments to the HRA.

* + - * 1. Separation of ‘family’ and ‘children’ in s 11 of the HRA

In the first of these proposed amendments, s 11 of the HRA, ‘Protection of the family and children’, would ‘be separated into two distinct parts, one recognising the rights of the family, and the other the rights of children’. This, it asserted, would make children’s rights ‘independent of the rights of the family’, as in the International Covenant on Civil and Political Rights at Articles 23 and 24. [[376]](#footnote-376)

In contrast, the submission asserted, at present:

Combining the rights of the family and children in a single section of the HR Act reduces the prominence of the rights of children as individuals, and sends an inaccurate message that children only have rights in the context of the family unit. [[377]](#footnote-377)

In light of this, the submission stated that:

It remains the Commission’s view that section 11 should be separated into two distinct parts, one recognising the rights of the family, and the other the rights of children. [[378]](#footnote-378)

* + - * 1. Change of terminology to ‘children and young people’

The second amendment proposed by the CYP Commissioner would replace the term ‘children’ with the term ‘children and young people’, on the grounds that:

* this language [was more] consistent with other ACT legislation; and
* it was ‘more inclusive and respectful of young people (those over 12, but not yet 18, years) in the ACT’. [[379]](#footnote-379)
	+ 1. Appearance before the Committee in public hearings

The Human Rights Commission appeared before the Committee in public hearings of 8 October 2015, at which the Human Rights and Discrimination Commissioner represented the Commission.

In response to questions, the Commissioner told the Committee that:

Certainly we made a submission into 2014 when economic, social and cultural rights were being reviewed generally in the Human Rights Act that it was an opportune time in the view of the Children and Young People Commissioner that he was of the view that you should not have section 11 applying both to family and to children, even under subsections. He wanted separate provisions because in the International Covenant on Civil and Political Rights, they are articles 23 and 24. He wanted them numerically separated. The government did not agree to that.[[380]](#footnote-380)

The Commissioner went on to tell the Committee that the Children and Young People Commissioner had, at that time:

also wanted the words “children and young people” inserted so that the situation of children over 12 and under the age of 18 was more inclusive and respectful and recognised their developed maturity. That is something reflected in his own title. I have to say at the federal level we do have a children’s commissioner rather than a children and young people’s commissioner. In the ACT we can change what our international and national standard is and make it more inclusive and reflective of what the ACT experience is.[[381]](#footnote-381)

* 1. Victorian Equal Opportunity and Human Rights Commission

The Victorian Equal Opportunity and Human Rights Commission lodged a submission to the inquiry and appeared before the Committee in hearings of 12 October 2015.

These are considered below.

* + 1. Submission

In considering the note that would be inserted added to s 11 of the HRA concerning childrens’ rights, the submission noted that childrens’ rights were currently recognised in s 11 and s 20 of the HRA, [[382]](#footnote-382) (p.5) and commented that:

The existing provisions in the HRA are similar in nature to the provisions contained in the Victorian *Charter*. These sections protect children’s rights in the family unit and children, based on their status as a child. They also recognise that children are particularly vulnerable in the criminal process and require special protection in the justice system. [[383]](#footnote-383)

However, the submission stated:

In Victoria, our protection of children provision extends to each child having the right without discrimination to ‘such protection as is in his or her best interests and is needed by him or her by reason of being a child.’ This is broader than the current ACT provision, and operates as a stand-alone provision. [[384]](#footnote-384)

This provision, the submission stated, gave effect to:

the *Convention on the Rights of the Child 1989* (‘CRC’), for example, article 3, which sets out that, in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. [[385]](#footnote-385)

The effect of the provision was that it could ‘prompt decision makers to refer to relevant articles in the CRC, for example, when ascertaining the scope of the right to protection of a child’s best interests’. This had occurred in the matter of *Secretary to the Department of Human Services v Sanding*, in which:

the Victorian Supreme Court noted a number of factors which must be taken into account when identifying the best interests of the child, including the principle of ensuring that the voice of the child is heard in all matters affecting the child, as provided in article 12 of the CRC. The Court found that the magistrate had properly taken these matters into account. [[386]](#footnote-386)

In another matter, the submission stated:

The Victorian Supreme Court contemplated the scope of the right to protection of children’s best interests in an application by two children for an order to quash a decision of the Children’s Court that children lacked maturity to provide instructions to legal representatives. The Children’s Court decision had denied them leave to be represented on a direct instructions basis. In the matter of *A & B v Children’s Court of Victoria & Ors* [2012], the Court observed that article 12 of the CRC provides that a child has a right to have an opinion, to have that opinion listened to and taken seriously. The Court held that assessing whether a child is mature enough to give instructions requires considerations of more than just a child’s age and must also assess the child’s development and capacity to give instructions. [[387]](#footnote-387)

The outcome of this case was that the Court ‘endorsed Sanding, finding that the best interests principle recognises children as autonomous rights-bearers whose views are entitled to be given proper consideration’. [[388]](#footnote-388)

In light of these comments and cases, the submission asserted that the proposed amendment to s 11 of the HRA ‘would be a positive clarification to promote recognition of children’s civil and political rights’, but stated, in addition, that the Commission ‘would also recommend’:

a further amendment to section 11 (2) of the HRA to include protection in a child’s ‘best interests’ and as needed by him or her by reason of being a child [because explicit] recognition of this kind would better align the HRA with the protection afforded specifically to children in the CRC. [[389]](#footnote-389)

* + 1. Appearance before the Committee in public hearings

The Equal Opportunity and Human Rights Commission appeared before the Committee in public hearings of 12 October 2015, at which the Director, Commissioner’s Office, represented the Commission.

The Committee asked the Commission questions about the effect, in practice, of there being separate provision for the rights of children in Victoria.[[390]](#footnote-390)

In response, the Director told the Committee that:

We have both got in our legislation the protection of families and children but our provision deals with children being protected and also refers to such protection in his or her best interest and is needed by him or her by reason of being a child. That addition, which is not in your legislation, has been quite useful in Victoria because the best interest principle comes up, of course, in a number of contexts where children do need protection.

The child protection area is a good example of that, and best interest is already in our legislation here, for example, and is the paramount consideration. It enables a broader understanding of best interest. I think when you have got a provision like ours in the charter it enables you to think through some of the principles you can take from the Convention on the Rights of the Child.[[391]](#footnote-391)

In response to further questions, the Director told the Committee that:

One of the examples here is where a child is of a particular age where they may have their own views on what is in their best interests in a context like removal from the home or child protection. If you understand the best interests in light of the Convention on the Rights of the Child, then that would give you a context where a child does have the right to have an opinion, to have that opinion listened to and be taken seriously and the right to be provided an opportunity to be heard in judicial proceedings that affect them, either directly or through a representative. It is not just a matter of age; it is about maturity and a reference to an individual child’s development in that opportunity. It is a more nuanced understanding of best interest because it draws on the convention.[[392]](#footnote-392)

* 1. Committee comment

The proposed amendment in the Human Rights Amendment Bill 2015 affecting the rights of children this would appear to be the least controversial of any proposed in the Bill.

However, the Committee notes proposals made in submissions by the ACT Human Rights Commission and the Victorian Equal Opportunity and Human Rights Commission that there should be separate provision for the rights of children and families in the HRA.

In the Committee’s view, this would appear to be a logical and equitable extension of the rights of children as they are provided for in the HRA. As for many aspects entailed by proposed s 27(2) of the HRA, the Victorian experience of a rights regime in which this was a feature—which appears not to have generated undue litigation or perverse effects— lends credence to proposals that this should be the case also in the ACT.

In light of this the Committee makes a relevant recommendation in the final chapter of this report.

# Committee comment

As noted, the Human Rights Amendment Bill 2015 proposes amendments which would affect Indigenous rights, the right to education and the rights of the child.

In each of these three areas the Committee finds in favour of the intent of the proposed amendments.

In the Committee’s view, the recognition of Indigenous cultural rights; the extension of the right to education to accord it the same status as civil and political rights as far as legal remedies are concerned; and the clarification that children hold rights additional to those they hold by virtue of being persons under the Act, are all constructive steps in the development of the HRA.

The Committee is, however, concerned about the process by which the Legislative Assembly has been informed about the nature and effect of the Human Rights Amendment Bill 2015. As noted in the immediately section below on Indigenous cultural rights, the Committee takes the view that the Assembly could—and should—have been better informed about the Bill from the outset, in particular by an Explanatory Statement that was more properly prepared.

In the Committee’s view, an absence of adequate documentation for Bills undermines the capacity of the Assembly to scrutinise legislation and, where necessary, propose amendments to it as part of the process of framing legislation. This goes to the heart of due process and the proper functioning of the parliamentary system of government in the ACT. It is for this reason that the Committee seeks to underscore this dimension of the inquiry, and to make relevant recommendations below.

* 1. Indigenous cultural rights

In relation to Indigenous rights, the Committee notes previous chapters and Committee comments in this report, on the basis of which the Committee takes the view that the amendments proposed are largely reasonable and predictable in their effect, and notes the representations made by contributors that Indigenous rights have a palpable significance for the wellbeing of Indigenous people.

As noted, most elements of these provisions have counterparts in the Victorian *Charter* and have led to little in the way of disorder, unintended consequences, or actions in the Courts.

However, as also noted, proposed s 27(2) of the HRA contains an important divergence from the form of the most relevant provision in the *Charter*, s 19(2), in that it employs the words ‘recognised and valued’. The Committee was informed that ‘recognised’ was consistent with rights as described in UN charter documents, [[393]](#footnote-393) and that ‘valued’ arose through discussions with the ATSIEB.[[394]](#footnote-394)

The Committee was pleased to hear of the positive outcomes that were anticipated if clauses of the Bill relating to Indigenous rights were passed by the Assembly. In particular the Committee notes the statements of Indigenous contributors to the inquiry in this regard.[[395]](#footnote-395)

In light of this, the Committee makes the following recommendation.

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

The Committee notes the views it has put forward in the Committee comment sections of this report in which the insufficient level of information provided in the Explanatory Statement to the Bill was noted. This was particularly evident in relation to proposed amendments that would affect Indigenous rights, but the Committee also saw this as a concern in relation to the right to education. The Committee also noted that in Scrutiny Report No.31 the Scrutiny Committee made comment to similar effect.

In light of this the Committee makes the following recommendation.

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.

In relation to assertions made in the Explanatory Statement and other places to the effect that Native Title was extinguished in the ACT, the Committee makes the following recommendation.

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.

The Committee notes evidence presented to it on the operation of the *Traditional Owner Settlement Act 2010* (Vic), and considers that it the introduction of similar legislation in the ACT should be considered.

In light of this the Committee makes the following recommendation.

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

* 1. Right to education

In relation to the right to education, the Committee finds the amendments proposed to be a reasonable extension to the right to education as it presently exists in the HRA. The Committee takes the view that the proposed deletion of s 40B (3) from the HRA will, by removing the ‘two-tier system’ presently in place, ultimately make the HRA a stronger and more intelligible instrument through which to protect the rights of residents of the ACT.

In light of this the Committee makes the following recommendation.

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

* 1. Childrens’ rights

In relation to childrens’ rights, the Committee notes that although discussion of this aspect of the Bill provoked the lowest level of controversy in debate in the Assembly to date, important representations were made in submissions by the ACT Human Rights Commission and the Victorian Equal Opportunity and Human Rights Commission on the benefits of making separate legislative provision in s 11 of the HRA for the rights of children and the rights of families. A further representation was made by the ACT Human Rights Commission on the benefit of changing terminology in the HRA from ‘children’ to ‘children and young people’.

The Committee finds these representations persuasive, and finds that these amendments would, if made to the HRA, increase its utility and inclusiveness.

In light of this, the Committee makes the following recommendations.

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

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’.

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.

Steve Doszpot MLA

Chair

— Human Rights Amendment Bill 2015

2015

THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Attorney-General)

Human Rights Amendment Bill 2015

A Bill for

An Act to amend the [Human Rights Act 2004](http://www.legislation.act.gov.au/a/2004-5%22%20%5Co%20%22A2004-5)

The Legislative Assembly for the Australian Capital Territory enacts as follows:

1 Name of Act

This Act is the *Human Rights Amendment Act 2015*.

2 Commencement

This Act commences on the day after its notification day.

Note The naming and commencement provisions automatically commence on the notification day (see [Legislation Act](http://www.legislation.act.gov.au/a/2001-14), s 75 (1)).

3 Legislation amended

This Act amends the [Human Rights Act 2004](http://www.legislation.act.gov.au/a/2004-5).

4 Preamble
Clause 7

omit

Indigenous people

substitute

Aboriginal and Torres Strait Islander peoples

5 Protection of the family and children
Section 11 (2), new note

after the examples, insert

Note 1 A child also has the other human rights set out in this Act.

6 Section 27 heading

substitute

27 Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities

7 New section 27 (2)

insert

 (2) Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied the right—

 (a) to maintain, control, protect and develop their—

 (i) cultural heritage and distinctive spiritual practices, observances, beliefs and teachings; and

 (ii) languages and knowledge; and

 (iii) kinship ties; and

 (b) 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.

Note The primary source of the rights in s (2) is the United Nations Declaration on the Rights of Indigenous Peoples, art 25 and art 31.

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

omit

9 ICCPR source of human rights
Schedule 1, item 30

substitute

|  |  |  |  |
| --- | --- | --- | --- |
| 30 | 27 (1) | rights of minorities | 27 |
| 31 | 27 (2) | cultural rights of Aboriginal and Torres Strait Islander peoples |  |

Note The primary source of the rights in s 27 (2) is the United Nations Declaration on the Rights of Indigenous Peoples, art 25 and art 31.

Endnotes

1 Presentation speech

 Presentation speech made in the Legislative Assembly on 26 March 2015.

2 Notification

 Notified under the [Legislation Act](http://www.legislation.act.gov.au/a/2001-14) on 2015.

3 Republications of amended laws

 For the latest republication of amended laws, see [www.legislation.act.gov.au](http://www.legislation.act.gov.au).

— Explanatory Statement

2015

LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY

HUMAN RIGHTS AMENDMENT BILL 2015

EXPLANATORY STATEMENT

Presented by

Simon Corbell MLA

Attorney-General

**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 HRAto:

* + 1. 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
		2. 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.[[396]](#footnote-396) 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.[[397]](#footnote-397)

**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 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.[[398]](#footnote-398)

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 quality 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 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.[[399]](#footnote-399)

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.[[400]](#footnote-400) 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”.[[401]](#footnote-401)

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.[[402]](#footnote-402)

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.

**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.

— Articles 25 and 31, UN Declaration on the Rights of Indigenous Peoples

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.[[403]](#footnote-403)

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.[[404]](#footnote-404)

— Article 27, UN International Covenant on Civil and Political Rights

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.[[405]](#footnote-405)

— Submissions

Submission No.1 — ACT Human Rights Commission

Submission No.2 — Victorian Equal Opportunity and Human Rights Commission

Submission No.3 — ACT Aboriginal and Torres Strait Islander Elected Body

Submission No.4 — ACT Torres Strait Islander Corporation

— Witnesses

Public hearing, 8 October 2015

* The Attorney-General, Mr Simon Corbell MLA, and Ms Julie Fields, Executive Director, Policy, Legislation and Planning, Justice and Community Safety Directorate
* ACT Human Rights and Discrimination Commissioner, Dr Helen Watchirs
* The Aboriginal and Torres Strait Islander Elected Body, Chair Mr Rod Little and Deputy Chair Ms Dianne Collins

Public hearing, 12 October 2015

* Ms Catherine Dixon, Director, Commissioner’s Office, Victorian Equal Opportunity and Human Rights Commission (via telephone link)
* Ms Samantha Faulkner, Chairperson, ACT Torres Strait Islander Corporation

1. Legislative Assembly for the ACT, *Debates*, 27 November 2012, p.46. [↑](#footnote-ref-1)
2. Legislative Assembly for the ACT, *Minutes of Proceedings*, No.99 - 7 May 2015, p.1103. [↑](#footnote-ref-2)
3. Legislative Assembly for the ACT, *Minutes of Proceedings*, No.109 - 11 August 2015, p.1233. [↑](#footnote-ref-3)
4. Legislative Assembly for the ACT, *Debates*, 26 March 2015, pp.1190-1993. [↑](#footnote-ref-4)
5. *Debates*, 7 May 2015, pp.1482-1497. [↑](#footnote-ref-5)
6. Moved by Mr Andrew Wall MLA, *Debates*, 7 May 2015, p.1497. [↑](#footnote-ref-6)
7. *Debates*, 29 June 1989, p. 572 *ff.* The *Report of the National Inquiry into Youth Homelessness* is available at: <https://www.humanrights.gov.au/our-work/childrens-rights/publications/our-homeless-children> [↑](#footnote-ref-7)
8. Mr Dennis Stevenson MLA, *Debates*, 15 November 1989, pp.2531. [↑](#footnote-ref-8)
9. *Debates*, 21 November 1989, p.2742 *ff*. [↑](#footnote-ref-9)
10. Mr Wayne Berry MLA, *Debates*, 22 March 1990, p.803 and *Debates,* 22 March, p.793 *ff.* [↑](#footnote-ref-10)
11. *Debates*, 1 May 1990, p.1388. [↑](#footnote-ref-11)
12. *Debates,* 12 September 1990, p.3093 *ff*. [↑](#footnote-ref-12)
13. See Speaker’s Ruling, *Debates*, 13 September 1990, p.3205 and subsequently motion to withdraw the Bill, p.3206. See also further Speaker’s Ruling, *Debates*, 12 February 1991 pp.17-18. [↑](#footnote-ref-13)
14. Mr Bernard Collaery MLA, *Debates,* 29 November 1990, p.4828 *ff*. [↑](#footnote-ref-14)
15. Ms Rosemary Follet MLA, *Debates*, 17 October 1991, p.3887 *ff*. Regarding the title of the Act, see Mr Moore, *Debates*, 24 March 1993, p.712. [↑](#footnote-ref-15)
16. Ms Rosemary Follet MLA, *Debates*, 8 September 1992, p.2021. [↑](#footnote-ref-16)
17. Mr Terry Connolly MLA, *Debates*, 1 April 1993, p.1085. [↑](#footnote-ref-17)
18. Mr Terry Connolly MLA, *Debates*, 1 April 1993, p.1085. [↑](#footnote-ref-18)
19. Mr Terry Connolly MLA, *Debates*, 16 December 1993, p.4732 *ff*. [↑](#footnote-ref-19)
20. Mr Terry Connolly MLA, *Debates*, 3 May 1995, p.107 *ff*. [↑](#footnote-ref-20)
21. Mr Jon Stanhope MLA, *Debates*, 9 April 2002, p.829 *ff*. [↑](#footnote-ref-21)
22. See *Debates*, 23 October 2003, p.4028 *ff*. The motion that the Assembly take note of the paper was continued and resolved in the affirmative on 25 November 2003: see *Debates*, 25 November 2003, p.4573 *ff*. [↑](#footnote-ref-22)
23. Mr Jon Stanhope MLA, *Debates*, 18 November 2003, pp. 4243-4249. As also recorded in *Minutes of Proceedings*, debate on the Bill was started on 18 November 2003 (MoP No.78, p.1004 *ff.*) and was adjourned; was continued on 2 March 2004, (MoP No. 90—2 March 2004, p.1126 *ff.*) and adjourned, and was resumed on 3 March 2004 (MoP No. 90-2, 3 March 2004 p.1128 *ff.*) and the question was put and passed the same day (MoP No. 90-2, 3 March 2004 p.1132). [↑](#footnote-ref-23)
24. Mr Simon Corbell MLA, *Debates*, 6 December 2007, p.4026 *ff*. [↑](#footnote-ref-24)
25. Mr Simon Corbell MLA, *Debates*, 18 August 2009, p.3229 *ff.* [↑](#footnote-ref-25)
26. Mr Simon Corbell MLA, *Debates*, 10 December 2009, pp.5640-5643. [↑](#footnote-ref-26)
27. *Debates*, 29 June 2010, pp.2705-2709. *ff.* [↑](#footnote-ref-27)
28. Mr Zed Seselja MLA and others, *Debates*, 27 October 2010, p.5099 *ff*. [↑](#footnote-ref-28)
29. Mr Jeremy Hanson MLA and others, *Debates*, 27 October 2010, p.5103 *ff.* [↑](#footnote-ref-29)
30. Mr Simon Corbell MLA, *Debates*, 18 November 2010, p.5638 *ff*. [↑](#footnote-ref-30)
31. Mr Simon Corbell MLA, *Debates*, 9 December 2010, pp.6123-6126. [↑](#footnote-ref-31)
32. Mr Simon Corbell MLA, *Debates*, 29 March 2012, pp.1499-1500 and *ff.* An amendedBill was subsequently passed on 23 August 2012: see *Minutes of Proceedings*, 23 August 2012, p.2058. [↑](#footnote-ref-32)
33. *Debates*, 26 March 2015, pp.1190-1993. [↑](#footnote-ref-33)
34. See Clause 4 of the Human Rights Amendment Bill 2015. [↑](#footnote-ref-34)
35. See Clause 6 of the Human Rights Amendment Bill 2015. [↑](#footnote-ref-35)
36. See Clause 7 of the Human Rights Amendment Bill 2015. [↑](#footnote-ref-36)
37. See Clause 7 of the Human Rights Amendment Bill 2015. [↑](#footnote-ref-37)
38. See Clauses 7 and 9 of the Human Rights Amendment Bill 2015. [↑](#footnote-ref-38)
39. See Explanatory Statement, Human Rights Amendment Bill 2015, p.1, for references to Section 19 of the *Charter of Rights and Responsibilities Act 2006* (VIC). [↑](#footnote-ref-39)
40. *Charter of Human Rights and Responsibilities Act 2006*, Section 19, ‘Cultural rights’, available at: <http://www.austlii.edu.au/au/legis/vic/consol_act/cohrara2006433/> [↑](#footnote-ref-40)
41. See the Explanatory Statement, p.7, for references to the UN *Declaration on the Rights of Indigenous Peoples* and *International Covenant on Civil and Political Rights*. Articles 25 and 31 of the *Declaration of the Rights of Indigenous Peoples* are directly referenced in Clauses 7 and 9 of the Bill in proposed notes to new Section 27(2) and to Schedule 1 of the Act. [↑](#footnote-ref-41)
42. *Explanatory Statement* for the Human Rights Amendment Bill 2015, p.2. [↑](#footnote-ref-42)
43. *Explanatory Statement* for the Human Rights Amendment Bill 2015, p.3. [↑](#footnote-ref-43)
44. *Explanatory Statement* for the Human Rights Amendment Bill 2015, p.4. [↑](#footnote-ref-44)
45. *Explanatory Statement* for the Human Rights Amendment Bill 2015, p.4. At this point the Explanatory Statement cites Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), p 1. [↑](#footnote-ref-45)
46. *Explanatory Statement* for the Human Rights Amendment Bill 2015, p.4. [↑](#footnote-ref-46)
47. *Explanatory Statement* for the Human Rights Amendment Bill 2015, p.4. [↑](#footnote-ref-47)
48. *Explanatory Statement* for the Human Rights Amendment Bill 2015, p.4. [↑](#footnote-ref-48)
49. *Explanatory Statement* for the Human Rights Amendment Bill 2015, p.5. [↑](#footnote-ref-49)
50. *Explanatory Statement* for the Human Rights Amendment Bill 2015, p.6. This view was also put by the Attorney-General in his presentation speech to the Bill, see *Debates*, 26 March 2015, p.1193. [↑](#footnote-ref-50)
51. *Explanatory Statement* for the Human Rights Amendment Bill 2015, p.6. At this point the *Explanatory Statement* cites ss 9, 13, 14, 17 18(c), 31, 45 and part 8 of the *Heritage Act 2004* (ACT) [↑](#footnote-ref-51)
52. *Explanatory Statement* for the Human Rights Amendment Bill 2015, p.6. [↑](#footnote-ref-52)
53. Mr Simon Corbell MLA, *Debates*, 26 March 2015, p.1190 *ff.* [↑](#footnote-ref-53)
54. *Standing Orders and Continuing Resolutions of the Assembly*, April 2014, Standing Order No.49. [↑](#footnote-ref-54)
55. Mr Simon Corbell MLA, *Debates*, 7 May 2015, p.1493 *ff.* [↑](#footnote-ref-55)
56. Mr Simon Corbell MLA, *Debates*, 26 March 2015, p.1190. [↑](#footnote-ref-56)
57. Mr Simon Corbell MLA, *Debates*, 26 March 2015, p.1191. [↑](#footnote-ref-57)
58. Mr Simon Corbell MLA, *Debates*, 26 March 2015, p.1192. [↑](#footnote-ref-58)
59. Mr Simon Corbell MLA, *Debates*, 26 March 2015, p.1192. [↑](#footnote-ref-59)
60. Mr Simon Corbell MLA, *Debates*, 26 March 2015, p.1192. [↑](#footnote-ref-60)
61. Mr Simon Corbell MLA, *Debates*, 26 March 2015, p.1192. At present the Act refers to ‘Indigenous people’ in Part 7 of its preamble. [↑](#footnote-ref-61)
62. Mr Simon Corbell MLA, *Debates*, 26 March 2015, p.1192. [↑](#footnote-ref-62)
63. Mr Simon Corbell MLA, *Debates*, 26 March 2015, p.1192. [↑](#footnote-ref-63)
64. Mr Simon Corbell MLA, *Debates*, 26 March 2015, p.1192. [↑](#footnote-ref-64)
65. Mr Simon Corbell MLA, *Debates*, 26 March 2015, p.1193. [↑](#footnote-ref-65)
66. Mr Simon Corbell MLA, *Debates*, 26 March 2015, p.1193. [↑](#footnote-ref-66)
67. Mr Simon Corbell MLA, *Debates*, 26 March 2015, p.1193. [↑](#footnote-ref-67)
68. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.1, available at: <http://www.parliament.act.gov.au/__data/assets/pdf_file/0011/719948/Report-31.pdf> [↑](#footnote-ref-68)
69. See Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), Resolution of Appointment, available at: <http://www.parliament.act.gov.au/__data/assets/pdf_file/0008/416834/Resolution_of_appointment.pdf> [↑](#footnote-ref-69)
70. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.3. [↑](#footnote-ref-70)
71. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.3. [↑](#footnote-ref-71)
72. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.3. [↑](#footnote-ref-72)
73. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.3. [↑](#footnote-ref-73)
74. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.3. [↑](#footnote-ref-74)
75. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.3. [↑](#footnote-ref-75)
76. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.3. [↑](#footnote-ref-76)
77. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.3. [↑](#footnote-ref-77)
78. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.3. [↑](#footnote-ref-78)
79. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.3. [↑](#footnote-ref-79)
80. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.3. [↑](#footnote-ref-80)
81. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.3. [↑](#footnote-ref-81)
82. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.3. [↑](#footnote-ref-82)
83. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.4. [↑](#footnote-ref-83)
84. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.4. [↑](#footnote-ref-84)
85. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.4. [↑](#footnote-ref-85)
86. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.4. [↑](#footnote-ref-86)
87. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.4. [↑](#footnote-ref-87)
88. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.4. [↑](#footnote-ref-88)
89. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.4. [↑](#footnote-ref-89)
90. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.4. [↑](#footnote-ref-90)
91. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.4. [↑](#footnote-ref-91)
92. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.4. [↑](#footnote-ref-92)
93. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.4. [↑](#footnote-ref-93)
94. Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.4. [↑](#footnote-ref-94)
95. *Standing Orders and Continuing Resolutions of the Assembly*, April 2014, Standing Order No.49. [↑](#footnote-ref-95)
96. Mr Simon Corbell MLA, *Debates*, 7 May 2015, p.1493 *ff.* [↑](#footnote-ref-96)
97. Mr Jeremy Hanson MLA, *Debates*, 7 May 2015, p.1482 *ff.* [↑](#footnote-ref-97)
98. Mr Jeremy Hanson MLA, *Debates*, 7 May 2015, p.1482. [↑](#footnote-ref-98)
99. Mr Jeremy Hanson MLA, *Debates*, 7 May 2015, p.1483. [↑](#footnote-ref-99)
100. Mr Jeremy Hanson MLA, *Debates*, 7 May 2015, p.1483. [↑](#footnote-ref-100)
101. Mr Jeremy Hanson MLA, *Debates,* 7 May 2015, p.1483, referring to Scrutiny Report No.31, p.3. [↑](#footnote-ref-101)
102. Mr Jeremy Hanson MLA, *Debates,* 7 May 2015, p.1484. [↑](#footnote-ref-102)
103. Mr Jeremy Hanson MLA, *Debates,* 7 May 2015, p.1484. [↑](#footnote-ref-103)
104. Mr Jeremy Hanson MLA, *Debates,* 7 May 2015, p.1484. [↑](#footnote-ref-104)
105. Mr Jeremy Hanson MLA, *Debates*, 7 May 2015, p.1484. [↑](#footnote-ref-105)
106. Ms Yvette Berry MLA, *Debates*, 7 May 2015, p.1485 *ff.* [↑](#footnote-ref-106)
107. Ms Yvette Berry MLA, *Debates*, 7 May 2015, p.1485*.* [↑](#footnote-ref-107)
108. Ms Yvette Berry MLA, *Debates*, 7 May 2015, p.1485*.* [↑](#footnote-ref-108)
109. Ms Yvette Berry MLA, *Debates*, 7 May 2015, p.1485*.* [↑](#footnote-ref-109)
110. Ms Yvette Berry MLA, *Debates*, 7 May 2015, p.1486*.* [↑](#footnote-ref-110)
111. Ms Yvette Berry MLA, *Debates*, 7 May 2015, p.1486*.* [↑](#footnote-ref-111)
112. Ms Yvette Berry MLA, *Debates*, 7 May 2015, p.1486*.* [↑](#footnote-ref-112)
113. Mr Andrew Wall MLA, *Debates*, 7 May 2015, p.1486 *ff.* [↑](#footnote-ref-113)
114. Mr Andrew Wall MLA, *Debates*, 7 May 2015, p.1486. [↑](#footnote-ref-114)
115. Mr Andrew Wall MLA, *Debates*, 7 May 2015, p.1487. [↑](#footnote-ref-115)
116. Mr Andrew Wall MLA, *Debates*, 7 May 2015, p.1488. [↑](#footnote-ref-116)
117. Mr Andrew Wall MLA, *Debates*, 7 May 2015, p.1488. [↑](#footnote-ref-117)
118. Mr Andrew Wall MLA, *Debates*, 7 May 2015, p.1488. [↑](#footnote-ref-118)
119. Mr Andrew Wall MLA, *Debates*, 7 May 2015, p.1489. [↑](#footnote-ref-119)
120. Mr Shane Rattenbury MLA, *Debates*, 7 May 2015, p.1489 *ff.* [↑](#footnote-ref-120)
121. Mr Shane Rattenbury MLA, *Debates*, 7 May 2015, p.1489. [↑](#footnote-ref-121)
122. Mr Shane Rattenbury MLA, *Debates*, 7 May 2015, p.1490. [↑](#footnote-ref-122)
123. Mr Shane Rattenbury MLA, *Debates*, 7 May 2015, p.1490. [↑](#footnote-ref-123)
124. Mr Shane Rattenbury MLA, *Debates*, 7 May 2015, p.1490, quoting ACT Human Rights Research Project, (2009), *The Human Rights Act 2004 (ACT): The First Five Years of Operation*, Australian National University, p.6, viewed 12 May 2015, <http://acthra.anu.edu.au/documents/ACTHRA_project_final_report.pdf>. [↑](#footnote-ref-124)
125. Mr Shane Rattenbury MLA, *Debates*, 7 May 2015, p.1490. [↑](#footnote-ref-125)
126. Mr Shane Rattenbury MLA, *Debates*, 7 May 2015, p.1491. [↑](#footnote-ref-126)
127. Mr Shane Rattenbury MLA, *Debates*, 7 May 2015, p.1491. [↑](#footnote-ref-127)
128. Mr Shane Rattenbury MLA, *Debates*, 7 May 2015, p.1491. [↑](#footnote-ref-128)
129. Mr Shane Rattenbury MLA, *Debates*, 7 May 2015, p.1491. [↑](#footnote-ref-129)
130. Dr Chris Bourke MLA, *Debates*, 7 May 2015, p.1492 *ff.* [↑](#footnote-ref-130)
131. Dr Chris Bourke MLA, *Debates*, 7 May 2015, p.1492. [↑](#footnote-ref-131)
132. Dr Chris Bourke MLA, *Debates*, 7 May 2015, p.1492. [↑](#footnote-ref-132)
133. Dr Chris Bourke MLA, *Debates*, 7 May 2015, p.1492. [↑](#footnote-ref-133)
134. Dr Chris Bourke MLA, *Debates*, 7 May 2015, p.1492. [↑](#footnote-ref-134)
135. Dr Chris Bourke MLA, *Debates*, 7 May 2015, p.1492. [↑](#footnote-ref-135)
136. Dr Chris Bourke MLA, *Debates*, 7 May 2015, pp.1492-1493. [↑](#footnote-ref-136)
137. Dr Chris Bourke MLA, *Debates*, 7 May 2015, p.1493. [↑](#footnote-ref-137)
138. Dr Chris Bourke MLA, *Debates*, 7 May 2015, p.1493. [↑](#footnote-ref-138)
139. Dr Chris Bourke MLA, *Debates*, 7 May 2015, p.1493. [↑](#footnote-ref-139)
140. See Standing Orders and continuing resolutions of the Assembly, April 2014, No.49, ‘Reply closes debate’. [↑](#footnote-ref-140)
141. Mr Simon Corbel MLA, *Debates*, 7 May 2015, p.1494. [↑](#footnote-ref-141)
142. Mr Simon Corbel MLA, *Debates*, 7 May 2015, p.1494. [↑](#footnote-ref-142)
143. Mr Simon Corbel MLA, *Debates*, 7 May 2015, p.1495. [↑](#footnote-ref-143)
144. Mr Simon Corbel MLA, *Debates*, 7 May 2015, p.1495. [↑](#footnote-ref-144)
145. Mr Simon Corbel MLA, *Debates*, 7 May 2015, p.1495. [↑](#footnote-ref-145)
146. Mr Simon Corbel MLA, *Debates*, 7 May 2015, p.1495. [↑](#footnote-ref-146)
147. Mr Simon Corbel MLA, *Debates*, 7 May 2015, p.1495, quoting *Report of the Human Rights Commission: Ninety-Fourth Session* (13-31 October 2008), (A/64/40), Vol.II, p.222, paragraph 7.2. [↑](#footnote-ref-147)
148. Mr Simon Corbel MLA, *Debates*, 7 May 2015, p.1495, quoting *Report of the Human Rights Commission: Ninety-Fourth Session* (13-31 October 2008), (A/64/40), Vol.II, p.222, paragraph 7.2. [↑](#footnote-ref-148)
149. Mr Simon Corbel MLA, *Debates*, 7 May 2015, p.1496. [↑](#footnote-ref-149)
150. Mr Simon Corbel MLA, *Debates*, 7 May 2015, p.1496. [↑](#footnote-ref-150)
151. See for example Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) *Scrutiny Report No.31*, 28 April 2015, p.5. [↑](#footnote-ref-151)
152. Mr Simon Corbell MLA, response to *Scrutiny Report No.31* of 28 April 2015 regarding the Human Rights Amendment Bill 2015, attachment to Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) *Scrutiny Report No.32*, 11 May 2015, available at: <http://www.parliament.act.gov.au/__data/assets/pdf_file/0004/724324/Report-32.pdf> [↑](#footnote-ref-152)
153. Mr Simon Corbell MLA, response to *Scrutiny Report No.31* of 28 April 2015 regarding the Human Rights Amendment Bill 2015, attachment to *Scrutiny Report No.32*, 11 May 2015, [p.1], referring to *Scrutiny Report No.31* of 28 April 2015, p.3 . [↑](#footnote-ref-153)
154. Mr Simon Corbell MLA, response to *Scrutiny Report No.31* of 28 April 2015 regarding the Human Rights Amendment Bill 2015, attachment to *Scrutiny Report No.32*, 11 May 2015, [p.11]. [↑](#footnote-ref-154)
155. Mr Simon Corbell MLA, response to *Scrutiny Report No.31* of 28 April 2015 regarding the Human Rights Amendment Bill 2015, attachment to *Scrutiny Report No.32*, 11 May 2015, [p.12]. [↑](#footnote-ref-155)
156. Mr Simon Corbell MLA, response to *Scrutiny Report No.31* of 28 April 2015 regarding the Human Rights Amendment Bill 2015, attachment to *Scrutiny Report No.32*, 11 May 2015, [p.12]. [↑](#footnote-ref-156)
157. Mr Simon Corbell MLA, response to *Scrutiny Report No.31* of 28 April 2015 regarding the Human Rights Amendment Bill 2015, attachment to Scrutiny Report No.32, 11 May 2015, [p.12]. [↑](#footnote-ref-157)
158. Mr Simon Corbell MLA, response to *Scrutiny Report No.31* of 28 April 2015 regarding the Human Rights Amendment Bill 2015, attachment to Scrutiny Report No.32, 11 May 2015, [p.12]. This view differed from that of the Scrutiny Committee, which in its report suggested relevantly that: ‘Paragraph 27(2)(b) … provides that Aboriginal and Torres Strait Islander peoples must not be denied the right to recognition of these relationships [however it ] *is arguable that these relationships must be recognised as existing at the present time, and be relied upon in any appropriate legal forum’*. [emphasis added], Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.4. The Scrutiny Committee also asserted that ‘a relevant person may seek to have the Supreme Court make a declaration that a particular right falling within the notion of a “relationship” exists in a particular context’, Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.4.. [↑](#footnote-ref-158)
159. Mr Simon Corbell MLA, response to *Scrutiny Report No.31* of 28 April 2015 regarding the Human Rights Amendment Bill 2015, attachment to *Scrutiny Report No.32*, 11 May 2015, [p.12]. [↑](#footnote-ref-159)
160. Mr Simon Corbell MLA, response to *Scrutiny Report No.31* of 28 April 2015 regarding the Human Rights Amendment Bill 2015, attachment to *Scrutiny Report No.32*, 11 May 2015, [p.12]. [↑](#footnote-ref-160)
161. Mr Simon Corbell MLA, response to *Scrutiny Report No.31* of 28 April 2015 regarding the Human Rights Amendment Bill 2015, attachment to *Scrutiny Report No.32*, 11 May 2015, [p.12]. At this point the Attorney-General cited Human Rights Law Centre, *Tribunal considers special measures and discrimination under the Charter and new Equal Opportunity Act – Case note* (28 November 2011) available at <http://hrlc.org.au/tribunal-considers-special-measures-and-discrimination-under-the-charter-and-new-equal-opportunity-act/> [↑](#footnote-ref-161)
162. Mr Simon Corbell MLA, response to *Scrutiny Report No 31* of 28 April 2015 regarding the Human Rights Amendment Bill 2015, attachment to *Scrutiny Report No.32*, 11 May 2015, [p.12]. At this point the Attorney-General cited *Parks Victoria (Anti-Discrimination Exemption)* [2011] VCAT 2238 (28 November 2011) at para [52]. [↑](#footnote-ref-162)
163. Mr Simon Corbell MLA, response to *Scrutiny Report No 31* of 28 April 2015 regarding the Human Rights Amendment Bill 2015, attachment to *Scrutiny Report No.32*, 11 May 2015, [p.13]. [↑](#footnote-ref-163)
164. Mr Simon Corbell MLA, response to *Scrutiny Report No 31* of 28 April 2015 regarding the Human Rights Amendment Bill 2015, attachment to Scrutiny Report No.32, 11 May 2015, [p.13], citing Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), *Scrutiny Report No.31*, p.3. [↑](#footnote-ref-164)
165. Mr Simon Corbell MLA, response to *Scrutiny Report No.31* of 28 April 2015 regarding the Human Rights Amendment Bill 2015, attachment to *Scrutiny Report No.32*, 11 May 2015, [p.13]. [↑](#footnote-ref-165)
166. Mr Simon Corbell MLA, response to *Scrutiny Report No.31* of 28 April 2015 regarding the Human Rights Amendment Bill 2015, attachment to *Scrutiny Report No.32*, 11 May 2015, [p.13]. [↑](#footnote-ref-166)
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360. Submission No.2, Victorian Equal Opportunity and Human Rights Commission, p.6. [↑](#footnote-ref-360)
361. Submission No.2, Victorian Equal Opportunity and Human Rights Commission, p.6. [↑](#footnote-ref-361)
362. *Proof Transcript*, 12 October 2015, p.37. [↑](#footnote-ref-362)
363. Ms Catherine Dixon, Proof Transcript, 12 October 2015, p.37. [↑](#footnote-ref-363)
364. See Legislative Assembly for the ACT, *Debates*, 7 May 2015, p.1482 *ff.* [↑](#footnote-ref-364)
365. See Mr Simon Corbell MLA, response to *Scrutiny Report No 31* of 28 April 2015 regarding the Human Rights Amendment Bill 2015, attachment to *Scrutiny Report No.32*, 11 May 2015, [p.16]. [↑](#footnote-ref-365)
366. *Scrutiny Report No.32*, 11 May 2015, p.6. [↑](#footnote-ref-366)
367. See ACT Human Rights Commission, Submission No.1, pp.7-8, and Victorian Equal Opportunity and Human Rights Commission, Submission No.2, pp.5-6 [↑](#footnote-ref-367)
368. *Explanatory Statement* for the Human Rights Amendment Bill 2015, p.3. At this point the Explanatory Statement cites UN Human Rights Committee (HRC), *CCPR General Comment No. 17: Article 24 (Rights of the Child)*, 35th Session, 7 April 1989. [↑](#footnote-ref-368)
369. *Explanatory Statement* for the Human Rights Amendment Bill 2015, p.3. At this point the *Explanatory Statement* cites s 20; s 21(3);s 22(3) of the *Human Rights Act 2004*. [↑](#footnote-ref-369)
370. *Proof Transcript*, 8 October 2015, pp.11-12. [↑](#footnote-ref-370)
371. Ms Julie Field, *Proof Transcript*, 8 October 2015, p.12. [↑](#footnote-ref-371)
372. Submission No.1, ACT Human Rights Commission, p.7. [↑](#footnote-ref-372)
373. Submission No.1, ACT Human Rights Commission, p.8. [↑](#footnote-ref-373)
374. Submission No.1, ACT Human Rights Commission, p.8. [↑](#footnote-ref-374)
375. Submission No.1, ACT Human Rights Commission, p.9. [↑](#footnote-ref-375)
376. Submission No.1, ACT Human Rights Commission, p.9. [↑](#footnote-ref-376)
377. Submission No.1, ACT Human Rights Commission, p.9. [↑](#footnote-ref-377)
378. Submission No.1, ACT Human Rights Commission, p.9. [↑](#footnote-ref-378)
379. Submission No.1, ACT Human Rights Commission, p.9. [↑](#footnote-ref-379)
380. Dr Helen Watchirs, *Proof Transcript*, 8 October 2015, p.17. [↑](#footnote-ref-380)
381. Dr Helen Watchirs, *Proof Transcript*, 8 October 2015, p.17. [↑](#footnote-ref-381)
382. Submission No.2, Victorian Equal Opportunity and Human Rights Commission, p.5. [↑](#footnote-ref-382)
383. Submission No.2, Victorian Equal Opportunity and Human Rights Commission, p.5. [↑](#footnote-ref-383)
384. Submission No.2, Victorian Equal Opportunity and Human Rights Commission, p.5, citing *Charter* s 17(2). [↑](#footnote-ref-384)
385. Submission No.2, Victorian Equal Opportunity and Human Rights Commission, p.5. [↑](#footnote-ref-385)
386. Submission No.2, Victorian Equal Opportunity and Human Rights Commission, p.5, citing *Secretary to the Department of Human Services v Sanding* [2011] VSC 42, paras 29, 30, 252. [↑](#footnote-ref-386)
387. Submission No.2, Victorian Equal Opportunity and Human Rights Commission, pp.5-6, citing *A & B v Children's Court of*

*Victoria & Ors* [2012] VSC 589, paras 91, 93, 100, 101. [↑](#footnote-ref-387)
388. Submission No.2, Victorian Equal Opportunity and Human Rights Commission, p.6. [↑](#footnote-ref-388)
389. Submission No.2, Victorian Equal Opportunity and Human Rights Commission, p.6. [↑](#footnote-ref-389)
390. *Proof Transcript*, 12 October 2015, p.31. [↑](#footnote-ref-390)
391. Ms Catherine Dixon, *Proof Transcript*, 12 October 2015, pp.31-32. [↑](#footnote-ref-391)
392. Ms Catherine Dixon, *Proof Transcript*, 12 October 2015, p.32. [↑](#footnote-ref-392)
393. Ms Julie Field, *Proof Transcript*, 8 October 2015, p.5. [↑](#footnote-ref-393)
394. Dr Helen Watchirs, *Proof Transcript*, 8 October 2015, p.14. [↑](#footnote-ref-394)
395. See Mr Rod Little, *Proof Transcript*, 8 October 2015, p.21; Ms Di Collins, *Proof Transcript*, 8 October 2015, pp.22, 25; and Ms Samantha Faulkner, *Proof Transcript*, 12 October 2015, p.40. [↑](#footnote-ref-395)
396. UN Human Rights Committee (HRC), *CCPR General Comment No. 17: Article 24 (Rights of the Child*), 35th Session, 7 April 1989. [↑](#footnote-ref-396)
397. s 20; s21(3);s 22(3) *Human Rights Act 2004.* [↑](#footnote-ref-397)
398. Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), p 1. [↑](#footnote-ref-398)
399. Human 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> [↑](#footnote-ref-399)
400. Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), p 3.2. [↑](#footnote-ref-400)
401. *Ibid.* [↑](#footnote-ref-401)
402. See e.g. ss 9, 13, 14, 17 18(c), 31, 45 and part 8 of the *Heritage Act 2004.* [↑](#footnote-ref-402)
403. United Nations, (2007), United Nations Declaration on the Rights of Indigenous Peoples, viewed 12 May 2015, <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf> [↑](#footnote-ref-403)
404. United Nations, (2007), United Nations Declaration on the Rights of Indigenous Peoples, viewed 12 May 2015, <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf> [↑](#footnote-ref-404)
405. United Nations, (1966), *International Covenant on Civil and Political Rights*, United Nations - Office of the High Commissioner for Human Rights, viewed 12 May 2015, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [↑](#footnote-ref-405)