

Indigenous Education (Targeted Assistance) Amendment Bill 2013

Introduced into the House of Representatives on 20 March 2013

Portfolio: School Education, Early Childhood and Youth

Overview

1.52 The bill seeks to amend the *Indigenous Education (Targeted Assistance) Act 2000* (IETA) to increase the legislative appropriations for the period from 1 January 2012 to 30 June 2014. The additional appropriation allows for an adjustment to the School Nutrition Program and the Additional Teachers initiative, which forms part of the Stronger Futures in the Northern Territory programs, and includes new funding for the *Achieving Results Through Indigenous Education* project which will be administered through the Sporting Chance program funded under IETA.

Compatibility with human rights

1.53 The bill is accompanied by a self-contained statement of compatibility which notes that the bill will promote enjoyment of the right to education by Indigenous children.¹ It also states that the measures, although involving a racially based program, are not discriminatory under the Convention on the Elimination of All Forms of Racial Discrimination (ICERD) or other relevant treaty non-discrimination guarantees because they constitute a 'special measure' within the meaning of article 1(4) of the ICERD.

1.54 The committee is currently examining a number of other aspects of the Stronger Futures in the Northern Territory legislation. It does not appear from the explanatory memorandum or the statement of compatibility that the bill relates directly to aspects of the Stronger Futures package that have been identified in submissions to the committee as possibly raising human rights compatibility issues, and the committee assesses this bill on this basis.

Right to education and the right to an adequate standard of living

1.55 The effect of the bill is to provide for additional funds for programs that will enhance enjoyment of the right to education by Indigenous students. Insofar as the additional funds will help to support the continuation of the School Nutrition program 'which enables a nutritious breakfast, lunch and snacks to be provided to 5,000 students in 67 target schools across remote Northern Territory communities'² it is likely to contribute not only to students' participation in education but also to

1 Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), also covered by article 28 of the Convention on the Rights of the Child.

2 Statement of compatibility, p 5.

promote enjoyment of their right to an adequate standard of living (including the right to adequate food) and the right to the highest attainable standard of health.³

Right to non-discrimination on the basis of race and special measures

1.56 The statement of compatibility states that, even though the programs to be funded by the additional appropriations are racially based, this involves no violation of international guarantees of non-discrimination on the basis of race. The statement of compatibility notes that article 2 of the ICERD requires Australia to take positive measures to address racial inequality. It justifies the measures as special measures permitted under the ICERD and so should not be considered to be discriminatory for the purposes of that treaty.

1.57 Article 1(4) of the CERD provides that, where special measures are taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals in the equal enjoyment of their human rights, those measures will not amount to racial discrimination.

1.58 Not all treatment that is racially based will be discriminatory within the meaning of the ICERD and the other international treaties that fall within the committee's mandate.⁴ The recognition that not all race-based distinctions will be discriminatory reflects the notion of substantive equality. While special measures are explicitly permitted by ICERD, it is intended that such measures will be temporary and will be terminated once the disadvantage has been redressed (even though this may involve a considerable period). On the other hand, differential treatment based on race that is objectively justified may continue indefinitely.⁵ Both types of measures are consistent with the obligation not to discriminate on the basis of race.

1.59 The High Court of Australia has held that the following criteria need to be satisfied in order for a measure to be characterised as a 'special measure':

- the measure must confer a benefit on some or all members of a class of people;
- the membership of this class must be based on race, colour, descent, or national or ethnic origin;

3 Adequate standard of living is contained in article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 27 of the Convention on the Rights of the Child (CRC); the right to health is contained in article 12 of the ICESCR and article 24 of the CRC.

4 CERD, General Recommendation No 32, para 8 (2009).

5 CERD, General Recommendation No 32, paras 14-15 (2009).

- the sole purpose of the measure must be to secure adequate advancement of the beneficiaries so they may equally enjoy and exercise their human rights and fundamental freedoms;
- the protection given to the beneficiaries by the measure must be necessary for them to enjoy and exercise their human rights equally with others; and
- the measure must not have already achieved its objectives.⁶

1.60 It is now also accepted that, as a general rule, any special measure should be developed in consultation with the group whose members are to be the beneficiaries of the measure.

1.61 In the present case, it appears that the measures supported by the proposed appropriations can reasonably be justified as 'special measures'. The statement of compatibility notes:

It is widely acknowledged that Aboriginal and Torres Strait Islander students have a lower level of educational engagement, attendance and attainment than non-Indigenous students.⁷

It goes on to note that the additional appropriations which 'provide funding for programs that are intended to achieve equality in educational outcomes for Indigenous students is a special measure and is not discriminatory as it is designed to benefit and ensure the improved educational attainment of Indigenous students.'⁸

1.62 The committee considers that the bill promotes the right to education, the right to an adequate standard of living and the right to equality and non-discrimination, and is compatible with Australia's obligations not to discriminate on the basis of race.

6 *Gerhardy v Brown* (1985) 159 CLR 70, 133 (Brennan J). See also CERD, General Recommendation No 32, para 16 (2009).

7 Statement of compatibility, p 5.

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