
The committee has deferred its consideration of the following legislative instruments

Aboriginal Land Rights (Northern Territory) Amendment (Delegation) Regulation 2013

FRLI: F2013L02122

Portfolio: Prime Minister and Cabinet

Tabled: Scheduled for House of Representatives and Senate, 11 February 2014

Summary of committee concerns

2.180 The committee draws the Minister's attention to the committee's consideration of special measures in its *Eleventh Report of 2013* and seeks clarification of the categorisation of this regulation, related regulations and the enabling Act as 'special measures'. The committee has deferred its consideration of this regulation while it considers our predecessor committee's recommendation for a review of the human rights compatibility of the Stronger Futures legislation.

Overview

2.181 This regulation amends the Aboriginal Land Rights (Northern Territory) Regulations 2007 to prescribe certain requirements and time periods in relation to an application by an Aboriginal and Torres Strait Islander corporation for a delegation of Land Council functions or powers.

2.182 The explanatory statement accompanying the regulation clarifies that subsection 28A(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Act) provides that an Aboriginal and Torres Strait Islander corporation may apply to a Land Council for a delegation of certain Land Council functions or powers. This provision was inserted by the *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* with the objective of enabling Northern Territory Aboriginal people to have more control over development decisions by allowing for the devolution of decision-making to local Aboriginal communities. To date, there have been no instances of a Land Council making a delegation to a corporation under section 28A of the Act.

Compatibility with human rights

Statement of compatibility

2.183 The statement of compatibility accompanying the regulation states that the regulation will create a more certain pathway for Aboriginal and Torres Strait Islander corporations to seek a delegation of Land Council functions or powers under section 28A of the Act, which will support greater local-level decision-making and support earlier amendments to the Act.

2.184 The statement's overall assessment is that the regulation is compatible with human rights because it is a special measure within the meaning of article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), as it is designed to secure to Aboriginal people the full and equal enjoyment of human rights and fundamental freedoms.

2.185 The statement argues that the principal Act 'is discriminatory in nature as it confers rights and privileges upon Aboriginal Australians, which are discriminatory as against non-Aboriginal Australians.'¹ However, it maintains that 'the beneficial nature of this discrimination enables the Act, the Regulations and the Regulation to be each classified as a 'special measure' within the meaning of paragraph 4 of article 1 of the ICERD (and subsection 8(1) of the *Racial Discrimination Act 1975*.'²

Committee view on compatibility

2.186 In its *Eleventh Report of 2013* our predecessor committee considered the *Stronger Futures in the Northern Territory Act 2012* and related legislation. In its report the committee considered the classification of measures as 'special measures' within the meaning of the ICERD.

2.187 The committee's consideration of the criteria to be satisfied in order for a measure to be characterised as a 'special measure' is set out at pages 21 to 31 of that report. In particular, the committee noted that, as a matter of international law (including under the ICERD), measures based on race or ethnicity do not invariably amount to discrimination that can only be considered legitimate if they can be justified as 'special measures'. The relevant question is whether there is an objective and reasonable justification for the differential treatment. Under international law, the recognition of the traditional land rights of Indigenous peoples and legislative structures to give effect to those rights are generally considered to be non-discriminatory; such measures are not 'special measures' within the meaning of the ICERD. The committee noted that there was a difference between international law and Australian law in this regard, as represented by the High Court's interpretation of the Racial Discrimination Act.³

2.188 The committee expressed concern 'at the tendency for explanatory memoranda to invoke the category of "special measures" as a justification for legislation that involves differential treatment based on race or ethnic origin, without sufficient analysis of whether the differential treatment may be justified as legitimate differential treatment based on reasonable and objective criteria.'⁴

1 Statement of compatibility, p 7.

2 Statement of compatibility, p 7.

3 Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013*, pp 29-31.

4 Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013*, p 28.

2.189 The committee wrote to the former Minister on 26 June 2013 inviting a response to the report. A response has not yet been received.

2.190 Before concluding its consideration of this regulation, the committee would welcome further clarification from the Minister regarding the categorisation of this regulation and related legislation as special measures.

2.191 The committee intends to defer its detailed consideration of this regulation, while it considers our predecessor committee's recommendation that a review be undertaken of the human rights compatibility of the *Stronger Futures in the Northern Territory in the Northern Territory Act 2012* and related legislation.

2.192 In the meantime, the committee intends to write to the Minister for Indigenous Affairs to draw his attention to the committee's consideration of special measures in its *Eleventh Report of 2013* and request clarification of the categorisation of the *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* and related regulations, including this regulation as special measures in light of the committee's comments in that report.