

# Statement of compatibility

## with human rights

*Prepared in accordance with the Thirteenth Assembly Sessional Orders (part 12.3) as adopted on 24 August 2017.*

### **Environment Protection Bill 2019**

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

#### **Overview of the bill**

This Bill establishes the *Environment Protection Act 2019* (the Act).

The purpose of this Bill is to support implementation of Government's environmental regulatory reform commitments by establishing the Territory's new environmental impact assessment and environmental approval system.

In summary, the Bill:

- reforms the Territory's environmental impact assessment process and repeals the *Environmental Assessment Act 1982* and *Environmental Assessment Administrative Procedures 1984*
- introduces a new environmental approval issued at the completion of the impact assessment process, and
- provides a range of modern regulatory tools including environment protection notices, offences and penalties to ensure that the impact assessment process and approvals are complied with and able to be enforced.

The Bill establishes the legislative policy objectives of:

- protecting the environment of the Territory

- promoting ecologically sustainable development so that the wellbeing of the people of the Territory is improved without adverse impact on the environment of the Territory
- recognising the role of environmental assessment and approval in promoting the protection and management of the environment of the Territory, and
- recognising the role of Aboriginal communities in environmental assessment and in the protection and management of the environment of the Territory.

Overall these policy objectives are considered legitimate objectives as they enable economic development actions and considerations of human rights and the environment. Furthermore, they respect the United Nations mandate on human rights and the environment, that is, the recognition that all people should have the right to a safe, clean, healthy and sustainable environment as without such things, other human rights, such as the right to live, health, food, water and sanitation are compromised.

Offences and penalties in the Bill have been prepared to comply with Part IIAA of the Criminal Code.

## **Human rights implications**

This Bill engages the following rights:

- the rights of appeal or review and whether those rights provide for an effective remedy, as contained in Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR)
- the rights to the protection of one's privacy and reputation, as contained in Article 17 of the ICCPR
- the rights to minimum guarantees in criminal proceedings, specifically the right to be free from self-incrimination, as contained in Article 14(3)(g) of the ICCPR
- the right to the presumption of innocence, as contained in Article 14(2) of the ICCPR
- the rights to enjoy and benefit from culture as contained in Article 27 of the ICCPR and Article 15 of the International Covenant on Economic, Social and

Cultural Rights (ICESCR) by regulating the conduct of commercial activity on the traditional lands of Indigenous Australia.

Rights of appeal and review

Article 2(3) of the ICCPR requires that a person whose rights or freedoms are violated should have access to an effective remedy, even if the violation was committed by persons acting in an official capacity. In providing the right to an effective remedy, a person must have access to a competent judicial, administrative or legislative decision making authority who can hear an appeal and review the purported violation. Furthermore, the person must have confidence that the authority will enforce any remedies if they are granted.

The right to an effective remedy is considered an essential component of all the rights within the ICCPR and is a right that should not be derogated. Although the United Nations Human Rights Committee (the UN Human Rights Committee) consider that the right to an effective remedy must be provided, it is acknowledged that a jurisdiction may benefit by deviating from the type of remedy provided, i.e. judicial or otherwise.

Clause 276 of the Bill provides powers for a person to seek a judicial review of a decision made under the Act by the Minister, the Chief Executive Officer (CEO), the Northern Territory Environment Protection Authority (NT EPA) or an environmental officer, provided the person is a proponent of an action to which the decision relates, or an applicant for the decision, or a person directly affected by the decision, or a person who has made a genuine and valid submission during an environmental impact assessment and environmental approval process to which the decision relates. A genuine and valid submission does **not** include a submission by a person in the form of a form letter or petition prepared by another body organisation, or a submission made after the end of the submission period, unless the court considers that in the circumstances it should be considered a genuine and valid submission.

Domestic laws such as the *Northern Territory Civil and Administrative Tribunal Act 2014* provide rights of review and appeal. Clause 277 of the Bill provides the right for an affected person to have certain decisions made under the Act to be reviewed by the Northern Territory Civil and Administrative Tribunal (NTCAT).

As the Bill is providing rights to persons to seek an effective remedy for decisions made under the Bill, it is considered that the rights of appeal and review are positively

affected by the Bill. The Bill allows a person to seek an effective remedy either via the courts or in some cases through NTCAT. As such it is considered that the Bill is compatible with Article 2(3) of the ICCPR.

### Privacy and reputation

Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. It also prohibits unlawful attacks on a person's reputation. It provides that persons have the right to the protection of the law against such interference or attacks. The UN Human Rights Committee has not defined 'privacy'. However, it should be understood to comprise freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy. The Committee has also given a liberal interpretation to the term home, which can include a person's workplace. The Committee states that searches of a person's home should be restricted to those necessary to gather evidence and should not amount to harassment.

A number of provisions in this Bill are considered to relate to matters addressed in Article 17 of the ICCPR, including:

- the collection, security, use, disclosure or publication of personal information
- the regulation of information held on public registers
- authorising powers to enter premises or search persons and premises
- compulsory occupation or acquisition of a home, or regulation of planning or environmental matters that may affect a person's home
- mandatory disclosure or reporting of information.

In reviewing the Bill and how these matters may interact with Article 17 of the ICCPR, it was determined that although components of the Bill are related to a number of privacy rights contained in Article 17, the limitations imposed are not considered arbitrary, and are necessary to facilitate the effective administration of the Act whilst addressing the legitimate policy objectives of the legislation.

The existing environmental impact assessment and approval system in the Northern Territory has long been recognised as being outdated and requiring substantial reforms. Known deficiencies in the existing system can be summarised as failing to provide certainty to government, industry and the community about environmental responsibilities, obligations and roles; inconsistency in the environmental impact

assessment system; lack of transparency and accountability; lack of confidence and trust by both industry and the community in the system being able to deliver appropriate environmental outcomes; and a substantial lack of available and effective compliance mechanisms.

The limitations that the Bill will place on the rights of privacy and reputation will assist in addressing the current problems with the Territory's environmental impact assessment system and will enable delivery of a modern regulatory system that provides an array of proactive and reactive tools to facilitate compliance and enforcement activities.

For example, in the interest of providing a transparent and accountable environmental impact assessment system, the Bill includes numerous provisions relating to the collection, security, use, disclosure or publication of information in relation to activities subject to an environmental impact assessment. In addition, there are a few clauses within the Bill that relate to the regulation of information held on a public register. Clause 156 and Clause 158 relate to the registration and keeping of a register of environmental auditors and environmental practitioners respectively. Clause 284 requires the CEO to keep a public register for the purposes of the Act.

These powers form parts of a number of components that are addressing the known problems with the existing environmental impact assessment system, and provide a legislative means to deliver on the legitimate objective of transparency and accountability in the environmental regulatory system. Furthermore, while in some instances information obtained may be personal, existing domestic laws such as the *Information Act 2002* would prevent personal information from being made publicly available and ensure its safe and secure management.

As such, any limitation imposed on these rights in Article 17 of the ICCPR are considered proportionate, reasonable, suitable and necessary.

Clauses 162 and 163 provide a broad range of powers that permit environmental officers to enter and search any land or premises, undertake investigations, collect information and evidence, obtain personal information and documents, and perform other activities considered necessary to fulfil the duties of an environmental officer being to monitor compliance with the Act, and investigate suspected contraventions of the Act.

The power in the Bill that is provided to an environmental officer to intrude on a person's privacy does not extend to residential premises unless consent is provided by the occupier, or a justice of the peace considers there is reasonable grounds and has issued a search warrant to enter the land or premises.

The control or regulation of the use of property in the interest of the public is regarded as a legitimate objective for placing limitations on property rights, irrespective of the common law approaches to property rights. Such legislative instruments that limit the use of property rights are generally intended to protect the environment or be in the interest of the broader public.

Environmental officers operating under the Bill require appropriate access to land and property to enable effective investigation, compliance and monitoring activities. Without the limitations that these clauses impose on the privacy provisions contained in Article 17 of the ICCPR, effective administration of the Bill that enables effective and transparent compliance and enforcement activities would not be possible. As such, the limitations that are being placed on property rights by the Bill are considered to be proportionate, reasonable and necessary. Additionally, the Bill contains supporting provisions to these powers that impose appropriate standards of behaviour and conduct on environmental officers whilst performing their duties.

As the Bill forms a component of the Territory's regulatory system for managing land, planning and environmental matters, the additional certainty and security the Act will provide to the broader Northern Territory community that development activities occurring in the Territory will be appropriately and sustainably managed, it is considered that any limitations the Bill is imposing on privacy and property rights in relation to planning regulations or environmental matters that may affect a person's home, are in some instances positive, or appropriately proportionate and reasonable.

Article 17 of the ICCPR also contain rights in relation to the protection of a person's reputation. In making decisions under the Bill, the Minister is often required to consider if a person is a fit and proper person to hold an environmental approval. This includes when a statement of unacceptable impact has been provided to the Minister by the NT EPA.

As part of the system of accepting a statement of unacceptable impact, the Minister must publish a statement of reasons explaining the refusal of an environmental

approval. Should the reasons in the statement be related to the person not being deemed a fit and proper person, there is the potential for the statement to affect a person's reputation.

In addition, there are other provisions within the Bill that may potentially impact on a person's reputation, if say for example, a copy of an environment protection notice is lodged with the Registrar-General and the notice is recorded in the Land Register as Clause 185 provides.

Although these potential limitations on a person's right against unlawful attacks on their honour and reputation were considered, it was concluded that these provisions are proportionate, reasonable and necessary for the objectives of transparency, accountability and certainty, and the disclosure of such information would be in the public interest over the right of the individual.

Division 8, Part 9 provides a mandatory duty to notify of environmental incident provisions. This limitation is considered necessary as it facilitates the legitimate objectives of transparency and protection of the environment. By providing these provisions, the Bill is enabling a proportionate and suitable mechanism considered essential for timely exposure of an environmental incident which may further assist in preventing or mitigating environmental harm arising from the incident. This is considered to be in the public interest as environmental impacts can affect human health as well as social and economic factors of communities, and the broader protection of the rights of the collective are considered to outweigh the rights of the individual.

In summary, although there are certain limitations being placed on the rights in Article 17 of the ICCPR, these limitations are considered permissible and do not compromise the Bill's compatibility with human rights.

Additionally, provisions included in alternate domestic law, such as the *Information Act 2002* commonly maintain appropriate protections of these rights, irrespective of the limitations identified in the Bill.

#### Right to be free from self-incrimination

Article 14(3) of the ICCPR establishes one of a number of minimum guarantees that must be observed in criminal proceedings. Article 14(3)(g) specifically relates to matters that may affect the law relating to self-incrimination. The privilege against self-

incrimination is a well-established common law principle and will always apply unless expressly abrogated by statute, with such abrogation often viewed as permissible.

Clause 175 in the Bill provides provisions relating to a person complying with requirements to provide information to an environmental officer even if the information might tend to incriminate the person or make the person liable to a penalty.

Clause 229 in the Bill relates to incriminating information and a requirement for a person to notify incidents even if to do so might incriminate the person or make the person liable to a penalty.

Both of these clauses place limitations on the right to be free from self-incrimination. That is, the Bill is expressly abrogating the privilege of the right to be free from self-incrimination.

To ensure the limitations being placed on the right to be free from self-incrimination are proportionate and reasonable whilst still enabling practical and effective regulatory powers, both clauses provide immunity provisions to persons who are obliged to provide information or documents.

Clause 175 includes an immunity provision that directs that any incriminating information provided by an individual is not admissible as evidence against the individual. Clause 229 provides an immunity provision that directs that any relevant incriminating information of a kind prescribed by regulations provided by a person is not admissible as evidence against the person. However, notwithstanding the immunity provisions, both clauses allow that incriminating information provided by the individual or person respectively can be used to locate or identify additional information relating to the initial information, and the use of the additional information is permitted to be used as evidence against the individual or person respectively.

As the limitations being imposed on the right to be free from self-incrimination are restricted through the use of immunity provisions, and encroachment on this common law right is generally permissible, these limitations are not considered significant and are reasonable and necessary for the purpose of the Bill and the legitimate objectives that the Bill is establishing.

As such, although there are limitations being placed on Article 14(3) of the ICCPR in relation to the right to be free from self-incrimination, the limitations are considered permissible and do not compromise the Bill's compatibility with human rights.

### Presumption of innocence

Article 14(2) of the ICCPR provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The right to presumption of innocence is also a fundamental common law principle.

Strict liability and absolute liability, when applied to an offence, can be considered a limitation of the presumption of innocence because the defendant can be found guilty, or an element of the offence proven, without the prosecution being required to prove fault.

When strict liability or absolute liability applies to an offence, the prosecution is only required to prove the physical elements of an offence, beyond reasonable doubt, not the fault elements, in order for the defendant to be found guilty. The defence of an honest and reasonable mistake of fact is available to the defendant (see section 43AX of the Criminal Code) where strict liability applies but not where absolute liability applies.

Use of strict liability or absolute liability may be justified in circumstances where there is public interest in ensuring that regulatory regimes are observed and it can reasonably be expected that a person should be aware of their duties and obligations in relation to their behaviour. For example, conducting a development activity in a protected environmental area would be known to a reasonable person as being against the law. As such, offences attached to such actions are often strict liability offences.

Absolute offences arise when an element of the offence is a pre-condition of the offence. For example, to be Chief Executive Officer of a company is a pre-condition to be held accountable as the Chief Executive Officer of a company that contravenes the law.

Strict and absolute liability provisions are not considered to be inconsistent with the presumption of innocence if they pursue a legitimate objective, and if they are proportionate, reasonable and necessary to achieve that objective. It can also be the case that it is more practical for the accused to be able to prove a fact (i.e. their innocence) rather than the prosecution to disprove it (prove guilt).

Strict liability offences are considered a key feature in environment regulatory frameworks as they provide an effective deterrent against the offence as they remove the requirement for the prosecution to prove a mental element of the offence. Such a requirement in environmental law is often a substantial impediment to prosecution so the application of strict liability offences is considered to assist in maintaining the integrity of the regulatory regime. Absolute liability is used very rarely.

Whether a strict or absolute liability provision places unacceptable limitations on the right to the presumption of innocence will depend on the circumstances of the case and the particular justification for an offence or an element of an offence being strict or absolute liability. A key principle underlining application of strict or absolute liability provisions is the fact that the legislation is intended to prevent the possibility of inadvertent contravention of the law because the law was made to prevent or protect from an undesirable outcome. For example, environmental harm.

The Bill contains a number of clauses that either apply strict liability offences, or contain at least one element to which strict liability applies. All of these strict liability offences are deemed to be reasonable, necessary and appropriate to achieve the objectives of the Bill and enable a contemporary environmental impact assessment system for the Territory that contains effective deterrents to committing an environmental offence.

The application of strict liability provisions are considered proportionate in environmental protection legislation as environmental offences are typically hard to prove and rarely proven, whether by omission or commission. Additionally, strict liability provisions are generally considered justified in laws designed to protect human health, safety and the environment, or on regulatory offences.

The limitations being imposed on the presumption of innocence by the Bill is not considered significant and is a permissible limitation for the purpose of achieving the legitimate objectives of the environmental protection Bill. The elements in this Bill to which strict liability applies are those where it can reasonably be expected that a person is aware of their duties and obligations.

For example, it is common throughout the Bill to apply strict liability offences on conduct undertaken by a person who is the approval holder for an environmental approval. In such instances, it is reasonable to expect that the approval holder would be aware of what is permitted conduct under their environmental approval.

The Bill does not contain any absolute liability offence provisions. However, Clause 293 provides the power for the Administrator to make regulations and apply a strict or absolute liability offence against a regulation. This clause restricts the penalty that can be applied to an offence against a regulation that is a strict or absolute liability offence. As with the limitation on the presumption of innocence in relation to the Bill's strict liability provisions, the limitation caused by this clause is considered permissible as it only provides the power to make regulations that can apply an absolute liability offence, and the penalty is restricted. The future application of absolute liability offences will accord with common permissible limitations for absolute liability offences such as ensuring an element of the offence is a pre-condition of the offence.

It is therefore considered that although there are limitations being placed on Article 14(2) of the ICCPR in relation to the presumption of innocence, the limitations are permissible and do not compromise the Bill's compatibility with human rights.

#### Rights to enjoy and benefit from culture

Article 27 in the ICCPR provide rights to persons belonging to ethnic, religious and linguistic minorities within a country to enjoy their own culture, religion and language along with other members of their community. Article 15 in the ICESCR recognises, amongst other things, the right of everyone to take part in cultural life.

Culture can be presented in numerous ways and is often linked to the use of land resources by Aboriginal peoples and the way this use relates to Indigenous peoples particular way of life. The cultural values of Aboriginal peoples, relationship with nature and rights associated with their traditional lands are expected to be regarded with respect and protected.

The UN Human Rights Committee considers that the concept of culture embraces not only the maintenance of traditional practices, but also social and economic activities that are part of a group's traditions. Additionally, the UN Human Rights

Committee on Economic, Social and Cultural Rights has identified a number of factors that capture culture, including way of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions.

Given the inherent nature of the Northern Territory and that a large part of the Territory belongs to Aboriginal peoples through native title rights and/or the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), the Bill will likely result in regulating commercial activity occurring on traditional lands. As a result there is potential that the Bill could limit the ability of some Aboriginal peoples to observe and take part in cultural practices, including the use and enjoyment of land and natural resources, due to the area of land forming a part of a development activity and be subject to regulatory activities attached to an environmental approval. There is therefore the potential that the Bill will limit certain rights that are conveyed in Article 27 in the ICCPR and Article 15 in the ICESCR. It should be noted however that these limitations do not impede on the rights conveyed on Aboriginal peoples through the application of the domestic laws provided in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) or the *Native Title Act 1993* (Cth).

Additionally, it should be noted that the UN Human Rights Committee has previously considered cases when the limitation on the right of minorities to enjoy their own culture on the rights of others was called into question. In these cases it was stated that commercial activity, such as mining, occurring on lands belonging to minorities, has a limited impact on the right of minorities to enjoy their own culture, and therefore may not be incompatible with Article 27 in the ICCPR. In stating this however, it was clear that the statement was made with recognition of the fact that consultation with affected minority representatives had taken place in the process of deciding to approve the activity.

Clause 43 in the Bill places general duties on proponents who are required to undertake an environmental impact assessment process. These duties, amongst others, include obligations to consult with affected communities, including Aboriginal communities, in a culturally appropriate manner; and to address Aboriginal values

and the rights and interests of Aboriginal communities in relation to areas that may be impacted by the proposed action.

Clause 165 provides environmental officers the power to enter land or premises that is Aboriginal land, even if they are not holding a permit to enter or remain on Aboriginal land. This clause could potentially be considered a limitation in relation to privacy rights and cultural rights.

Notwithstanding this limitation, perceived or otherwise, it is considered permissible as the Bill is intended to protect the whole of the Northern Territory environment including the environment on Aboriginal land, whilst enabling sustainable economic development. Furthermore, the Bill is not related to legislation concerning the granting of land, land title rights or tenure for specific development activities (i.e. a mine). Such matters are administered through other domestic laws such as the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), the *Native Title Act 1993* (Cth) and/or the *Minerals Titles Act 2010*.

In consideration of the other domestic laws, it was concluded that although this issue was examined, any perceived limitations arising from Clause 165 are not substantial. Additionally, as Clause 43 in the Bill establishes general duties on proponents to consult with Aboriginal communities, it was considered that the Bill positively impacts on the rights to enjoy and benefit from one's culture, and that any limitations that may arise on one's rights due to the Bill applying to the whole of the Northern Territory and potentially regulating commercial activities on Aboriginal land are also not substantial and permissible. It is therefore concluded that the Bill is compatible with the rights to enjoy and benefit from culture that are contained in Article 27 in the ICCPR and Article 15 in the ICESCR.

## **Conclusion**

This Bill does place limitations on certain human rights. Overall however, the Bill is considered compatible with human rights as the limitations imposed are reasonable, necessary and proportionate, and facilitate the overarching legitimate objectives of the Act.