



FACT SHEET:

Cultural rights of Aboriginal and Torres Strait Islander peoples

Section 28 of the *Human Rights Act 2019*

Section 28 of the *Human Rights Act 2019* says that:

1. Aboriginal people and Torres Strait Islander peoples hold distinct cultural rights.
2. Aboriginal peoples and Torres Strait Islander peoples must not be denied the right, with other members of their community-
 - (a) to enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings; and
 - (b) to enjoy, maintain, control, protect and develop and use their language, including traditional cultural expression; and
 - (c) to enjoy, maintain, control, protect and develop their kinship ties; and
 - (d) to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom; and
 - (e) to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.
3. Aboriginal peoples and Torres Strait Islander peoples have the right not to be subjected to forced assimilation or destruction of their culture.

The Human Rights Act specifies that Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights as Australia's first people. The Act says that Aboriginal and Torres Strait Islander peoples must not be denied this right, with other members of their community, to live life as an Aboriginal or Torres Strait Islander person who is free to practice their culture.

This section is based on two international instruments. One is article 27 of the International Covenant on Civil and Political Rights, which Australia ratified in 1980. The other is articles 8, 25, 29 and 31 of the United Nations Declaration on the Rights of Indigenous Peoples. Australia announced support for this declaration in 2009.

The Human Rights Act also protects cultural rights generally at section 27 of the Act.

Cultural rights are complemented by the rights to freedom of religion and of expression, which are protected in sections 20 and 21 of the Act.

Scope of the right

This section recognises that Indigenous peoples and individuals have distinct cultural rights. They have the right not to be subjected to forced assimilation or destruction of their culture (reflecting article 8 of the UNDRIP). They 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 (article 25 of UNDRIP). They have the right to conserve and protect the environment and the productive capacity of their lands, territories and waters (article 29 of the UNDRIP). They have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expression (article 31 of UNDRIP).

The Act protects the right of Aboriginal and Torres Strait Islander peoples to live life as an Aboriginal or Torres Strait Islander person and to practice their culture. Examples of practicing culture include:

- to maintain and use Indigenous languages;
- to maintain kinship ties;
- freedom to teach cultural practices and educations to children; and
- the right to maintain distinctive spiritual, material and economic relationships with land, water and other resources that there is a connection with under traditional laws and customs.

Like all rights in the Act, the cultural rights of Aboriginal and Torres Strait Islander peoples can be limited, but only where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

When this right could be relevant

Section 28 could be relevant to laws, policies, acts or decisions that:

- limit the ability of Aboriginal persons to take part in cultural practice, or otherwise interferes with their distinct cultural practices;
- restrict access to a place of spiritual significance for Aboriginal people, or prevent or limit traditional practices on that land;
- regulate the conduct of commercial activities on the traditional lands of Aboriginal persons;
- interfere with the relationship between Aboriginal and Torres Strait Islander peoples and land, water and resources;
- regulate the conduct of commercial activities on the traditional lands of Aboriginal and Torres Strait Islander peoples; or
- limit the ability of Aboriginal and Torres Strait Islander peoples to maintain a connection to their community, including because of the child protection, criminal law and mental health systems.

Example

RECOGNITION OF CULTURAL RIGHTS LED TO SUPPORT INSTEAD OF EVICTION

An Aboriginal woman lived in housing owned and leased by a non-Aboriginal community organisation. A condition of her tenancy was that she was required to engage with community services. After her nephew died she went back to her country for a couple of weeks of 'sorry business'. When she returned she started receiving warnings to engage with services, however she wasn't able to do so because she was overwhelmed with family responsibilities, trauma and grief.

A possession order was made and the police came to her door with a warrant. Her advocates made an application for an urgent review and stay. They argued that the community organisation had failed to engage with the woman's cultural rights and the rights of her grandchild and family members in their eviction process. These rights are protected in the Victorian Charter of Rights and Responsibilities. As a result the community organisation withdrew their possession application and engaged an Aboriginal support service.

Source: Victorian Aboriginal Legal Service

This factsheet is not intended to be a substitute for legal advice.