

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Indigenous Affairs

Aboriginal and Torres Strait Islander Act 2005, section 143G

Torres Strait Regional Authority Election Rules 2017

Overview

Section 143G of the *Aboriginal and Torres Strait Islander Act 2005* (the Act) provides that the Minister may, after consulting the Torres Strait Regional Authority (TSRA) and the Electoral Commissioner, make rules not inconsistent with the Act for the conduct of TSRA elections. Rules made under section 143G are a legislative instrument (subsection 143G(8)), and disallowable by either House of Parliament under section 42 of the *Legislation Act 2003*.

The *Torres Strait Regional Authority Election Rules 2017* (the Election Rules) cover all matters relating to nomination of candidates for election, conduct of the election including postal voting, pre-poll voting, the poll, scrutiny of ballot papers, declaration of the poll and electoral offences.

The Election Rules largely mirror those in the *Torres Strait Regional Authority Election Rules 1996* which were due to sunset on 1 October 2017.

As per section 143G(6) of the Act, the Election Rules reflect the desire for the TSRA elections to be conducted in a manner similar to the manner in which elections for the Parliament are conducted. The aim is to increase the understanding of, and participation in, elections for the Parliament by Torres Strait Islanders and Aboriginal persons living in the Torres Strait area.

Background

Section 142 of the Act establishes the TSRA as a corporate Commonwealth entity to deliver programmes for Torres Strait Islanders and Aboriginal persons living in the Torres Strait area.

Under section 142R, the TSRA consists of the eligible number of members elected in accordance with Division 5 of Part 3A of the Act (the Minister has not otherwise determined the constitution of the TSRA under section 142S of the Act).

Division 5 of Part 3A of the Act deals with TSRA elections, including the entitlement of persons to vote, qualification to be elected to the TSRA, timing of elections and voting. Section 143G enables the Minister to make rules for the conduct of elections.

The TSRA was originally established on 1 July 1994 under the *Aboriginal and Torres Strait Islander Commission Act 1989*, as a separate authority from the Aboriginal and Torres Strait Islander Commission. The Election Rules are adapted from the *Aboriginal and Torres Strait Islander Commission (Regional Council Election) Rules 1990*, and the Casual Vacancy Rules in Part 6 are adapted from the *Aboriginal and Torres Strait Islander Commission (Regional Council Election) (Casual Vacancies) Rules 1990*.

Regulatory Impact Statement

The Office of Best Practice Regulation has advised that a Regulatory Impact Statement is not required for the Election Rules as it remakes the previous instrument with minor non-substantive changes.

Commencement

The Election Rules commence on the day after they are registered on the Federal Register of Legislation.

Consultation

Before making rules for the conduct of elections, the Minister is required:

- to consult with the TSRA and the Electoral Commissioner under section 143G of the Act; and
- to undertake any consultation that the Minister considers to be appropriate and reasonably practicable to undertake under section 17 of the *Legislation Act 2003*.

The Minister wrote to the Australian Electoral Commission (AEC) and the TSRA in mid-2016 proposing minor technical amendments to the previous Election Rules be made in the re-making of the Election Rules and inviting feedback.

On behalf of the Minister, officials from the Department of the Prime Minister and Cabinet have worked with TSRA and AEC officials on the Election Rules.

Explanation of the Election Rules

Parts 1 to 6

Part 1 sets out the name of the Election Rules, when the Election Rules commence, defines key terms and specifies collection districts.

To mitigate the risk of uncertainty, the Australian Bureau of Statistics' 'Census Collection District' (CCD) maps are used as a reference point for the ward boundaries in Rule 8, despite being no longer in use for the National Census. CCD maps will be replaced in the future and amendments to reflect these changes will be made to these Election Rules.

Part 2 sets out the requirements for candidate nomination.

Part 3 provides for the conduct of the election. Division 1 sets out some general requirements such as prohibiting multiple votes by one person and how votes should be secured and counted. Division 2 stipulates the requirements for postal voting. Division 3 provides for pre-poll voting. Division 4 sets out the arrangements for the poll including the requirements for ballot boxes, ballot papers and related procedures.

Part 4 stipulates how voting in the election is to be scrutinised.

Part 5 deals with the declaration of the poll and how errors are to be corrected.

Part 6 provides for how casual vacancies are to be treated, including recounting of votes and conduct of by-elections.

Part 7 – Electoral offences

Part 7 details a suite of electoral offences.

Notes on offences with elements of strict liability

The instrument contains two offences with elements of strict liability:

- paragraph 154(1)(a) provides that it is an offence where a person in a polling booth on polling day engages in conduct that disrupts, or tends to disrupt, the operation of the poll. Subrule 154(2) provides that strict liability applies to whether the conduct disrupts, or tends to disrupt, the operation of the poll.
- subrule 155(1) provides that it is an offence where a person has been removed from a polling booth at the direction of the presiding officer given under subrule 154(3), and re-enters the booth without permission. Subrule 155(2) provides that strict liability applies to whether such a direction was given by the presiding officer under rule 154.

The objective of imposing strict liability for such offences is to provide for the proper conduct of elections and ensure that voters are free to exercise their democratic rights without interference or disruption. In the interests of public safety and the broader public interest, it is reasonable that only the conduct of the accused be proved. Honest and reasonable mistake of fact remains an allowable defence, as per section 9.2 of the *Criminal Code*.

The penalties for the above offences do not include a term of imprisonment and are significantly less than the 60 penalty unit limit generally considered appropriate for strict liability offences under the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Notes on offences providing a defence which imposes an evidential or stronger legal burden of proof on the defendant

Four provisions in the instrument set out a defence to an offence, but impose on the defendant an evidential burden of proof, requiring the defendant to raise evidence about the defence:

- subrule 73(3), defence to unlawfully entering a polling booth without permission if the person had permission from the Presiding Officer;
- rule 135, defence to divulging information about the vote of a voter if done for the purposes of Part 4 (scrutiny of the votes);
- subrule 139(2), defence to distributing certain electoral advertising material if the material is of specified kinds; and
- subrule 144(2), defence to leaving voting directions in polling booths if the document is an official instruction displayed by proper authority.

An evidential burden requires a person to provide evidence of an asserted fact in order to prove that fact to a court. In the above instances, the Election Rules place an evidential burden on the defendant as he or she is best placed to raise evidence of any assertions he or she are seeking to rely upon in defending the charges.

Five further offences specify defences but impose on the defendant a stronger, legal burden of proof, requiring the defendant to positively prove the defence:

- subrule 140(3), defence to offences in relation to the publication and distribution of misleading or deceptive material if the person proves that they did not know, or could not be reasonably expected to know, that the thing was likely to mislead a voter;
- subrule 140(4), defence to offences in relation to publication of false representations of ballot papers if the person proves that they did not know, or could not be reasonably expected to know, that the representation was likely to induce a voter to vote informally;
- subrules 153(4) and (5), defences to offences in relation to making an official mark on a ballot paper if the person proves that he or she acted with lawful authority; and
- subrule 156(2), defence to offence of defamation of candidates if the person proves that he or she had reasonable grounds for believing and did in fact believe the statement made to be true.

As per the Attorney General's Department Guidance Sheet on the presumption of innocence, under international human rights law, "a reverse onus provision will not necessarily violate the presumption of innocence provided that the law is not unreasonable in the circumstances and maintains the rights of the accused."

The policy objective of the above-listed provisions is to ensure the integrity of TSRA elections, and to safeguard voters from being misled by officials or purported officials. By imposing on the defendant the evidential burden of proof, it ensures that people will be on notice as to any potential contravention; requiring that proper care is taken in the exercise of official duties, in communicating with voters and producing material. In such cases, it is more practical for the defendant to prove, on the balance of probabilities, that he or she held a reasonable belief about his or her own conduct, than the prosecution to have to disprove it.

Subrules 140(3) and (4) – in relation to publication of deceptive material - are consistent with the burden of proof stipulated under section 329 of the *Commonwealth Electoral Act 1918* (Electoral Act), while subrule 156(2), which refers to alleged defamation, is consistent with the usual approach to defamation under the general law.

Furthermore, any decision to charge a person under these provisions would remain subject to Commonwealth Prosecution Policy.

Part 8 – Miscellaneous

Part 8 includes a range of miscellaneous provisions related to the election, including if further elections are required, the storage of electoral papers and the collection of statistical information.

Note on Rule 166 – delegation powers

Rule 166 provides that where a power or function is conferred on the Electoral Commissioner under the Election Rules, the Electoral Commissioner may by written notice, delegate that power or function to the Deputy Electoral Commissioner or a member of staff of the Electoral Commission. This broad sub-delegation is similar to section 16 of the Electoral Act.

The broad power of delegation is necessary and extends to individuals with relevant qualifications and attributes necessary to exercise the powers or functions. The functions given to the Electoral Commissioner under the Election Rules are essentially administrative in nature and deal with the appointment of officers, polling places, times for polling and approving forms, amongst other functions that relate to the conduct of TSRA elections, a core function that the Australian Electoral Commission has successfully performed over a long period.

The Electoral Commissioner, the Deputy Electoral Commissioner and “a member of staff of the Commission” referred to in rule 166 are the same people who undertake the election functions under the Electoral Act. The Australian Electoral Commission ensures that all staff are trained in the conduct of elections such that they are able to perform their allocated tasks during an election.

Schedules 1 to 3

Schedule 1 repeals the previous instrument, the *Torres Strait Regional Authority Election Rules 1996*.

Schedule 2 details the grounds on which a voter can apply for a postal or pre-poll vote.

Schedule 3 stipulates the procedure to be followed in a recount.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Torres Strait Regional Authority Election Rules 2017

The Torres Strait Regional Authority Election Rules 2017 (the Election Rules) 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*.

Overview of the Instrument

The Election Rules establish rules for the conduct of Torres Strait Regional Authority (TSRA) elections. These rules largely mirror those in the *Torres Strait Regional Authority Election Rules 1996*, which were due to sunset on 1 October 2017.

Background

Section 142 of the *Aboriginal and Torres Strait Islander Act 2005* (the Act) establishes the TSRA as a corporate Commonwealth entity to deliver programmes for Torres Strait Islanders and Aboriginal persons living in the Torres Strait area.

Under section 142R, the TSRA consists of the eligible number of members elected in accordance with Division 5 of Part 3A of the Act (the Minister has not otherwise determined the constitution of the TSRA under section 142S of the Act).

Section 143G of the Act enables the Minister to make rules for the conduct of TSRA elections.

Human rights implications

The Election Rules engage the following rights:

- the *right to self-determination* in Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- the *right to take part in public affairs and elections* in Article 25 of the ICCPR;
- the *rights of equality and non-discrimination* in Article 2, 16 and 26 of the ICCPR and Article 2 of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD); and
- the *right, when charged with a criminal offence, to be presumed innocent until proved guilty according to law* in Article 14 of the ICCPR.

Right to self-determination

Article 1 of the ICCPR and ICESCR recognises the rights of all peoples to participate effectively in public life. The UN Committee on the Elimination of Racial Discrimination has stated that the right to self-determination involves ‘the rights of all peoples to pursue freely their economic, social and cultural development without outside interference.’¹

The Election Rules advance the right to self-determination of Aboriginal and Torres Strait Islander persons in the Torres Strait area.

Right to take part in public affairs and elections

Article 25 of the ICCPR guarantees the rights of citizens to stand for public office, to vote in elections and to have access to positions in the public service.

The UN Human Rights Committee has stated that the conduct of public affairs relates to the exercise of legislative, executive and administrative powers, and covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.² Citizens participate directly in the conduct of public affairs when they are elected to public office. They also do so when they vote to decide public issues through a referendum or other electoral process. Indirect participation takes place when people elect bodies such as parliaments to represent them.

The Election Rules advance the rights of Aboriginal and Torres Strait Islander persons in the Torres Strait area. The Election Rules:

- enable Aboriginal and Torres Strait Islander persons to participate directly in the affairs of the TSRA by establishing a mechanism for eligible candidates to be elected to the TSRA; and
- enable Aboriginal and Torres Strait Islander persons to participate indirectly in the affairs of the TSRA by enabling them to determine a candidate to stand for election to the TSRA.

Rights of equality and non-discrimination

Articles 2, 16 and 26 of the ICCPR affirm the rights of all people to be treated equally. Article 2 of the ICERD further prohibits discrimination on the basis of race.

The Election Rules favour the interests of Aboriginal and Torres Strait Islander persons in the Torres Strait area over those of other persons. In doing so, the Election Rules treat Aboriginal and Torres Strait Islander persons differently on the basis of their race, with the result that other persons do not benefit from being able to participate in the affairs of the TSRA. This means that those persons cannot enjoy certain rights (such as political rights in Article 5(c) of ICERD) to the same extent as Aboriginal and Torres Strait Islanders.

While the Election Rules constitute differential treatment on the basis of race, it can be characterised as a ‘special measure’ with the meaning of Article 1(4) of the ICERD. Article 1(4) provides that ‘special measures’ are deemed not to be discrimination. Special measures are designed to ‘secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms.’ For a measure to be characterised as a ‘special measure’ it must:

- be for a particular group or individuals;
- be taken for the sole purpose of securing the adequate advancement of those groups or individuals;
- be ‘necessary’; and
- not continue after its objectives have been achieved.

The Election Rules meet these criteria. The Election Rules:

- apply directly to Aboriginal and Torres Strait Islander persons in the Torres Strait area;
- have as their sole purpose the effective involvement of Aboriginal and Torres Strait Islander persons in the formulation of policies and programmes affecting them;
- are necessary to empower Aboriginal and Torres Strait Islander persons to participate in public affairs, and is a reasonable and proportionate response given historical marginalisation from public life of this particular group; and
- have a purpose which has yet to be achieved, as ongoing disadvantage experienced by Aboriginal and Torres Strait Islander persons demonstrates.

The right, when charged with a criminal offence, to be presumed innocent until proved guilty according to law

Article 14.2 of the ICCPR states that, “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”

The Election Rules provide nine offences that require a defendant to either raise evidence about their defence (evidential burden) or positively prove the defence (legal burden, discharged on the balance of probabilities).

Each of the nine electoral offence relates to alleged misconduct that may undermine the integrity of an election or impact upon (or prevent) voters in exercising their right to self-determination and right to participate in elections.

By imposing on the defendant the evidential or legal burden of proof, it ensures that people will be on notice as to any potential contravention; requiring that voters are cautious to avoid disruption to other voters or the election and that proper care is taken in the exercise of official duties, in communicating with voters and producing material.

Where the Election Rules place an evidential burden on the defendant, it is only in cases where the defendant is the best placed to raise evidence of any assertions he or she are seeking to rely upon in defending the charges.

In regards to where the legal burden of proof is reversed, the nature of the offences suggest that it is not unreasonable for the defendant to prove, on the balance of probabilities, that he or she held a reasonable belief about his or her own conduct or acted according to law, than the prosecution to have to disprove it.

The penalties for the nine relevant offences do not include a term of imprisonment and carry a 10 penalty unit or less fine.

Any potential defendant would still be protected by their general rights at law. It is also noted that the decision to charge a person under these provisions would remain subject to Commonwealth Prosecution Policy.

Conclusion

The Election Rules are compatible with human rights. The Election Rules advance the rights of Aboriginal and Torres Strait Islander persons in the Torres Strait area to self-determination and participation in public affairs and elections. While it involves differential treatment on the basis of race, the Election Rules constitute a special measure within the meaning of Article 1(4) of the ICERD. To the extent that the Election Rules may limit the rights of those charged with an electoral offence, the limitations are not unreasonable in the circumstances, maintain the rights of the accused and support the broader legitimate objective of ensuring Torres Strait Islanders' right of self-determination and electoral participation.

¹ UN Committee on the Elimination of Racial Discrimination, *General Recommendation 21*, CERD, 48th sess, contained in UN Doc A/51/18 (15 March 1996).

² UN Committee on Human Rights, *General Comment No 25*, UN Doc CCPR/C/21/Rev.1/Add.7 (27 August 1996).