

Human  
Rights  
Law  
Centre.

*Right to a Healthy Environment  
in the ACT Human Rights Act*  
Submission by the Human Rights Law Centre

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# Human Rights Law Centre

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## Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

The Human Rights Law Centre acknowledges the people of the Kulin, Eora and Larrakia Nations, the Traditional Owners of the unceded lands on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people through colonisation. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

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# 1. Introduction

The Human Rights Law Centre (**HRLC**) welcomes the opportunity to comment on the ACT Government's Discussion Paper on the proposal to include a right to a healthy environment in the *Human Rights Act 2004* (ACT) (**HRA**). We have consulted with a number of organisations in drafting this submission, including Aboriginal and Torres Strait Islander organisations, to which we are very grateful.

The Human Rights Law Centre strongly supports placing human rights at the heart of all of our laws. Not only would this mean that Australia honours the promises this country has made internationally, it also means everyone in the community can benefit from government decisions and services being guided by the values of equality, freedom, compassion and dignity.

Human rights cannot be realised without a healthy environment. Our laws need to recognise the deeply interdependent and intertwined relationship between a healthy environment and strong and healthy communities and people – an interdependency long recognised and honoured by Aboriginal and Torres Strait Islander people.

We welcome the ACT Government taking the step to inquire into whether to strengthen the HRA by including the right to a healthy environment, following the formal recognition of this right by the UN Human Rights Council and the UN General Assembly. We support the inclusion of a right to a clean, healthy and sustainable environment ('healthy environment') in the HRA because:

- Our current laws are failing the environment and in doing so, failing communities. Governments across Australia should be doing everything they can, together with Aboriginal and Torres Strait Islander people, to rectify this in the face of the extraordinary threat that climate change, biodiversity loss and pollution pose to humanity and to human rights.
- The inclusion of a standalone right to a healthy environment in the HRA would be a first for Australia, and set an important precedent for other governments across Australia. It would also help to ensure Australia remains in-step with a growing number of countries internationally that already recognise this right, and honour Australia's support of the recent landmark UN General Assembly resolution.
- The dialogue model of the HRA provides a robust and balanced framework for incorporating the right, with clear obligations on public authorities, law-makers and courts. This will help ensure that the relationship between human wellbeing and the environment is centred in the decision-making and service provision of the public service and in the creation and interpretation of laws that will affect future generations in the ACT.

Everyone in the community will benefit from the right to a healthy environment because all people rely on it for the necessities of life and enjoyment of their rights.

The ACT community will also benefit from the inclusion of the broad range of rights recognised in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), which has been ratified by Australia. The right to health, to an adequate standard of living, to housing and other rights are not currently protected in the HRA. These rights are also pre-conditions to the equal enjoyment of the human rights already protected in the HRA and should be included.

## 1.1 Recommendations

The Human Rights Law Centre makes the following recommendations:

1. Include the right to a clean, healthy and sustainable environment in the *Human Rights Act 2004*.
2. Engage closely with Aboriginal and Torres Strait Islander people in the ACT and centre their rights, expertise and knowledge in the drafting of the right.

3. Draft the right in broad principled terms, rather than listing substantive and procedural aspects that may limit how this right is understood and interpreted in the ACT context.
4. Treat the right in the same way that rights listed in Part 3 of the HRA are treated, without creating potentially arbitrary and unclear distinctions between immediate and progressively realisable aspects.

If the ACT Government decides to distinguish between progressively realisable aspects and obligations of immediate effect:

- a. The approach taken to the right to education in section 27A of the HRA should not be followed because this severely restricts the right to two limited aspects.
  - b. If immediate obligations are to be listed, this should include, at a minimum, a positive duty to take steps to ensure that every person (including future generations) can enjoy the right to a healthy environment equally without discrimination; a clear duty to not take any retrogressive steps; and include any specific duties owed to Aboriginal and Torres Strait Islander peoples that emerge from engagement with Aboriginal and Torres Strait Islander communities in the ACT.
5. Adopt the recommendations of the No Rights Without Remedy Parliamentary Inquiry into strengthening the HRA.

## 2. Why the *Human Rights Act* should include a right to a healthy environment

The Human Rights Law Centre is strongly in support of the inclusion of a right to a clean, healthy and sustainable environment ('healthy environment') in the HRA.

The interconnected and interdependent relationship between human rights and the environment is the reality that we live in but is not reflected in law. The triple planetary threat of climate change, pollution and biodiversity loss brings into sharp relief the absolute necessity for public servants, ministers, members of parliament, judges and tribunal members to understand humanity's dependence on healthy environments and for the health of environments and ecosystems to play a central role in decision-making at every level of government. The dialogue model of the ACT's HRA is well suited to achieve this with the inclusion of the right to a healthy environment.

### 2.1 Climate change & environmental degradation are impacting human rights

Australia is on an unsustainable environmental trajectory.<sup>1</sup> But it is the environment that "holds the key to our survival and wellbeing...it is the source of our food, water, air and raw materials."<sup>2</sup> Climate change, pollution and biodiversity loss are well-recognised as being urgent and compounding threats to human wellbeing and human rights.

The realisation of all human rights is deeply interwoven with healthy environments. Rights to life, health, housing, water, food, self-determination, culture and non-discrimination among others cannot be realised if there is no environment that allows for it.<sup>3</sup>

The climate crisis is already impacting the rights of many within our communities. Unprecedented fires, floods and storms have devastated many communities across Australia. Rising sea levels and coastal erosion are threatening the islands and peoples of the Torres Strait and causing mass regional displacement. Prolonged heatwaves are causing water shortages and endangering the lives of the sick, the elderly and those without access to resilient or secure housing.

The human rights implications of climate and environmental inaction will fall disproportionately on structurally marginalised communities, as rising temperatures exacerbate existing inequalities in access to affordable food, housing, healthcare and insurance. Communities and generations the least responsible for this crisis will bear the brunt of the harm.

The threats and impacts on Aboriginal and Torres Strait Islander peoples' connection to Country, culture and wellbeing are particularly acute and disproportionate, exacerbating the racialised environmental, social and economic injustices that are the foundation of the Australian settler state. As the Lowitja Institute has explained:

*Colonisation created disparities in health and wellbeing between Aboriginal and Torres Strait Islander and non-Indigenous Australians through dispossession of traditional land and waterways, suppression of culture and disempowerment. Climate change is compounding these*

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<sup>1</sup> Professor Graeme Samuel AC, Independent Review of the EPBC Act (Final Report, October 2020), viii.

<sup>2</sup> Dr Terri Janke et al, State of the Environment Report (19 July 2022) 13 ('State of the Environment Report').

<sup>3</sup> See UN Human Rights Committee comment that States' implementation of the obligation to respect and ensure the right to life, in particular life with dignity, depends on measures taken by States to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors (Human Rights Committee, *General Comment 36(2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, UN Doc CCPR/C/GC/36 (30 October 2018)) ('General Comment 36'). See also 'Submission of the Office of the High Commissioner for Human Rights to the 21<sup>st</sup> Conference of the Parties to the United Nations Framework Convention on Climate Change' (Office of the High Commissioner on Human Rights) <<https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf>>.

*historical injustices, increasing inequities and feelings of powerlessness as communities despair over the desecration of their land, water and seascapes.*<sup>4</sup>

Indigenous peoples around the world have long understood and advocated for the environment to be cared for and nurtured as a living entity that we are part of, not separate to. It is beyond time for governments to listen.

The 2021 *State of the Environment* report warns that “the state and trend of the environment of Australia are poor and deteriorating as a result of increasing pressures from climate change, habitat loss, invasive species, pollution and resource extraction”.<sup>5</sup> The report directly links these trends with our health and wellbeing, living standards, cultural and spiritual life and connection to Country for Aboriginal and Torres Strait Islander people. For example, competition for land area caused by urban sprawl, combined with climate change impacts, is putting increasing adverse pressure on fresh food provision and security, access to clean water, air and general liveability.<sup>6</sup>

The Intergovernmental Panel on Climate Change’s (IPCC) Sixth Assessment Report warns that human-induced climate change led to irreversible impacts, with natural and human systems being pushed beyond their ability to adapt.<sup>7</sup> In our region, the cascading and compounding impacts on natural and human systems have included water shortages and insecurity, heat stress, floods and drought, climate-sensitive air pollution, and natural disasters like bushfires.<sup>8</sup> A recent review of Australia’s *Environment Protection and Biodiversity Conservation Act* also warned that the environment in Australia is “not sufficiently resilient” to withstand these effects of climate change, and the environmental trajectory is currently unsustainable.

The flow on consequences of these assessments for human rights is significant and can be seen in the far-reaching impacts of the 2019-20 Black Summer bushfires, which caused 417 deaths and thousands of hospital admissions.<sup>9</sup> In the ACT, it was reported that people in Canberra lived under hazardous levels of air pollution for over one-third of the 2019-20 summer.<sup>10</sup> Direct impacts were also reported on cultural heritage, public safety and physical and mental health, as well as devastating impacts on the health of important ecosystems, such as the Namadgi National Park.<sup>11</sup>

More broadly, the ACT’s *State of the Environment 2019* report found that average temperatures in the ACT have risen 1.5 degrees since 1926. Temperatures are predicted to continue increasing, with rainfall expected to decrease, exacerbating bushfire and drought risks and posing significant risks to people’s health and to ecosystems that are critical to human resilience to climate change.<sup>12</sup>

As the State of the Environment report and the Environmental Defenders Office’s recent report on the right to a healthy environment<sup>13</sup> make clear, laws across Australia are failing us by failing to ensure environments that are conducive to our wellbeing and that of future generations.<sup>14</sup> Australian governments at all levels need to be working collaboratively and doing everything they can, side-by-side with Aboriginal and Torres

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<sup>4</sup> Heal Network & CRE-SRIDE 2021, ‘Climate Change and Aboriginal and Torres Strait Islander Health’ (Discussion Paper, Lowitja Institute, November 2021), 9 available at

<[https://www.lowitja.org.au/content/Image/Lowitja\\_ClimateChangeHealth\\_1021\\_D10.pdf](https://www.lowitja.org.au/content/Image/Lowitja_ClimateChangeHealth_1021_D10.pdf)> (‘Lowitja Report’)

<sup>5</sup> State of the Environment Report, Key Findings, 10.

<sup>6</sup> Ibid, 70.

<sup>7</sup> Intergovernmental Panel on Climate Change, Summary for Policymakers (Sixth Assessment Report, Intergovernmental Panel on Climate Change, 28 February 2022) 13 [B.1] available at <[https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC\\_AR6\\_WGII\\_SummaryForPolicymakers.pdf](https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf)>.

<sup>8</sup> See generally Intergovernmental Panel on Climate Change, Climate Change 2022: Impacts, Adaptation and Vulnerability (Sixth Assessment Report, Intergovernmental Panel on Climate Change, 28 February 2022) Chapter 11: Australasia available at <[https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC\\_AR6\\_WGII\\_Chapter11.pdf](https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_Chapter11.pdf)>.

<sup>9</sup> Nicolas Borchers Arriagada et al, Unprecedented smoke-related health burden associated with the 2019-20 bushfires in eastern Australia (Newsletter, 12 March 2020) available at <<https://onlinelibrary.wiley.com/doi/10.5694/mja2.50545>>.

<sup>10</sup> Environmental Defenders Office, ‘A Healthy Environment is a Human Right’ (Research Report, Environmental Defenders Office, 25 August 2022), 26 (‘EDO Report’).

<sup>11</sup> Ibid.

<sup>12</sup> Commissioner for Sustainability and the Environment, *ACT State of the Environment 2019*.

<sup>13</sup> EDO Report, above n 10.

<sup>14</sup> Ibid 20.

Strait Islander people, to ensure that the current trend of environmental deterioration, which does not recognise borders, is reversed. The ACT Government has a significant opportunity to provide leadership in this space, as it did when it enacted the HRA, by recognising a right to a healthy environment.

## 2.2 Aligning with legal developments internationally

At the international level, the interdependence between the environment and human rights was recognised over 50 years ago in the Stockholm Declaration, where it was declared that the environment was essential to ‘well-being and to the enjoyment of basic human rights’,<sup>15</sup> and that humanity has a ‘fundamental right to...an environment of a quality that permits a life of dignity and well-being’, which must be safeguarded for present and future generations. Since that time, many UN bodies and independent experts have drawn attention to the need for a right to a healthy environment, either explicitly or through commentary about the interdependence between human rights and the environment.

Significantly, in October 2021, the UN Human Rights Council resolved to recognise the right to a safe, clean, healthy and sustainable environment, recognising that environmental degradation interferes with the enjoyment of human rights, and that the exercise of human rights is vital to the protection of the environment.<sup>16</sup> And most recently, in July 2022, a landmark resolution by the UN General Assembly recognised a clean, healthy and sustainable environment as a human right.<sup>17</sup> The UN Special Rapporteur for Human Rights and the Environment, Professor David R Boyd, has urged that the General Assembly’s resolution be viewed as a catalyst for greater legislative and policy change.<sup>18</sup>

The right to a healthy environment, in its various permutations has, to date, been recognised by at least 155 countries around the world, through regional human rights treaties and/or national constitutions or laws (representing over 80% of UN member states).<sup>19</sup> The Special Rapporteur on Human Rights and the Environment has noted that in a number of countries that have recognised this right in their constitutions, it has become “one of the fundamental principles shaping, strengthening and unifying the entire body of environmental law”.<sup>20</sup> As the Special Rapporteur observes, “as a result of the legal recognition of their right to a healthy environment, many millions of people are breathing cleaner air, have gained access to safe drinking water, have reduced their exposure to toxic substances and are living in healthier ecosystems”.<sup>21</sup>

Australia voted in support of the UN General Assembly’s July 2022 resolution, however it remains one of a handful of nations in the world without explicit legal protection for the right to a healthy environment, at either the federal or state/territory level.

## 2.3 A framework for environmentally and socially just decision-making

The HRA provides a logical framework for recognising the right to a healthy environment. It situates the right as being interconnected with other human rights, against which public authorities, law-makers and courts have clear obligations. The nature of the obligations that are placed on public authorities, courts and

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<sup>15</sup> United Nations, *Report of the United Nations Conference on the Human Environment*, UN Doc.A/CONF.48/14 (16 June 1972) 3.

<sup>16</sup> United Nations Human Rights Council, *Resolution adopted by the Human Rights Council on 8 October 2021: The human right to a clean, healthy and sustainable environment*, HRC Res 48/13, 48<sup>th</sup> sess, Agenda item 3, UN Doc A/HRC/RES/48/13 (8 October 2021).

<sup>17</sup> United Nations General Assembly, *Resolution adopted by the General Assembly on 28 July 2022*, GA Res 76/300, 76<sup>th</sup> sess, Agenda item 74(b), UN Doc A/RES/76/300 (28 July 2022).

<sup>18</sup> Virtual Roundtable on the Human Right to a Clean, Healthy and Sustainable Environment: Implications for Business (Macquarie Law School, Virtual Roundtable, 7 April 2022) (‘Virtual Roundtable’).

<sup>19</sup> United Nations General Assembly, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, 73<sup>rd</sup> sess, Agenda Item 74(b) of the preliminary list, UN Doc A/73/188 (19 July 2018), 13 [36] (‘Special Rapporteur Report’).

<sup>20</sup> United Nations General Assembly, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, 73<sup>rd</sup> sess, Agenda Item 74(b) of the preliminary list, UN Doc A/73/188 (19 July 2018), 13 [36] (‘Special Rapporteur Report’) [40].

<sup>21</sup> *Ibid*, [44].

the parliament through the HRA will help to build a culture in the ACT in which the health and rights of people and communities are central to environmental policy and law-making.<sup>22</sup> We note however, that a more accessible pathway needs to be provided to allow individuals to enforce their rights, which is critical to creating a culture of rights-focused decision-making by public authorities.

Aspects of the right to a healthy environment can be protected through existing rights in the HRA, such as the rights to life, peaceful assembly, to participate in public life, equality and Aboriginal and Torres Strait Islander peoples' cultural rights.<sup>23</sup> Increasingly, traditional human rights are being interpreted through an environmental lens by UN bodies, providing important guidance on the obligations on governments. For example, the UN Human Rights Committee's General Comment 36 on the right to life has identified "environmental degradation, climate change and unsustainable development" as "some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life", necessitating governments to take measures to "preserve the environment and protect it against harm, pollution and climate change caused by public and private actors."<sup>24</sup>

In Australia, the *Human Rights Act 2019* (Qld) is being relied upon in an objection against a mining lease sought by Waratah Coal Pty Ltd for its proposed Galilee Basin coal mine.<sup>25</sup> The objectors, including Youth Verdict, have based their objections on a number of human rights, including the right to life, protection of children and Aboriginal and Torres Strait Islander peoples' cultural rights – in particular that climate change impacts stemming from the mine would impact on First Nations peoples' rights to preserve, practice and evolve culture as a result of rising sea levels and extreme weather events.<sup>26</sup>

What international human rights law demonstrates is that the ACT Government already has obligations. Cases like *Waratah Coal Pty Ltd v Youth Verdict* highlight the pressing need for a clear legislative framework that recognises the interdependence between human rights and the environment, in particular to help guide public authorities in meeting their obligations, which in turn should mean greater transparency and certainty for the public.

Given that a healthy environment is a precondition to the realisation of other human rights, the inclusion of the right in the HRA can help provide a foundation for applying a human rights lens to decision-making in the administration of environmental, land, planning and development laws where human rights may be less routinely considered. It would for example, support decision-making that is consistent with the objects and principles of the *Environment Protection Act 1997*, by giving a human rights lens to statutory objects focused on health and the integration of environmental, economic and social considerations, and the principle of inter-generational equity.<sup>27</sup> It would also help ground important policy initiatives, like *Canberra's Living Infrastructure Plan: Cooling the City*, within a human rights framework. Ultimately, placing the right to a healthy environment at the heart of law and policy making will support more HRA-

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<sup>22</sup> On the positive impacts of the HRA, see ACT Justice and Community Safety Directorate, Government Response: Australian National University Human Rights Research Project Report *The Human Rights Act 2004 (ACT): The First Five Years of Operation* (March 2012).

<sup>23</sup> See for example UN Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, 37<sup>th</sup> session, Agenda Item 3, UN Doc A/HRC/37/59 (24 January 2018) outlining the UN Special Rapporteur on Human Rights and the Environment's 2018 Framework Principles, which drew from existing international human rights obligations, to demonstrate how interconnected the environment and human rights are.

In relation to the right to life, see UN HRC General Comment 36 [62], above n 3. On cultural rights, see Human Rights Committee, *Poma Poma v Peru*, Comm. 1457/2006, UN Doc CCPR/C/95/D/1457/2006 (27 March 2009); *Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina (Judgment)* (Inter-American Court of Human Rights, Series C No 400, 6 February 2020). On the right to health, see Committee on Economic, Social and Cultural Rights, *General Comment No.14: The Right to the Highest Attainable Standard of Health (Art. 12)*, 22<sup>nd</sup> sess, UN Doc E/C.12/2000/4 (11 August 2000).

<sup>24</sup> General Comment 36 [26], [62], above n 3.

<sup>25</sup> *Waratah Coal Pty Ltd v Youth Verdict Ltd* (No 5) [2022] QLC 4.

<sup>26</sup> *Waratah Coal Pty Ltd v Youth Verdict Ltd*, closing written submissions of the Respondent, available at <[https://www.youthverdict.org.au/files/ugd/b4b563\\_9d62930d4d5847ed93eaa0abeb3c76bf.pdf](https://www.youthverdict.org.au/files/ugd/b4b563_9d62930d4d5847ed93eaa0abeb3c76bf.pdf)>.

<sup>27</sup> *Environmental Protection Act 1997* (ACT) s 3D(1)(c).

compliant decision-making and thereby reduce the need for resort to the courts and the disproportionate burden this places on structurally-oppressed groups.

Recognition of the right to a healthy environment in the HRA will also help place the interdependence between healthy environments, communities and people at the heart of law-making in the ACT, including the proposed Planning Bill 2022. Future generations stand to benefit significantly from laws made today that are consistent with the right to a clean, healthy and sustainable environment.

Finally, the inclusion of a right to a healthy environment in the HRA would provide a model for law-makers across Australia. This is critical given predicted cross-border impacts of climate change and environmental degradation on people's lives across Australia and the demonstrated failure of Australian environmental laws highlighted above.

**Recommendation 1:** *Include the right to a clean, healthy and sustainable environment in the HRA.*

### 3. What should this right look like?

The recognition of a specific right to a healthy environment in the HRA would be the first of its kind in Australia.<sup>28</sup> While there is much experience from overseas and guidance from the United Nations to draw from, there is also the wealth of experience and expertise held by First Nations people, which must be prioritised.

We note that the Discussion Paper asks a number of questions about how this right should be defined in legislation, which are addressed in this section.

#### 3.1 Prioritising First Nations peoples' expertise

Aboriginal and Torres Strait Islander people around Australia have for so long fought for Australian Governments to recognise and respect their sovereignty, custodianship and care of the incredible land, waters and ecosystems of Australia. As the authors of the 2021 *State of the Environment: Indigenous* chapter, note:

*“For millennia, Indigenous Australians have known the seasons, animals, plants and elements of Country, and have spoken languages that transmit the knowledge and stories of Country. Plants, animals and elements are our totems, working in reciprocity with us – we look after them, they look after us, enacting deep scientific knowledge of biota, genetics and land management and so much more.”<sup>29</sup>*

The failure of governments to recognise and respect Aboriginal and Torres Strait Islander peoples' rights, knowledges and practices is a key cause of the climate and environmental challenges that we face today and will continue to limit our ability to combat these challenges if this doesn't change. As the Lowitja Institute state in their submission on the Discussion Paper, addressing climate change and the dire state of our environment requires justice, redress and decolonisation.<sup>30</sup>

The impacts of climate and environmental injustice compound the long and ongoing history of colonisation and racism in Australia to pose acute threats to the health and wellbeing of Aboriginal and Torres Strait Islander people. As the *State of the Environment* report noted 'mainstream decisions that disconnect people from Country have a negative impact on health and wellbeing.'<sup>31</sup> The Lowitja Institute has noted that, despite this, Aboriginal and Torres Strait Islander people are sidelined too often from discussions

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<sup>28</sup> Noting that aspects of the right identified by the UN Special Rapporteur on Human Rights and the Environment are already protected in different state, territory and federal laws across Australia. For more, see EDO Report, above n 10.

<sup>29</sup> *State of the Environment: Indigenous*, 10.

<sup>30</sup> The Lowitja Institute, Submission to the ACT Justice and Community Safety Directorate (September 2022).

<sup>31</sup> *Ibid*, 7.

about how to address climate change and that this sidelining is one of the many ways in which colonisation continues to be enacted against Aboriginal and Torres Strait Islander people.<sup>32</sup>

The ACT Government's own *State of the Environment 2019* report opened with recognition of the central role of Aboriginal people in managing the environment. There are huge opportunities, as part of the transition to low-waste and more just and sustainable ways of doing things in the ACT, for past injustices perpetrated against Aboriginal and Torres Strait Islander peoples to be acknowledged and redressed and for Aboriginal and Torres Strait Islander peoples' sovereignty and leadership to be recognised.<sup>33</sup>

In this context, we urge the ACT Government to ensure that it develops a definition of the right to a healthy environment in collaboration with Aboriginal and Torres Strait Islander people in the ACT and in a way that ensures respect for their rights to land, water, culture and self-determination.

The 2021 *State of the Environment* chapter on Indigenous peoples highlights the importance of ensuring that Aboriginal and Torres Strait Islander voices are listened to and a central role for Aboriginal and Torres Strait Islander knowledge and sustainable cultural practices. The right to self-determination and the recognition of cultural responsibilities of stewardship are vital for making this a reality. These are key foundations to building a healthy environment in the ACT and should underpin the ACT Government's engagement with Aboriginal people in the ACT on defining the right to a healthy environment.

### 3.2 International guidance

At the international level, the UN General Assembly has recognised the right as one to 'a clean, healthy and sustainable environment'.<sup>34</sup> The UN Special Rapporteur on Human Rights and the Environment has described the right as being to a 'safe, clean, healthy and sustainable environment' and indicated six substantive elements, as follows:

- Clean air
- A safe climate
- Access to safe drinking water and sanitation
- Healthy biodiversity and ecosystems
- Toxic free environments in which to live, work and play
- Healthy and sustainably produced food.

The Special Rapporteur has also identified procedural elements of the right, which are common to human rights across the board, and relate to accessing information, participation in decision-making and access to justice. Additionally, the Special Rapporteur has noted that the obligations of non-discrimination and equality apply to the equal enjoyment of human rights relating to a safe, clean, healthy and sustainable environment – it follows that States must provide for equal access to environmental benefits and ensure their actions relating to the environment do not themselves discriminate.<sup>35</sup>

We note that the above substantive elements identified by the Special Rapporteur lack any recognition of deep relationship between the wellbeing of Indigenous peoples and the health of nature, and the cultural responsibilities many Indigenous peoples around the world carry in respect of the ecosystems of their lands and waters.

International law and comparative human rights jurisprudence can also provide some guidance to the ACT Government's engagement with Aboriginal and Torres Strait Islander people on this matter. For example:

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<sup>32</sup> Lowitja Report, 9. See also Lowitja Institute's submission to the ACT Justice and Community Safety Directorate, September 2022.

<sup>33</sup> Ibid.

<sup>34</sup> United Nations General Assembly, *Resolution adopted by the General Assembly on 28 July 2022*, GA Res 76/300, 76th sess, Agenda item 74(b), UN Doc A/RES/76/300 (28 July 2022).

<sup>35</sup> Special Rapporteur Report, 10 [25].

- The *UN Declaration on the Rights of Indigenous Peoples (UNDRIP)* outlines a range of relevant rights and government obligations, including:
  - The right of Indigenous peoples to practice their cultural and spiritual traditions, to protect cultural and religious sites; and to protect and develop histories, languages and ways of transmitting knowledge.<sup>36</sup>
  - The obligation of governments to consult and cooperate with Indigenous peoples to obtain free, prior and informed consent before adopting or implementing legislative or administrative measures that may affect them, or approving any project affecting their lands or resources.<sup>37</sup>
  - The right of Indigenous peoples to own, maintain and strengthen relationships with traditionally owned lands, waters and resources, and to determine priorities and strategies for the use of their lands and to exercise their right to development.<sup>38</sup>
  - The right of Indigenous peoples to protect and develop their cultural heritage and their knowledges; to conserve vital medicinal plants, animals and minerals, and to protect the environment and productive capacity of their lands and resources.<sup>39</sup>
  - Obligations on governments to provide effective redress for breach of rights.
  
- While Australia is not a signatory, the *ILO Convention (No.169 – Indigenous and Tribal Peoples Convention 1989)* also provides for:
  - Special measures to be adopted to safeguard Indigenous peoples’ cultures and environment.<sup>40</sup>
  - Obligations on Governments to not only assess the social, spiritual, cultural and environmental impact of planned development activities, but also take cooperative measures to protect and preserve the environment;<sup>41</sup> and
  - The safeguarding of the rights of Indigenous peoples to the natural resources pertaining to their lands, and their right to participate in the use, management and conservation of these resources.<sup>42</sup>
  
- Finally, the Inter-American Commission on Human Rights has provided helpful interpretative guidance to understanding the right to a healthy environment in the context of Indigenous peoples and the broader human rights framework.<sup>43</sup> In particular:
  - That the right operates as an autonomous right, protecting components of the environments, such as forests, seas, rivers and other natural features, as interests in themselves.<sup>44</sup>
  - Recognition of the links between Indigenous peoples’ right to collective ownership and the ‘protection of, and access to, the resources to be found in their territories, because those natural resources are necessary for the very survival, development and continuity of their way of life.’<sup>45</sup>

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<sup>36</sup> United Nations General Assembly, *Resolution adopted by the General Assembly on 13 September 2007*, GA Res 61/295. United Nations Declaration on the Rights of Indigenous Peoples, 61<sup>st</sup> sess, Agenda item 68, UN Doc A/RES/61/295 (2 October 2007), arts 11-13.

<sup>37</sup> Ibid arts 10-11, 19, 28-29.

<sup>38</sup> Ibid arts 23, 25, 26 and 32(1)

<sup>39</sup> Ibid arts 24, 29(1) and 31.

<sup>40</sup> International Labour Organization, *Indigenous and Tribal Peoples Convention, 1989 (No.169)* (27 June 1989), art 4(1).

<sup>41</sup> Ibid art 7(3).

<sup>42</sup> Ibid arts 14-15.

<sup>43</sup> *The Environment and Human Rights (Advisory Opinion)* (Inter-American Court of Human Rights, Series A-23 OC23-17, 15 November 2017).

<sup>44</sup> Ibid [62].

<sup>45</sup> Ibid [42].

- The right of Indigenous peoples to be consulted in a way that respects their tradition and culture in the development of environmental impact assessment.<sup>46</sup>
- The duty on the state to establish mechanisms of monitoring and oversight.<sup>47</sup>
- The duty on the state to protect Indigenous communities' ancestral territories, owing to the relationship such lands have with cultural identity and the collective nature of a fundamental human right that must be respected in a 'multicultural, pluralist and democratic society'.<sup>48</sup>

### 3.1 How broadly should the right be defined?

The Human Rights Law Centre recommends that the right be framed at a broad principled level, consistent with the UN General Assembly's recognition of the right as being to a "clean, healthy and sustainable environment". This is because:

- The right has only recently been formally recognised by the UN General Assembly, and has not yet been elucidated in an international treaty or considered by UN complaints bodies as standalone right. As the international human rights community builds this body of human rights law, our understanding of the scope of the right will evolve. Broad wording in the HRA will therefore allow for interpretation and understanding of the right to evolve as necessary.<sup>49</sup>
- There is slow but increasing recognition by the Australian governments, including the ACT Government, that Aboriginal and Torres Strait Islander people must play a key role in confronting the environmental challenges we face. Non-Indigenous Australia is slowly starting to learn about and respect First Nations knowledge and expertise and different ways of relating to natural environments. As noted above, the Special Rapporteur's list of substantive aspects is lacking in this recognition. It is important that the HRA not act as a barrier to positive change through overly-specific wording.
- Climate change, pollution and biodiversity loss are colliding in multifaceted ways and it is difficult to predict all of the different environmental challenges that will be faced in the future. Significant changes to environmental laws are also expected, particularly at the federal level, while many aspects of environmental management require cross-jurisdiction legal and administrative coordination and cooperation. Framing the right at a high level will allow for the right to be interpreted according to matters within the jurisdiction and control of the ACT, while allowing for developments in climate and environmental science to be considered in understanding the application of the right.
- In general, human rights laws in Australia and internationally list rights at a principled level, rather than listing detailed aspects of each right. The right to a healthy environment is not unique in having procedural and substantive aspects – this is common across the different rights, for which governments have differentiated obligations to respect, protect and promote human rights.

Ultimately, detailing specific aspects of the right to a healthy environment is likely to limit the application of this right in the future, in ways that may be detrimental to human rights and the environment. In saying this, the final wording should be decided in collaboration with Aboriginal people in the ACT for the reasons articulated above.

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<sup>46</sup> Ibid [156] – [170].

<sup>47</sup> Ibid [152] – [155].

<sup>48</sup> Ibid [113].

<sup>49</sup> Noting that section 31 of the HRA allows for international law to be considered in interpreting human rights.

## 3.2 Nature of the obligations created

The Discussion Paper asks a series of questions about the obligations or duties that should be imposed on the ACT Government. These questions assume that the right to a healthy environment should be subject to the concept of ‘progressive realisation’, meaning that for any obligations to be of immediate effect on the ACT Government, they would need to be specified as such in the HRA.

The UN Special Rapporteur on Human Rights and the Environment has noted that due to resource constraints, governments should be afforded some discretion in terms of progressively realising aspects of the right to a healthy environment. The obligation of progressive realisation comes from ICESCR and requires governments to utilise maximum of available resources to “take deliberate, concrete and targeted measures”.<sup>50</sup> There are however, obligations of immediate effect, in particular the obligation to ensure that all people enjoy ICESCR rights without discrimination and the obligation on governments to refrain from retrogressive action that would undermine realisation of rights.<sup>51</sup> Core minimum obligations have also been identified for particular rights by the UN Committee on Economic, Social and Cultural Rights.

The ACT’s HRA recognises two ICESCR rights in Part 3A of the Act, but deals with the nature of the obligations created in very different ways as follows:

- The **right to education** in section 27A describes every child as having the right to free school education and every person as having the right to further education and vocational training. However, these rights are significantly curtailed to two ‘immediately realisable aspects’, being to enjoy them without discrimination and to recognise that parents may choose schooling that conforms to their religious or moral convictions. The wording of this right in the HRA excludes all other aspects of the right to education, including any obligations of progressive realisation.
- The **right to work and other work-related rights** in section 27B is worded more expansively in the HRA. However, a note in the section states “Aspects of rights under this section are considered at international law to be subject to an obligation of progressive realisation”, and is followed by another note that specifies Article 8(4) of the Optional Protocol to ICESCR as relevant to interpreting the obligation of progressive realisation, including considerations of reasonableness. This section also includes a note that section 28 of the HRA sets out a test for determining reasonable limitations on all human rights protected in the Act. The inter-relationship between section 28 and ‘progressive realisation’ has not been tested in the ACT courts.

### 3.2.1 Why the right should be treated like other rights in Part 3 of the Act

The Human Rights Law Centre’s view is that the right to a healthy environment in the HRA does not need to incorporate the distinction between immediate and progressive obligations. Rather it should be treated like all other rights under Part 3 of the Act. This is because:

- As the Discussion Paper itself has noted, inclusion of the right to a healthy environment in the HRA “would not require public authorities to provide all Canberrans with a healthy environment in all circumstances.”<sup>52</sup> The obligations on public authorities are to take proper consideration of human rights and not act incompatibly with them unless they have a good reason. A good reason is one that is lawful, reasonable and “demonstrably justified in a free and democratic society” – the section 28 limitations test. The criteria in section 28 provide a robust framework for balancing competing

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<sup>50</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966 UNTS 3 (entered into force 3 January 1976) art 2 (**ICESCR**); see generally Special Rapporteur Report.

<sup>51</sup> Committee on Economic, Social and Cultural Rights, *General Comment No.3: The nature of States parties’ obligations (article 2, para.1)*, 5<sup>th</sup> sess, UN Doc E/1991/23 (14 December 1990) [9].

<sup>52</sup> ACT Justice and Community Safety Directorate, *Right to a Healthy Environment: Discussion Paper* (Discussion Paper, June 2022) 10.

rights and interests, and preventing unjustifiable retrogressive steps.<sup>53</sup> These elements of the HRA respect the primacy of the ACT Parliament and recognise that there will be times that the ACT government needs to limit human rights but it should have strong justification if it seeks to do so.

- As noted above, what ‘progressive realisation’ means in the context of the right to work in the HRA has not yet been tested. The right to a healthy environment has also not yet been explored through the development of a treaty or authoritatively interpreted by a UN treaty body in terms of determining core minimum requirements, as has been the case with ICESCR rights.<sup>54</sup> The inclusion of progressive realisation, alongside the section 28 limitations test, is therefore also likely to create uncertainty for public authorities, law-makers, courts and the public in determining what each institution’s obligations are.
- The Queensland *Human Rights Act 2019* has included two rights drawn from ICESCR – the right to education and to health services. Significantly, it treats the realisation of these as of equal importance as other human rights in terms of the obligations created and does not distinguish between immediate and progressive obligations.<sup>55</sup>
- Human rights are indivisible and interdependent. As the Discussion Paper has noted, the distinction between the treatment of rights in the *International Covenant on Civil and Political Rights* and ICESCR is largely artificial, and the right to a healthy environment has at this stage been recognised outside of the ICESCR framework. Regardless of how the right may evolve in international law in the future, the goal at this stage should be to create a human rights framework that best protects the rights and interests of the ACT community, and particularly people and groups that have long been excluded and oppressed by discriminatory economic, political and social systems.

### 3.2.2 Approach to progressive realisation if the ACT Government goes down this path

If the ACT Government does seek to limit the right through the obligation of progressive realisation, we would urge the ACT Government not to follow the approach taken to drafting of the right to education. The wording of the right to education in the HRA excludes any progressively realisable aspects and severely restricts the right to education to two limited aspects.

An approach similar to that recommended in the 2010 *ACT Economic, Social and Cultural Rights Research Project* report could be considered if the ACT Government is determined to distinguish between immediate and progressive obligations on a right-by-right basis. The approach recommended for ICESCR rights was to state the right in broad terms and then specify aspects of the right that are *not* subject to progressive realisation (meaning that those aspects should be treated like all other rights in the HRA in terms of creating immediate obligations).<sup>56</sup> In saying this, we note that it is less than ideal to create different types of obligations for different rights in the incremental way that this has happened in recent years.

Ideally, a holistic approach would be taken to the addition of new rights to ensure a consistent and coherent approach to the obligation of progressive realisation. For example, the limitations test in section 28 of the HRA could be amended to include consideration of the extent (if any) to which the right must be progressively realised under international law as part of understanding the nature of the right. This could

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<sup>53</sup> Section 28 also applies to obligations relating to the interpretation of legislation and the assessment of whether Bills in parliament are compatible with human rights. See sections 30 and 37.

<sup>54</sup> See for example Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The right to social security (art.9)*, 39<sup>th</sup> sess, UN Doc E/C.12/GC/19 (4 February 2008).

<sup>55</sup> See sections 36 and 37 of the *Human Rights Act 2019* (Qld).

<sup>56</sup> Hilary Charlesworth et al, Australian Capital Territory Economic, Social and Cultural Rights Research Project, Report (2010) 135.

then provide a foundation for the recognition of economic, social and cultural rights that are currently missing from the HRA.

If the ACT Government decides to list specific immediate obligations, at a minimum, the Human Rights Law Centre recommends that this list be non-exhaustive and include a positive duty to take steps to ensure that every person can enjoy the right to a healthy environment equally without discrimination; a clear duty to not take any retrogressive steps; and any specific duties owed to Aboriginal and Torres Strait Islander peoples that emerge from engagement with Aboriginal and Torres Strait Islander communities in the ACT. We have recommended that the obligation of non-discrimination be framed as a positive duty to take steps, in recognition of the need for the ACT Government to take proactive steps to address the structures and systems that exclude many groups, including Aboriginal and Torres Strait Islander people, people with disability and children, from decision-making and render them more vulnerable to the impacts of climate change, pollution and environment degradation. We would also suggest that this duty include explicit reference to future generations so as to capture the principle of inter-generational equity in the *Environment Protection Act 1997*.

We note that the Discussion Paper asks how the right to a healthy environment could recognise the specific importance of Country for Aboriginal and Torres Strait Islander people. This is an important foundational question, the answer to which should shape the drafting of this right in the HRA. This is not however, a question for the Human Rights Law Centre, as a non-Indigenous organisation based outside of the ACT to answer. As outlined at section 3.1 of this submission, Aboriginal and Torres Strait Islander peoples' rights, expertise and knowledge should be central to the drafting of this right (and all human rights) and we urge the ACT Government to work with Aboriginal and Torres Strait Islander people in the ACT on this.

***Recommendation 2:*** *Engage closely with Aboriginal and Torres Strait Islander people in the ACT and centre their rights, expertise and knowledge in the drafting of the right.*

***Recommendation 3:*** *Draft the right in broad principled terms, rather than listing substantive and procedural aspects that may limit how this right is understood and interpreted in the ACT context.*

***Recommendation 4:*** *Treat the right in the same way that rights listed in Part 3 of the HRA are treated, without creating potentially arbitrary and unclear distinctions between immediate and progressively realisable aspects.*

*If the ACT Government decides to distinguish between progressively realisable aspects and obligations of immediate effect:*

- a. *The approach taken to the right to education in section 27A of the HRA should not be followed because this severely restricts the right to two limited aspects.*
- b. *If immediate obligations are to be listed, this list should be non-exhaustive and include, as a minimum, a positive duty to take steps to ensure that every person (including future generations) can enjoy the right to a healthy environment equally without discrimination; a clear duty to not take any retrogressive steps; and include any specific duties owed to Aboriginal and Torres Strait Islander peoples that emerge from engagement with Aboriginal and Torres Strait Islander communities in the ACT.*

## 4. Fair processes and the realisation of human rights

The Discussion Paper asks what else the ACT Government can do to fulfil the right to a healthy environment, noting a number of actions that the Government is already undertaking. We have limited our response to this question to briefly address matters critical to safeguarding the procedural aspects of the right to a healthy environment.

We note that the submission of the Environmental Defenders Office to the Planning Bill 2022 outlines a number of important recommendations, including to promote the right of people in the ACT to access environmental information, to participate in environmental decision-making and to access justice.<sup>57</sup> These are important procedural aspects of the right to the healthy environment that are necessary to ensure that every person in the ACT can access information and participate in decisions that concern their ability to live their best lives in a healthy environment. They are crucial for transparency and accountability and we urge the ACT Government to adopt these.

#### 4.1 Rights need remedies

An area of significant concern to the Human Rights Law Centre in terms of procedural justice, is the lack of free or low-cost avenues for people to bring complaints and seek remedies for a breach of any of the human rights protected in the HRA. Currently, the only option for a person to enforce their rights is through the Supreme Court, which is a costly, complex and intimidating jurisdiction.

The HRA should provide for access to justice, an essential procedural element of the right to a healthy environment (and all other human rights in the Act). This is critical to embedding the HRA into communities in a substantive way and to increasing awareness of human rights and responsibilities across the community. It is also a necessary step for the ACT Government to take in terms of complying with its obligations to fulfil human rights.

The HRLC has previously called for fairer enforcement mechanisms to be enshrined in the HRA by:<sup>58</sup>

- Enabling complaints about any breach of the HRA to be made to the Human Rights Commission for confidential conciliation; and
- Where conciliation is unsuccessful, enable a complaint about a breach of the HRA to be made to the ACT Civil and Administrative Tribunal for resolution.

The HRC or ACAT should be empowered to make such orders as is necessary depending on the nature of the breach of human rights listed in the HRA.

Our recommendations, as well as similar recommendations from most other submissions to the inquiry, were accepted by the ACT Parliamentary Inquiry into 'No Rights Without Remedy.'<sup>59</sup> We urge the ACT Government to swiftly accept the report's recommendations and implement them so that the benefits of the ACT's HRA flow more evenly through the community.

***Recommendation 5:*** *Adopt the recommendations of the No Rights Without Remedy Parliamentary Inquiry into strengthening the HRA.*

## 5. Conclusion

The ACT Government is commended for continuing to look at how the HRA can evolve and light the path for other jurisdictions in terms of ensuring human rights are fully and properly placed at the heart of decision making.

In summary, we urge the ACT Government to incorporate the right to a clean, healthy and sustainable environment into the HRA, to treat the right equally to human rights listed in Part 3 of the Act and to prioritise the rights, knowledge and expertise of Aboriginal and Torres Strait Islander people in the ACT in the drafting

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<sup>57</sup> EDO reference

<sup>58</sup> See Human Rights Law Centre, Submission No 9 to Standing Committee on Justice and Community Safety, *Inquiry into Petition No 32-21: No Rights Without Remedy* (7 April 2022) 3-4, available at <<https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/624e2b877720304a6ef5d134/1649290119745/220407+Draft+HRLC+submission+to+Justice+and+Community+Safety+Committee.pdf>>.

<sup>59</sup> Standing Committee on Justice and Community Safety, Legislative Assembly for the Australian Capital Territory, *Report into the Inquiry into Petition 32-21 (No Rights Without Remedy)*, (Report No 7, 23 June 2022).

of right. We also urge the ACT Government to implement the remedies strengthening recommendations of the ACT Parliamentary inquiry so that all people have a pathway to realise their rights.