



AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS™

Discussion Paper on the Right to a Healthy Environment

Public consultation to inform consideration
of a right to a healthy environment in the
Human Rights Act 2004

Justice and Community Safety Directorate
ACT Government

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History books can either remember you taking action to protect the environment when it was most needed, or condemning current and future generations to a world crushed by climate change, pollution, nature loss and their many implications for human rights.

We have a choice. We need to decide wisely and act with urgency.¹

Acknowledgements

Australian Lawyers for Human Rights (**ALHR**) acknowledges the traditional owners and custodians of the lands on which we work in the Australian Capital Territory as the first people of this country. We recognise that the land belonging to these peoples was never ceded, given up, bought, or sold. We pay our respect to Elders past, present and emerging and express our strong support for the Uluru Statement from the Heart.

About Australian Lawyers for Human Rights

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees.

ALHR seeks to utilise its extensive experience and expertise in the principles and practice of international law and human rights law in Australia to:

- Promote Federal and State laws across Australia that comply with the principles of international human rights law;
- Engage with the United Nations in relation to Australian human rights violations;
- Promote and support lawyers' practice of human rights law in Australia;
- Engage internationally to promote human rights and the rule of law.

¹ Michelle Bachelet, UN High Commissioner for Human Rights, *"The right to a clean, healthy, and sustainable environment - what does it mean for States, for rights-holders and for nature?"* Delivered at Glion Human Rights Dialogue 16 May 2022

Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

Executive Summary

Australian Lawyers for Human Rights (**'ALHR'**) is grateful for the opportunity to provide this submission in relation to the *Discussion Paper on the Human Right to a Healthy Environment* (**'the Discussion Paper'**). This submission reflects strong support for the inclusion of the human right to a clean, healthy and sustainable environment in the *Human Rights Act 2004* (ACT) (**'the HRA'**) and ALHR's view that the right should be broadly defined to comply with international customary law and norms related to the right.

Since 2020 ALHR has been a member organisation of the Global Pact for the Environment², a coalition of over 1,300 civil society organisations and climate advocates from over 70 countries calling for the global recognition of the right to a healthy environment.

ALHR is currently engaged in a joint campaign with GreenLaw on enshrining the right to a healthy environment in the HRA. This submission reflects upon, and is intended to supplement, that work.

"All human rights depend on a healthy environment. We cannot be healthy, eat adequate and nutritious food, drink clean water and breathe clear air without it."³

The right to a clean, healthy and sustainable environment received universal recognition by the United Nations General Assembly on 28 July 2022⁴. More than 150 countries recognise and protect the right to a healthy environment through their constitutions, national laws, judiciaries or ratification of regional and international instruments. Sadly, despite this international progress Canberrans do not yet enjoy legal recognition of their right to a clean, healthy and sustainable environment. We face a dangerously changing climate, unsustainable, exploitative resource extraction and declining biodiversity - all of which will have profound human rights impacts for people living in the ACT.

² <https://globalpactenvironment.org/en/>

³ Michelle Bachelet, UN High Commissioner for Human Rights Op.Cit.

⁴ United Nations General Assembly [Resolution A/76/L.75](#), "The Right to a Clean, Healthy and Sustainable Environment, 26 July 2022 available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N22/436/72/PDF/N2243672.pdf?OpenElement>

The 2021 *State of Environment Report* declared that “the state and trend of the environment of Australia are poor and deteriorating as a result of increasing pressures.”⁵ Our climate is changing, rainfall is decreasing, with resulting impacts upon our biodiversity and river systems, ecosystems are in collapse and the environment is experiencing significant degradation. At the same time, as noted by David Boyd, UN special rapporteur on human rights and environment:

*“Everyone’s health and quality of life depends on clean air, safe water, sustainably produced food, a stable climate, and healthy biodiversity and ecosystems.”*⁶

Given this national and global crisis, ALHR welcomes the ACT’s leadership in beginning a conversation about legal recognition of the human right to a healthy environment - and what practical measures can be taken by the ACT Government, and all of us, to ensure this right is protected.

⁵ Australia, *State of the Environment Report 2021 Key Findings* available at: <https://soe.dcceew.gov.au/overview/key-findings>

⁶ United Nations Human Rights Press Release, “*UN recognition of human right to healthy environment gives hope for planet’s future – human rights expert*” 8 October 2021

Recommendations

1	That the right to a clean, healthy and sustainable environment for all be included in the <i>Human Rights Act 2004</i> .
2	That the right to a clean, healthy and sustainable environment be drafted in broad principles that reflect international human rights standards and jurisprudence so as to not limit its interpretation and application in law.
3	That further consultation be undertaken with Aboriginal and Torres Strait Islander people in the ACT and their knowledge, expertise and experience be respected and reflected in any legislative reform, consistent with the United Nations Declaration on the Rights of Indigenous Peoples.
4	<p>That the ACT Government also take proactive steps to consult with a wide range of vulnerable groups, including but not limited to:</p> <ul style="list-style-type: none"> • people with disability who may be impacted by planning decisions, • children and young people, • people with health conditions affected by environmental factors (such as air quality), • low socio-economic communities, • communities exposed to industrial sites and • people particularly vulnerable to planning decisions (such as renters and public or social housing residents/tenants).
5	That the recommendations of the No Rights Without Remedy Parliamentary Inquiry be adopted so that the right to a clean, healthy and sustainable environment is enforceable via an accessible complaints mechanism.
6	That the ACT Human Rights Commission and ACT Civil and Administrative Appeals Tribunals be additionally resourced to hear and conciliate complaints regarding the right to a healthy environment.

Relevant international legal obligations

ALHR believes that explicitly protecting the human right to a clean, healthy and sustainable environment in the HRA contribute to the fulfilment of the Australian Government's international legal obligations under binding instruments and in accordance with contemporary norms of human rights and fundamental freedoms as expressed by various UN Treaty Bodies, Special Rapporteurs and foreign jurisprudence.

Furthermore, the enshrinement of the human right to a healthy environment in the HRA is an opportunity for the ACT Government to promote best practice human rights protections within its domestic jurisdiction.

The human right to a healthy environment has not emerged from a single international human rights instrument, as was the case with civil and political, and social and economic human rights.⁷ Rather, the human right to a healthy environment has emerged from international environmental law, the 'greening' of international human rights law,⁸ and from the recognition of the right at a domestic and regional level by countries across the globe.

Evolution of the right to a healthy environment at the United Nations

The human right to a healthy environment was first recognised in international environmental law by the *Stockholm Declaration 1972*.⁹ The preamble of that declaration emphasises that both natural and artificial environments are "essential to [humankind's] well-being and to the enjoyment of basic human rights - even the right to life itself".¹⁰

Following on from the *Stockholm Declaration* there evolved an increasing international recognition of:

- the interrelationship between human rights and environmental protection and the reality that a healthy environment is a prerequisite for the enjoyment of human rights; and
- The idea that certain human rights such as access to information, participation in decision-making, and access to justice in environmental matters, are likewise essential to good environmental decision-making.

⁷ John H Knox, 'Constructing the Human Right to a Healthy Environment' (2020) 16 *Annual Review of Law and Social Science* 79.

⁸ Ibid.

⁹ *Report of the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14/Rev.1 (1973, adopted 16 June 1972) 3 [1] ('*Stockholm Declaration*').

¹⁰ Ibid, preamble [3].

Similarly, the preamble of the *Paris Agreement* (2015) acknowledges:

“...that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples...”¹¹

Simultaneously, as the connection between the environment and human rights was being affirmed in international environmental law, a growing body of statements on recognition of the right to a safe, healthy environment was also evolving within international human rights law.

In November 2002, the UN Committee on Economic, Social and Cultural Rights adopted its general comment No. 15 on the right to water stating that: “The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. This was followed in In 2010 the UN General Assembly passed a landmark resolution recognising:

“the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights”¹²

In March 2018 the former United Nations Special Rapporteur on Human Rights and the Environment, John Knox, presented the *Framework Principles on Human Rights and the Environment*¹³ to the UN Human Rights Council. These set out states’ obligations under existing human rights law as they relate to the enjoyment of a safe, clean, healthy and sustainable environment.

The 16 Framework Principles

1. States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights.
2. States should respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment.

¹¹ *Paris Agreement*, opened for signature 22 April 2016 (entered into force 4 November 2016) preamble [11] (*‘Paris Agreement’*).

¹² United Nations General Assembly Resolution A/RES/64/292 ‘The human rights to water and sanitation’ 28 July 2010

¹³ *Framework Principles on Human Rights and the Environment* (2018) HRC/37/59) (2018)

3. States should prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment.
4. States should provide a safe and enabling environment in which individuals, groups and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation and violence.
5. States should respect and protect the rights to freedom of expression, association and peaceful assembly in relation to environmental matters.
6. States should provide for education and public awareness on environmental matters.
7. States should provide public access to environmental information by collecting and disseminating information and by providing affordable, effective and timely access to information to any person upon request.
8. To avoid undertaking or authorizing actions with environmental impacts that interfere with the full enjoyment of human rights, States should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights.
9. States should provide for and facilitate public participation in decision-making related to the environment, and take the views of the public into account in the decision-making process.
10. States should provide for access to effective remedies for violations of human rights and domestic laws relating to the environment.
11. States should establish and maintain substantive environmental standards that are non-discriminatory, non-retrogressive and otherwise respect, protect and fulfil human rights.
12. States should ensure the effective enforcement of their environmental standards against public and private actors.

13. States should cooperate with each other to establish, maintain and enforce effective international legal frameworks in order to prevent, reduce and remedy transboundary and global environmental harm that interferes with the full enjoyment of human rights.
14. States should take additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities.
15. States should ensure that they comply with their obligations to indigenous peoples and members of traditional communities, including by:
16. States should respect, protect and fulfil human rights in the actions they take to address environmental challenges and pursue sustainable development.

The principles recognise that certain procedural human rights such as access to information, participation in decision-making, and access to justice in environmental matters, are likewise essential to good environmental decision-making and a prerequisite to the enjoyment of the right to a healthy environment. .

From 2019 to the present the work of the current Special Rapporteur on human rights and the environment, David Boyd, has further defined the right to a healthy environment as comprising both the above procedural elements and substantive elements¹⁴ including access to: clean air; a safe climate; safe drinking water and sanitation; healthy biodiversity and ecosystems; toxic free environments in which to live, work and play; and healthy and sustainably produced food.

The importance of a healthy environment to the attainment of human rights has therefore been recognised by the evolving content and scope of other human rights.

For example, the UN Human Rights Committee (UNHRC) recognises that:

¹⁴ See David R Boyd, Special Rapporteur on Human Rights and the Environment, Right to a Healthy Environment: Good Practices, UN DOC A/HRC/43/53 (30 December 2019) and See David R Boyd, Special Rapporteur on Human Rights and the Environment, Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc A/HRC/40/55 (8 January 2019) and David R Boyd, Special Rapporteur on Human Rights and the Environment, Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc A/74/161 (15 July 2019)

“environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life”.¹⁵

International jurisprudence affirms that environmental degradation constitutes a threat to the right to life as enshrined by article 6 of *the International Covenant on Civil and Political Rights*.¹⁶ Notably, In a 2015 view, the UN Human Rights Committee held:

“State parties should take all appropriate measures to address the general conditions in society that may give rise to threats to the right to life or prevent individuals from enjoying their right to life with dignity, and these conditions include environmental pollution.”¹⁷

On 8 October 2021, the UN Human Rights Council (UNHRC) adopted resolution 48/13¹⁸ recognising *“the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights,”* and appointed a new Special Rapporteur on human rights and climate change. Both resolutions were comfortably passed.

The first, proposed by Costa Rica, The Maldives, Morocco, Slovenia and Switzerland, recognises that the right to a safe, clean, healthy and sustainable environment is related to other rights which States are already obliged to protect under international law and calls on all States to work together to implement this newly-recognised right.

The second resolution, presented by the Bahamas, European Union, Fiji, Panama, Paraguay, Sudan and the Marshall Islands establishes a mandate for an independent expert to report to the UNHRC on the impacts of climate change on human rights, and to provide guidance to States on the implementation of a human rights-based approach to climate action.

In the lead up to the vote on the resolutions, the UN High Commissioner for Human Rights, Michelle Bachelet, addressed the Council noting that “a safe, clean, healthy and sustainable environment is the foundation of human life” and that environmental threats “constitute the single greatest challenge to human rights in our era.”¹⁹

¹⁵ *General Comment No. 36, Article 6 (Right to Life)*, CESCR, UN Doc CCPR/C/GC/35 (3 September 2019) [62].

¹⁶ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html>.

¹⁷ *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2751/2016*, CCPR, UN Doc CCPR/C/126/D/2751/2016 (20 September 2019) [7.3].

¹⁸ Resolution 48/13 A/HRC/48/L.23/Rev.1

¹⁹ Environmental crisis: High Commissioner calls for leadership by Human Rights Council member states (13 September 20221) at <https://www.ohchr.org/en/2021/09/environmental-crisis-high-commissioner-calls-leadership-human-rights->

In a further significant international development and drawing on the UNHRC resolution, on 28 July 2022 the United Nations General Assembly (UNGA) adopted a resolution A/76/L.75 “recognising the right to a clean, healthy and sustainable environment as a human right,” by 161 votes in favour, no votes against and 8 abstentions, declaring:

Australia supported this international affirmation of a standalone human right to a healthy environment

While UNGA resolutions are not legally binding instruments, the resolution is a powerful tool that will work to shape and strengthen new international norms and trigger acceleration for environmental action that safeguards human rights. It therefore has the potential to provide a foundation for a comprehensive international instrument on the right to a healthy environment and other environmental rights.

ALHR acknowledges that these historic resolutions follow decades of campaigning, in particular by Indigenous Peoples organisations and those representing Small Island Developing States, as well as our Torres Strait 8²⁰ here in Australia.

Regional Human Rights Instruments

The first regional human rights instrument to enshrine the human right to a healthy environment was the *African Charter on Human and Peoples’ Rights 1981* (*‘Banjul Charter’*).²¹ Article 24 of that Charter provides:

“all peoples shall have the right to a general satisfactory environment favourable to their development”.

In 1988, the San Salvador Protocol to the *American Convention on Human Rights 1969* came into force.²² Article 11 of that Protocol enshrines the right to a healthy environment, affirming that:

“everyone shall have the right to live in a healthy environment and to have access to basic public services”.

council-member-states?LangID=E&NewsID=27443 and see ALHR Media Release 9 October 2021:

<https://alhr.org.au/unhrc-healthy-environment/>

²⁰ See <https://ourislandsourhome.com.au/>

²¹ *African (Banjul) Charter on Human and Peoples’ Rights*, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (entered into force 21 October 1986).

²² *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; Protocol of San Salvador*, adopted 17 November 1988, OEA/Ser.A/44 (entered into force 16 November 1999).

Similarly, the *ASEAN Human Rights Declaration*, adopted in 2012, states that every individual has the right to “an adequate standard of living” including “the right to a safe, clean and sustainable environment”.²³

While neither the *European Convention on Human Rights 1953* or the *EU Charter of Fundamental Rights 2009* yet explicitly recognise the right to a healthy environment, in 1998 the *Aarhus Convention* was adopted by the UN Economic Commission for Europe. This, protects human rights relating to the procedural elements of environmental governance, including access to justice and information, and participation in decision-making.²⁴ Article 1 of the Aarhus Convention guarantees:

“the right of every person of present and future generations to live in an environment adequate to his or her health and well-being”.

The right to a healthy environment is now recognised in the domestic legal systems of more than 80% of UN member states, with 156 out of 193 having either incorporated the right into their constitutions, enacted legislation or ratified a regional instrument which enshrines the right.²⁵

Conclusion

The inclusion of the right to a healthy environment within numerous regional human rights instruments and recent UN resolutions recognising the right, demonstrate that there is now no doubt that this right has widespread acceptance and significance within the international community.

There is now a new era in human rights-based environmental and climate policy at the highest international level. Together these declarations represent a compelling global consensus that a safe, clean, healthy and sustainable environment is integral to the full enjoyment of almost every human right protected within the core UN Human Rights Treaties. Environmental protection is now considered as an essential part of human rights protection.

Indeed, there is now discussion as to whether the right to a healthy environment has evolved to already enjoy status as a binding norm of international customary law.

²³ *ASEAN Human Rights Declaration* (entered into force November 19 2012) art 28(f).

²⁴ *Aarhus Convention*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001).

²⁵ *Right to a Healthy Environment: Good Practices*, UN GAOR, 43rd sess, 53rd mtg, Agenda Item 3, UN Doc, A/HRC/43/53 (30 December 2019).

For instance, Rodríguez-Garavito, an international human rights lawyer and Chair of the Center for Human Rights and Global Justice at New York University School of Law, has argued that the human right to a healthy environment is customary law because of the wide generality of States that already recognise the right.²⁶

What is clear is that there is an overwhelming international consensus that a clean, healthy and sustainable environment is a necessary precondition of human life and indeed a precondition for the enjoyment of all fundamental human rights and every persons' capacity to live in dignity and security

The ACT Government should enshrine the human right to a healthy environment in the HRA

ALHR strongly supports the Discussion Paper's proposal and believes that the human right to a clean, healthy and sustainable environment should be included in the HRA for the following reasons:

Inclusion of a stand alone right to a clean, healthy and sustainable environment within the ACT HRA would be consistent with the abovementioned international human rights standards and the clear global consensus reflected in regional and domestic jurisdictions globally.

A safe, clean, healthy and sustainable environment is integral to the enjoyment of all fundamental human rights enshrined within the core United Nations Treaties and the HRA.

Recognition of this within the HRA will contribute to better outcomes for all Canberrans, particularly those most vulnerable to the impacts of the environmental and climate crisis.

Not only will it render the human rights protections offered by the HRA more comprehensive and consistent with international developments, but it will serve to catalyse more ambitious, coherent and coordinated action to protect the environment across the ACT.

It will reflect the compelling global consensus as evidenced by regional and international developments at the UN that a safe, clean, healthy and sustainable environment is integral to

²⁶ César Rodríguez-Garavito, 'A Human Right to a Healthy Environment?: Moral, Legal, and Empirical Considerations' in J. Knox & R. Pejan (Eds.), *The Human Right to a Healthy Environment* (Cambridge: Cambridge University Press, 2018) 155-168.

the full enjoyment of the human rights protected within core human rights treaties, and indeed, the human rights already explicitly enshrined under the HRA.²⁷

ALHR recognises the ACT Government's positive actions to protect the environment and we acknowledge that, as one of only three states and territories to have introduced a legislated human rights framework, the ACT plays a significant role in leading the country on human rights compliance. We applaud amendments to the Human Rights Act introduced since 2004 which have expanded the scope of the human rights protected by the Act.

Equally, the ACT has been a leader in responsible environmental governance and climate action. Indeed, the ACT was the first Australian State or Territory jurisdiction to declare a climate emergency.²⁸

ALHR therefore submits that it is now time to further contribute to this important legacy and expand that scope of the HRA by introducing amendments to explicitly recognise the right of all Canberrans to a clean, healthy and sustainable environment.

The enshrinement of the human right to a healthy environment, which incorporates obligations to ensure a safe climate, will build upon and strengthen the important human rights, environmental and climate reform already being implemented by the ACT Government.

Further, ALHR submits that taking a rights based approach to the climate and environmental crisis that current and future generations of Canberrans will undoubtedly be living through is fundamental to ensuring that those most impacted are not left behind. I

It will place people - and their health, safety and dignity - at the heart of decisions by government and public entities and government action and legislative reform through the mechanisms for dialogue and accountability established by the HRA.

Further, while the ACT Government is taking positive actions to secure environmental outcomes, ALHR emphasises the following findings of recent investigations into the state of the environment in the ACT which reflect the need for a rights-based approach:

- Canberrans are being **exposed to an unsafe climate**. The *2019 State of the Environment Report* prepared by the Commissioner for Sustainability and the Environment found that the Territory has heated by an average of 1.5°C since records

²⁷ *The human right to a clean, healthy and sustainable environment*, UN Doc A/76/L.75 (24 July 2022) 3,3.

²⁸ ACT Government, ACT Climate Change Strategy (Climate Change Strategy) 2019-2025, 1.

began in 1926.²⁹ These climatic changes are contributing to hotter average temperatures, lower water inflows and elevated bushfire risks;

- **Air quality and water quality standards must be improved** to uphold the human right to a healthy environment. Between 2015-2018 there were 31 days where PM2.5 levels exceeded air quality standards, with transport emissions and wood heaters constituting the main sources of air pollution.³⁰ It is likely that the ACT's overall air quality has trended downwards since 2018, notably during the 2019-2020 Black Summer Bushfires. Aquatic ecosystem health has been rated as 'fair' in the ACT, but water inflows are trending downwards and recreational water quality is poor and deteriorating;³¹
- The above trends in air and water quality indicate that Canberrans' **rights to live, work and play in non-toxic environments is not being consistently achieved**;
- **Healthy food and sustainable agricultural systems are not accessible** for the majority of Canberrans. A 2021 survey undertaken by ACT Health found that 93% of workers in the ACT have inadequate fruit and vegetable consumption, with higher rates of unhealthy eating amongst those from lower socio-economic backgrounds;³² and
- There are a range of **pressures upon the integrity and viability of ecosystems and biodiversity** across the ACT, namely, continued greenfield and unsustainable development, invasive species, climate change and insufficient funding for ecological conservation.³³

The above trends are likely to accelerate and intensify as climate change worsens and the impacts of unsustainable development, pollution and biodiversity loss accumulate across the Territory.

ALHR further notes that the ACT is currently not achieving the procedural aspects of the human right to a healthy environment as follows:

- **Access to environmental information is restricted.** The ACT does not have a comprehensive live database of environmental information and key environmental indicators, such as water quality, cannot be accessed by the public. Furthermore, the public does not have full access to the information that informs environmental decision-making within the Territory;

²⁹ ACT Commissioner for Sustainability and the Environment, *ACT State of the Environment* (Report, 2019).

³⁰ Ibid.

³¹ Ibid.

³² PricewaterhouseCoopers, *ACT Workplace Health Promotion Needs Analysis* (Summary Report, prepared on behalf of the ACT Government Health Directorate, 2011).

³³ See generally Conservation Council ACT Region, *Our Environment Our Future ACT Election Priorities 2020* (2020).

- **Public involvement in environmental decision-making is limited and inaccessible for vulnerable groups.** The public and third parties are restricted in the extent to which they can engage in environmental decision-making,³⁴ often limited to a single period of public consultation during development applications or planning law reform processes (see, for example, ss 217 and 219 of the *Planning and Development Act 2007* (ACT)). Notification of these public consultations is limited to a written notice which is not an accessible or inclusive means of seeking public input, particularly for vulnerable and marginalised groups, including those who speak English as a second language, those with disabilities and First Nations Peoples; and
- The ACT **lacks adequate and accessible mechanisms for the public to access justice** and enforce their human right to a healthy environment. The human right to a healthy environment cannot currently be enforced under the HRA, and in any event, the HRA currently lacks an accessible complaints mechanism that would facilitate access to justice.³⁵

Explicit protection of the human right to a healthy environment has contributed to positive human rights outcomes across the globe. A 2012 study, conducted by Boyd, UN Special Rapporteur on Human Rights and the Environment, on the constitutional protection of environmental rights found that countries that had enshrined the right to a healthy environment enjoyed greater environmental outcomes.³⁶ A further study in 2016, conducted by Jeffords and Minkler, found that the codification of environmental rights led to better scores on the Environmental Performance Index.³⁷

ALHR submits that there is a proven connection between explicit protection of the human right to a clean, healthy and sustainable environment and the achievement of that right in practice.

ALHR also notes that the ACT Government has previously recognised that the HRA has contributed to increased awareness of human rights issues within government, positively impacted policy debates and the scrutiny of legislation to be human rights compliant³⁸ and

³⁴ Environmental Defenders Office, *Submission on the Planning Bill* (EDO Submission, June 2022) 37.

³⁵ See Australian Lawyers for Human Rights, *No Rights Without Remedy: Submission to Inquiry into Petition 32-21* (Submission, 2022) <<https://alhr.org.au/wp/wp-content/uploads/2022/04/07-04-22-ALHR-Submission-ACT-HRA-No-Rights-Without-RemedyFC.pdf>>.

³⁶ David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver, UBC Press, 2012) 20.

³⁷ Chris Jeffords and Lanse Minkler, 'Do Constitutions Matter? The Effect of Constitutional Environmental Rights Provisions on Environmental Outcomes' (2016) 69(2) *Kyklos* 294.

³⁸ 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).

provided important accountability mechanisms, for example the audit powers of the ACT Human Rights Commission.³⁹

- ALHR submits that, based upon the ACT's experience of the HRA so far, it is reasonable to expect that the protection of the human right to a healthy environment in the HRA would result in the following outcomes: Consistent consideration and increased awareness of the human right to a clean, healthy and sustainable environment within government and when making decisions that impact Canberrans;;
- Human rights-informed dialogue in relation to climate and environmental policies in the ACT;
- Enforcement of the human right to a healthy environment through the ACT Supreme Court and, in time, through the adoptions of an accessible complaints mechanism contributing to systemic cultural change and reduced breaches of the human right to a healthy environment; and
- The potential for systemic reforms to better realise the right through the investigative and audit powers of the ACT Human Rights Commission.

There are ongoing environmental challenges impacting upon the rights of Canberrans, these range from the real impact of environmental degradation on the life, health and dignity of all people across the ACT, to the current limitations imposed upon the ability of all Canberrans to equally participate in environmental decision-making.

Explicit protection of the human right to a healthy environment is a necessary and essential first step to addressing these challenges for current and for future generations.

The human right to a healthy environment should be defined in the HRA according to international customary laws and norms

ALHR recommends that the human right to a healthy environment is defined broadly in the HRA, according to emerging international customary laws and established norms with respect to the right. We therefore recommend that the human right to a healthy environment be defined in similar terms to the UN General Assembly Resolution (A/76/L.75) passed on 29 July 2022 that articulates the right as follows:

Recognizes the right to a clean, healthy and sustainable environment as a human right.

³⁹ Helen Watchirs and Gabrielle McKinnon, "Five Years' Experience of the Human Rights Act 2004 (ACT): Insights for Human Rights Protection in Australia" (2010) 33(1) *UNSW Law Journal* 136.

This language reflects the UN Human Rights Committee Resolution (A/HRC/RES/48/31) passed on 8 October 2021 that recognised the human right to a healthy environment in similar language:

Recognizes the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights.

A broad definition of the human right to a healthy environment incorporates established procedural and substantive elements of the right. These obligations have been progressively developed by domestic and regional human rights instruments and the jurisprudence of foreign and international tribunals. The UN Special Rapporteur on Human Rights and the Environment has distilled these elements into a series of thematic reports providing clarity and cohesion to the scope and content of the human right to a healthy environment as it has emerged from international customary laws and norms.

The elements of the human right to a healthy environment can be categorised into procedural, substantive and non-discriminatory components, as follows:

- The procedural aspects of the right extend to the right to access environmental information, meaningful and inclusive public involvement in environmental decision-making and access to justice;
- The substantive elements of the right include rights to clean air, a safe climate, access to safe drinking water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work and play, and finally, healthy ecosystems and biodiversity; and
- The right further imposes obligations upon governments to ensure there is equal access and non-discrimination in the protection and promotion of the human right to a healthy environment.⁴⁰

As noted above, these obligations are recognised components of the human right to a clean, healthy and sustainable environment as articulated by the UN Human Rights Committee and UN General Assembly. Each of the procedural and substantive elements of the right are underpinned by international human rights law, international environmental law and the practices of a broad generality of States that have already implemented the human right to a healthy environment.⁴¹

⁴⁰ UN Special Rapporteur on Human Rights and the Environment, *Right to a Healthy Environment: Good Practices*, UN GAOR, 43rd sess, 53rd mtg, Agenda Item 3, UN Doc, A/HRC/43/53 (30 December 2019).

⁴¹ Ibid.

A broad definition will therefore provide clarity to government entities bound to uphold the right, third parties that may be impacted by the right and, ultimately, will assist judicial or quasi-judicial decision-makers apply the right within the context of the ACT.

Furthermore, a broadly articulated right, stated in the same terms as globally applicable international instruments, is consistent with the overall legislative approach to the protection of human rights in the ACT. ALHR particularly notes that none of the human rights currently protected under the HRA, with the exception of the right to education (see s 27A of the HRA), have been narrowly defined or restricted. Rather the HRA incorporates the language of broadly applicable human rights instruments, which provides clarity for government entities and ensures that the interpretation and application of the rights protected by the Act is consistent with international law (ensuring internal consistency within the Act, see s 31 of the HRA).

In relation to s 27A of the HRA, which enshrines the right to education and provides that the protection of that right is limited to an enumerated list of immediately realisable obligations, ALHR recommends against such a legislative approach to the human right to a healthy environment. The human right to a healthy environment is being actively developed within international human rights law, and an artificially narrow definition of the right under the HRA risks becoming outdated and providing incomplete human rights protections for Canberrans.

Furthermore, it is already recognised under international law, at least implicitly as a matter of State practice, that the positive obligations imposed by the human right to a healthy environment are progressive. For example, international best practice with respect to a safe climate emphasises long-term emissions reduction strategies with interim targets and accountability mechanisms.⁴² ALHR notes the ACT is already developing policies that will contribute to the progressive realisation of many of the aspects of a human right to a healthy environment, such as emissions reduction strategies compatible with a safe climate.⁴³ It is therefore unclear how the human right to a healthy environment could be limited to an enumerated list of immediately realisable rights without creating the perception within the community that the ACT Government is seeking to carve out certain environmental policies for the accountability mechanisms contained within the HRA.

⁴² Ibid 9.

⁴³ See, eg, ACT Government, *ACT Climate Change Strategy (Climate Change Strategy) 2019-2025*.

Duties

The UN Special Rapporteur on Human Rights and the Environment has recognised the right to a clean and healthy environment as consisting of six substantive elements and a number of procedural elements (see above) which assist in demarcating the duties which would be conferred on the ACT Government.⁴⁴

All human rights are indivisible and interconnected, and the realisation of each right supports and enables the realisation of others. For this reason, we encourage the ACT Government to adopt a broad, principle-based approach to the duties and responsibilities that the right confers on the ACT Government and its agents.

There is a question of immediate and progressive realisation which is flagged in the Discussion Paper. The ICESCR puts forward the notion of ‘progressive realisation’ and requires that governments use the resources available to “take deliberate, concrete and targeted measures” to realise the right.⁴⁵ It is not an excuse for inaction. The ICESCR nonetheless requires governments to ensure all people ensure ICESCR rights without discrimination and that governments do not take regressive action that undermine the fulfillment of human rights.⁴⁶

Currently in various sections, the HRA demarcates between rights with ‘immediately realisable aspects’⁴⁷ and rights subjected to the obligation of ‘progressive realisation’.⁴⁸ We understand from the Discussion Paper that the drafters’ intention is for any right to a healthy environment be subject to ‘progressive realisation,’ that is, for any obligation to confer an immediate duty it would need to be specified as such in the Act.

It is ALHR’s recommendation that the obligations conferred by the right do not need to qualified by this distinction.

The obligation conferred on public authorities by the insertion of this right into the HRA is for public authorities to take proper consideration of the right when making decision, and to not act

⁴⁴ 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).

⁴⁵ *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.

⁴⁶ Committee on Economic, Social and Cultural Rights, *General Comment No.3: The nature of States parties’ obligations (article 2, para. 1)*, 5th sess, UN Doc E/1991/23 (14 December 1990) [9].

⁴⁷ E.g. s27A the right to education

⁴⁸ E.g. s27B

in a manner which is incompatible with said right unless there is a ‘good reason’⁴⁹ as per the framework set out in section 28.

This is a broad obligation that respects the ultimate decision-making capacity of the ACT Government, and its role in balancing competing rights and priorities. For this reason, we do not believe the ACT Government should limit the scope and interpretation of this right through a specific ‘progressive realisation’ framework. Rather, we recommend the ACT Government leave scope for the international and national jurisprudence with respect to the right to evolve.

We particularly note that the duties conferred on the ACT Government by this right include procedural as well as substantive rights. This means there is a positive obligation conferred on the ACT Government to ensure the broader community, as well as affected parties have access to environmental information, that information is provided in a way that is accessible to all members of the community (e.g. consideration should be given to providing information in plain English, in different formats including non-written formats etc.) that community members are consulted in a timely and genuine manner, and that the ACT Government demonstrates that views of the community have been considered in the final decision-making process.

First Nations People

ALHR acknowledges that First Nations Indigenous legal systems across the globe have long recognised that humans are ecologically embedded beings who exist as part of ecosystems, and with responsibilities to protect those ecosystems.

Kombumerri and Wakka Wakka scholar, Graham, explains the First Nations Indigenous relationship to Country in Indigenous law as follows:

*“The land is a sacred entity, not property or real estate; it is the great mother of all humanity. The Dreaming is a combination of meaning (about life and all reality), and an action guide to living. The two most important kinds of relationship in life are, firstly, those between land and people and, secondly, those amongst people themselves, the second being always contingent upon the first.”*⁵⁰

The principles underpinning the human right to a healthy environment reflect many First Nations Indigenous legal systems, notably, that in order to live in dignity, humans require healthy ecosystems and have a responsibility to care for those ecosystems.

⁴⁹ A good reason is one that is lawful, reasonable and “demonstrably justified in a free and democratic society” – the section 28 limitations test.

⁵⁰ Mary Graham, ‘Some Thoughts about the Philosophical Underpinnings of Aboriginal Worldview’ (2008) 45 Australian Humanities Review 181, 181.

In more recent years, the human right to a healthy environment has emerged as a result of First Nations/Indigenous advocacy and movements that originated in the Global South.⁵¹ For example, activist and Inuk woman, Sheila Watt-Cloutier, filed a petition⁵² to the Inter-American Commission on Human Rights in 2005, arguing that the United States Government's failure to regulate greenhouse gas emissions violated the Inuit Peoples' rights to health, culture and livelihood of Inuit Peoples' under the *American Declaration of the Rights and Duties of Man*.⁵³

The absence of recognition of the interrelationship between a healthy environment and human rights in many domestic jurisdictions may also be viewed as a legacy of colonialism, conquest, First Nations dispossession and the exploitation of vast tracts of land.⁵⁴

The United Nations Declaration on the Rights of Indigenous Peoples enshrines the right of First Nations peoples to maintain traditional connections to land and territory, conserve and protect the environment, protect traditional knowledge, cultural heritage and expression; and the protection of traditions, sites and ceremonial objects.⁵⁵

The right to a healthy environment can only properly be developed in consultation and collaboration with First Nations communities in the ACT. As the ACT State of Environment Report states: "it is now increasingly recognised that Indigenous knowledge is vital to our understanding of how our environment works and the development of sustainable best practice in Australia."⁵⁶ Consultation and co-design with First Nations peoples is not only necessary to respect and uphold the rights of Indigenous peoples to their land and Country, but will also give the drafters the benefit of this deep environmental knowledge.

Further guidance can be drawn from the Statement from Indigenous Authors (**the Statement**) to the 2021 Australian State of Environment Report, which states:

"The wellbeing of Indigenous communities is violently impacted when we cannot connect and practise culture. Poor health, low life expectancy and other social circumstances impact our

⁵¹ David Boyd, 'Catalyst for change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment' in John H Knox and Ramin Pejman (eds), *The Human Right to a Healthy Environment* (Cambridge University Press, 2018) 17.

⁵² Sheila Watt-Cloutier, 'Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States', Petition to the Inter American Commission on Human Rights, 7 December 2005.

⁵³ Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man*, 2 May 1948

⁵⁴ Kelly Duquette, 'Environmental Colonialism' January 2020

⁵⁵ UNDRIP Articles 11 - 13, 25 - 32

⁵⁶ ACT State of the Environment | 2019 Report, Chapter 2, p 29

ability to practise and maintain our stewardship of Country. People are strong and healthy when they are on Country, connected and fulfilling their cultural obligations. Country is healthier too. Colonisation has seen our people ripped from Country – the road to our collective healing is putting people back on Country.”⁵⁷

As well as the fundamental right to the protection of Country, the Statement also offers guidance on the role First Nations peoples and communities should play in Government decisions. While the below themes refer specifically to the State of Environment Report, these principles should be adopted by the ACT Government in its own consultation and decision-making frameworks to ensure the voices of First Nations peoples are included and respected.

“Key themes are emerging in what Indigenous stakeholders expect from the government and the report. These are:

- inclusion of the Indigenous voice in the national environmental discussion, and increased participation in decision-making
- actioning the SoE report recommendations
- better valuing of Indigenous knowledge (from traditional knowledge holders and not just Indigenous scientists)
- self-determination and decision-making on environmental work
- genuine engagement with realistic timeframes. Governments should reach out to all levels of community to include the diversity of Indigenous voices and to recognise that traditional knowledge often sits at the grassroots level
- community-led solutions tailored to individual communities
- continual collection of information in the years between reports
- use of language that is plain English, so everyone can read and understand it
- long-term commitments from government, industry and community partners, in terms of programs and investments
- removal of barriers that Indigenous communities are expected to overcome to access resourcing

⁵⁷ <https://soe.dcceew.gov.au/indigenous/outlook-and-impact>

- more training programs to support caring for Country.”⁵⁸

ALHR is not suggesting this is a prescriptive list of relevant considerations for the ACT Government when making environmental decisions that impact First Nations peoples, but that it is a useful starting point. We strongly recommend the ACT Government commit to ongoing and sustained dialogue with First Nations communities in the ACT in the development, and realisation, of a right to a healthy environment.

Further consultation is recommended for the ACT Government to determine how to fulfil its obligations and to continue to promote the human right to a healthy environment

ALHR welcomes the ACT Government’s consideration of the steps that could be taken to progressively fulfil its obligations pursuant to the human right to a healthy environment.

As ALHR discussed above, aspects of the human right to a healthy environment and immediately realisable and impose obligations on the ACT government to not take regressive actions that negatively impact the realisation of the human right to a healthy environment, or any of the elements that constitute the right, and to ensure equal access and non-discrimination in relation to the right. However, the positive obligations imposed by substantive and procedural aspects of the right will require progressive government action to be realised within the ACT. This following section provides guidance on those aspects of the right.

In particular we encourage the ACT Government to proactively consult with vulnerable and marginalised communities, and the civil society groups and community organisations representing those communities.

This extends to identified communities, including First Nations Peoples, CALD persons, persons with disabilities and youth. We also urge the ACT Government to engage with communities that are likely to be disproportionately impacted by environmental degradation in the ACT.

ALHR urges that proper consultation with vulnerable groups, or affected persons or communities, be incorporated into the development of the right to a healthy environment.

We take this opportunity to emphasise that the ACT Government should take proactive steps to consult in a deep and sustained way with a wide range of groups, including but not limited to:

⁵⁸ Ibid.

- First Nations peoples,
- people with disability who may be impacted by planning decisions,
- children and young people,
- people with health conditions affected by environmental factors (such as air quality),
- low socio-economic communities,
- communities exposed to industrial sites and
- people particularly vulnerable to planning decisions (such as renters and public or social housing residents/tenants).

Further, ALHR urges the ACT Government to take steps to address the structural inequalities that are contributing to these groups' vulnerabilities.

We strongly encourage the ACT Government to integrate equity considerations into all of its environmental policies including principles of intergenerational equity and the impact of today's decisions on the lives of future generations.

Finally, we note that the rights of vulnerable groups and the realisation of other community-wide human rights are often, and incorrectly, presented as sites of conflict. For example, the right to a healthy environment with protected sites of biodiversity may be presented as in opposition with the right to affordable public housing proposed to be built in the same location. It is ALHR's view that this is a lazy approach to understanding the mutually enforcing role that human rights can play. By designing an affordable housing policy that prioritises universal design principles, medium-density housing and active transport we can provide more housing to Canberrans while minimising our footprint on the broader land, air and water systems.

We also recommend that the ACT Government work constructively with the ACT Commissioner for Sustainability and the Environment as she finalises the 2023 State of the Environment Report (ACT), to be released next year. That State of the Environment Report is an important opportunity for the ACT Government to reflect upon:

- Current and comprehensive environmental trends, particularly environmental challenges impacting upon the human right to a healthy environment in the ACT; and
- Receive informed recommendations from the Commissioner on viable avenues of reform to improve environmental outcomes and governance in the ACT.

However, we also note the ongoing campaign for 'No Rights Without Remedy' under the HRA. In November 2021, the 'No Rights Without Remedy' Petition was jointly supported by ALHR and the ACT Council of Social Services and was signed by 518 signatories and tabled in the

Legislative Assembly. That petition informed the basis of the Inquiry into Petition 32-21 (No Rights Without Remedy) convened by the ACT Legislative Assembly Standing Committee on Justice and Community Safety.

The Standing Committee delivered its recommendations pursuant to that inquiry on 23 June 2022, finding that:

*“The Committee recommends that the ACT Government **support and enact the terms of the petition** to create a system that mirrors the current approach with respect to discrimination complaints.”*⁵⁹

The establishment of an accessible complaints mechanism would improve access to justice for all rights enshrined under the HRA, and would significantly contribute to achievement of the procedural aspects of the human right to a healthy environment. ALHR has made an extensive submission in support of the accessible complaints mechanism.⁶⁰

ALHR further recommends that the ACT Government explore options to ensure that an accessible complaints mechanism is designed to provide access to justice and appropriate remedies for breaches of the human right to a healthy environment, including:

- Consideration of specific funding for the ACT Human Rights Commission and ACT Civil and Administrative Appeals Tribunal to hire experts in environmental matters;⁶¹ and
- Consideration of additional training for the ACT Human Rights Commission, ACT Civil and Administrative Appeals Tribunal and ACT Supreme Court to ensure that judicial and quasi-judicial officers have sufficient environmental expertise to adjudicate alleged breaches of the human right to a healthy environment.⁶²

⁵⁹ ACT Legislative Assembly Standing Committee on Justice and Community Safety, *Report into the Inquiry into Petition 32-21 (No Rights Without Remedy)* (Inquiry Findings, June 2022) iv.

⁶⁰ Australian Lawyers for Human Rights, *No Rights Without Remedy: Submission to Inquiry into Petition 32-21* (Submission, 2022) <<https://alhr.org.au/wp/wp-content/uploads/2022/04/07-04-22-ALHR-Submission-ACT-HRA-No-Rights-Without-RemedyFC.pdf>>.

⁶¹ Annika Reynolds et al, *Submission to the Inquiry into Petition 32-21 (No Rights Without Remedy)* (GreenLaw, Submission, 2022) 6-8.

⁶² See generally George Pring and Catherine Pring, *Greening justice: creating and improving environmental courts and tribunals* (The Access Initiative, 2009).

Conclusion

ALHR welcomes the opportunity to be able to contribute to this discussion and commends the Discussion Paper.

ALHR is strongly supportive of the inclusion of the right to a clean, healthy and sustainable environment in the *Human Rights Act 2004*. Given the unprecedented risk that human activity poses to our land, air and water; and in turn the risk this poses to human life, health and happiness, it is timely for the ACT Government to move to enshrine this right in legislation.

For this right to be meaningful and enforceable, there must be an accessible complaints mechanism also enshrined in law. To that end, we urge the ACT Government to implement the recommendations of the No Rights Without Remedy Parliamentary Inquiry as a matter of priority and ensure the ACT Human Rights Commission and ACT Civil and Administrative Appeals Tribunal are adequately resourced to hear and resolve these matters.

Finally, we strongly urge the ACT Government to consult deeply with First Nations people in the ACT and ensure their knowledge, expertise and experience be respected and reflected in any legislative reform.

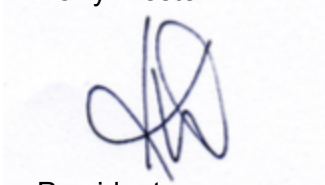
Our nation's climate and environmental crisis must be approached from within a human rights framework. The ACT's laws should recognise that a healthy environment is a prerequisite for the enjoyment of all Canberran's fundamental human rights. This is the only way that we can ensure those most vulnerable to the impacts of climate change and environmental degradation are not left behind.

It's time for the ACT to recognise in law that policy and legislation will be enhanced when the human right to a healthy environment is at the centre of government decision-making.

Please do not hesitate to contact me at president@alhr.org.au if you would like to discuss any aspect of this submission.

Yours sincerely,

Kerry Weste



President
Australian Lawyers for Human Rights

Any information provided in this submission is not intended to constitute legal advice, to be a comprehensive review of all developments in the law and practice, or to cover all aspects of the matters referred to. Readers should take their own legal advice before applying any information provided in this document to specific issues or situations.