



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

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Submission Cover Sheet

Inquiry into Human Rights (Healthy Environment) Amendment Bill 2023

Submission Number: 008

Date Authorised for Publication: 06 December 2023



ACT
Government

ACT Government Submission

Standing Committee on Justice and
Community Safety Inquiry into the
Human Rights (Healthy Environment)
Amendment Bill 2023

November 2023

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1. Introduction

The ACT Government welcomes the opportunity to provide a submission to the Standing Committee on Justice and Community Safety's (the Committee) inquiry into the Human Rights (Healthy Environment) Amendment Bill 2023 (the Bill). The Bill provides express recognition of the right to a clean, healthy and sustainable environment as a standalone right in the *Human Rights Act 2004* (Human Rights Act).

This submission seeks to assist the Committee by providing contextual information in relation to the background to the right and its evolution at the international level, the local impetus for reform, and the nature and scope of the right as provided for in the Bill. The submission is intended to supplement information presented in the Explanatory Statement to the Bill and the presentation speech of the Minister for Human Rights, Tara Cheyne MLA.

2. Context for reforms

A. Human Rights in the ACT

The ACT is a leading human rights jurisdiction in Australia and was the first Australian jurisdiction to introduce a legislative bill of rights.

The Human Rights Act provides statutory protection of human rights in the Territory. The Human Rights Act protects a number of civil and political rights as well as some economic, social and cultural rights (ESC rights). These rights are primarily drawn from the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Public authorities are required to act consistently with human rights recognised in the Act and to give proper consideration to relevant rights in decision making.¹

The Government has continued to undertake reforms to strengthen the Human Rights Act, including the introduction of the right to education, cultural rights of Aboriginal and Torres Strait Islander peoples, and the right to work. Our Human Rights Act has proved to be a model for other jurisdictions to follow, with Victoria enacting their *Charter of Human Rights and Responsibilities Act* in 2006 and Queensland adopting their *Human Rights Act* in 2019.

As part of the Government's commitment to strengthen the culture of human rights in the ACT, in the Parliamentary and Governing Agreement for the Tenth Legislative Assembly, the Government committed to exploring the introduction of the right to a healthy environment.

B. Environmental and climate challenges

The United Nations High Commissioner for Human Rights has placed the triple planetary crisis – the threat of climate change, environmental pollution, and biodiversity loss – at the top of the human rights challenges of our era.²

In Australia, we continue to witness harm to our natural environment and impacts on our physical and mental health, including through toxic pollution, natural disasters driven by climate change, destruction of

¹ *Human Rights Act 2004*, section 40B.

² 'Moment for Nature' (video message), delivered by the High Commissioner for Human Rights, Michelle Bachelet at High-Level Thematic Debate of the General Assembly, 19 July 2022, <https://www.ohchr.org/en/statements/2022/07/moment-nature>

First Nations cultural heritage, and losses of our iconic and native species.³ The Intergovernmental Panel on Climate Change's (IPCC) recent Sixth Assessment Report warns that "the [Australasia] region faces an extremely challenging future".⁴

At a local level, Canberra joined many other cities, states and territories around the world in 2019 in declaring a state of climate emergency, acknowledging the need for urgent action across all levels of government.⁵ The ACT Climate Change Strategy sets out measures the Government intends to take to address the challenge of climate change including reducing greenhouse emissions and building resilience to climate change impacts. The ACT is also taking key actions in our preventive health strategy which focus on the promotion of active living and rely to a large extent on broader environmental factors such as safe and accessible urban spaces, nature and other amenities.⁶

There is a growing body of national, regional and international law that recognises the close relationship between human rights and the environment. This is coupled with a trend across different countries towards adoption of laws with express protection for individuals' right to a clean, healthy and sustainable environment.

C. International developments

It has been over 50 years since the right to a healthy environment was recognised in the Stockholm Declaration. The Stockholm Declaration, which contained 26 principles, placed environmental issues at the forefront of international concerns and marked the start of a dialogue between industrialised and developing countries on the link between economic growth, the pollution of the air, water, and oceans and the well-being of people around the world.

More recently, the new emerging right to a healthy environment has been recognised by the United Nations (UN) Human Rights Council and the UN General Assembly. In October 2021, Human Rights Council made a resolution recognising the right to a safe, clean, healthy and sustainable environment as a human right that is important for the enjoyment of other human rights.

In a landmark resolution on 28 July 2022, the UN General Assembly reaffirmed recognition of the human right to a clean, healthy and sustainable environment. 161 member States voted to adopt the resolution, including Australia. Many of the UN member States recognise the right to a healthy environment in constitutional, legislative texts and/or accession to regional treaties incorporating the right.⁷

The General Assembly recognised the right to a clean, healthy and sustainable environment as a human right, and noted the relationship of this right with other rights and existing international law. The resolution affirmed that the promotion of the right requires the full implementation of multilateral environment agreements under the principles of international environmental law. It also called upon States, international organisations, business enterprises and other relevant stakeholders to adopt policies to

³ Environmental Defenders Office, *A Healthy Environment is a Human Right: Report on the Status of the Human Right to a Healthy Environment*, p. 24.

⁴ Intergovernmental Panel on Climate Change, 'Climate Change 2022: Impacts, Adaptation and Vulnerability', p. 1585.

⁵ ACT Government, *ACT Climate Change Strategy 2019-2025*, p. 1.

⁶ ACT Health, *Healthy Canberra ACT Preventive Health Plan 2020-2025* (2019), p. 6-7.

⁷ Human Rights Council A/HRC/43/53, Report of the Special Rapporteur on the issue of human rights, obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, *Right to a healthy environment: good practices*, 30 December 2019.

enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all.

D. Local impetus for reform

As part of the Government's commitment to strengthen the culture of human rights in the ACT, in the Parliamentary and Governing Agreement for the Tenth Legislative Assembly, the ACT Labor and ACT Greens committed to exploring the introduction of the right to a healthy environment. The PAGA recognises the need to focus on the fundamental challenges and opportunities facing the ACT as we emerge from a global health and economic crisis and the real and immediate threat climate change poses to our city, our country and the world.

In February 2022, the ACT Legislative Assembly passed an Assembly Resolution following the motion of Ms Jo Clay, MLA, calling on the Government to investigate the inclusion of a right to a healthy environment into the Human Rights Act, conduct community consultation, and report back to the Assembly.

On 30 June 2022 the ACT Government commenced public consultation on these issues, seeking community views on how the right to a healthy environment could be included in the Human Rights Act and what the content of the right could be via the release of a discussion paper and online survey via YourSay.⁸ A public panel discussion was also hosted to commence consultation. Forty written responses were received to the discussion paper, which included 22 written submissions and 18 survey responses.

During consultation, the Government heard from more than forty organisations and individuals representing the interests of the environmental movement, the community sector, healthcare providers, the business and property sectors, ACT community councils, Aboriginal and Torres Strait Islander health research, and community health research. Submissions and survey responses came from individuals of all ages, grassroots environmental and community groups that are involved in environmental initiatives, as well as organisations that represent the interests of people with chronic health conditions impacted by the environment. Many of the more prominent advocacy organisations engaged in activism for human rights and the environment within the ACT and nationally also participated in conversations.

The community's views were sought on the implications, benefits and challenges of protecting the right to a healthy environment and other wider considerations for implementation. The community responses expressed strong support for introducing the right to a healthy environment into the Human Rights Act. This was seen as a positive initiative to place people and community at the centre of environmental protection and recognise the importance to our collective wellbeing of restoring and protecting the environment.

The feedback noted that a range of benefits would flow from recognising the right to a healthy environment, including greater awareness and dialogue of environmental impacts and encouraging more ambitious goals to protect our environment and climate for a sustainable future. In particular, it was considered that the right would have significant benefits for Aboriginal and Torres Strait Islander peoples, who hold a unique relationship to country as traditional owners and custodians and who are

⁸ ACT Justice and Community Safety Directorate, Discussion Paper, *Right to a Healthy Environment*, https://hdp-au-prod-app-act-yoursay-files.s3.ap-southeast-2.amazonaws.com/2316/5622/1655/Discussion_Paper_-_Right_to_a_Healthy_Environment.pdf

disproportionately impacted by climate change, environmental degradation, loss of biodiversity and the consequential adverse health and wellbeing impacts.⁹

On 29 November 2022, the Minister for Human Rights, Tara Cheyne MLA, committed to the Government introducing the right to a healthy environment into the Human Rights Act in this term of Parliament.

3. Human Rights (Healthy Environment) Amendment Bill 2023

The Human Rights (Healthy Environment) Amendment Bill 2023 was introduced by the Minister for Human Rights on 26 October 2023. In an Australian first, the Bill provides express statutory recognition for the right to a clean, healthy and sustainable environment.

The Bill amends the Human Rights Act to insert a new section into Part 3A 'Economic, social and cultural rights'. The key features of the Bill include:

- inserting a new right into the Human Rights Act recognising that everyone has the right to a clean, healthy and sustainable environment,
- providing that in relation to the new right, the remedies in section 40C of the Human Rights Act, being the right of individuals affected by a breach of a human rights obligation by a public authority and the ability to raise a breach of human rights in other proceedings, will not initially apply, and
- requiring a statutory review of the operation of the new right and the ongoing need for the restriction on the right to a healthy environment in relation to the section 40C remedies, with a report to be tabled as soon as practicable after five (5) years of the Bill commencing operation.

The Bill will commence within six months after notification, following debate and passage by the Legislative Assembly.

A. Defining the right to a healthy environment

Noting that the right to a healthy environment has not yet been fully articulated in a binding international treaty or considered by UN complaints bodies as a stand-alone right, the right in the proposed new section 27C has been drafted to be broad and flexible. Adopting the language of the UN General Assembly Resolution, that everyone has the right to a clean, healthy and sustainable environment, will allow the right to evolve and develop consistently with international law.

While other bespoke and prescriptive definitions were explored, these risked diverging from the developing international understandings of the right. A key consideration is that the Human Rights Act is intended to reflect and give effect to Australia's international human rights obligations in the ACT context. It is thus important that the rights protected in the Human Rights Act mirror and connect with international human rights, and that the interpretation of the scope and content these rights can be informed by international human rights case law and commentary of the UN treaty bodies.

⁹ Your Say Report, Right to a Healthy Environment – Report on What We Heard, presented to the Legislative Assembly, November 2022, https://hdp-au-prod-app-act-yoursay-files.s3.ap-southeast-2.amazonaws.com/8716/6967/9172/Your_Say_Report_-_Right_To_A_Healthy_Environment_-_Report_On_What_We_Heard.pdf

An alternative formulation has been proposed by the Australian Human Rights Commission in its position paper on a federal Human Rights Act which would more narrowly and prescriptively define a right to a healthy environment and the scope of obligations. This definition draws only on aspects of the right protected under existing international human rights treaties.¹⁰ This definition is narrower than that contemplated by the UN General Assembly Resolution, which was underpinned by reports of the Special Rapporteur on Human Rights and the Environment (Special Rapporteur). In particular, the focus on avoiding pollution and toxicity does not incorporate the key aspects of ensuring a safe climate, and protecting the natural environment and biodiversity. Based on community responses to the public consultation, the Government considered that there is a strong expectation that the ACT's right to a healthy environment would include these elements and align with the broader UN General Assembly articulation of the right which address all three of the global environmental challenges described as the triple planetary crisis.

B. Nature and scope of the right

The right to a healthy environment has been the subject of a number of reports by the Special Rapporteur which provide guidance on the scope of the right and obligations. In particular, the Special Rapporteur's publication in 2018 of the 'Framework Principles' for the right seeks to articulate core obligations in respecting and fulfilling the right. The principles confirm that the right encompasses the following substantive elements:

- (a) clean air,
- (b) a safe climate,
- (c) access to safe water and adequate sanitation,
- (d) healthy and sustainably produced food,
- (e) non-toxic environments in which to live, work, study and play, and
- (f) healthy biodiversity and eco-systems.

The right also protects procedural elements, such as access to information on environmental risks and harms, participation in environmental-decision-making, and requiring the prior assessment of possible environmental impacts of proposed projects and policies, including their potential effects on human rights.

Aspects of the right to a healthy environment will be subject to progressive realisation, which require governments to take reasonable steps within available resources to achieve these rights, and not to take retrogressive steps. Progressively realisable aspects are generally those obligations that require ongoing investment to fulfil and can continue to be improved, such as setting and implementing targets to address climate change.

The obligation of States to achieve progressively the full realisation of these rights by all appropriate means requires States to take deliberate, concrete and targeted measures towards that goal, but States have some discretion in deciding which means are appropriate in light of available resources.

¹⁰ Australian Human Rights Act, 'Free and Equal', *Position Paper: A Human Rights Act for Australia*, 2022, pp. 115, 131.

The discretion is not unlimited and is constrained by two general obligations that require immediate action by the Government:

- (a) to ensure no discrimination in the way the right to a healthy environment is enjoyed (reflected in the new section 27C(2)), and
- (b) avoid any unjustified retrogressive measures that may deprive people of rights as currently enjoyed.

As with other rights in the Human Rights Act, the right to a healthy environment is not absolute and can be subject to such limitations as are demonstrably justifiable in a free and democratic society. Section 28 of the Human Rights Act provides a principled approach to allow human rights considerations to be factored into policy and decision making, and would permit the Government to balance the right to a healthy environment against legitimate public interest objectives, including competing rights.

This means that when the Government is introducing legislation, and when public authorities are making decisions and exercising their functions, the right to a healthy environment would not prohibit actions that have adverse environmental effects, but would require that any interferences with the right be reasonable and demonstrably justified. This would include an assessment of whether there are other ways reasonably available to achieve the same objective that would have less impact on the right to a healthy environment.

Further detail about the current understanding of the scope and nature of the right is set out in the Explanatory Statement to the Bill.

C. Enforcement of the right

Given the broad range of existing laws, initiatives and practices in the ACT that are directed at environmental protection, complemented by the robust processes of human rights scrutiny through cabinet and assembly processes, the ACT is well placed to implement and comply with the right to a healthy environment. Further, the emerging understanding of the right is largely consistent with existing international environmental agreements and reflects obligations that are already understood and implemented in many countries, including Australia.

The specific obligation for public authorities to act consistently with human rights and to give proper consideration to relevant rights in decision making in section 40B of the Human Rights Act will apply to the new right.

To allow public authorities time to fully understand, implement and institutionalise the right to a healthy environment in decision-making, policies and legislation, the direct right of action to the ACT Supreme Court for a breach of public authority obligations, and the ability to raise public authority breaches as part of other litigation, set out in section 40C of the HR Act, will not initially apply to this right. This reflects the fact that the right has only recently been formally recognised by the UN General Assembly and has not yet been articulated in a binding treaty and that the ACT is the first Australian jurisdiction to introduce the right. This limitation will also allow for further development and crystallisation of the right at the international level, which may provide greater clarity on the obligations owed before the right becomes justiciable.

The focus in this initial implementation period will be on building capacity of public authorities to understand and give effect to this right, and ensuring that this right is protected through consideration in legislation, policy and decision making. Training and providing time for public authorities to consider the right will be a key priority. Fact sheets will be developed by the Justice and Community Safety Directorate, in consultation with the Human Rights Commission, to assist in the implementation of the right.

While it would not be possible to rely on a breach of the right to a healthy environment by a public authority to bring a Supreme Court action, or to raise a breach in other legal proceedings during this initial period, this constraint would not render right ineffective. All of the other enforcement mechanisms in the Human Rights Act would apply to the right to a healthy environment, including:

- (a) obligations on public authorities to give proper consideration to relevant human rights in decision making and to act consistently with human rights,
- (b) the requirement for the Attorney-General to certify compatibility of new Government Bills,
- (c) the right would form part of the scrutiny by the Legislative Assembly Scrutiny of Bills Committee,
- (d) the requirement for Courts and decision makers to interpret laws to be consistent with human rights, as far as possible and consistent with the purpose of the law,
- (e) the ability for the Supreme Court to issue a declaration of incompatibility where a law cannot be interpreted to be compatible with the right to a healthy environment, and
- (f) the ability to bring complaints to the Human Rights Commission under the Human Rights (Complaints) Legislation Amendment Bill 2023 which was passed by the Legislative Assembly on 28 November 2023 and is expected to commence operation in 2024.

The final mechanism at (f) above is important as it will provide an accessible mechanism for individuals to raise and resolve concerns. It will further assist to identify key areas of interaction of the right to a healthy environment with decision making to improve practice.

A specific provision is included in the Bill (proposed new section 40C(5B)) to clarify that the restriction on litigation would not have any effect on the ability to take action in relation to breaches of other rights in the Human Rights Act that include aspects of the right to a healthy environment, such as the right to life and the cultural rights of Aboriginal and Torres Strait Islander peoples. This means a person would not be precluded from bringing a matter to the ACT Supreme Court or relying on the person's other rights protected in the Human Rights Act in other legal proceedings involving an environmental issue.

The proposal to limit the application of a new human right is not unprecedented. When the right to education was introduced into the Human Rights Act it was subject to more stringent restrictions in relation to enforcement of public authority obligations. These restrictions were later removed.

This approach will best achieve the Government's implementation objective of having a broad, principled approach that is able to evolve with international human rights law, in a way that allows for public authorities to engage with and develop a robust understanding of the application of it. It also preserves the key features of the ACT's dialogue model.

D. Statutory review

The Bill includes an addition section (new section 43) in the Human Rights Act to impose a review obligation on the Minister for Human Rights to conduct a review and present a report to the Legislative Assembly as soon as practicable after the Bill commencing operation. The review must include consideration of the need for the restriction on litigation and will also assess the impact of the right and any refinement needed based on further development and crystallisation of the right at the international level.

The review provision will provide ACT Government directorates and agencies with the certainty of a five year period before any changes to allow litigation would be implemented, but provides for the review to commence earlier to minimise delays.

4. Conclusion

The ACT Government welcomes the Inquiry into the Human Rights (Healthy Environment) Amendment Bill 2023. The ACT Government is committed to continuing to build and strengthen our human rights culture in the ACT. Introducing the right to a healthy environment will ensure environmental and climate considerations feature in public authority functions and decision-making, particularly in the development, implementation and interpretation of legislation. This will institutionalise a greater understanding of human rights and environmental considerations across Government and the broader community.