



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

Mr Peter Cain MLA (Chair), Dr Marisa Paterson (Deputy Chair), Mr Andrew Braddock MLA

Submission Cover Sheet

Inquiry into Human Rights (Healthy Environment) Amendment Bill 2023

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SUBMISSION TO THE INQUIRY
INTO THE HUMAN RIGHTS
(HEALTHY ENVIRONMENT)
AMENDMENT BILL 2023

8 December 2023



Acknowledgement of Country

We recognise that Aboriginal and Torres Strait Islander Nations are the first sovereigns of the lands and waters of this continent. This sovereignty was never ceded and continues to this day, informing Indigenous connection to land, waters and community.

Indigenous respect and guardianship over Country is an integral part of environmental justice and must be acknowledged and respected for the realisation of environmental justice. Indigenous leadership, autonomy and justice are also critical to broader climate justice in Australia.

GreenLaw and its members acknowledge we meet on Indigenous land and, in working towards environmental justice, we stand beside the traditional guardians of these lands. We recognise that during the writing of this submission we met on Ngunnawal and Ngambri Country. We pay our respects to Elders past and present.

GreenLaw

GreenLaw welcomes the opportunity to provide feedback to the ACT Legislative Assembly Standing Committee on Justice and Community Safety on the Human Rights (Healthy Environment) Amendment Bill 2023 (“the Bill”). As one of the key organisations named by the Hon Jo Clay MLA in a motion passed on 10 February 2022 calling on the ACT government to investigate the inclusion of the right to a healthy environment into the Human Rights Act 2004 (ACT),¹ we are pleased to see that a Bill has now been introduced into the ACT Legislative Assembly to recognise the right.

GreenLaw is a young person-led law reform and legal research institute leveraging the expertise and imagination of the next generation of lawyers to tackle the climate crisis. GreenLaw works in partnership with Universities, non-government organisations and other industry partners to deliver policy development, legal research and law reform recommendations. GreenLaw conducts novel research in four core research areas: democracy and the environment, a just transition, thriving ecosystems, and future communities. GreenLaw was recognised as a key civil society group addressing the climate crisis by the Pro Bono Centre’s *2020 Pro Bono Guide to the Climate Crisis*.

This submission reflects the views of GreenLaw researchers and is not intended to be an institutional submission by the Australian National University nor is it intended to represent the views of the respective employers of voluntary researchers.

If it would be of assistance, we are happy to be contacted for further comment, please email: green_law@outlook.com.

¹ Jo Clay MLA, Motion: to investigate the inclusion of the human right to a healthy environment in the Human Rights Act (10 February 2022), https://www.parliament.act.gov.au/__data/assets/pdf_file/0003/1946226/NP-38-10-February-2022.pdf.

GreenLaw Supports the Full Protection of the Human Right to a Healthy Environment

GreenLaw welcomes the opportunity to provide feedback to the ACT Legislative Assembly Standing Committee on Justice and Community Safety on the Human Rights (Healthy Environment) Amendment Bill 2023 (“the Bill”). As one of the key organisations named by the Hon Jo Clay MLA in a motion passed on 10 February 2022 calling on the ACT government to investigate the inclusion of the right to a healthy environment into the Human Rights Act 2004 (ACT),² we are pleased to see that a Bill has now been introduced into the ACT Legislative Assembly to recognise the right.

In this submission we make some preliminary observations of the consultation process that has predicated the introduction of the Bill before discussing our central recommendations to the ACT Legislative Assembly Standing Committee on Justice and Community Safety.

Upholding Human Rights During Consultation

As a preliminary note, GreenLaw is disappointed that, despite our inclusion in the above motion and our position as a young person led organisation, we have had limited opportunities to engage in the development of the Bill to date.

This is particularly disappointing in the context of a consultation on human rights. It is recognised under international human rights law that people have the right to take conduct in public affairs (see Article 25 of the ICCPR), and furthermore, the right to meaningful consultation is explicitly protected for vulnerable groups (for example, people with disability pursuant to Article 29 of the CRPD). In the ACT these rights find their expression under s 17 of the *Human Rights Act 2004* (ACT). The right to consultation is also an aspect of the human right to a healthy environment, forming part of the right’s procedural aspects (as set out below).

GreenLaw made an extensive submission to the ACT Justice and Community Safety Directorate’s *Discussion Paper on the Right to a Healthy Environment*³ and was invited to one roundtable during the 1.5 year consultation period undertaken by the ACT Government on this matter.

We urge the Standing Committee to consider the [submission](#) we made to the ACT Justice and Community Safety Directorate (annexed to this submission), which provides extensive analysis of the following:

² Jo Clay MLA, Motion: to investigate the inclusion of the human right to a healthy environment in the Human Rights Act (10 February 2022), https://www.parliament.act.gov.au/__data/assets/pdf_file/0003/1946226/NP-38-10-February-2022.pdf.

³ See Conservation Council ACT Region, *Submission to the Justice and Community Safety Directorate: Right to a Healthy Environment in the ACT* (Submission, August 2022).

- the importance of enshrining the human right to a healthy environment given existing environmental and climate challenges across the ACT, and in light of the particular vulnerabilities of children and young people to the impacts of environmental degradation and climate change;
- the well-defined content and scope of the human right to a healthy environment as it has developed under international human rights law for many decades prior to the crystallisation of the right by the United Nations General Assembly in *The human right to a clean, healthy and sustainable environment*, A/RES/76/300 (28 July 2022);⁴ and
- the importance of ensuring the human right to a healthy environment is meaningfully and accessibly enforceable, via both the ACT Supreme Court and an accessible complaints mechanism.

GreenLaw is a youth-led organisation, and all the members that have contributed to this submission are under the age of 25. We are the next generation that will face the onerous burden of the climate crisis and biodiversity collapse. A legacy that has been bequeathed upon us by all previous generations and this current generation of leaders.

We recognise that the ACT Government generally takes its responsibilities for protecting our human rights and the importance of ensuring inter-generational equity seriously. We expect the ACT Government and ACT Legislative Assembly to work constructively with young people to protect our future prosperity and equity.

GreenLaw Commends the Protection of the Human Right to a Healthy Environment in ACT Law

GreenLaw strongly supports amendment to the Human Rights Act 2004 (ACT) to enshrine the human right to a clean, healthy and sustainable environment, as set out at s 27C of the Bill.

The current wording of the Bill reflects longstanding and well understood international human rights law. The human right to a healthy environment is composed of procedural and substantive elements and confers an equal access and non-discrimination obligation upon governments.⁵

The procedural elements are:

- **access to environmental information** including live information on environmental conditions and public access to the information and databases that inform environmental decision-making;
- **public participation in environmental decision-making** such that the public, including vulnerable groups, are able to meaningfully participate in and influence environmental decisions, policies and law reform; and

⁴ *The Human Right to a Clean, Healthy and Sustainable Environment*, GA Res 76/300, UN GAOR, 76th sess, Agenda Item 74(b), Supp No 49, UN Doc A/RES/ (24 July 2022).

⁵ 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).

- **access to justice**, namely, mechanisms that enable the public to enforce the human right to a healthy environment. Best practice access to justice incorporates broad standing to sue, measures to overcome economic barriers and appropriate quasi-judicial and judicial training in environmental matters.⁶

The substantive elements of the right extend to:

- **clean air** including monitoring air quality and addressing all sources of air pollution;
- **a safe climate**, which requires governments to limit climate change to 1.5°C warming or less, and further, to implement appropriate adaptation measures;
- **healthy and sustainably produced food** incorporating two major elements, providing adequate and nutritious food to all people and the development of sustainable agricultural systems;
- **access to safe water and adequate sanitation** including protecting water sources and addressing water pollution, as well as measures to provide adequate sanitation to all people;
- **non-toxic environments in which to live, work and play**, which requires governments to regulate and remove toxic substances from the environment; and
- **healthy ecosystems and biodiversity** imposing broad obligations upon governments to protect the integrity of native ecosystems, preserve biodiversity and protect access to ecological services provided by local ecosystems.

Put another way, the substantive aspects of the human right to a healthy environment are the means by which communities are empowered to ensure the substantive elements of the right are achieved in practice.

We commend the current wording of s 27C of the Bill because it reflects the well understood articulation of the human right to a healthy environment and ensures that the Territory is well placed to protect all of the procedural and substantive aspects of the right.

However, we note that the human right to a healthy environment is not an economic and social human right (second generation right) as expressed by various UN Treaty Bodies, Special Rapporteurs, foreign jurisprudence, and the general practice of the international community. The human right to a healthy environment is more accurately categorised as a third-generation human right, otherwise known as a 'solidarity rights'.⁷ The international community has not expressed in regional instruments nor in practice a tendency to divide the human right to a healthy environment into immediately and progressively realisable elements. We recommend that references to the progressive realisation of aspects of the right to a healthy environment be removed from the Bill.

⁶ Ibid 7.

⁷ M. Abdul Hannan, 'Interface between the Third Generation Human Rights and Good Governance in a Globalized World' in Jeffery F. Addicott, Md Jahid Hossain Bhuiyan and Tareq M.R. Chowdhury (eds) *Globalization, International Law, and Human Rights* (Oxford University Press, 2011) 117, 117-118.

The Human Right to a Healthy Environment Should be Fully Enforceable

The current wording of proposed s 40C of the Bill is a direct violation of the human right to a healthy environment and is strongly opposed.

Enforcement mechanisms under the *Human Rights Act* are an essential aspect of ensuring that all the human rights protected under the Act are protected in practice, and further, that a culture of human rights compliance is fostered within ACT public authorities.⁸ The need for accessible enforcement mechanisms is heightened because the capacity of persons to access justice and seek remedies for any breaches of the human right to a healthy environment is a critical component of the right.

In this regard, we commend the introduction of the Human Rights (Complaints) Legislation Amendment Bill 2023, and support the establishment of an accessible complaints mechanism that provides a pathway for individuals to bring complaints regarding alleged breaches of the human right to a healthy environment before the ACT Human Rights Commission.

Nonetheless, we are deeply concerned that the Bill, through operation of s 40C, renders the human right to a healthy environment non-justiciable for the first five years of the Bill's operation. There is no sunset clause nor any other mechanism to provide certainty that any review after five years would result in the justiciability of the human right to a healthy environment. **This is an unacceptable outcome that appears to compromise with unfounded concerns that the protection of the human right to a healthy environment will prove a burden on public authorities.**

The Act imposes direct human rights obligations upon public authorities, pursuant to Pt 5A of the *Human Rights Act*. A person who claims that a public authority has contravened its human rights obligations may start proceedings against that authority in the ACT Supreme Court within one year of the alleged breach (s 40C of the Act). The Act specifically denies damages as a form of relief under the Act (see s 40C(4)) but otherwise leaves the ACT Supreme Court a wide discretion to award any remedy it considers appropriate.

The ACT Supreme Court, in addition to its discretion to award a remedy, may also issue a declaration of incompatibility where it finds that a law of the ACT is incompatible with an enshrined human right under the Act (see ss 32 and 33 of the *Human Rights Act*). This appropriately balances the role of the Court in interpreting human rights and the need for the democratically elected legislator to remain the entity that drafts and reforms law in the Territory.

The above clearly demonstrates that the *Human Rights Act* already imposes a series of safeguards to limit excess litigation, including limitation periods and limits on the Court's discretion to award remedies. In addition to these safeguards, we note that the ACT Supreme

⁸ 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) *The University of New South Wales Law Journal* 136, 169.

Court is independently empowered to regulate its proceedings and ensure that vexatious or spurious litigation is avoided.

The experience of the ACT to date has been that the *Human Rights Act* has functioned primarily as a means of establishing a human rights dialogue within all branches of government, rather than as a vehicle for strategic litigation. We note that the ACT Human Rights Commissions' reviews of the Human Rights Act have consistently indicated that the ACT Supreme Court is an **underutilised** avenue of enforcement. Over a decade, the Human Rights Act was mentioned in less than 200 judgments of the ACT Supreme Court.⁹ The ACT Supreme Court has declared legislation invalid for human rights non-compliance on a mere two occasions.¹⁰

The ACT Government itself has acknowledged that the *Human Rights Act* has:

- Increased awareness and understandings of human rights issues throughout government;¹¹
- Positively impacted political debates and the consideration of policy issues from a human rights perspective;¹² and
- Provided an 'impetus' for agencies and government bureaucracies to consider their human rights obligations when making decisions or considering the implications of proposed law reform.¹³

However, access to judicial enforcement remains an important mechanism for access to environmental remedies and to maximise the normative impact of the recognition of the human right to a healthy environment. Unenforceable human rights are little more than aspirational statements, and have limited impact on human rights compliance in any one jurisdiction.

By contrast, a range of quantitative studies have found that the full protection of the human right to a healthy environment (including enforcement mechanisms) has significant benefits including strengthening democratic norms in relation to the environment, and ultimately, substantive environmental outcomes. For example, a 2012 study of constitutional environmental rights found that countries that had enshrined the right to a healthy environment enjoyed greater environmental outcomes. For example, environmental laws were strengthened, and environmental rights were imbedded in those instruments (including greater access to environmental information, participation in decision-making and access to justice).¹⁴ Furthermore, governments and courts were more likely to fill regulatory gaps in relation to the

⁹ ACT Human Rights Commission, *Look who's talking: A snapshot of ten years of dialogue under the human rights act 2004* (Report, 2014), 4-5.

¹⁰ See *Davidson v Director-General, Justice and Community Safety Directorate* [2022] ACTSC 83 and , *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147.

¹¹ 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), 24.

¹² *Ibid* 2.

¹³ ACT Justice and Community Safety Directorate, *Economic, social and cultural rights in the Human Rights Act 2004 – Section 43 review* (November 2014) 26..

¹⁴ David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012).

environment, and to prevent rollbacks of environmental laws and standards.¹⁵ Ultimately, the ecological footprint of those countries was reduced.¹⁶

Boyd, the author of that study, noted:

However, when the consistent relationship between constitutional provisions and superior environmental performance is combined with the evidence of stronger environmental legislation, enhanced opportunities for public participation in environmental governance, and increasing enforcement of environmental laws, the case for entrenching environmental protection in national constitutions must be regarded as compelling.¹⁷

A further study in 2016, conducted by Jeffords and Minkler, found that jurisdictions that had the codified environmental rights had better scores on the Environmental Performance Index.¹⁸

The ACT has, once again, been a leader in Australia by introducing a Bill to protect the human right to a healthy environment as a standalone provision. We commend the government's leadership and urge the ACT Legislative Assembly to ratchet up its ambition, and ensure the human right to a healthy environment is protected in practice not only on paper.

Summary of Recommendations

We therefore make five recommendations that we encourage the Standing Committee to adopt to meaningfully and fully protect the human right to a healthy environment in a manner that contributes to the flourishing of human and non-human life in our city. Those recommendations are:

Recommendation 1

That the human right to a clean, healthy and sustainable environment be enshrined as a standalone human right in the Human Rights Act 2004 (ACT), as currently articulated in s 27C of the Bill.

Recommendation 2

That s 40C of the Bill be removed, to ensure the human right to a healthy environment is enforceable, and fulfils the procedural aspects of the human right to a healthy environment.

Recommendation 3

That the limitations and balancing provisions already contained in the Human Rights Act 2004 (ACT) are sufficient to ensure the human right to a healthy environment is appropriately

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid 20.

¹⁸ Chris Jeffords and Lanse Minkler, 'Do Constitutions Matter? The Effect of Constitutional Environmental Rights Provisions on Environmental Outcomes' (2016) 69(2) *Kyklos* 294.

balanced against other considerations and, in combination with existing ACT Supreme Court procedure rules, are sufficient safeguards against vexatious litigation.

Recommendation 4

That Note 1 under cl 4 of the Bill be amended such that the only primary source of the human right to a healthy environment is listed as the United Nations General Assembly, The human right to a clean, healthy and sustainable environment, A/RES/76/300 (28 July 2022), reflecting the human right's status as a third generation right rather than an economic, social or cultural human right.



Annika Reynolds, Judita Hudson, Penelope Hallam, Saige Kelsey, Erin Ronge and Peta Bulling

ANNEXURE A: SUBMISSION TO THE RIGHT TO A HEALTHY ENVIRONMENT DISCUSSION PAPER

7 September 2022

Acknowledgement of Country

We recognise that Aboriginal and Torres Strait Islander Nations are the first sovereigns of the lands and waters of this continent. This sovereignty was never ceded and continues to this day, informing Indigenous connection to land, waters and community.

Indigenous respect and guardianship over Country is an integral part of environmental justice and must be acknowledged and respected for the realisation of environmental justice. Indigenous leadership, autonomy and justice are also critical to broader climate justice in Australia.

GreenLaw and its members acknowledge we meet on Indigenous land and, in working towards environmental justice, we stand beside the traditional guardians of these lands. We recognise that during the writing of this submission we met on Ngunnawal and Ngambri Country, as well as the lands of the Dharug and Gadigal Peoples. We pay our respects to Elders past and present.

GreenLaw

GreenLaw welcomes the opportunity to provide a submission in response to the Right to a Healthy Environment Discussion Paper proposed by the ACT Government.

GreenLaw is a young person-led law reform and legal research institute leveraging the expertise and imagination of the next generation of lawyers to tackle the climate crisis. GreenLaw works in partnership with Universities, non-government organisations and other industry partners to deliver policy development, legal research and law reform recommendations. GreenLaw conducts novel research in four core research areas: democracy and the environment, a just transition, thriving ecosystems, and future communities. GreenLaw was recognised as a key civil society group addressing the climate crisis by the Pro Bono Centre's *2020 Pro Bono Guide to the Climate Crisis*.

GreenLaw is currently engaged in a joint campaign with Australian Lawyers for Human Rights on enshrining the right to a healthy environment in the *Human Rights Act 2004* (ACT). This submission reflects, and is intended to supplement, that ongoing work.

This submission reflects the views of GreenLaw researchers and is not intended to be an institutional submission by the Australian National University or University of Sydney nor is it intended to represent the views of the respective employers of voluntary researchers.

If it would be of assistance, we are happy to be contacted for further comment, please email: green_law@outlook.com.

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Executive Summary

GreenLaw **strongly supports** amendment to the *Human Rights Act 2004* (ACT) to enshrine the human right to a clean, healthy and sustainable environment (hereafter referred to as the 'human right to a healthy environment' or the 'right').

The human right to a healthy environment is composed of procedural and substantive elements and confers an equal access and non-discrimination obligation upon governments.¹⁹The procedural elements are:

- **access to environmental information** including live information on environmental conditions and public access to the information and databases that inform environmental decision-making;
- **public participation in environmental decision-making** such that the public, including vulnerable groups, are able to meaningfully participate in and influence environmental decisions, policies and law reform; and
- **access to justice**, namely, mechanisms that enable the public to enforce the human right to a healthy environment. Best practice access to justice incorporates broad standing to sue, measures to overcome economic barriers and appropriate quasi-judicial and judicial training in environmental matters.²⁰

The substantive elements of the right extend to:

- **clean air** including monitoring air quality and addressing all sources of air pollution;
- **a safe climate**, which requires governments to limit climate change to 1.5°C warming or less, and further, to implement appropriate adaptation measures;
- **healthy and sustainably produced food** incorporating two major elements, providing adequate and nutritious food to all people and the development of sustainable agricultural systems;
- **access to safe water and adequate sanitation** including protecting water sources and addressing water pollution, as well as measures to provide adequate sanitation to all people;
- **non-toxic environments in which to live, work and play**, which requires governments to regulate and remove toxic substances from the environment; and
- **healthy ecosystems and biodiversity** imposing broad obligations upon governments to protect the integrity of native ecosystems, preserve biodiversity and protect access to ecological services provided by local ecosystems.

¹⁹ 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).

²⁰ Ibid 7.

Put another way, the substantive aspects of the human right to a healthy environment are the means by which communities are empowered to ensure the substantive elements of the right are achieved in practice.

In this submission we outline why the human right to a healthy environment should be enshrined in ACT law and then analyse how such reforms should be enacted. Our environment is at risk because of a range of challenges in the ACT, namely, climate change, unsustainable development and biodiversity loss. Despite the ACT Government's leadership in this area, the procedural and substantive dimensions of our human right to a healthy environment are not being consistently achieved for all Canberrans. This is particularly acute for young people who are increasingly exposed to severe climate change and biodiversity loss. It is an integral component of inter-generational equity that our human rights as young people are protected in law.

This submission will address the following questions that arise from the Discussion Paper:

- How could we define the right to a healthy environment?
- What duties could be included for the Government and private entities to ensure respect for individuals' right to a healthy environment?
- What additional measures could be considered to ensure protection of the right to healthy environment for vulnerable groups?
- How could the Government go about fulfilling the right to a healthy environment?

GreenLaw is not an Indigenous-led organisation and has therefore not specifically addressed the component of the Discussion Paper that discusses Aboriginal and Torres Strait Islander People. We strongly encourage the ACT Government to ensure that Indigenous Peoples across the ACT are fully and meaningfully engaged in this consultation process. This includes the ACT Government ensuring that their consultations are accessible and respectful.²¹

Our central recommendation arising from the Discussion Paper is that the ACT Government should enshrine the human right to a healthy environment in broad terms, consistent with international customary laws and norms. We believe that the right should be defined broadly in the *Human Rights Act* and that the implementation of the right should be articulated in more detail through consequential reforms to environmental and planning laws, as well as government policies and procedures.

It is during the implementation stage of the right that additional considerations should be considered by the ACT Government, namely, integrating a rights-based approach to environmental governance entities, how to best protect the rights of vulnerable groups, and therefore, ultimately how to fulfil the human right to a healthy environment.

²¹ See generally Ambelin Kwaymullina, 'Research, Ethics and Indigenous Peoples: An Australian Indigenous perspective on three threshold considerations for respectful engagement' (2016) 12(4) *AlterNative: International Journal of Indigenous Peoples* 437.

We therefore make 15 recommendations that we encourage the ACT Government to adopt to meaningfully and fully protect the human right to a healthy environment in a manner that contributes to the flourishing of human and non-human life in our city. Those recommendations are:

Summary of Recommendations

Recommendation 1

That the human right to a clean, healthy and sustainable environment be enshrined as a standalone human right in the Human Rights Act 2004 (ACT).

Recommendation 2

That the human right to a clean, healthy and sustainable environment be defined broadly and consistently with the UN General Assembly Resolution and UN Human Rights Committee Resolution recognising the right.

Recommendation 3

That the limitations and balancing provisions already contained in the Human Rights Act 2004 (ACT) are sufficient to ensure a broadly defined human right to a healthy environment is appropriately balanced against other considerations.

Recommendation 4

That the human right to a clean, healthy and sustainable environment be defined broadly and without listing certain immediately realisable obligations, consistent with international customary law and norms.

Recommendation 5

That the ACT Government consider further avenues to integrate into its practices, policies and laws the framework principles developed by the UN Special Rapporteur on Human Rights and the Environment that articulate government obligations conferred by the human right to a healthy environment.

Recommendation 6

That the ACT Government consult with environmental governance entities and other stakeholders, including the public, on consequential reforms to environmental and planning law frameworks to ensure the right is consistently integrated into environmental decision-making and policy.

Recommendation 7

That the ACT Government engage with the Commissioner for Sustainability and the Environment as follows:

- *Specific review and consideration of the investigations and state of the environment reports already prepared by the Commissioner as part of the government's consultation on the right to a healthy environment;*
- *Consideration of the Minister for the Environment directing the Commissioner to either undertake a separate investigation into implementing the right in ACT environmental and planning laws or to incorporate consideration of the right into the 2023 State of the Environment Report (ACT); and*
- *Consideration of how the functions and role of the Commissioner can be amended and/or engaged to promote the human right to a healthy environment in the ACT.*

Recommendation 8

That relevant ACT Government agencies and entities, once the right is enshrined, expressly provide for how the human right to a healthy environment will impact non-government entities in relevant laws, policies and procedures, guided by international customary laws and norms.

Recommendation 9

That the ACT Government proactively consult with the public and relevant stakeholders on mechanisms for promoting within the ACT the dialogue model of human rights in relation to the human right to a healthy environment.

Recommendation 10

That the ACT Government integrate reforms to implement a two-tiered complaints mechanism into its agenda to enshrine the human right to a healthy environment in the Human Rights Act 2004 (ACT).

Recommendation 11

That the ACT Government explore options to ensure that the two-tiered complaints mechanism is sufficiently funded and includes appropriate environmental expertise such that any complaints relating to the human right to a healthy environment are appropriately resolved and remedied.

Recommendation 12

That the ACT Government meaningfully consult with vulnerable groups to determine what additional measures should be integrated into any reforms implementing the human right to a healthy environment to ensure vulnerable groups' rights to a healthy environment are protected and promoted.

Recommendation 13

That the ACT Government, through the implementation of the human right to a healthy environment, consider the importance of inter-generational equity and mechanisms for young people and children to access and meaningfully contribute to environmental decision-making and policy.

Recommendation 14

That the ACT Government fulfil its obligations conferred by the human right to a healthy environment through consequential reforms that uphold the procedural aspects to the right, and to explore further policy options for continual promotion of the substantive elements of the right.

Recommendation 15

That the ACT Government consult with business groups and other stakeholders to discuss opportunities for the implementation of the human right to a healthy environment through government investment, public-private partnerships and other mechanisms to leverage private equity and contribute to positive environmental and economic outcomes.

The Importance of Enshrining the Human Right to a Healthy Environment in the ACT

GreenLaw **strongly supports** the introduction of the human right to a healthy environment into ACT law through the *Human Rights Act* and consequential reforms.

The ACT is a leading jurisdiction in Australia for climate action, environmental protection and human rights. This leads to the question whether protection of the human right to a healthy environment as a standalone human right will contribute to genuine environmental and human rights outcomes in the ACT. GreenLaw believes that enshrinement of the human right to a healthy environment will contribute to better environmental and human rights outcomes for our community. We make this submission on the basis of the following:

Our Human Right to a Healthy Environment Is Being Threatened

Human beings are a part of our environment and rely upon that environment for healthy and sustainable food, breathable air and clean water. We benefit from healthy ecosystems that are resilient against natural disasters and are responsible for protecting and ensuring the thriving of non-human beings. However, the environment that we depend upon is at risk.

The 2019 *State of the Environment Report (ACT)* prepared by the Commissioner for Sustainability and the Environment concluded that:

Since 2009-10, there has been a decrease of 11% in the ACT's total [ecological] footprint and a decrease of 20% in our carbon footprint. Despite this, the ACT's ecological footprint continues to test our resolve to live more sustainable lives.²²

In particular the following environmental challenges are impacting the integrity of the ACT's ecosystems, viability of its biodiversity, water and air quality, and therefore, the health of all Canberrans:

Climate change represents an existential and catastrophic risk to the environment across the globe. In 2019, the ACT declared a state of climate emergency in recognition of the need for urgent action to address the climate crisis.²³ The 2019 *State of the Environment Report (ACT)* found that climate change is already negatively impacting the ACT environment:

- The annual mean maximum temperature in the ACT has risen by 1.5°C since 1926, and consequently, the number of hot days has doubled since 1950;
- Rainfall trends are variable but there is evidence that the ACT has been drier than average in more recent years; and

²² ACT Commissioner for Sustainability and the Environment, *ACT State of the Environment* (Report, 2019) 9.

²³ ACT Government, *ACT Climate Change Strategy 2019-25* (Report, 2019) 1.

- These climatic trends have resulted in reduced inflows to water storage, greater fire danger, increased tree mortality and increased rates of algal blooms in our lakes.²⁴

We recognise that the ACT Government is taking nation leading steps to address the causes and consequences of climate change. The *ACT Climate Change Strategy 2019-25* provides a feasible pathway to net zero greenhouse gas emissions by 2045, with credible interim targets and accountability mechanisms.²⁵ Furthermore, in June 2021, the ACT Legislative Assembly endorsed the movement for the Fossil Fuel Non-Proliferation Treaty in a world first.²⁶ Nonetheless climate change is still negatively impacting Canberrans' human right to a healthy environment.

Environment degradation and land clearing is a pressing issue in the ACT, infringing upon the human right to a healthy environment for all Canberrans. The ACT has, as of 2019, an ecological footprint that is nine times the size of the ACT.²⁷ Between 1991 and 2016 there has been an increase in urban land area of 57%.²⁸ The main trend contributing to the clearing of native vegetation and ecosystems is urban expansion. These trends are putting pressure on, and degrading, the character of Canberra as the Bush Capital and the viability of the ecosystems that all Canberrans benefit from.

There are currently 52 listed threatened species and three listed ecological communities in the ACT.²⁹ At a federal level, pursuant to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), there are at least 16 listed threatened species and ecological communities that are present in the ACT, some of which are not listed under ACT legislation. For example, in March 2022 the Gang-gang Cockatoo – the ACT's faunal emblem – was listed as endangered under federal environmental legislation.³⁰ The Conservation Council of the ACT has emphasised that Gang-gang Cockatoos have 'suffered enormously' after the 2019-2020 Black Summer Bushfires risking the viability of this iconic and beloved species.³¹

Another facet of Canberra's environment is the presence and health of our urban trees. Such trees provide many benefits to our city, from improving air quality, climate abatement and heat

²⁴ 'Climate Change', *Office of the Commissioner for Sustainability and the Environment* (Web Page) <<https://actsoe.com.au/report/climate-change/>>.

²⁵ See ACT Government, *ACT Climate Change Strategy 2019-25* (Report, 2019).

²⁶ The Honourable Jo Clay MP, 'Fossil Fuel Non-Proliferation Treaty – Proposal' (Motion delivered at the ACT Legislative Assembly, Canberra, 2 June 2021) 184 – 185.

²⁷ 'Human Settlements', *Office of the Commissioner for Sustainability and the Environment* (Web Page) <<https://actsoe.com.au/report/human-settlements/#key-findings>>.

²⁸ 'Land', *Office of the Commissioner for Sustainability and the Environment* (Web Page) <<https://actsoe.com.au/report/land/#key-findings>>.

²⁹ 'Threatened Species and Ecological Communities', *ACT Government Environment, Planning and Sustainable Development Directorate – Environment* (Web Page) <<https://www.environment.act.gov.au/nature-conservation/conservation-and-ecological-communities/threatened-species-and-ecological-communities#threatened-species-act>>.

³⁰ 'Species Profile and Threats Database', *Australian Government Department of Climate Change, Energy, the Environment and Water* (Web Page) <http://www.environment.gov.au/cgi-bin/sprat/public/publicspecies.pl?taxon_id=768>.

³¹ 'Gang Gang Cockatoos: What Canberra's Favourite Bird is up to while we're in lockdown', *Conservation Council Act Region* (Web Page, 2 September 2021) <<https://conservationcouncil.org.au/blog/2021/09/02/gang-gang-cockatoos/>>.

control to representing valuable cultural links to Indigenous and non-Indigenous history.³² However, Canberra's urban open spaces and roads have a canopy cover of approximately 22%, dropping to 18% over residential land (falling to lower rates in Canberra's newer suburbs).³³ Despite the ACT Government committing to increase both tree canopy cover and permeable surfaces to 30% across the city by 2045,³⁴ the state of our urban environment is not meeting the current human rights and health needs of our people.

Water and air quality standards are high across the ACT but trending downwards, representing a future challenge for the health of our environment and therefore the promotion of our human rights. All air quality and pollution issues have impacts upon the health of Canberrans, the most pressing of which is the elevated presence of PM_{2.5} in the ACT.³⁵ Poor air quality also negatively affects the amenity of our environment and the integrity of our ecosystems.

The main drivers of reduced water quality in the ACT are land use impacts, modified river flows and climate change.³⁶ The Commissioner for Sustainability and the Environment concluded that 48% of rivers in the ACT have poor to degraded riparian conditions.³⁷ Adequate water and air quality are both substantive components of the human right to a healthy environment, underpinning human and non-human flourishing.

We further note that there are **other ongoing environmental challenges** in the ACT that have been recognised in the 2019 *State of the Environment Report (ACT)* and 2021 *State of the Environment Report (Cth)*. These challenges include: waste management, transport and transport pollution, land management and planning, and Indigenous heritage and leadership in environmental matters.

The ACT's Environmental Laws Do Not Fully Address These Environmental Challenges

Our environmental laws are not adequately protecting our city from the impacts of environmental degradation. We anticipate that the 2022 *State of the Environment Report (ACT)* to be released by the Commissioner for Sustainability and the Environment next year will provide updated information and trends on the state of the ACT's environment and priorities for reform.

Below we provide a summary of some of the areas where the Territory's environmental laws and policies could be strengthened to better uphold the substantive elements of the human right to a healthy environment, noting areas where the ACT Government has already made commitments for such reforms:³⁸

³² Commissioner for Sustainability and the Environment, *ACT State of the Environment (Report, 2019)* 80.

³³ Brent Jacobs, Nicholas Mikhailovich and Candice Delaney, *Benchmarking Australia's Urban Tree Canopy: An i-Tree Assessment, Institute for Sustainable Futures (Final Report, May 2014)*.

³⁴ See ACT Government, *Canberra's Living Infrastructure Plan: Cooling the City* (2019).

³⁵ 'Air', *Office of the Commissioner for Sustainability and the Environment (Web Page)* <<https://actsoe.com.au/report/air/#key-findings>>.

³⁶ 'Water', *Office of the Commissioner for Sustainability and the Environment (Web Page)* <<https://actsoe.com.au/report/water/#key-findings>>.

³⁷ Commissioner for Sustainability and the Environment, *ACT State of the Environment (Report, 2019)* 276.

³⁸ Drawn from: Conservation Council ACT Region, *Our Environment Our Future ACT Election Priorities 2020* (2020).

Environmental Law/Policy	Relevant element of the human right to a healthy environment	ACT Government commitments ³⁹
Set a timetable to achieve net-zero emissions from transport by 2030	A safe climate; clean air	Partial commitment to use only zero emissions public transport by mid-2030s
Establish minimum energy efficiency standards for rental properties	A safe climate; clean air	Full commitment, not implemented
Legislate to ensure land of moderate to high conservation value (such as Natural Temperate Grasslands) outside of the reserve system is protected in perpetuity	Healthy ecosystems and biodiversity	No commitments to date
Provide reserve status for the Newline Woodland, Bluetts Block, Piney Creek, Lands End, Woods Lane and Glenoch grasslands	Healthy ecosystems and biodiversity	No commitments to date
Implement strategies to achieve the 30% tree canopy equitably across suburbs	Healthy ecosystems and biodiversity; clean air	Full commitment, progressive implementation
Invest \$1.2m over 4 years to support the Environment Protection Authority to improve water management regulation and compliance	Clean water and adequate sanitation; healthy ecosystems and biodiversity; non-toxic environment in which to live, play and work	No commitments to date
Roll out food and organic waste collection to all Canberra households	Healthy and sustainable food	Partial commitment to begin trialling organic waste collection from 2023

GreenLaw has previously conducted extensive research into renewable energy reform in the ACT through the prism of the human right to a healthy environment.⁴⁰ We found that greater government support and regulatory reform is needed to support the rollout of community-scale batteries across the ACT, specifically in low-income suburbs, as a mechanism for addressing energy storage limitations and achieving positive human rights outcomes.⁴¹ Such reform is essential because:

First, community renewable energy assets have the potential to reduce energy stress by providing security, affordability, and reliability. Second, there is a strong argument that people should not be limited in their ability to invest in renewable energy based on their ability to own property. This argument was recognised in the rationale for Canberra’s first community solar

³⁹ As outlined in the ACT Labour and ACT Greens, *Parliamentary and Governing Agreement* (Agreement, 10th Legislative Assembly ACT, 2 November 2020)

⁴⁰ See Peta Bulling et al, *Submission to the Inquiry Into Renewable Energy Innovation in the ACT* (GreenLaw Submission, 2021) and Annika Reynolds and Peta Bulling, *Supplementary Submission to the Inquiry into Renewable Energy Innovation in the ACT* (GreenLaw Submission, 2021).

⁴¹ Ibid.

farm. Associated with this is the paradox that disadvantaged communities will be most affected by climate change.⁴²

We also made findings with respect to the use of fracked gas in the ACT and presence of gas infrastructure. The use of such gas is currently responsible for 21% of the ACT's annual emissions.⁴³ The extraction of fossil gas releases significant amounts of methane, which is a more potent greenhouse gas than carbon dioxide in the short term.⁴⁴ The Climate Council, relying on modelling by the University of Melbourne, also highlights that 'gas powered generation has the highest scope 3 emissions of any form of generation'.⁴⁵ While the ACT Government has recently announced an accelerated transition pathway from the use of gas, there are still concerns that such reforms will be skewed towards new suburbs and new gas connections rather than assisting vulnerable and low-income Canberrans make the switch from gas. These energy reforms highlight that the human right to a healthy environment is not being consistently realised in our environmental and planning laws for everyone across our community.

The ACT's Environmental Laws Do Not Achieve the Procedural Components of the Human Right to a Healthy Environment

GreenLaw further notes that the ACT's environmental laws do not consistently uphold the procedural elements of the human right to a healthy environment. That is, Canberra's environmental and planning laws do not provide adequate access to environmental information, facilitate public participation in decision-making or ensure consistent access to justice.

The ACT does not have comprehensive or live environmental databases that are accessible to the public. Currently, live data is restricted to air quality index readings and the Canberra Pollen Count.⁴⁶ Water quality is not provided as live data to the public, despite the ACT Health Protection Service and Environment Protection Authority conducting year-round analysis of ACT waters for blue-green algae.⁴⁷ The Commissioner for Sustainability and the Environment has previously recommended measures to establish live water quality data in her 2022 investigation into ACT waterways.⁴⁸

The capacity of the public to be meaningfully involved in decision-making and to access justice and seek remedies for environmental harms is also limited. Under proposed planning law

⁴² Peta Bulling et al, *Submission to the Inquiry Into Renewable Energy Innovation in the ACT* (GreenLaw Submission, 2021) 21.

⁴³ Annika Reynolds and Peta Bulling, *Supplementary Submission to the Inquiry into Renewable Energy Innovation in the ACT* (GreenLaw Submission, 2021) 5.

⁴⁴ Climate Council, *Gas: Dangerous, Expensive and Unnecessary* (Web Page, 4 February 2020) <<https://www.climatecouncil.org.au/gas-dangerous-expensive-and-unnecessary/>>.

⁴⁵ Climate Council, *Submission to the New South Wales Independent Planning Commission Hearing Into the Proposed Santos Narrabri Gas Project* (Submission Report, August 2020) 14.

⁴⁶ 'Air Quality', *ACT Government Health* (Web Page, 29 March 2021) <<https://www.health.act.gov.au/about-our-health-system/population-health/environmental-monitoring/air-quality>>.

⁴⁷ 'Recreational Water', *ACT Government Health* (Web Page, 6 September 2021) <<https://www.health.act.gov.au/about-our-health-system/population-health/environmental-monitoring/recreational-water-quality>>.

⁴⁸ Office of the Commissioner for Sustainability and the Environment, *State of the Lake and Waterways in the ACT* (Report, 2022).

reforms in the ACT, third parties will only be able to seek judicial or merits review for a limited range of decisions⁴⁹ if they fulfil certain criteria, including that they made a public submission during the application process and that they can prove the development may cause them to suffer material detriment.⁵⁰ These restrictions do not achieve access to justice for Canberrans and do not reflect best practice environmental justice outcomes. For example, the *Aarhus Convention* (which is not binding on the ACT but nonetheless persuasive) requires, among other mechanisms:⁵¹

- Third-party enforcement rights to allow persons to challenge breaches of the law relating to the environment;
- Open standing to seek review of government decisions, prevent breaches of environmental laws or seek redress for environmental harms; and
- Access to justice mechanisms that limit the expense and time taken to seek redress through a court or tribunal.

These procedural barriers pose ongoing risks to the capacity of the public, civil society, and third-party entities to seek redress for breaches of the human right to a healthy environment and to contribute to its promotion in government policy.

The ACT's Human Rights Laws Do Not Sufficiently Recognise the Relationship Between Our Environment and Our Human Rights

The *Human Rights Act* does not explicitly protect the human right to a healthy environment, and any implicit protection afforded by the Act is fragmented and ineffective in upholding the right for all Canberrans.

Reynolds and Bulling have argued that the right to life, protected under s 9 of the *Human Rights Act*, incorporates some aspects of the right to a healthy environment into ACT law.⁵² But such an argument is yet untested in the ACT Supreme Court and there is no record that government decision-makers have considered the environmental aspects of the right to life when making environmental decisions. This shows that it is insufficient to rely upon an expansive interpretation of the rights currently protected in ACT law to achieve the promotion of the human right to a healthy environment.

Inadequate recognition of the human right to a healthy environment is also a concern in the ACT because we have a unicameral parliamentary system and lack other important checks and balances that could guard against executive or legislative breach of the human right to a healthy environment.

⁴⁹ See Planning Bill 2022 (ACT), Schedule 6, Part 6.2.

⁵⁰ Planning Bill 2022 (ACT), Schedule 6, Part 6.1, s 6.1.

⁵¹ *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature on 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001) art 9.

⁵² Annika Reynolds and Peta Bulling, 'Renewable Energy to Fulfil our Human Rights: The Australian Capital Territory's Potential to Lead the Nation' (2021) 36(4) *Australian Environment Review* 83.

The Legal Protection of the Right Will Contribute to Better and More Consistent Environmental Outcomes

Codifying the human right to a healthy environment has contributed to positive environmental and social outcomes in jurisdictions across the globe. Explicit protection of the right contributes to:

- Increased government accountability for environmental decision-making;
- Increased public participation in environmental and planning law decision-making and reforms; and
- Increased government consideration of the right and therefore government decision-making and actions that are more consistently compatible with the achievement of the right.⁵³

A 2012 study of constitutional environmental rights found that countries that had enshrined the right to a healthy environment enjoyed greater environmental outcomes. For example, environmental laws were strengthened, and environmental rights were imbedded in those instruments (including greater access to environmental information, participation in decision-making and access to justice).⁵⁴ Furthermore, governments and courts were more likely to fill regulatory gaps in relation to the environment, and to prevent rollbacks of environmental laws and standards.⁵⁵ Ultimately, the ecological footprint of those countries was reduced.⁵⁶

Boyd, the author of that study, noted:

However, when the consistent relationship between constitutional provisions and superior environmental performance is combined with the evidence of stronger environmental legislation, enhanced opportunities for public participation in environmental governance, and increasing enforcement of environmental laws, the case for entrenching environmental protection in national constitutions must be regarded as compelling.⁵⁷

A further study in 2016, conducted by Jeffords and Minkler, found that jurisdictions that had the codified environmental rights had better scores on the Environmental Performance Index.⁵⁸

It is therefore highly likely that enshrinement of the human right to a healthy environment in ACT law will contribute to better and more consistent environmental outcomes for all Canberrans.

The ACT Government itself has acknowledged that the *Human Rights Act* more generally has:

⁵³ Environmental Defenders Office, *A Healthy Environment is a Human Right: Report on the Status of the Human Right to a Healthy Environment in Australia* (Report, 2022) 35.

⁵⁴ David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012).

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.* 20.

⁵⁸ Chris Jeffords and Lanse Minkler, 'Do Constitutions Matter? The Effect of Constitutional Environmental Rights Provisions on Environmental Outcomes' (2016) 69(2) *Kyklos* 294.

- Increased awareness and understandings of human rights issues throughout government;⁵⁹
- Positively impacted political debates and the consideration of policy issues from a human rights perspective;⁶⁰ and
- Provided an 'impetus' for agencies and government bureaucracies to consider their human rights obligations when making decisions or considering the implications of proposed law reform.⁶¹

Watchirs and McKinnon have similarly found that the enactment of human rights legislation in the ACT has had several positive impacts. For example, the audit powers of the ACT Human Rights Commission have 'been an important tool that has been used to achieve systemic reform for some of the most vulnerable people in the Territory'.⁶²

We expect that the explicit protection of the human right to a healthy environment will therefore contribute to better understandings of the connections between human beings and the environment across all levels of government, more consistent consideration of the right in government decision-making and policy debates, and the integration of the right into the decision-making processes of agencies. The protection of the right will further empower the ACT Human Rights Commission to audit public authorities and contribute to systemic reforms that promote the human right to a healthy environment. In turn, these systemic changes across government will enable the ACT to achieve better environmental outcomes.⁶³

These positive outcomes will provide an important foundation for addressing the environmental challenges surveyed earlier in this submission, and therefore, the progressive realisation of the human right to a healthy environment. Critically, enshrinement of the right will also act as a safeguard against any future regressive government action.

Protecting the Human Rights of Young People

GreenLaw is a youth-led organisation, and all the members that have contributed to this submission are under the age of 25. We are the next generation that will face the onerous burden of the climate crisis and biodiversity collapse. A legacy that has been bequeathed upon us by all previous generations and this current generation of leaders.

We recognise that the ACT Government takes its responsibilities for protecting our human rights and the importance of ensuring inter-generational equity seriously. We expect, and recognise, that the ACT Government and ACT Legislative Assembly is committed to working constructively with young people to protect our future prosperity and equity.

⁵⁹ 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), 24.

⁶⁰ *Ibid* 2.

⁶¹ ACT Justice and Community Safety Directorate, *Economic, social and cultural rights in the Human Rights Act 2004 – Section 43 review* (November 2014) 26..

⁶² 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) *The University of New South Wales Law Journal* 136, 169.

⁶³ *Ibid*.

Part of continuing to uphold the principle of inter-generational equity is enshrining our human right to a healthy environment in law, providing a legal basis for the continued protection and improvement of the environment for the next generation.

To this end, we note that the *UN Convention on the Rights of the Child* (1990) provides a clear normative basis for protecting the human right to a healthy environment because of the critical impact environmental health has upon the rights and dignity of children. Notably, article 24(1) and (2)(c) of the Convention affirms that:

1. State Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. State Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
2. State parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
 - ...
 - (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration **the dangers and risks of environmental pollution**.⁶⁴

It is in the interests of young people and children across the ACT that our human right to a healthy environment is enshrined in law. The capacity of young people and children, especially those under the age of 18, to enforce our rights and influence environmental decision-making is currently limited. An enforceable duty to protect our environmental health now and into the future would contribute to empowering our community.

⁶⁴ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 24.

Continuing the ACT's Leadership in the Environment and Human Rights

Finally, we note and commend the ACT's leadership in environmental and human rights matters compared to other Australian jurisdictions. We were the first State and Territory to enact human rights legislation and we are a leading jurisdiction on issues of the environment and climate change.⁶⁵

We encourage the ACT Government and Legislative Assembly to continue building upon this leadership by enshrining the human right to a healthy environment in ACT law. Such reform aligns with the ACT Government's broader strategies on the environment, climate change and human rights, and will undoubtedly contribute to the ACT Government continuing to meet the expectations and needs of its constituents.

We therefore recommend:

Recommendation 1

That the human right to a clean, healthy and sustainable environment be enshrined as a standalone human right in the Human Rights Act 2004 (ACT).

⁶⁵ Annika Reynolds and Peta Bulling, 'Renewable Energy to Fulfil our Human Rights: The Australian Capital Territory's Potential to Lead the Nation' (2021) 36(4) *Australian Environment Review* 83.

The Scope and Definition of the Human Right to a Healthy Environment

GreenLaw supports the enshrinement of broadly defined human right to a healthy environment in the *Human Rights Act*. Such a definition should be drafted in a manner that:

- Ensures all procedural and substantive elements of the human right to a healthy environment are protected;
- Minimises legislative limitations upon the right, leaving the interpretation and evolution of the scope of the human right a healthy environment to the ACT Supreme Court and government policy; and
- Emphasises the contemporary understanding of the human right to a clean, healthy and sustainable environment, rather than more narrow rights to exploit natural resources.⁶⁶

In particular, we support a scope and definition that is based upon *UN General Assembly Resolution 76/300*, which was passed on 28 July 2022 in the following terms:

The General Assembly,

...

1. Recognizes the right to a clean, healthy and sustainable environment as a human right;⁶⁷

Such a definition also reflects the text of the resolution passed by the UN Human Rights Committee in October 2021 recognising the human right to a healthy environment.⁶⁸ A range of jurisdictions across the globe enshrine the human right to a healthy environment in similarly broad terms, including:

Jurisdiction	Definition of the Human Right to a Healthy Environment
Ecuador	The right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability and the good way of living (<i>sumak kawsay</i>), is recognised. ⁶⁹
Fiji	Every person has the right to a clean and healthy environment, which includes the right to have the natural world protected for the benefit of present and future generations through legislative and other measures. ⁷⁰

⁶⁶ The right to exploit natural resources in a sustainable manner has been enshrined in a number of jurisdictions across the globe, for example s 17 of the *Rhode Island Constitution*. These rights are considered to form the basis of a protected human right to a healthy environment in those jurisdictions but focuses legislative and executive action in furtherance of those rights on protecting the economic natural resources of that jurisdiction.

⁶⁷ *The Human Right to a Clean, Healthy and Sustainable Environment*, GA Res 76/300, UN GAOR, 76th sess, Agenda Item 74(b), Supp No 49, UN Doc A/RES/ (24 July 2022) 3.

⁶⁸ UNOHC, 'UN recognition of human right to healthy environment gives hope for planet's future – human rights expert' (Press Release, United Nations, 8 October 2021).

⁶⁹ *Constitution of Ecuador*, art 14.

⁷⁰ *Constitution of the Republic of Fiji* s 40(1).

Philippines	The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature. ⁷¹
Spain	Everyone has the right to enjoy an environment suitable for personal development, as well as the duty to preserve it. ⁷²

Several sub-national jurisdictions comparable to the ACT also enshrine the human right to a healthy environment, either in State Constitutions or other laws. The definition and scope of the protections in these jurisdictions vary:

Jurisdiction	Protection of the Right to a Healthy Environment
Hawaii, USA	<i>Hawaiian Constitution</i> , art XI s 9 provides that each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources.
Illinois, USA	Article XI, s 2 of the <i>Illinois Constitution</i> provides that each person has the right to a healthful environment.
Massachusetts, USA	<i>Massachusetts Constitution</i> , art XCVII enshrines the right of the people to have clean air and water, freedom from excessive and unnecessary noise, the natural, scenic, historic, and aesthetic qualities of their environment, and the natural resources of that environment protected.
Montana, USA	The <i>Constitution of the State of Montana</i> declares the right to a clean and healthful environment an inalienable right of people in that State (s 3).
Northwest Territories, CAN	Section 2(a) of the <i>Environment Rights Act 1988</i> affirms that one of the purposes of that Act is to protect the right of the people of the Northwest Territories to a healthy environment.
Ontario, CAN	The <i>Environmental Bill of Rights 1993</i> states that one of its purposes is to protect the right to a healthful environment by the means provided in this Act (s 2(1)).
Pennsylvania, USA	The <i>Pennsylvania Constitution</i> enshrines the right to clean air, pure water, the preservation of the natural, scenic, historic and aesthetic values of the environment, and natural resources in art 1, s 27.
Quebec, CAN	<i>Environmental Quality Act 1978</i> , Ch Q-2 recognises that every person has a right to a healthy environment and to its protection, and to the protection of living species inhabiting it.
Rhode Island, USA	Contained in s 17 of the <i>Rhode Island Constitution</i> are protections for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the State.
Yukon, CAN	The preamble of the <i>Environment Act 2002</i> recognises that a healthful environment is indispensable to human life and health, and therefore, every individual in Yukon has the right to a healthy environment.

There are differences in the articulation of the human right to a healthy environment across the jurisdictions outlined above. The variations in these definitions reflect the drafting and legislative traditions of those jurisdictions, as well as different time periods, priorities of environmental protection and understandings of how human beings relate to and rely upon the environment.

⁷¹ *The Constitution of the Republic of Philippines*, art II, s 16.

⁷² *Constitución Española* s 45(1).

However, we support the ACT Government committing to a broad scope and definition of the human right to a healthy environment, that reflects the texts of the UN General Assembly Resolution and UN Human Rights Committee Resolution recognising the right, for the following reasons:

A Broad Definition Accords with International Law

A generality of States have enshrined the human right to a healthy environment in some form.⁷³ However, the most globally applicable instruments that define the right, the recent UN General Assembly Resolution and UN Human Rights Committee Resolution, use broad language to articulate the human right to a healthy environment.

The use of broad language reflects the procedural and substantive elements of the human right to a healthy environment as it has developed from domestic and regional instruments, international human rights law and international environmental law.⁷⁴ The ACT Government should therefore adopt similar language when amending the *Human Rights Act*.

Furthermore, the *Human Rights Act* provides that the interpretation of the human rights under that Act are to be considered in light of 'international law, and the judgments or foreign and international courts and tribunals'.⁷⁵ If the Act is amended to protect the human right to a clean, healthy and sustainable environment, that articulation of the right reflects globally applicable international instruments and will assist ACT entities in interpreting the right in a manner that best reflects international human rights and environmental law.

A narrow definition or one that includes only some elements of the human right to a healthy environment does not promote the interests of the public and is likely to be more uncertain for government entities and the judiciary. A narrow definition that does not accord with international law could result in the judiciary overly relying on caselaw within particular foreign jurisdictions that also enshrine a narrowly worded human right to a healthy environment. This could result in perverse outcomes for individuals and would, in any event, contribute to uncertainty within government organisations as to the scope of their obligations.

A Broad Definition Ensures All Procedural and Substantive Aspects of the Right are Protected

Additionally, a broad definition will ensure that all procedural and substantive aspects of the human rights are protected and provides scope for other aspects of the right to be protected as international law evolves.

In jurisdictions where the right has been articulated in broad terms, government policy and judicial responses have evolved to meet community expectations and to protect substantive aspects of the right. For example, the *Philippines Constitution* (1987) enshrines the human right to

⁷³ Michelle Bachelet, 'The right to a clean, healthy, and sustainable environment - what does it mean for States, for rights-holders and for nature?' (UNOHC Release, 16 May 2022).

⁷⁴ John H. Knox, 'Constructing the Human Right to a Healthy Environment' (2020) 16 *Annual Review of Law and Social Science* 79.

⁷⁵ *Human Rights Act 2004* (ACT) s 31(1).

a healthy environment in broad terms. In recent years, the language of that Constitution has been relied upon to expand the right to protect the wellbeing of future generations.⁷⁶ The Philippines' Supreme Court has also enacted opening standing and limited costs for public interest environmental litigation,⁷⁷ and developed two new civil action writs to remedy environmental harms.⁷⁸ The experience of the Philippines demonstrates that broad language provides flexibility for the government and judiciary to expand upon, and shape the implementation of, the right in ways that align with community expectations and needs.

Rather than being onerous, a broad definition reflects the consensus position of international human rights entities and will provide clarity to the ACT Government and other entities. It is well established under international law what procedural and substantive aspects are included within a broad definition of the human right to a healthy environment. In contrast, a narrow or specific definition could become dated and no longer reflect the position of international law leading to confusion and inconsistent administration of the right.

A Broad Definition Would Not Be Onerous or Uncertain

The *Human Rights Act* already contains limiting and balancing provisions that will ensure a broadly defined human right to a healthy environment does not impose an onerous or uncertain burden on the ACT Government or other entities impacted by the operation of the Act. There are two ways that the Act provides limitations upon the interpretation, and therefore application, of human rights:

- First, the interpretation of the human rights protected under the Act should be consistent with the ordinary meaning of the words and Act as a whole (s 31(2)(a)); and
- Second, human rights may be subject to 'reasonable limits set by laws that can be demonstrably justified in a free and democratic society', taking into account relevant factors enshrined under the Act (s 28).

The second limitation reflects that some non-absolute human rights may be legitimately limited in accordance with international law.⁷⁹ Furthermore, s 28 of the *Human Rights Act* also recognises that competing human rights must be balanced, so as to protect the rights of others. These limitations are legitimate under international human rights law⁸⁰ and are established mechanisms within the *Human Rights Act* that are well adapted to ensuring that the human right to a healthy environment is interpreted in a manner that is not onerous or uncertain.

Finally, as will be discussed further in this submission, we note that while some aspects of the human right to a healthy environment impose immediate obligations, many of the substantive

⁷⁶ *Re Minors Oposa v Secretary of the Department of Environment and Natural Resources* (Supreme Court of the Philippines) (1994) 33 ILM 174.

⁷⁷ Rules of Procedure for Environmental Cases 2010 (Philippines) r 4-5.

⁷⁸ *Ibid* r 7-8.

⁷⁹ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19.

⁸⁰ *Universal Declaration on Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 29.

aspects of the right will require ongoing and continual action to be realised over the long-term.⁸¹ Therefore the manner in which the ACT Government realises the human right to a healthy environment is most appropriately dealt with at a policy level, to ensure government flexibility, adaptability and cohesion with other government environmental and human rights roadmaps.⁸² Imposing additional limitations upon the scope and definition of the human right to a healthy environment within the Act would make this policy setting more difficult and would be inconsistent with the legislative approach to the protection of all other rights enumerated under the *Human Rights Act*.

The Right Categorised Under International Law

As has been discussed above, the human right to a healthy, clean and sustainable environment (that is, a broadly defined right as we have recommended) is composed of substantive and procedural elements. The right imposes a further non-discrimination and equal access obligation upon the ACT Government to ensure that the human rights of vulnerable and marginalised groups are upheld.

The human right to a healthy environment is not an economic and social human right (second generation right) as expressed by various UN Treaty Bodies, Special Rapporteurs, foreign jurisprudence, and the general practice of the international community. The human right to a healthy environment is more accurately categorised as a third-generation human right, otherwise known as a 'solidarity rights'.⁸³ The international community has not expressed in regional instruments nor in practice a tendency to divide the human right to a healthy environment into immediately and progressively realisable elements.

We note that the Discussion Paper proposes to divide the right into immediately and progressively realisable elements, and further, seeks community feedback on how that divide should be enshrined in legislation (drawing upon ss 27A and 27B of the *Human Rights Act* as examples). GreenLaw **strongly urges** the ACT Government not to enshrine immediately and progressively realisable obligations in the *Human Rights Act*.

We urge **against** a demarcation of the right because:

- To do so would not align with the international community's approach to the right, introducing uncertainty into how the right should be interpreted and applied in the ACT;
- The human right to a healthy environment is actively evolving at an international level and enshrining specific obligations within the *Human Rights Act* risks providing incomplete human rights protections for Canberrans and becoming outdated; and
- It is unnecessary given the ACT Government is already, in a range of areas, taking positive steps to realise the human right to a healthy environment. It would not be an onerous

⁸¹ Seamus Byrne, "Reclaiming Progressive Realisation: A Children's Right" (2020) 28 *The International Journal of Children's Rights* 748.

⁸² ACT Legislative Assembly, 'Matters of Public Importance – Your Assembly @ Work' (Media Release, Issue 1/2022, 11 February).

⁸³ M. Abdul Hannan, 'Interface between the Third Generation Human Rights and Good Governance in a Globalized World' in Jeffery F. Addicott, Md Jahid Hossain Bhuiyan and Tareq M.R. Chowdhury (eds) *Globalization, International Law, and Human Rights* (Oxford University Press, 2011) 117, 117-118.

administrative or costs burden for the ACT Government to be obligated to act in accordance with the human right to a healthy environment as defined according to international customary law and norms.

GreenLaw further notes, as a youth organisation based in the ACT, that imposing artificial limits upon the human right to a healthy environment by establishing enumerated immediately realisable obligations contributes to the perception that the ACT Government is not prioritising the full promotion of our human rights. As it is not international practice to divide the right as such, any attempt to do so under the *Human Rights Act* risks the perception that the ACT Government is deliberately carving out certain activities from the accountability mechanisms within the Act.

The human right to a healthy environment is considered a third generation right under international law, a solidarity right because it underpins the flourishing of the entire community.⁸⁴ However, such flourishing will be hampered, especially for vulnerable groups such as young people, if the right is artificially restricted in practice.

Finally, the concept of 'progressive realisation' as introduced under the *International Convention on Economic and Social Rights* (1976)⁸⁵ does not excuse government inaction. The Convention requires governments to commit their available resources to 'take deliberate, concrete and targeted measures' to realise the economic and social rights protected by that instrument.⁸⁶ Therefore even if the human right to a healthy environment was split into progressive and immediately realisable duties under the Act, the ACT Government would still have broad obligations to continually act in a manner compatible with the promotion and achievement of the right. We suggest that, in practice, the demarcation between immediately realisable and progressive obligations will be minimal and will not generate any benefits for the ACT Government or related entities, or indeed, the public.

⁸⁴ Ibid.

⁸⁵ *The International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

⁸⁶ Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties' Obligations (Art 2, Para. 1 of the Covenant)*, 5th sess, UN Doc E/1991/23 (14 December 1990) [9].

The *Human Rights Act* has been a powerful mechanism for integrating human rights awareness and consideration into the operations of the ACT Government and broader community.⁸⁷ It would be a missed opportunity if the human right to a healthy environment was implemented in such a manner that its cultural power was stifled.

We therefore recommend:

Recommendation 2

That the human right to a clean, healthy and sustainable environment be defined broadly and consistently with the UN General Assembly Resolution and UN Human Rights Committee Resolution recognising the right.

Recommendation 3

That the limitations and balancing provisions already contained in the Human Rights Act 2004 (ACT) are sufficient to ensure a broadly defined human right to a healthy environment is appropriately balanced against other considerations.

Recommendation 4

That the human right to a clean, healthy and sustainable environment be defined broadly and without listing certain immediately realisable obligations, consistent with international customary law and norms.

⁸⁷ See generally 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) *The University of New South Wales Law Journal* 136.

Duties that Should be Conferred by the Right on the ACT Government

GreenLaw urges the ACT Government to adopt a broad, principle-based approach to the duties and responsibilities that the right confers upon the ACT Government and its agents, and indirectly upon third-party entities.

We note that the *Human Rights Act* is limited to imposing direct obligations on public authorities, as defined by ss 40 and 40B of the Act. Section 40D provides a mechanism by which other entities may opt-in to be subject to the obligations imposed by the Act. However, non-public entities may be nonetheless indirectly impacted by the operation of the *Human Rights Act*.

In this section we therefore address the direct obligations and duties that we recommend be imposed upon the ACT Government, and specific environmental governance entities, and further make recommendations on how the right indirectly impacts third parties.

The Duties and Obligations to be Imposed on the ACT Government

In 2018, the UN Special Rapporteur on Human Rights and the Environment proposed *Framework Principles* to guide the implementation of the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.⁸⁸

There are 16 *Framework Principles*, extracted below:⁸⁹

- 1 The ACT Government should ensure a safe, clean, healthy and sustainable environment in order to respect, promote and fulfil human rights.
- 2 The ACT Government should respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment.
- 3 The ACT Government 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 The ACT Government 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 The ACT Government should respect and protect the rights to freedom of expression, association and peaceful assembly in relation to environmental matters.

⁸⁸ Special Rapporteur on Human Rights and the Environment, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, 37th sess, Agenda Item 3, UN Doc. A/HRC/37/59 (24 January 2018) ('*Framework Principles*').

⁸⁹ Please note mention of States has been omitted and replaced with the ACT Government for ease of reference and understanding.

- 6 The ACT Government should provide for education and public awareness on environmental matters.
- 7 The ACT Government 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, the ACT Government 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 The ACT Government 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 The ACT Government should provide for access to effective remedies for violations of human rights and domestic laws relating to the environment.
- 11 The ACT Government should establish and maintain substantive environmental standards that are non-discriminatory, non-retrogressive and otherwise respect, protect and fulfil human rights.
- 12 The ACT Government should ensure the effective enforcement of their environmental standards against public and private actors.
- 13 The ACT Government States should cooperate with other domestic and international jurisdictions to establish, maintain and enforce effective international and domestic legal frameworks in order to prevent, reduce and remedy transboundary and global environmental harm that interferes with the full enjoyment of human rights.
- 14 The ACT Government 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 The ACT Government should ensure that they comply with their obligations to indigenous peoples and members of traditional communities, including by:
 - (a) Recognizing and protecting their rights to the lands, territories and resources that they have traditionally owned, occupied or used;
 - (b) Consulting with them and obtaining their free, prior and informed consent before relocating them or taking or approving any other measures that may affect their lands, territories or resources;
 - (c) Respecting and protecting their traditional knowledge and practices in relation to the conservation and sustainable use of their lands, territories and resources; and
 - (d) Ensuring that they fairly and equitably share the benefits from activities relating to their lands, territories or resources.
- 16 The ACT Government should respect, protect and fulfil human rights in the actions they take to address environmental challenges and pursue sustainable development.

In the *Human Rights Act*, the obligations conferred on public authorities are that such entities must take into consideration the right when making decisions and to not act in a manner incompatible with the right except when the factors in s 28 of the Act are met. This is an appropriate framework to guide the duties and obligations of the ACT Government with respect to the human right to a healthy environment.

We also emphasise that the duties and obligations conferred upon the ACT Government by the human right to a healthy environment include procedural aspects. There is a positive obligation imposed upon the ACT Government to ensure that the public, including vulnerable groups, and affected parties have access to environmental information and that such information is both cost and language accessible. The community and affected parties should also be consulted in a timely and genuine manner on environmental decisions, especially proposed developments, and the ACT Government must demonstrate that it has taken into account the views of the community in any final environmental decisions, policies or outcomes.

We recommend that the ACT Government consider further avenues to integrate into its practices, policies and laws the framework principles outlining government obligations pursuant to the human right to a healthy environment.

Additional Duties to be Imposed on Entities Responsible for Environmental Governance in the ACT

GreenLaw encourages the ACT Government to explore mechanisms to imbed the human right to a healthy environment within environmental and planning law frameworks and broader environmental governance within the ACT. Consequential reforms to environmental and planning, biodiversity conservation, climate change and energy laws (among other applicable pieces of legislation) will reduce administrative uncertainty, inconsistent application of the right and will better integrate the right into the practice of environmental governance entities in the Territory.

The ACT Government must ensure that the implementation of the right, including its constitutive procedural and substantive elements, incorporates a whole of society approach and comprehensive integration of the right into government policy-making to achieve best practice. For example, with respect to a safe climate, in Peru, the *Climate Change Framework Law* (2018) mandates that climate change considerations must be incorporated into public spending decisions at all levels of government. Similarly, the Philippines have incorporated equity considerations into its *Climate Change Act* (2009), requiring 'gender-sensitive, pro-children and pro-poor perspective[s]' to be included in all climate change and renewable energy policies.

Notably:

The Environment, Planning and Sustainable Development Directorate (EPSDD) has jurisdiction over the ACT Government's key planning, land management and environment priorities.⁹⁰ In practice, whether the human right to a healthy environment is achieved in the Territory will be

⁹⁰ Environment, Planning and Sustainable Development Directorate, *Annual Report 2020-2021* (Report, 2021) 16.

dictated by the extent to which the right is effectively integrated into the EPSDD's policies, operations and decision-making.

We encourage the ACT Government to, as part of implementing the right, review the following aspects of the EPSDD:

- **Operational policies** relating to public consultation and access to environmental information;
- **Operational policies and procedures guiding environmental and planning decision-making** to ensure that a rights-based approach is adopted;
- **Training policies and procedures** to ensure staff are provided adequate information and training on the right and how it impacts upon their functions; and
- Opportunities to integrate the right into EPSDD **objectives and accountability mechanisms** within the directorate.

The Conservator of Flora and Fauna, is the Executive Director of Policy at the EPSDD, as established by the *Nature Conservation Act 2014* (ACT) with responsibilities over protecting and conserving threatened species and ecosystems, including the administration of the licencing system for native flora and fauna and managing the nature reserve system. The Conservator has additional responsibilities under the *Planning and Development Act 2007* (ACT), the *Fisheries Act 2000* (ACT) and the *Tree Protection Act 2005* (ACT).

As the Conservator has jurisdiction over matters concerning healthy ecosystems and biodiversity, the administration of that role has implications for the achievement of the right to a healthy environment. We urge the ACT Government to consider amendments to the *Nature Conservation Act* to include the right as an object of that Act and as a consideration that the Conservator must take into account when making decisions.

The Environment Protection Authority is established under the *Environment Protection Act 1997* (ACT) and is responsible for the administration of that Act, as well as the administration of the *Water Resources Act 2007* (ACT), *Clinical Waste Act 1990* (ACT) and the *Lakes Act 1976* (ACT). The Environment Protection Authority aims to protect the environment by preventing environmental degradation, resource protection and adverse risk of harm to both human health and the health of the ecosystem, whilst recognising the need to achieve an effective integration of environmental, economic and social considerations.

The Environment Protection Authority must have regard to the principles of ecologically sustainable development in the course of performing its duties but is not currently obligated to take a rights-based approach to its functions.

The Environment Protection Authority is a critical enforcement body, whose role in upholding environmental laws across the Territory,⁹¹ will contribute to the enforcement of the substantive elements of the right to a healthy environment. We urge the ACT Government to consult with the Environment Protection Authority and other stakeholders, including the public, on necessary reforms to empower it to effectively promote the right, including:

⁹¹ Environmental Defenders Office, *ACT Environment Law Handbook* (EDO, 3rd ed, 2015) 209.

- Whether the Environment Protection Authority should be empowered under any of the Acts it administers to bring enforcement actions against entities for breaches of the right that fall within those legislative schemes. For example, a pollution offence that also degrades human health and is therefore also a violation of the right;
- How to imbed a rights-based approach within the Environment Protection Authority's functions and administration; and
- Additional funding to bolster the Environment Protection Authority's capacity to deliver positive environmental outcomes in the ACT and therefore contribute to the realisation of the right.

The Commissioner for Sustainability and the Environment is an independent statutory position established by the *Commissioner for Sustainability and the Environment Act 1993* (ACT). The Commissioner undertakes the following functions and activities:

- Investigation of complaints about the management of the environment by the ACT Government or a Territory authority and issues relating to ecologically sustainable development in the ACT;
- The completion of investigations as directed by the Minister for the Environment;
- The undertaking of conduct on the Commissioner's own initiative, including investigations into agencies where those actions would have a substantial impact on the environment; and
- The delivery of state of the environment reports.

The Commissioner's role as an independent ombudsman for the environment should be leveraged by the ACT Government during its consultation process on enshrining the right in the *Human Rights Act* and consequential environmental law reforms to implement that right. GreenLaw recommends that:

- The ACT Government, as part of its consultation, specifically reviews and considers investigations and state of the environment reports prepared by the Commissioner to date. These are an important source of information on environmental threats to the achievement of the right in the ACT, and furthermore, explore viable avenues of reform to address these challenges;
- The Minister for the Environment direct the Commissioner to undertake either a separate investigation into viable avenues for implementing the right to a healthy environment in ACT environmental and planning laws or to incorporate consideration of how to implement the right into the 2023 *State of the Environment Report (ACT)*; and
- The ACT Government consider whether, and how, the Commissioner's role and functions could be engaged to promote the human right to a healthy environment.

The Office of Water is not yet an operational entity. Nonetheless, GreenLaw commends the establishment of an Office of Water and encourages the ACT Government to consider ways in which the establishment, governance and jurisdiction of that entity can further promote the human right to a healthy environment, notably the procedural elements of the right and the obligations to provide access to safe water and adequate sanitation.

Impact of the Right to a Healthy Environment on Third Parties

We recognise that non-government entities are likely to be indirectly impacted by the protection of the human right to a healthy environment in ACT law, predominantly through altered government processes and decision-making. For example, the EPSDD would need to be satisfied that approving a development application is compatible with the right, which may consequentially affect how a developer designs a proposed project.

GreenLaw emphasises that the indirect impact of the right to a healthy environment is **positive** for the community, business and industry in the Act. The indirect impact of protecting the right will be the gradual integration of environmental human rights considerations into broader community, business and industry activities.

The ACT Government has committed, and is investing in, a Canberra economy and society that is equitable and sustainable. Enshrining the human right to a healthy environment is consistent with this vision for our city. We also note that the right is an opportunity for further investment in knowledge economies and environmentally sustainable sectors in the ACT, notably in emissions reduction technologies that will be critical to delivering a safe climate.

GreenLaw encourages the ACT Government to expressly outline how the human right to a healthy environment will impact non-government entities in relevant laws, policies and funding decisions. Such provisions should be guided by international customary laws and norms relating to the human right to a healthy environment, namely:⁹²

- The **procedural aspects of the right extend to private entities**, including to ensure the public are able to access environmental information from businesses and other entities where appropriate;
- The ACT Government's obligations to **prevent third parties from interfering with the enjoyment and achievement of the substantive aspects of the right**. For example, regulating air pollution so that private industries do not violate the right to clean air; and
- The ACT Government's obligations to **monitor and assess** third party compliance with environmental standards and environmental human rights obligations.

The ACT Government should also explore mechanisms for **prioritising funding** for and government support of businesses and industries that are contributing to the achievement of the human right to a healthy environment, such as sustainable food systems.

Therefore, we recommend:

Recommendation 5

That the ACT Government consider further avenues to integrate into its practices, policies and laws the framework principles developed by the UN Special Rapporteur on Human Rights and the Environment that articulate government obligations conferred by the human right to a healthy environment.

⁹² See generally 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).

Recommendation 6

That the ACT Government consult with environmental governance entities and other stakeholders, including the public, on consequential reforms to environmental and planning law frameworks to ensure the right is consistently integrated into environmental decision-making and policy.

Recommendation 7

That the ACT Government engage with the Commissioner for Sustainability and the Environment as follows:

- *Specific review and consideration of the investigations and state of the environment reports already prepared by the Commissioner as part of the government's consultation on the right to a healthy environment;*
- *Consideration of the Minister for the Environment directing the Commissioner to either undertake a separate investigation into implementing the right in ACT environmental and planning laws or to incorporate consideration of the right into the 2023 State of the Environment Report (ACT); and*
- *Consideration of how the functions and role of the Commissioner can be amended and/or engaged to promote the human right to a healthy environment in the ACT.*

Recommendation 8

That relevant ACT Government agencies and entities, once the right is enshrined, expressly provide for how the human right to a healthy environment will impact non-government entities in relevant laws, policies and procedures, guided by international customary laws and norms.

Enforcement Under the *Human Rights Act*

While enforcement mechanisms were not specifically raised by the Discussion Paper, GreenLaw strongly encourages the ACT Government to explore additional enforcement mechanisms under the Act as part of any reforms pursuant to either the No Rights With Remedy reform process or as part of protecting the human right to a healthy environment.

Enforcement mechanisms under the *Human Rights Act* are currently inadequate to ensure the promotion of any human right protected under that Act, including the putative human right to a healthy environment. The need for accessible enforcement mechanisms is heightened because the capacity of persons to access justice and seek remedies for any breaches of the human right to a healthy environment is a critical component of the right.

The Current Enforcement Mechanisms Under the *Human Rights Act*

The Act imposes direct human rights obligations upon public authorities, pursuant to Pt 5A of the *Human Rights Act*. A person who claims that a public authority has contravened its human rights obligations may start proceedings against that authority in the ACT Supreme Court within one year of the alleged breach (s 40C of the Act). The Act specifically denies damages as a form of relief under the Act (see s 40C(4)) but otherwise leaves the ACT Supreme Court a wide discretion to award any remedy its considers appropriate.

The ACT Supreme Court, in addition to its discretion to award a remedy, may also issue a declaration of incompatibility where it finds that a law of the ACT is incompatible with an enshrined human right under the Act (see ss 32 and 33 of the *Human Rights Act*). This appropriately balances the role of the Court in interpreting human rights and the need for the democratically elected legislator to remain the entity that drafts and reforms law in the Territory.

The ACT Human Rights Commission may seek leave to intervene in human rights cases, and the ACT Attorney-General may also elect to intervene (but does not need to seek leave of the Court).⁹³ In the recent case of *Davidson v Director-General, Justice and Community Safety Directorate* [2022] ACTSC 83, the ACT Human Rights Commission intervened and submitted that the law in dispute was incompatible with international human rights law and practice relating to prisoners being provided with one hours of open air and exercise. The Court made findings that upheld those submissions,⁹⁴ demonstrating the importance of the intervenor power of the ACT Human Rights Commission in furthering the human rights jurisprudence of the Court.

⁹³ Human Rights Act 2004 (ACT) s 36.

⁹⁴ *Davidson v Director-General, Justice and Community Safety Directorate* [2022] ACTSC 83, [213].

However, this mechanism for bringing proceedings to enforce a breach of the *Human Rights Act* does not currently uphold the procedural aspects of the human right to a healthy environment as follows:

- The establishment of the ACT Supreme Court as the first and only avenue for independent appeal and review of any breaches of human rights is not time efficient or cost effective. The time, cost and formality of ACT Supreme Court processes represents a significant barrier to the community;
- Neither the ACT Supreme Court nor the *Human Rights Act* establishes clear guidelines or caps for litigatory costs. For example, costs orders or procedural rules to facilitate public interest litigation. Litigatory costs are a major economic barrier for access to justice, as recognised by the UN Special Rapporteur on Human Rights and the Environment;⁹⁵ and
- The limits imposed upon remedies, namely the prohibition on awarding damages, restricts access to justice as expressed by the human right to a healthy environment. Damages are an important remedy in an environmental context because monetary compensation can be utilised to remedy environmental harms or human harm occasioned by breaches of the human right to a healthy environment.⁹⁶

The ACT Human Rights Commission is also empowered with an audit function to review the effect of Territory laws upon human rights and report in writing to the ACT Attorney-General (s 41 of the *Human Rights Act*). To date, four audits have been completed that have informed systemic review of various aspects of the ACT Government. Such audits, and the mechanism under the Act that establishes declarations of incompatibility, are designed to promote a dialogue model of human rights. The ACT Human Rights Commission describes this model as follows:

The dialogue model of human rights protection seeks to inculcate a culture of human rights awareness within and between the three branches of government. In particular, it aims to ensure that human rights are taken into account when developing, interpreting and applying ACT law and policy.⁹⁷

GreenLaw strongly supports this model and urges the ACT Government, during this consultation process, to proactively discuss with stakeholders potential mechanisms to strengthen the dialogue model within the *Human Rights Act* specifically in relation to the human right to a healthy environment. In particular, avenues for imbedding human rights considerations in areas of the ACT Government that may not have previously been significantly regulated by the Act, such as the EPSDD.

⁹⁵ 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) [30].

⁹⁶ See generally on best practice environmental courts and tribunals: George Pring and Catherine Pring, *Greening justice: creating and improving environmental courts and tribunals* (The Access Initiative, 2009).

⁹⁷ Human Rights and Discrimination Commissioner, *Declaration of Incompatibility (s.32)* (ACT Human Rights Commission, Factsheet) <<https://hrc.act.gov.au/wp-content/uploads/2015/03/Section-32-Declaration-of-incompatibility.pdf>>.

An Accessible Complaints Mechanism

Earlier this year, the ACT Legislative Assembly commenced the Inquiry into Petition 32-21 (No Rights Without Remedy). In June 2022, the ACT Legislative Assembly Standing Committee on Justice and Community Safety handed down its findings with respect to that Inquiry. In summary, the Committee recommended that the ACT Government support and enact the terms of the petition to establish an accessible complaints mechanism.⁹⁸

The proposed model for an accessible complaints mechanism utilises the existing infrastructure of the ACT Human Rights Commission and the ACT Civil and Administrative Tribunal (ACAT) to provide a no-cost, simple pathway for individuals to make complaints. The complaints mechanism would function as follows:

- An individual would be able to make an initial written or oral complaint to the ACT Human Rights Commission regarding an alleged breach of their human rights. The Commission is then empowered to facilitate conciliation to, where possible, resolve the issue; and
- If this is unsuccessful, the Commission can refer to complaint to the ACAT. The Tribunal is designed to be simple, fast and no-cost process that does not require an individual to pay for legal representation to have access to justice.

Such a process is already enshrined in Queensland's Human Rights Act 2019.⁹⁹ In that Act, individuals are able to access conciliation through the Queensland Human Rights Commission. Since it commenced this process has been utilised to achieve accessible, cost-effective and meaningful outcomes for the people of that state.

We encourage the ACT Government to consider opportunities to design the accessible complaints mechanism so as to promote access for justice pursuant to the human right to a healthy environment. Fundamentally, the accessible complaints mechanism should be sufficiently funded and incorporate environmental experts or bodies such that persons seeking to have their human right to a healthy environment enforced will be heard by suitably trained experts empowered to remedy environmental harms.¹⁰⁰ There are a number of ways the accessible complaints mechanism could be designed to achieve this, including:

- **Specific funding for the ACT Human Rights Commission to develop expertise in the legal and scientific areas** that are likely to arise in the course of conciliating a human right to a healthy environment complaint, for example, training in pollution management; or
- **Reforming the role of the ACT Commissioner for Sustainability and the Environment** to extend her jurisdiction to include conciliating human right to a healthy environment complaints, or establishing an environmental human rights statutory position-holder to fulfil the role.

⁹⁸ 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.

⁹⁹ Human Rights Act 2019 (Qld) Sub div 4.

¹⁰⁰ George Pring and Catherine Pring, *Greening justice: creating and improving environmental courts and tribunals* (The Access Initiative, 2009).

We further recommend that additional funding or training be provided to the ACAT and ACT Supreme Court to ensure that quasi-judicial or judicial officers adjudicating matters involving alleged breaches of the human right to a healthy environment have the necessary environmental expertise.¹⁰¹

While the Discussion Paper does not directly address, or further, the reform process to enshrine an accessible complaints mechanism, we encourage the ACT Government to ensure an accessible complaints mechanism is enshrined in the Act as part of fulfilling its procedural obligations pursuant to the human right to a healthy environment.

GreenLaw has made further submissions regarding an accessible complaints mechanism that can be accessed here:

https://www.parliament.act.gov.au/__data/assets/pdf_file/0003/1990155/Submission-o8-Green-Law.pdf

Therefore, we recommend:

Recommendation 9

That the ACT Government proactively consult with the public and relevant stakeholders on mechanisms for promoting within the ACT the dialogue model of human rights in relation to the human right to a healthy environment.

Recommendation 10

That the ACT Government integrate reforms to implement a two-tiered complaints mechanism into its agenda to enshrine the human right to a healthy environment in the Human Rights Act 2004 (ACT).

Recommendation 11

That the ACT Government explore options to ensure that the two-tiered complaints mechanism is sufficiently funded and includes appropriate environmental expertise such that any complaints relating to the human right to a healthy environment are appropriately resolved and remedied.

¹⁰¹ Ibid.

Consideration of Vulnerable Groups

GreenLaw supports the ACT Government's consideration of additional protections that should be afforded to vulnerable groups in the ACT so that all people are able to equally enjoy the protections afforded by the human right to a healthy environment.

We believe that the right should be broadly enshrined in the *Human Rights Act* and that implementation of the right should be articulated through consequential reforms to environmental and planning laws, as well as government policies and procedures. It is during the implementation stage of the right that additional obligations for vulnerable groups should be conferred upon the ACT Government and related entities.

The following section outlines our recommendations for considering and consulting with vulnerable groups, and how to implement the right in a manner that takes into account the vulnerabilities of children and young persons in particular.

Vulnerable Groups in the ACT

Vulnerability refers to the 'interface between exposure to the physical threats to human wellbeing and the capacity of people and communities to cope with those threats.'¹⁰² We therefore encourage the ACT Government to consider both those groups that are vulnerable by reasons of identity and those disproportionately exposed to environmental harms.

Identified groups include: children and young persons, Indigenous Peoples, women, older persons, persons with disabilities, persons from ethnic or racial minorities, LGBTIQ+ persons and displaced persons.¹⁰³ Many individuals also experience intersecting forms of vulnerability which compounds their risk of suffering environmental harm.¹⁰⁴

Communities disproportionately exposed to environmental harms include those from low-socioeconomic suburbs, renters and tenants in public housing, and communities that are located in proximity to major industrial sites. It is also likely that such communities also have higher populations of individuals from the identified backgrounds above.

We urge the ACT Government to proactively engage with these groups and communities to seek their feedback on enshrining the right, and critically, to hear from those communities on how the right should be implemented in a manner that ensures equitable promotion of the human right to a healthy environment.

Children and Young Persons

As a young person-led law reform and legal research institute, GreenLaw recognises that young people are particularly vulnerable to present and future forms of environmental harm, and

¹⁰² United Nations Environment Programme, *Global Environment Outlook 3 Past, Present and Future Perspectives* (Earthscan Publications Ltd, 2002) 302.

¹⁰³ Special Rapporteur on Human Rights and the Environment, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, 37th sess, Agenda Item 3, UN Doc. A/HRC/37/59 (24 January 2018) 16-17.

¹⁰⁴ Sarah Dávila-Ruhaak, 'Making a case for the right to a healthy environment for the protection of vulnerable communities: A case of coal-ash disaster in Puerto Rico' (2020) 9(2) *Michigan Journal of Environmental & Administrative Law* 379.

therefore, benefit from the protection of the human right to a healthy environment. Children are, after all, the 'first embodiment of the interests of future generations'.¹⁰⁵

Children are vulnerable as they are developing physically and have less resistance to environmental harm. Exposure to environmental harm may also have long-lasting impacts as children get older, including increased likelihood of diseases.¹⁰⁶ The vulnerability of children and young people is compounded by climate change. Indeed, it is young people and future generations who will bear the brunt of climate change which will contribute to increasingly more intense and erratic weather events in the coming decades.

Children and young people are also vulnerable in the sense that they have less capacity to influence environmental decision-making and enforce their human rights to a healthy environment. Children cannot exercise their right to vote and are more dependent on adults with less mobility and less resources.¹⁰⁷

We therefore urge the ACT Government to **implement** the human right to a healthy environment in a manner that promotes inter-generational equity and empowers children and young people to participate in processes of environmental decision-making.

Because children and young people have limited means of influencing environmental decision-making, it is critical that the ACT Government implement and fund mechanisms that will enable children and young people to meaningfully contribute to environmental decision-making, namely:

- **Raising awareness and funding education** within the Territory on environmental human rights and how to enforce them for children and young people;
- **Providing opportunities** for children and young people to contribute to environmental policies, notably long-term policies for the future of the Territory's environment;
- **Providing environmental information**, especially on proposed developments or policies, in accessible formats that can be understood by young people and children; and
- Working constructively with the **ACT Public Advocate and Children and Young People Commissioner** on other pathways to improve access to environmental justice for children and young people.

Environmental organisations and human rights defenders play a critical role in campaigning for and facilitating effective protection of the rights of vulnerable populations. This is particularly so in the case of young people who lack the full set of legal rights that adults have. As such, the ACT Government should also recognise the rights of such organisations and protect their ability to engage in human rights defence work and campaigning relating to the human right to a healthy environment.¹⁰⁸

¹⁰⁵ Edith Brown Weiss, 'In fairness to our children: International law and intergenerational equity' (1994) 2 *Childhood* 22, 22.

¹⁰⁶ Special Rapporteur on Human Rights and the Environment, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, 37th sess, Agenda Item 3, UN Doc. A/HRC/37/59 (24 January 2018) 16-17.

¹⁰⁷ Kirsten Davies, Gil Marvel Tabucanon and Pamela Box, 'Children, Climate Change and the intergenerational Right to a Viable Future' in Nicola Ansell, Natascha Klocker and Tracey Skelton (eds), *Geographies of Global Issues: Change and Threat* (Springer Reference, 2016) 401.

¹⁰⁸ Sarah Dávila-Ruhaak, 'Making a case for the right to a healthy environment for the protection of vulnerable communities: A case of coal-ash disaster in Puerto Rico' (2020) 9(2) *Michigan Journal of Environmental & Administrative Law* 379.

We therefore recommend:

Recommendation 12

That the ACT Government meaningfully consult with vulnerable groups to determine what additional measures should be integrated into any reforms implementing the human right to a healthy environment to ensure vulnerable groups' rights to a healthy environment are protected and promoted.

Recommendation 13

That the ACT Government, through the implementation of the human right to a healthy environment, consider the importance of inter-generational equity and mechanisms for young people and children to access and meaningfully contribute to environmental decision-making and policy.

Fulfilling the Human Right to a Healthy Environment in the ACT

The fulfilment of the human right to a healthy environment in the ACT will be an ongoing process and we look forward to constructively working with the ACT Government and ACT Legislative Assembly to realise the right through consequential legislative and policy reform.

Earlier in this submission we have provided recommendations on necessary reforms to the *Human Rights Act* to promote the human right to a healthy environment, notably the procedural aspects of the right, and outlined our recommendations for the duties and obligations that the right confers on the ACT Government and environmental governance entities.

We consider this next section to provide the final step in that process, measures to promote the procedural and substantive aspects of the right in substantive environmental and planning laws, once the legal and administrative framework for the right is established in the *Human Rights Act* and other relevant legislation and policies.

Many of the avenues for promoting the human right to a healthy environment arise from discrete legislative schemes or policies of the ACT Government. We therefore encourage the ACT Government to broadly enshrine the human right to a healthy environment such that government flexibility and cohesion is upheld across various environmental and climate policies. Below we outline important avenues of reform that the ACT Government should explore to fulfil both the procedural and substantive aspects of the right:

The Procedural Aspects of the Human Right to a Healthy Environment

Throughout this submission we have made various recommendations relating to the procedural aspects of the human right to a healthy environment. Below we summarise the guiding principles that the ACT Government should uphold to fulfil these aspects of the right.

The ACT Government should consider introducing reforms that establish a presumption in favour of access to environmental information held by a public authority. Access should be granted to environmental information unless it can be proven that the information falls within an enumerated and finite list of exemptions.¹⁰⁹ For example, there should be an exemption to withhold information that would adversely impact national defence or public security.

The right to access environmental information should be guided by the following:

- **Access to any person:** the right to access information should extend to any person without having to prove their interest in the information or state reasons for the request;
- **Reasonable time:** information should be provided within reasonable time limits, preferably as soon as possible and, at the latest, within a month of the request;

¹⁰⁹ Environmental Defenders Office, *Submission on the Planning Bill* (EDO Submission, June 2022) 37.

- **Continuous disclosure of risks:** public authorities must, without being requested disclose relevant information regarding environmental risks arising from its own activities or activities its manages or has the power to approve; and
- **Transparency:** the ACT Government should continue to invest in the preparation, publication and dissemination of a report on the state of the environment, including information on the quality of the environment and information on pressures on the environment.¹¹⁰

As discussed earlier in this submission, GreenLaw urges the ACT Government to implement measures to improve public involvement in environmental decision-making and access to justice. In particular, the ACT Government should prioritise consequential environmental law reform that increases the ability of third parties to seek merits and judicial review of environmental decisions. And further, the ACT Government should continue working towards establishing an accessible complaints mechanism within the *Human Rights Act*.

Clean Air and Clean Water

Air that is free from pollution and toxic substances is a precondition for healthy human life and the flourishing of the environment more broadly. The government must not violate the right to breathe clean air through either their own actions or by allowing the right to be violated by third parties, for example business or polluting industries.¹¹¹ Similarly, clean and sustainable water is a prerequisite for all life on Earth and is considered sacred across a range of cultures, including Indigenous Nations in Australia.¹¹² Water-related obligations that fall within the ambit of the human right to a healthy environment include freedom from water scarcity and water pollution, protecting populations and ecosystems from the impacts of water-related disasters and ensuring the sustainability and health of water ecosystems (both freshwater and oceanic).¹¹³

The ACT Government has demonstrated its strong commitment to ensuring clean air through initiatives like the live air quality monitoring program whereby ACT Health reports on air quality using current data on air pollutants.¹¹⁴ This initiative is critical to ensure that the public has access to information on air pollutant levels. To compliment these efforts and achieve a safer climate, the ACT Government can take action to address the sources of air pollution, including through transitioning to net zero emissions transport across the ACT.

The ACT Government has also demonstrated its commitment to enhancing water management through establishing the Office for Water. This body will coordinate between various areas of Government that are involved in water management and can accordingly simplify and enhance the Government's approach to water-related issues. In addition, the Office for Water will focus

¹¹⁰ Ibid.

¹¹¹ 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).

¹¹² See, eg, Martuwarra RiverOfLife et al, 'Recognizing the Martuwarra's First Law Right to Life as a Living Ancestral Being' (2020) 9(3) *Transnational Environmental Law* 541.

¹¹³ 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) [5].

¹¹⁴ 'Air quality in the ACT', *ACT Government Health* (Web Page) < <https://www.health.act.gov.au/about-our-health-system/population-health/environmental-monitoring/monitoring-and-regulating-air>>.

on improving the public's access to, and understanding of, water information while advancing the interests and contributions of the Ngunnawal People.¹¹⁵

The ACT Government can further strengthen its approach to improving water quality and management by undertaking consistent, long-term and live monitoring of its water quality and pollutants. This would be in addition to the information provided by Waterwatch.¹¹⁶ Furthermore, the community can also be supported to participate in water management including through a formal mechanism within the Office of Water, and through secure and consistent funding for community groups that already contribute to water management.¹¹⁷ All water-related governmental policies and programs should be consistent with, and underpinned by, climate change projections for the ACT.¹¹⁸

A Safe Climate

Human-induced greenhouse gases are responsible for approximately 1.1°C of warming since 1850-1990 and are expected to drive global temperatures to reach or exceed 1.5°C of warming in the next 20 years.¹¹⁹ Changes in our global climate underpin sea-level rise, extreme weather events and environmental degradation,¹²⁰ representing a pressing threat to the human right to a healthy environment. Through the *UN Framework Convention on Climate Change* the international community has committed to the 'stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'.¹²¹ Put another way, the international community (and by extension, the ACT government) has committed to ensuring a safe climate that is compatible with human flourishing and dignity.

We acknowledge and commend the ACT Government for pioneering the consolidation of State and Territory policy considerations into overarching climate change strategies that promote a safe and healthy environment. The ACT Government's *Climate Change Strategy 2019-2025*, has not only contributed to marked emissions reductions in the Territory, but also encouraged other States to produce similar strategies, with the *NSW Climate Change Strategy 2020-2050* following a year later and the *Victorian Climate Change Strategy* following two years after that.¹²² We

¹¹⁵ 'Introducing the Office for Water', *ACT Government Environment, Planning and Sustainable Development Directorate – Environment* (Web Page) <<https://www.environment.act.gov.au/home/home-news-listing/introducing-the-office-for-water>>; ACT Government, 'Dedicated office of Water at the forefront of water initiatives in the ACT' (Media Release, 15 July 2022).

¹¹⁶ Office of the Commissioner for Sustainability and the Environment, *State of the Lake and Waterways in the ACT* (Report, May 2022) 397.

¹¹⁷ *Ibid* 399.

¹¹⁸ *Ibid*.

¹¹⁹ Katherine Leitzell, 'Climate Change widespread, rapid, and intensifying', *IPCC* (Online, 9 August 2021). <<https://www.ipcc.ch/2021/08/09/ar6-wg1-20210809-pr/>>

¹²⁰ S.I. Seneviratne et al, 'Changes in climate extremes and their impacts on the natural physical environment' in *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation: A Special Report of Working Groups I and II of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2012) 109-230.

¹²¹ *United Nations Framework Convention on Climate Change*, UN GAOR, 48th sess, 86th mtg, UN Doc A/RES/48/189 (20 January 1994).

¹²² ACT Government, *ACT Climate Change Strategy 2019-25* (Report, 2019).

further note and commend the ACT's integration of long-term and short-term strategic planning, enabling it to set priority goals and achieve interim targets on emissions reduction.¹²³

As has been discussed above in this submission, GreenLaw has undertaken research into renewable energy reform in the ACT that would further promote a safe climate,¹²⁴ and therefore, the human right to a healthy environment for all Canberrans. We encourage the ACT Government, as part of its implementation of the right to consider investment in community owned, developed, or co-invested energy infrastructure. Such infrastructure not only contributes to critical energy storage that supports deeper penetration of renewables in the electricity grid,¹²⁵ but has a range of social, economic, and technical benefits for those communities that are not fully captured in a market context. Our research found that community-scale batteries provide:

- Savings on electricity bills for communities, including households, local businesses and community organisations;
- Reductions in network overloads that smooth out peaks in electricity demand. Thus, reducing the burden on the grid and saving consumers money;
- Additional voltage and frequency services that help stabilise the grid; thus, improving the grids resilience to natural disasters;
- Empowerment to communities, by enabling them to tackle climate change and by doing so strengthening social connections; and
- Alleviation of socio-economic inequalities by lessening the financial burden of electricity access, especially for renters who are currently excluded from accessing most renewable energy options.¹²⁶

Healthy Food and Sustainable Agricultural Systems

Healthy and nutritious food is essential to support human life. However, global agricultural systems also represent a serious threat to healthy ecosystems and biodiversity. It is therefore essential that governments provide for both sufficient food to support their populations and ensure that the production of that food is sustainable. Governments are also obligated to prevent

¹²³ Ibid.

¹²⁴ See Peta Bulling et al, *Submission to the Inquiry Into Renewable Energy Innovation in the ACT* (GreenLaw Submission, 2021) and Annika Reynolds and Peta Bulling, *Supplementary Submission to the Inquiry into Renewable Energy Innovation in the ACT* (GreenLaw Submission, 2021).

¹²⁵ Clean Energy Council, *Battery Storage: The New Clean Peaker* (Research Report, April 2021) <<https://assets.cleanenergycouncil.org.au/documents/resources/reports/battery-storage-the-new-clean-peaker.pdf>> 2.

¹²⁶ Dr Hedda Ransan-Cooper, *Stakeholder Views on the Potential Role of Community Scale Storage in Australia* (Commissioned Report, Australian National University, 4 August 2020) <<https://arena.gov.au/assets/2020/08/stakeholder-views-on-community-scale-storage-in-australia.pdf>> 57.

the violation of the right to healthy and sustainably produced food by third parties, including agricultural industries and businesses.¹²⁷

The ACT Government has taken positive steps to fulfil its obligations pursuant to this element of the human right to a healthy environment. For example, the Labor-Greens government has committed to rolling out organic and food waste collection in Canberra, and the ACT Government has commissioned research into the carbon footprint of our food.¹²⁸ Both measures contribute to increasing the sustainability of Canberra's food systems.

GreenLaw encourages the ACT Government to continue to implement measures that support healthy and sustainable food systems in the ACT, including by addressing the following aspects of the human right to healthy food and sustainable agricultural systems:¹²⁹

- Reduce greenhouse gas emissions resulting from agriculture and safeguard carbon sinks threatened by agriculture, particularly land clearing;
- Decrease the use of pesticides, fertilizers and antibiotics in agriculture;
- Restore soil health and safeguard water resources; and
- Transform food system governance by incorporating the right to a healthy environment and healthy food into legislation, imposing liability upon businesses that violate these obligations.

Non-Toxic Environments in Which to Live, Work and Play

Prevention and remediation of pollution and the spread of other toxic substances is essential to uphold the rights of people and to protect the health of the environment.¹³⁰ Toxic substances harm human health and threaten the attainment of a broad range of human rights. Furthermore, toxic substances, whether transmitted by water, air or substance pollution, threaten the integrity of ecological processes and harm non-human species.

The ACT has robust pollution laws and toxic substance regulation. Furthermore, the ACT Government's commitment, and actions to date, to reduce the Territory's greenhouse gas emissions contribute to the fulfilment of this aspect of the human right to a healthy environment.

We do not have environmental science expertise and therefore are not well positioned as a research organisation to provide recommendations on how the ACT Government could better regulate or reduce toxic substances in the ACT. However, we note that the ACT has yet to ban per- and poly-fluoroalkyl substances (PFAS), despite signing the *Intergovernmental Agreement on*

¹²⁷ UN Special Rapporteur on Human Rights and the Environment, *Healthy and sustainable food: reducing the environmental impacts of food systems on human rights*, UN GAOR, 76th sess, UN Doc A/76/179 (19 July 2021) [72].

¹²⁸ See Daniella White, 'Canberra to measure the carbon costs of food, goods brought in to territory', *The Canberra Times* (online, 22 January 2022) <<https://www.canberratimes.com.au/story/7081054/canberra-to-measure-the-carbon-cost-of-food-goods-brought-in-to-territory/>>.

¹²⁹ UN Special Rapporteur on Human Rights and the Environment, *Healthy and sustainable food: reducing the environmental impacts of food systems on human rights*, UN GAOR, 76th sess, UN Doc A/76/179 (19 July 2021) [68]-[76].

¹³⁰ See UN Special Rapporteur on Human Rights and the Environment, *The right to a clean, healthy and sustainable environment: non-toxic environment*, UNHRC 49th sess, Agenda Item 3, UN Doc A/HRC/49/53 (12 January 2022).

a *National Framework for Responding to PFAS Contamination*, which includes commitments for phasing out the use of PFAS. Consideration of banning PFAS, which has potential severe health effects, would further contribute to the fulfilment of the human right to a healthy environment.

Healthy Ecosystems and Biodiversity

The enjoyment of the human right to a healthy environment depends upon access to a safe, clean, healthy, and sustainable environment. Actions that jeopardise or exploit the natural environment may be in breach of the ACT Government's human rights obligations and may detrimentally impact Indigenous communities and their rights.¹³¹ The obligation to ensure healthy ecosystems also extends to preserving biodiversity, critically the integrity of native ecosystems and to take action to prevent biodiversity decline through threatened species management.¹³²

The ACT has established environmental and planning, biodiversity conservation and climate change laws that contribute to the achievement of healthy ecosystems and biodiversity. Despite this, the ACT faces significant environmental challenges and many of our native ecosystems, places and species are under threat.¹³³

We therefore encourage the ACT Government, as part of fulfilling the obligations conferred by the human right to a healthy environment, to ensure that the ACT's biodiversity conservation laws adhere to best practice principles. This means integrating a human rights-based approach to all aspects of conserving, protecting, restoring, using and benefitting from healthy ecosystems and biodiversity, as follows:¹³⁴

- Upholding procedural obligations relating to healthy ecosystems and biodiversity, including assessing the impacts of proposed projects that could damage, destroy or diminish healthy ecosystems and biodiversity and implementing human rights safeguards into the design and use of biodiversity financing mechanisms;
- Monitoring and reporting on the state of biodiversity in the ACT and threats to biodiversity;
- Adopting and implementing Territory biodiversity plans;
- Mainstreaming biodiversity considerations into other policy areas, namely, health, finance and planning;

¹³¹ 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) [104].

¹³² *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN GAOR, 34th sess, Agenda Item 3, UN Doc A/HRC/34/49 (19 January 2017) [104].

¹³³ See, eg, ACT Commissioner for Sustainability and the Environment, *ACT State of the Environment* (Report, 2019).

¹³⁴ *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN GAOR, 34th sess, Agenda Item 3, UN Doc A/HRC/34/49 (19 January 2017) [69]-[70].

- Creating protected areas and establishing other conservation measures to protect a representative range of ecosystems and biodiversity;
- Establishing rules to ensure the sustainable use and enjoyment of natural ecosystems and biodiversity; and
- Continuing to strengthen and invest in laws protecting threatened species and their recovery.

A major threat to healthy ecosystems and biodiversity in the ACT is continued greenfill development and urban sprawl.¹³⁵ We encourage the ACT Government to take measures that reduce the ACT's ecological footprint by investing in greater urban infill, delivering more housing for our population without sacrificing our right to a healthy environment.

Supporting Business and Industry to Contribute to the Fulfilment of the Right

Canberra is proud to be a city that supports technological innovation and invests in economies of knowledge. Our businesses and industries are already tackling many of the grave environmental challenges that most threaten our human rights, from climate change to air pollution. The ACT Government's continual promotion and fulfilment of the human right to a healthy environment is fundamentally an **opportunity** for our business community.

In particular, we encourage the ACT Government to discuss with business and industry stakeholders on how the following may contribute to fulfilment of the right:

- **Measures and investment to strengthen environmental and social governance practices** within the ACT business community, including knowledge hubs and training;
- ACT Government **funding or public-private partnerships on projects that contribute to the realisation of the right**, notably within emissions reduction and biodiversity conservation industries; and
- **Policies to promote and create opportunities for community co-investment** in projects that are compatible with the right, such as community-owned renewable energy projects.¹³⁶

¹³⁵ ACT Commissioner for Sustainability and the Environment, *ACT State of the Environment* (Report, 2019).

¹³⁶ See Peta Bulling et al, *Submission to the Inquiry Into Renewable Energy Innovation in the ACT* (GreenLaw Submission, 2021).

In summary, the ACT Government is already taking positive steps to fulfil the human right to a healthy environment for Canberrans. We have further discussed a range of reform options that would further promote the right in the ACT, and therefore recommend:

Recommendation 14

That the ACT Government fulfil its obligations conferred by the human right to a healthy environment through consequential reforms that uphold the procedural aspects to the right, and to explore further policy options for continual promotion of the substantive elements of the right.

Recommendation 15

That the ACT Government consult with business groups and other stakeholders to discuss opportunities for the implementation of the human right to a healthy environment through government investment, public-private partnerships and other mechanisms to leverage private equity and contribute to positive environmental and economic outcomes.

Balancing Social, Economic and Environmental Values in the ACT

We urge the ACT Government to recognise and integrate into any legislative and policy reforms pursuant to the right, that our environment underpins the flourishing of our economy and society. Social, economic and environmental values are not divergent points, but fundamentally connected to each other.

Michelle Bachelet, UN High Commissioner for Human Rights, has called on the international community to:

Today, I call upon you to **commit yourselves fully to the task of making the right to a healthy environment a reality for all people.**

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.¹³⁷

Our environment is crisis – globally and locally. The ACT Government has recognised this, when it declared a climate emergency and, critically, through the many actions and environmental policies it has implemented to protect and restore nature for the benefit of us all.

Our businesses and industries benefit from a clean, healthy and sustainable environment. Clean air allows our cafes and restaurants to seat people outside. Clean water supports our tourism and hospitality sectors, and ensures local agriculture is safe to eat and enjoy. Healthy biodiversity and ecosystems underpin our air and water quality, provide important natural buffers from natural disasters and draw many tourists to our beautiful Bush Capital.

The immediate economic benefits of the exploitation of environmental resources are seductive. But we urge the ACT Government to recognise that ‘optimal’ economic policy requires ‘rapid abatement of carbon emissions’.¹³⁸ Indeed, modern economists are increasingly focusing on the impacts of environmental harm upon the economy, through the flow on negative impacts on bond markets, interest rates, risk aversion in investors, labour productivity and long term total factor productivity when our environment is degraded or in crisis.¹³⁹

¹³⁷ Michelle Bachelet, ‘The right to a clean, healthy, and sustainable environment - what does it mean for States, for rights-holders and for nature?’ (UNOHC Release, 16 May 2022).

¹³⁸ Frank Ackerman, Elizabeth A. Stanton, and Ram’on Bueno, ‘Epstein–Zin utility in DICE: Is risk aversion irrelevant to climate policy?’ (2013) 56(1) *Environmental and Resource Economics* 73, 73–84.

¹³⁹ See Michael Bauer and Glenn Rudebusch, ‘The Rising Cost of Climate Change: Evidence from the Bond market’ (Working Paper Series No. 2020-25, Federal Reserve Bank of San Francisco, 28 June 2021); Rocco Colacito, Bridget Hoffmann and Toan Phan, ‘Temperature and Growth: a Panel Analysis of the United States’, (2018) 51(2-3) *Journal of Money, Credit and Banking* 313.; Frank Ackerman, Elizabeth A. Stanton, and Ram’on Bueno ‘Epstein–Zin

Limits on the scope or implementation of the right to a healthy environment in the ACT based upon claims that such limitations carry social and economic benefits are unjustified. They also risk undermining the effective promotion and implementation of the right to a healthy environment, imposing more significant environmental burdens on our generation – and all future generations. This risks our social and economic rights, as well as our right to a healthy environment, as young people. As noted by Edith Weiss, climate change is an ‘inherently intergenerational problem with extremely serious implications for equity between ourselves and future generations’.¹⁴⁰

Providing the best social and economic outcome for all Canberrans can only be done through ensuring the broad application and implementation of the human right to a healthy environment.

utility in DICE: Is risk aversion irrelevant to climate policy?’ (2013) 56 (1), *Environmental and Resource Economics*, 73–84.; M Donadelli, M Juppner, M Riedel and C Schlag, ‘Temperature Shocks and Welfare Costs’, (2017) 82 *Journal of Economic Dynamics and Control*, 331.

¹⁴⁰ Edith B. Weiss, ‘Climate Change, Intergenerational Equity, and International Law’ (2008) *Georgetown University Law Centre* 615, 627.