



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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Chair, Standing Committee on Justice and Community Safety
Via: LACommitteeJCS@parliament.act.gov.au

30 November 2023

Dear Chair,

Submission to Inquiry into the Human Rights (Healthy Environment) Amendment Bill 2023

The ACT Human Rights Commission is pleased to provide a submission to inform the Committee's examination of the Human Rights (Healthy Environment) Amendment Bill 2023.

The Commission strongly supports amending the *Human Rights Act 2004* to incorporate the human right to a healthy environment as part of the ACT's human rights framework. It is evident, and acutely relevant amidst ongoing environmental and climate crises, that our human rights and wellbeing depend on having a clean, sustainable and healthy environment. Recognising the right to a healthy environment as part of our human rights framework will bring environmental justice and environmental impacts to the forefront of decision-making across ACT Government.

Notwithstanding our strong support for enacting the right to a healthy environment, our submission queries whether the proposed construction reflects close engagement with Aboriginal and Torres Strait Islander peoples, and raises concern about limiting litigation of duties to consider and comply with the right to a healthy environment pending a statutory review in five years.

We would be pleased to appear before the Committee to discuss this submission and issues arising from other evidence. We request that our submission be published in full.

Yours sincerely

Dr Penelope Mathew
President and Human Rights Commissioner

Karen Toohey
Discrimination, Health Services, and Disability
and Community Services Commissioner

About the ACT Human Rights Commission

- i. The ACT Human Rights Commission is an independent agency established by the *Human Rights Commission Act 2005* (HRC Act), having operated since 1 November 2006. Its main object is to promote the human rights and welfare of people in the ACT. Since 1 April 2016, a restructured Commission has included:
 - The President and Human Rights Commissioner
 - The Discrimination, Health Services, Disability and Community Services (DHSDCS) Commissioner
 - The Public Advocate and Children and Young People Commissioner; and
 - The Victims of Crime Commissioner
- ii. This submission is made primarily on behalf of the President and Human Rights Commissioner and the DHSDCS Commissioner. The Commission's previous submission to public consultation about introducing a right to a healthy environment in the ACT is available on our website, and should be read in conjunction with this submission.¹

Our views

The Commission strongly supports legislating the right to a healthy environment in the *Human Rights Act 2004* (ACT) ('HR Act'). It is a matter of significant pride that the ACT would be the first jurisdiction to recognise a standalone human right to a healthy environment in Australia. As we have previously observed, while the right to a healthy environment will not alone address the challenges presented by climate change and environment harms, it is not merely symbolic or performative.

The right to a healthy environment recognises the fundamental connection between a healthy environment and the enjoyment of basic human rights and wellbeing.² Acknowledging this interdependency within the HR Act will be key to embedding regard to environmental and climate impacts across all areas and activities of the ACT Government both now and for future generations. Our earlier submission in the course of public consultation outlines in detail the anticipated benefits of enacting the right to a healthy environment into the HR Act, which we commend to the Committee.³

We further welcome that the proposed drafting of the right to a healthy environment will accord with its recognition by the UN General Assembly in July 2022,⁴ which affirmed that:

"Everyone has the right to a clean, healthy and sustainable environment."

Framing the right in broad principled terms is, in our view, critical to ensuring its interpretation keeps pace with how it is understood and developed in international human rights law. Such drafting ensures consistency with the conventional framing of other rights in the HR Act and other statutory bills of rights in Australia. The Commission would accordingly be reluctant to support further changes to define or clarify the substantive and procedural elements that form part of the right to a healthy environment.

¹ ACT Human Rights Commission, *Submission – introduction of a right to a healthy environment in the Human Rights Act 2004*, (Submission to public consultation, 9 September 2022), available at: <https://www.hrc.act.gov.au/_data/assets/pdf_file/0005/2300198/Submission-Right-to-a-Healthy-Environment-Discussion-Paper-2022.pdf>

² UN General Assembly, United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972: List of Participants, UN Doc A/CONF.48/INF.5/Rev.1 (21 September 1972) ('Stockholm Declaration'); *Rio Declaration on Environment and Development*, 31 ILM 874 (12 August 1992), Preamble.

³ Above 1, [11]-[27].

⁴ UN General Assembly, 'The human right to a clean, healthy and sustainable environment', UN Doc. A/RES/76/300 (28 July 2022).

Significance for Aboriginal and Torres Strait Islander peoples

The Commission does not speak for the traditional custodians of the ACT region. The Commission acknowledges that the right to a healthy environment has special relevance and significance for Aboriginal and Torres Strait Islander peoples, and must be understood in that context. For many Aboriginal and Torres Strait Islander peoples, ‘a healthy environment’ will be inherently tied to their intimate, personal, spiritual and cultural connection with Country; and also form part of holistic conceptions of health, identity and wellbeing.

The Commission understands that Aboriginal and Torres Strait Islander peoples’ relationships with Country, and the land, waters and natural resources with which they have a traditional connection, provide an inextricable foundation for the exercise of self-determination.⁵ The right to a healthy environment accordingly obliges governments to ensure timely, full and effective participation in decision-making across the spectrum of matters that affect Aboriginal and Torres Strait Islander peoples and Country.⁶

The Bill’s explanatory statement does not indicate whether, or how, Aboriginal and Torres Strait Islander peoples have been closely engaged as an active partner in introducing the right to a healthy environment into the HR Act. Consistent with their collective right to self-determination and distinct cultural rights under s 27(2) of the HR Act, the views, expertise and knowledge of Aboriginal and Torres Strait Islander peoples (including traditional custodians of the ACT and surrounding region) must directly inform how the human right to a healthy environment is legislated and implemented.

We accordingly recommend that the Committee’s Inquiry prioritise hearing from Aboriginal and Torres Strait Islander people about recognition of the right to a healthy environment, as well as children and young people for whom recognising and realising the right is especially important.

Classification

It is broadly accepted in international human rights law that all rights are indivisible, interrelated and interdependent,⁷ and all human rights impose positive and negative obligations to respect, protect and fulfil the values that they enshrine.⁸ As a proposition that has emerged from the content of other established human rights, the right to a healthy environment itself includes both positive and negative obligations derived from established human rights.

Aspects of the right to a healthy environment that are sourced in economic, social and cultural rights, like access to safe water and adequate sanitation, healthy and sustainably produced food and the highest attainable standard of physical and mental health (‘the right to health’), may be capable of ‘progressive realisation’ to the maximum of available resources and should be understood as such. The right to a healthy environment must not, however, be understood solely as an economic, social and cultural right that must only be realised progressively to the maximum of available resources.⁹ It will equally impose immediate realisable obligations, like a strong presumption against taking retrogressive measures. To the extent that such duties also derive from the civil and political rights protected in Part 3 of the HR Act, like rights to life, security and privacy, they must be understood in that context.

⁵ Michael Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (Federation Press, 2016) 173, relying on *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001) 79 Inter-Am Court HR (ser C) [144], [148]–[149].

⁶ John H Knox (Special Rapporteur on Human Rights and the Environment), ‘Framework principles on human rights and the environment’ (‘Framework Principles’), UN Doc. A/HRC/37/59 (24 January 2018), 18 (Principle 15).

⁷ *Vienna Declaration and Programme of Action* (World Conference on Human Rights, 14-25 June 1993), [5].

⁸ UN Human Rights Committee, General Comment No. 31 [80] – The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 80th sess, 2187th mtg, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004).

⁹ Above 1, [36]–[40].

We recognise that, due to the existing structure of the HR Act, the decision has been made to situate the new right to a healthy environment within Part 3A (Economic, social and cultural rights). The explanatory statement seeks to remedy this concern by clarifying that obligations arising from the new right may be sourced in civil and political rights or economic, social cultural rights, or both. Any recommended changes to the Bill or explanatory statement must therefore be vigilant to ensure they do not inadvertently portray the right to a healthy environment as one that is only subject to an obligation of progressive realisation. Ultimately, the right to a healthy environment underscores the artificial nature of delineating between different generations and categories of rights. Accordingly, the Commission would broadly support amending the HR Act to remove the arbitrary distinction between civil and political rights and economic social and cultural rights in Part 3 and Part 3A respectively.

Non-discrimination

Environmental harm disproportionately impacts overburdened communities and individuals experiencing vulnerability who are most susceptible to adverse impacts – including due to age, gender, poverty, disability, cultural and traditional connections to land, water and resources, and other factors. The right to a healthy environment therefore requires, as a core component, that States ensure equal and effective protection from discrimination. This includes by taking additional measures to protect those who are most vulnerable to, or at particular risk from, environmental harm.

In its present form, s 27C makes explicit provision, in subsection (2), that everyone is entitled to enjoy [the right to a healthy environment] without discrimination. The right to equality and non-discrimination, as understood in international human rights law and reflected in s 8 of the HR Act, ensures that all human rights must be guaranteed without distinction or discrimination of any kind (including by taking additional measures to protect those who most exposed, or disproportionately affected by, breaches of human rights).¹⁰ We accordingly maintain that it is unnecessary, duplicative and undesirable for new rights, like the right to a healthy environment and the right to work, to expressly provide for their enjoyment without discrimination.¹¹

Justiciability

It is of some concern that the Bill would limit litigation of a public authority's obligations under the HR Act with respect to the right to a healthy environment for a period of at least five years. Proposed ss 40C(5A) will prevent a person from bringing proceedings in the ACT Supreme Court alleging that a directorate, minister, agency or other public authority has failed to act compatibly with, or properly consider, their human right to a healthy environment. A person would similarly be unable to rely on the right in other legal proceedings.

While not clarified in the explanatory statement, we understand this constraint on litigation is based in two concerns:

- Firstly, it seeks to ensure that ACT Government agencies and other public authorities have adequate time, in addition to the period of delayed commencement, to understand and implement their obligations under the new right; and

¹⁰ Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (2nd ed, 2005), 'Article 26 – Equality', UN Human Rights Committee, *General comment No. 18: Non discrimination*, 37th sess, UN Doc CCPR/C/GC/18 (10 November 1989), [10].

¹¹ ACT Human Rights Commission, *Submission to Standing Committee on Justice and Community Safety Inquiry into the Human Rights (Workers Rights) Amendment Bill 2019* (Submission, 31 January 2020), 6, available at: <https://www.parliament.act.gov.au/data/assets/pdf_file/0010/1475254/01.-ACT-Human-rights-Commission.pdf>; Above 1, [41]-[44].

- Second, it responds to perceived complexity about the scope, nature and content of the new right by allowing time for it to further develop and crystallise at the international level.¹²

We acknowledge that such concerns attest to uncertainty among ACT Government agencies about the potential impacts of environmental human rights litigation on their existing functions, and that a suitable transitional period would support agencies to fully understand and apply the right in policies and practice. The Commission does not, however, agree that such considerations warrant the cautious approach taken by the Bill, including barring access to the ACT Supreme Court and judicial remedies to allege breaches of the right to a healthy environment by public authorities.

Among the procedural duties that form part of the right to a healthy environment, governments are obliged to ensure access to effective judicial and administrative remedies for environmental harm.¹³ To restrict any litigation of the right to a healthy environment pending the outcomes of a statutory review after five years does not, in our view, satisfy the requirement to ensure effective remedies. Embedding this constraint on litigation under s 40C would also appear at odds with the need for urgent action in the face of triple planetary crises of climate change, environmental pollution and biodiversity loss, affirmed by the ACT Legislative Assembly in February 2022. Despite being presented as a temporary measure to allow agencies time to implement the new right, we are worried that the Bill would not automatically sunset proposed ss 40C(5A) and 40C(5B) after five years.

Introducing new rights into the HR Act has not precipitated a sharp or sustained increase in litigation or ‘lawfare’ that would justify limiting access to judicial remedies for a particular human right. We recognise that confining litigation of the right to a healthy environment under s 40C emulates the ‘step-by-step approach’ to introducing the right to education in s 27A of the HR Act in 2012, which partly responded to concerns about the justiciability of economic, social and cultural rights. Since removing this restriction in 2016, only two ACT Supreme Court matters have alleged non-compliance with s 27A, and without success.¹⁴ Similarly, the ACT Supreme Court has not had cause to engage substantively with arguments based on the right to work and work-related rights,¹⁵ which was introduced in 2020 and includes aspects that are capable of progressive realisation. Given these experiences and disincentives to Supreme Court litigation that we have previously articulated,¹⁶ the Commission would not anticipate a significant increase in environmental human rights-based claims under s 40C on commencement of the right to a healthy environment.

Moderating access to judicial remedies for alleged breaches of certain rights is, in broad terms, undesirable and fragmentary. Human rights are interdependent, interrelated and indivisible;¹⁷ that is, they reinforce and support each other. To the extent that the right to a healthy environment is derived from obligations under other recognised rights (like the right to life, privacy and home, rights of children, equality and non-

¹² ACT Legislative Assembly, *Hansard*, 26 October 2023, 3429 (Tara Cheyne MLA), available at: <<https://www.hansard.act.gov.au/hansard/10th-assembly/2023/PDF/P231026.pdf#page30>>

¹³ Framework Principles, 13 (Principle 10).

¹⁴ *Islam v Director-General of the Department of Justice and Community Safety Directorate* [2018] ACTSC 322 (23 November 2018); *Manny v Commonwealth of Australia*; *Manny v University of Canberra* [2023] ACTSC 160 (29 June 2023).

¹⁵ To date, the right to work has been referenced by a single applicant in various interlocutory applications in the same matter (see *Ezekiel-Hart v Council of the Law Society of the ACT & Anor* [2021] ACTSC 133; (No 2) [2022] ACTSC 29 (25 February 2022); (No 2) [2023] ACTSC 207 (31 July 2023); and (No 3) [2022] ACTSC 300 (3 November 2022)).

¹⁶ ACT Human Rights Commission, Submission No 6 to Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Inquiry into Petition 32-21 (No Rights Without Remedy)* (7 April 2022), available at: <https://www.parliament.act.gov.au/_data/assets/pdf_file/0010/1990153/Submission-06-ACT-Human-Rights-Commission.pdf>

¹⁷ Above 7.

discrimination, and the cultural rights of Aboriginal and Torres Strait Islander peoples),¹⁸ these rights will continue to provide clear and established principles, jurisprudence and commentary – both domestic and international – on which individuals could base environmental human rights claims; as is confirmed by s 40C(5B) of the Bill.¹⁹

Although the United Nations General Assembly has only recently endorsed the right to a clean, healthy and sustainable environment as a human right, its scope and content are not, in this regard, novel or undeveloped. Referring to the thorough mapping of environmental human rights obligations by successive Special Rapporteurs on Human Rights and the Environment over more than a decade,²⁰ the former mandate-holder, Professor John H Knox, has highlighted that, ‘the human right to a healthy environment is not an empty vessel waiting to be filled.’²¹ As with all human rights, however, “our understanding of it will continue to grow for many years to come,” including as related standards, treaties or principles gradually develop.²²

In raising these concerns, the Commission does not seek to convey that delaying litigation of the right to a healthy environment under s 40C will entirely undermine its normative impact. A court (including the ACT Civil and Administrative Tribunal) will still be required to interpret a Territory law, as far as it is possible to do so consistently with its purpose, in a way that is compatible with the right to a healthy environment.²³ The Supreme Court would still be empowered to declare a law incompatible with the right to a healthy environment, should this issue arise in a proceeding before it. It is also our view that the ACT Civil and Administrative Tribunal will, when exercising its administrative review jurisdiction, still be obliged to properly consider, and act consistently with, the right to a healthy environment to the extent that it would itself have public authority obligations when acting in an administrative capacity.

We also welcome that parallel reforms in the Human Rights (Complaints) Legislation Amendment Bill 2023 will empower individuals to make a complaint to the Commission where they believe a public authority has acted inconsistently with, or failed to relevantly consider, their right to a healthy environment. Given these other means of relying on the right to a healthy environment, the proposed constraint will not necessarily assure additional time to agencies to become familiar with the scope and content of the new right. The Committee may wish to seek further information as to why the proposed constraint on litigation under s 40C is required for agencies to fully understand and implement their new human rights obligations.

Accordingly, while the Commission would not oppose passage of the Bill in its current form, we do not support the inclusion of ss 40C(5A) and (5B). Other less restrictive options, including a lesser period of two or three years before the statutory review commences or sunseting or the proposed constraint on s 40C litigation after a similar period, must be examined. Should the Bill retain the proposed constraint on litigation of the right to a healthy environment under s 40C, directorates, agencies and other public

¹⁸ *Human Rights Act 2004* (HR Act), ss 9, 12, 11(2), 8, 27(2)); see, for example, UN Human Rights Committee, *Views: Communication No. 3624/2019*, 135th sess, UN Doc CCPR/C/135/D/3624/2019 (18 September 2023) (‘Billy and others v Australia’); UN Committee on the Rights of the Child, *General comment No. 26 (2023) on children’s rights and the environment, with a special focus on climate change*, 93rd sess, UN Doc CRC/C/GC/26 (22 August 2023).

¹⁹ Human Rights (Healthy Environment) Amendment Bill 2023, cl 7.

²⁰ See, for example, Framework Principles.

²¹ John H Knox and David R Boyd, *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 Doc. A/73/188 (19 July 2018), [13]

²² John H Knox, as quoted in Office of the High Commissioner for Human Rights, ‘UN expert calls for global recognition of the right to safe and healthy environment’ (Press Release, 5 March 2018), available at: <<https://www.ohchr.org/en/press-releases/2018/03/un-expert-calls-global-recognition-right-safe-and-healthyenvironment?LangID=E&NewsID=22755>>

²³ HR Act, s 30.

authorities must make effective use of the intervening period to ensure their policies, practices and decision-making consider and uphold the right to a healthy environment.

Implementation and support

Once commenced, a range of measures will be required to ensure the right to a healthy environment is fully understood and applied across all areas and activities of the ACT Public Service, and other public authorities (e.g. Ministers, bodies undertaking public functions). Clear and accessible information about the nature, content, scope and relevance of the right in different contexts will be necessary to foster and cement widespread awareness of the human right to a healthy environment across whole-of-government. To this end, the Commission recommends resources be provided for development of targeted guidance materials, training and new channels of information exchange (e.g. a human rights community of practice) that ensure ongoing dialogue about the relevance of the right to a healthy environment during early stages of decision-making and policy development.

Within ACT Government, human rights scrutiny of proposed laws, policies, actions or decisions will need to anticipate and assess the proposed impacts of measures on environmental protection, including whether there are less rights-restrictive options for ways of achieving the desired aim. This will include active engagement with Aboriginal and Torres Strait Islander peoples and those with relevant specialist advice, information and consultation, including about impacts on biodiversity and ecosystems, planning and urban design, heritage, air quality, and other environmental and cultural domains. Accessible descriptions of what the right protects should also be made available to the ACT community to promote growing awareness of the right, and how it will operate within the ACT's broader human rights framework.

If suitably resourced to do so, the Commission would be open to undertaking a human rights audit of the ACT's existing environmental protection laws and practices against the right to a healthy environment. From our perspective, there would be benefit in undertaking a baseline audit in the first 18 to 24 months following commencement. A human rights audit under s 41 would serve to ascertain the extent to which the right to a healthy environment and related rights are currently implemented under ACT legislation and operational practice. We believe a collaborative audit conducted in cooperation with agencies would help build their capacity to navigate and apply the new right. It would promote vital awareness among staff and relevant stakeholders, while identifying any gaps in protection or opportunities to better realise the right to a healthy environment. Given the extensive coverage of the right and its relevance across a range of public functions, such an audit would be a significant undertaking and require extensive technical and cultural expertise. Accordingly, the Human Rights Commissioner would be unable to undertake an audit while maintaining her current functions without additional dedicated resourcing.