



**LEGISLATIVE ASSEMBLY**  
FOR THE AUSTRALIAN CAPITAL TERRITORY

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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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AUSTRALIAN  
LAWYERS  
FOR  
HUMAN RIGHTS™

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

Standing Committee on Justice and Community Safety  
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***“All human rights depend on a healthy environment. We cannot be healthy, eat adequate and nutritious food, drink clean water and breathe clear air without it.”<sup>1</sup>***

Michelle Bachelet, UN High Commissioner for Human Rights

## **Acknowledgements**

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

## **About Australian Lawyers for Human Rights**

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

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

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

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

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

## Executive Summary

Australian Lawyers for Human Rights (**'ALHR'**) thanks the Standing Committee on Justice and Community Safety (**the Committee**) for the opportunity to provide feedback on the *Human Rights (Healthy Environment) Amendment Bill 2023* (**'the Bill'**).

Since 2020 ALHR has been a member organisation of the Global Pact for the Environment<sup>2</sup>, a coalition of over 1,300 civil society organisations and climate advocates from over 70 countries calling for the global recognition of the right to a healthy environment.

ALHR is a strong supporter of the *Human Rights Act 2004 (ACT)* (**HRA**) and we acknowledge that, as one of only three states and territories to have introduced a legislated human rights framework, the ACT plays a significant role in leading the country on human rights compliance. We applaud amendments to the HRA introduced since 2004 which have expanded the scope of the human rights protected by the Act.

ALHR commends the introduction of s 27C of the Bill, which articulates the right to a healthy environment in a manner that is compatible and reflective of existing international human rights law. The current wording of s 27C ensures that all of the substantive and procedural aspects of the human right to a healthy environment will be protected in the ACT law. Those elements are as follows:

- The procedural aspects of the right extend to the right to access environmental information, meaningful and inclusive public involvement in environmental decision-making and access to justice;
- The substantive elements of the right include rights to clean air, a safe climate, access to safe drinking water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work and play, and finally, healthy ecosystems and biodiversity; and

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

- The right further imposes obligations upon governments to ensure there is equal access and non-discrimination in the protection and promotion of the human right to a healthy environment.<sup>3</sup>

However, ALHR is concerned that the Bill currently renders the human right to a healthy environment non-justiciability by operation of proposed s 40C(5A) and (5B) of the Bill. The operation of that provision, in ALHR's submission, is to establish a hierarchy of human rights within the Act which is contrary to international human rights law, and in breach of procedural aspects of the human right to a healthy environment. Furthermore, those provisions are likely to undermine the potential positive normative impacts of the human right to a healthy environment, and in any event, are inutile by virtue of the justiciability of the right to life.

The following submission outlines ALHR's support for the articulation of the right in the Bill, our concerns with the non-justiciability of the right and broader comments on the need for meaningful consultation of certain groups and appropriate funding for the accessible complaints mechanism. For further information on the scope and context of the human right to a healthy environment, please see ALHR's [submission](#) to the August 2022 Justice and Community Safety Directorate Public Consultation to Inform Consideration of the Right to a Healthy Environment, provided herewith as Annexure A.<sup>4</sup>

## Recommendations

1. The articulation of the human right to a healthy environment under s 27C of the Bill is commended and should be passed by the ACT Legislative Assembly without amendment.
2. The non-justiciability restriction set out under s 40C of the Bill should be removed from the Bill.
3. Given that there are no rights without remedy, the ACT Government should:

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

<sup>4</sup> Available here:

<https://alhr.org.au/wp/wp-content/uploads/2022/11/07-09-22-ALHR-Submission-ACT-Discussion-Paper-on-Right-to-a-Healthy-Environment-2.pdf>

- a. ensure that the ACT Human Rights Commission (HRC), is adequately resourced such that it can receive and conciliate complaints about breaches of the right to a healthy environment;
  - b. Ensure the delivery of a program of human rights education, aimed at fostering understanding of the right to a healthy environment across the community, with particular attention to marginalised or disadvantaged groups;
  - c. ensure adequate funding for legal advice services to give individuals information, legal advice and assistance about their human right to a healthy environment; and
  - d. conduct an in depth consultation process engaging with the expertise of relevant bodies and stakeholders to receive guidance as to the precise nature of the resourcing that would be required to deliver (a), (b) and (c).
4. That the ACT Government uphold the participation rights of people with disabilities, First Nations peoples and Children as it introduces and implements the right to a healthy environment.

## **The ACT Legislative Assembly Should Enshrine the Right of Everyone to a Clean, Healthy and Sustainable Environment**

ALHR commends the introduction of the Bill, and ***strongly supports*** the articulation of the human right to a healthy environment under s 27C of the Bill as follows:

### **27C Right to a healthy environment**

- (1) Everyone has the right to a clean, healthy and sustainable environment.
- (2) Everyone is entitled to enjoy this right without discrimination.

ALHR submits that proposed s 27C reflects existing international human rights and environmental law, and will facilitate executive, legislature and judicial interpretation and application of the right to a healthy environment in the ACT.

ALHR also notes that this wording is similar to existing NSW and Victorian laws that enshrine the right to a healthy environment as a guiding principle in environmental and planning law, as follows (for example, see s 8(5) of the *Climate Change (Net Zero Future) Act 2023* (NSW)).

We further note that proposed s 27C of the Bill is consistent with the recommendation of the Australian Human Rights Commission to include the human right to a healthy environment in the putative federal human rights charter.<sup>5</sup>

ALHR has advocated for the explicit protection of the human right to a clean, healthy and sustainable environment within the HRA for three primary reasons:

1. The inclusion of a standalone right to a clean, healthy and sustainable environment is consistent with well established international human rights standards and the global consensus that the right to a healthy environment is a binding human right, as reflected in regional and domestic jurisdictions globally;
2. A safe, clean, healthy and sustainable environment is integral to the enjoyment of all fundamental human rights enshrined and international human rights law and expressed within the HRA;<sup>6</sup> and
3. Recognition of the right to a healthy environment will contribute to better human rights and environmental outcomes for all Canberrans, particularly those most vulnerable to the impacts of environmental and climate crises.

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

Further, ALHR submits that taking a rights based approach to the climate and environmental crises that current and future generations of Canberrans will undoubtedly be living through is fundamental to ensuring that those most impacted are not left behind. Indeed, this was acknowledged by Minister Cheyne in the Explanatory Statement that accompanied the introduction of the Bill to the Assembly on 26 October 2023:

*The ACT will be the first jurisdiction to enshrine the right to a healthy environment. This reflects the Government's recognition of the triple planetary threat of climate change, environmental pollution and biodiversity loss and the increasingly urgent need for action. Introducing the right is*

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<sup>5</sup> Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (Position Paper: A Human Rights Act for Australia, 2022).

<sup>6</sup> 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*, 37<sup>th</sup> sess, Agenda Item 3, UN Doc. A/HRC/37/59 (24 January 2018) ('*Framework Principles*').

*part of the Government's long-term commitment to protecting human rights and recognising the importance of the environment in determining outcomes for human health and wellbeing.*<sup>7</sup>

While the ACT Government is taking positive actions to secure climate and environmental outcomes across the Territory, ALHR emphasises that there are ongoing environmental and climate issues in the Territory that would benefit from a human rights-based approach from public authorities.

The *2019 State of the Environment Report for the ACT*, prepared by the Commissioner for Sustainability and the Environment found that a range of environmental indicators are trending downwards.<sup>8</sup> For example, the Territory has heated by an average of 1.5°C since records began in 1926 and between 2015-2018 there were 31 days where PM2.5 levels exceeded air quality standards, with transport emissions and wood heaters constituting the main sources of air pollution.<sup>9</sup> It is likely that the ACT's overall air quality has trended downwards since 2018, notably during the 2019-2020 Black Summer Bushfires. Aquatic ecosystem health has been rated as 'fair' in the ACT, but water inflows are trending downwards and recreational water quality is poor and deteriorating.<sup>10</sup> These above trends indicate that Canberrans' rights to a safe climate, to clean air and drinking water, and to live in non-toxic environments is not being consistently achieved and that greater scrutiny in respect of whether government environmental policies are compatible with human rights is needed.

ALHR further emphasises that the ACT is not currently achieving the procedural aspects of the human right to a healthy environment. It is particularly concerning that public involvement in environmental decision-making is limited and inaccessible for vulnerable groups.

The public and third parties are restricted in the extent to which they can engage in environmental decision-making,<sup>11</sup> often limited to a single period of public consultation during development applications or planning law reform processes (see, for example, ss 217 and 219 of the *Planning and Development Act 2007* (ACT)). Notification of these public consultations is limited to a written notice which is not an accessible or inclusive means of seeking public input,

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<sup>7</sup> Minister Tara Cheyne MLA, *Explanatory statement: Human Rights (Healthy Environment) Amendment Bill 2023* (26 October 2023).

<sup>8</sup> ACT Commissioner for Sustainability and the Environment, *ACT State of the Environment* (Report, 2019).

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Environmental Defenders Office, *Submission on the Planning Bill* (EDO Submission, June 2022) 37.

particularly for vulnerable and marginalised groups, including those who speak English as a second language, those with disabilities and First Nations Peoples.

ALHR emphasises these above issues to demonstrate that the legal definition and scope of the human right to a healthy environment is well understood domestically and internationally (as will be further discussed below). There are key avenues that the ACT Government should be pursuing to better protect the human right to a healthy environment for all Canberrans.

**Ensuring that the human right to a healthy environment is meaningfully and fully enshrined in ACT law is the first critical step.**

## **Relevant International Obligations and Sources of the Right**

ALHR submits that the human right to a healthy environment is a binding and well established international human right, first articulated in the *Stockholm Declaration 1972*.<sup>12</sup> In this regard, ALHR is disappointed and concerned that the ACT Government has characterised the right as an emerging right that is “not yet...established as a matter of customary international law”.<sup>13</sup> Below we set out the development and crystallisation of the human right to a healthy environment in international, regional and domestic laws across the globe.

We emphasise that, while Australian human rights law has lagged in its development, the rest of the international community has long recognised and enforceable the environmental rights of individuals.

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

The human right to a healthy environment was first recognised in international environmental law by the *Stockholm Declaration 1972*.<sup>14</sup> The preamble of that declaration emphasises that both natural and artificial environments are “essential to [humankind's] well-being and to the enjoyment of basic human rights - even the right to life itself”.<sup>15</sup>

The other foundational international environmental law declaration, the *Rio Declaration on Environment and Development 1992*,<sup>16</sup> sets out under Article 1 that “human beings are the

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<sup>12</sup> *Report of the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14/Rev.1 (1973, adopted 16 June 1972) 3 [1] (*‘Stockholm Declaration’*).

<sup>13</sup> Minister Tara Cheyne MLA, *Explanatory statement: Human Rights (Healthy Environment) Amendment Bill 2023* (26 October 2023).

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

<sup>15</sup> *Ibid*, preamble [3].

<sup>16</sup> *Rio Declaration on Environment and Development*, 31 ILM 874 (12 August 1992) (*‘Rio Declaration’*).

centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”<sup>17</sup>

Following on from the *Stockholm Declaration* and *Rio Declaration* there has been evolved an increasing international recognition of the interrelationship between human rights and environmental protection and the reality that a healthy environment is a prerequisite for the enjoyment of human rights; and the idea that certain human rights such as access to information, participation in decision-making, and access to justice in environmental matters, are likewise essential to good environmental decision-making.

Indeed, the *United Nations Framework Convention on Climate Change* (1992) references the *Stockholm Declaration 1972* and its core provisions, including those that seek to protect environmental rights. Similarly, the preamble of the *Paris Agreement* (2015) acknowledges:

“...that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective **obligations on human rights**, the right to health, the rights of indigenous peoples...”(emphasis added).<sup>18</sup>

A body of international jurisprudence recognising environmental rights has also steadily developed from 1993 onwards. Seminally, in *Gabčíkovo-Nagymaros*, (then) Vice-President Weeramantry of the International Court of Justice, highlighted that the ‘protection of the environment’ was a ‘vital part’ of human rights, including the right to health and the right to life.<sup>19</sup>

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

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

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<sup>17</sup> Ibid, Art [1].

<sup>18</sup> *Paris Agreement*, opened for signature 22 April 2016 (entered into force 4 November 2016) preamble [11] (*‘Paris Agreement’*).

<sup>19</sup> *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7 at 79 (Sep Op Weeramantry).

*“the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights”<sup>20</sup>*

In March 2018 the former United Nations Special Rapporteur on Human Rights and the Environment, John Knox, presented the *Framework Principles on Human Rights and the Environment*<sup>21</sup> to the UN Human Rights Council. These set out states’ obligations under existing human rights law as they relate to the enjoyment of a safe, clean, healthy and sustainable environment. The principles recognise that certain procedural human rights such as access to information, participation in decision-making, and access to justice in environmental matters, are likewise essential to good environmental decision-making and a prerequisite to the enjoyment of the right to a healthy environment.

From 2019 to the present the work of the current Special Rapporteur on human rights and the environment, David Boyd, has further defined the right to a healthy environment as comprising both the above procedural elements and substantive elements<sup>22</sup> including access to: clean air; a safe climate; safe drinking water and sanitation; healthy biodiversity and ecosystems; toxic free environments in which to live, work and play; and healthy and sustainably produced food.

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

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

*“environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life”<sup>23</sup>.*

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<sup>20</sup> United Nations General Assembly Resolution A/RES/64/292 ‘The human rights to water and sanitation’ 28 July 2010

<sup>21</sup> 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*, 37<sup>th</sup> sess, Agenda Item 3, UN Doc. A/HRC/37/59 (24 January 2018) (*‘Framework Principles’*).

<sup>22</sup> See David R Boyd, Special Rapporteur on Human Rights and the Environment, *Right to a Healthy Environment: Good Practices*, UN DOC A/HRC/43/53 (30 December 2019) and See David R Boyd, Special Rapporteur on Human Rights and the Environment, *Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/HRC/40/55 (8 January 2019) and David R Boyd, Special Rapporteur on Human Rights and the Environment, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/74/161 (15 July 2019)

<sup>23</sup> *General Comment No. 36, Article 6 (Right to Life)*, CESCR, UN Doc CCPR/C/GC/35 (3 September 2019) [62].

International jurisprudence affirms that environmental degradation constitutes a threat to the right to life as enshrined by article 6 of *the International Covenant on Civil and Political Rights*.<sup>24</sup> Notably, In a 2015 view, the UNHRC held:

*“State parties should take all appropriate measures to address the general conditions in society that may give rise to threats to the right to life or prevent individuals from enjoying their right to life with dignity, and these conditions include environmental pollution.”*<sup>25</sup>

On 8 October 2021, the UN Human Rights Council adopted resolution 48/13<sup>26</sup> recognising “*the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights,*” and appointed a new Special Rapporteur on human rights and climate change. Both resolutions were comfortably passed.

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

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

In the lead up to the vote on the resolutions, the UN High Commissioner for Human Rights, Michelle Bachelet, addressed the Council noting that “a safe, clean, healthy and sustainable environment is the foundation of human life” and that environmental threats “constitute the single greatest challenge to human rights in our era.”<sup>27</sup>

In a further significant international development and drawing on the UNHRC resolution, on 28 July 2022 the United Nations General Assembly (**UNGA**) adopted a resolution A/76/L.75

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<sup>24</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html>.

<sup>25</sup> *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2751/2016*, CCPR, UN Doc CCPR/C/126/D/2751/2016 (20 September 2019) [7.3].

<sup>26</sup> [Resolution 48/13 A/HRC/48/L.23/Rev.1](#)

<sup>27</sup> Environmental crisis: High Commissioner calls for leadership by Human Rights Council member states (13 September 20221) at <https://www.ohchr.org/en/2021/09/environmental-crisis-high-commissioner-calls-leadership-human-rights-council-member-states?LangID=E&NewsID=27443> and see ALHR Media Release 9 October 2021: <https://alhr.org.au/unhrc-healthy-environment/>.

“recognising the right to a clean, healthy and sustainable environment as a human right,” by 161 votes in favour, no votes against and 8 abstentions, declaring:

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

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

ALHR acknowledges that these historic resolutions follow decades of campaigning, in particular by Indigenous Peoples organisations and those representing Small Island Developing States, as well as our Torres Strait 8<sup>28</sup> here in Australia.

### **Regional Human Rights Instruments**

The first regional human rights instrument to enshrine the human right to a healthy environment was the *African Charter on Human and Peoples’ Rights 1981* (**‘Banjul Charter’**).<sup>29</sup> Article 24 of that Charter provides:

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

In 1988, the San Salvador Protocol to the *American Convention on Human Rights 1969* came into force.<sup>30</sup> Article 11 of that Protocol enshrines the right to a healthy environment, affirming that:

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

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<sup>28</sup> See <https://ourislandsourhome.com.au/>.

<sup>29</sup> *African (Banjul) Charter on Human and Peoples’ Rights*, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (entered into force 21 October 1986).

<sup>30</sup> *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; Protocol of San Salvador*, adopted 17 November 1988, OEA/Ser.A/44 (entered into force 16 November 1999).

Similarly, the *ASEAN Human Rights Declaration*, adopted in 2012, states that every individual has the right to “an adequate standard of living” including “the right to a safe, clean and sustainable environment”.<sup>31</sup>

While neither the *European Convention on Human Rights 1953* or the *EU Charter of Fundamental Rights 2009* yet explicitly recognise the right to a healthy environment, in 1998 the *Aarhus Convention* was adopted by the UN Economic Commission for Europe. This protects human rights relating to the procedural elements of environmental governance, including access to justice and information, and participation in decision-making.<sup>32</sup> Article 1 of the Aarhus Convention guarantees:

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

### **United Nations Committee on the Rights of the Child (UNCRC) General Comment No. 26 (2023) on children’s rights and the environment, with a special focus on climate change \***

Published in August 2023, the UNCRC’s *“General Comment No. 26 on children’s rights and the environment with a special focus on climate change,”*<sup>33</sup> explicitly affirms the children’s right to a clean, healthy and sustainable environment, issuing a comprehensive interpretation of Member States’ obligations under the UN Convention on the Rights of the Child (**CRC**):

*“Children have the right to a clean, healthy and sustainable environment. This right is implicit in the Convention and directly linked to, in particular, the rights to life, survival and development, under article 6, to the highest attainable standard of health, including taking into consideration the dangers and risks of environmental pollution, under article 24, to an adequate standard of living, under article 27, and to education, under article 28, including the development of respect for the natural environment, under article 29.*

*The substantive elements of this right are profoundly important for children, given that they include clean air, a safe and stable climate, healthy ecosystems and biodiversity, safe and sufficient water, healthy and sustainable food and non-toxic environments.*

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<sup>31</sup> *ASEAN Human Rights Declaration* (entered into force November 19 2012) art 28(f).

<sup>32</sup> *Aarhus Convention*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001).

<sup>33</sup> General comment No. 26 (2023) on children’s rights and the environment, with a special focus on climate change \* CRC/C/GC/26

Within General Comment No. 25 the UNCRC also emphasises the importance of procedural elements of the right to a healthy environment for children, including access to information, participation in decision-making and child-friendly access to justice, with effective remedies.

General Comment No 26 calls on states to:

*“...incorporate children’s right to a clean, healthy and sustainable environment into their national legislation and take adequate measures to implement it in order to strengthen accountability. This right should be mainstreamed across all decisions and measures concerning children, including policies related to education, leisure, play, access to green spaces, child protection, children’s health and migration, and national frameworks for the implementation of the Convention.”*

As noted below in relation to consultation, General Comment No. 26 also states that children’s views must be considered in environmental decision-making.

### **Domestic Recognition of the Human Right to a Healthy Environment**

The right to a healthy environment is now recognised in the domestic legal systems of more than 80% of UN member states, with 156 out of 193 having either incorporated the right into their constitutions, enacted legislation or ratified a regional instrument which enshrines the right.<sup>34</sup> The majority of UN member states consider themselves bound to uphold the human right to a healthy environment, as demonstrated by State practice and the decisions of domestic and regional courts and tribunals.

For example, the Ecuadorian Constitution protects the human right to a healthy environment in the following terms: “The right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability and the good way of living.”<sup>35</sup> The right is justiciable and has been developed through judicial scrutiny and interpretation. Recently, in 2021, the Sucumbios Provincial Court of Justice held that the State of Ecuador had breached the rights of Indigenous communities within the Amazon to their rights to a healthy environment by failing to ban the unabated flaring of gas from oil companies operating in the region.<sup>36</sup>

A number of sub-national governments across the globe also protect the human right to a healthy environment either in their State Constitution or laws. For example, several provinces of

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<sup>34</sup> *Right to a Healthy Environment: Good Practices*, UN GAOR, 43rd sess, 53<sup>rd</sup> mtg, Agenda Item 3, UN Doc, A/HRC/43/53 (30 December 2019).

<sup>35</sup> *Constitution of Ecuador*, art 14.

<sup>36</sup> See *Herrera Carrion v Ministry of the Environment (Mecheros Case)*, Provincial Court of Justice of Sucumbios, Juicio No: 21201202000170 (29 July 2021).

Canada protect the human right to a healthy environment. Indeed, Ontario has recognised the human right to a healthy environment for several decades, pursuant to the *Environmental Bill of Rights 1993*. That Bill also explicitly provides for open standing to appeal environmental decisions (see s 38). The justiciability of the human right to a healthy environment under Ontario law has proven important for the development of that right and to foster human rights-based approaches to environmental decision-making in Ontario. For example, in 2013, the Aamjiwnaang First Nation brought a claim against Ontario for failing to protect their people from industrial pollution generated by Sarnia's Chemical Valley, in *Lockridge and Plan v. Director, Ministry of Environment et al.* (2013), 322 O.A.C. 345 (DC). However, as the claim progressed through the Ontario judicial system, the case created the opportunity for the government to work collaboratively with the Aamjiwnaang First Nation and to take steps to resolve the toxic pollution impacting First Nations people. Ultimately the case was withdrawn after Ontario introduced a cumulative effects policy that would better assess and regulate the cumulative impacts of pollution from multiple industrial sites within a region.<sup>37</sup>

### **The Legal Status of the Human Right to a Healthy Environment**

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

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

An international court or tribunal has not yet declared the human right to a healthy environment as binding customary international law. Nonetheless, a range of academics and scholars posit that there is widespread international recognition of the right and that general State practice indicates a wide generality of States consider the right to be binding law.<sup>38</sup> For instance, Rodríguez-Garavito, an international human rights lawyer and Chair of the Center for Human Rights and Global Justice at New York University School of Law, has argued that the human

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<sup>37</sup> See, Ecojustice, "Update: Lawsuit over air pollution in Chemical Valley discontinued" (Blog Post, 15 December 2017).

<sup>38</sup> See Knox & R. Pejan (Eds.), *The Human Right to a Healthy Environment* (Cambridge: Cambridge University Press, 2018).

right to a healthy environment is customary law because of the wide generality of States that already recognise the right.<sup>39</sup>

In any event, ALHR emphasises that the ACT is a sub-national jurisdiction and need not be limited by the status of the human right to a healthy environment under international law. As set out above, a broad generality of States and a number of sub-national jurisdictions already protect and enforce the human right to a healthy environment. The ACT would not be alone in enshrining a fully enforceable human right to a healthy environment, and would have recourse to a plethora of international instruments and jurisprudence, as well as decades of domestic consideration by other governments to guide its own interpretation and implementation of the right to a healthy environment.

### **The Human Right to a Healthy Environment is Not an Economic, Cultural or Social Human Right**

ALHR notes that the Bill proposes to establish the human right to a healthy environment under Part 3A of the HRA, which is the part of the Act that covers economic, social and cultural rights. We note further the amendments include reference to UNGA recognition of the right to a healthy environment.

It is a matter for the legislature under which heading the right is enshrined in the HRA. However, for the purpose of clarity, ALHR emphasises that the human right to a clean, healthy and sustainable environment is not characterised as an economic, social or cultural right. It has not been the practice of UN Treaty bodies, regional instruments or domestic courts across the globe to treat the human right to a healthy environment as an economic, social or cultural right, or to divide the right into immediately and progressively realisable obligations. Rather, the right has developed as a standalone human right, best characterised as a third-generation human right, otherwise known as a 'solidarity rights'.<sup>40</sup>

Further, as outlined above, international law recognises that all of the human rights enshrined within the core international human rights treaties, whether civil and political or economic, social and cultural, depend on a clean, healthy and sustainable environment.

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<sup>39</sup> César Rodríguez-Garavito, 'A Human Right to a Healthy Environment?: Moral, Legal, and Empirical Considerations' in J. Knox & R. Pejan (Eds.), *The Human Right to a Healthy Environment* (Cambridge: Cambridge University Press, 2018) 155-168.

<sup>40</sup> 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.

ALHR recommends that the ACT Legislative Assembly ensure that the right to a healthy environment is established as a standalone human right, to best align the expression of the right in the HRA with international practice and jurisprudence. This will assist with the interpretation, development and enforcement of the right in the Territory.

## **The Human Right to a Healthy Environment Should be Fully Enforceable**

ALHR is concerned that the Bill renders the human right to a healthy environment non-justiciable, as follows:

### **40C Legal proceeding in relation to public authority actions**

*(5A) This section does not apply to a claim that a public authority has acted in contravention of section 40B if the contravention claimed is—*

*(a) that the public authority acted in a way that is incompatible with the human right set out in section 27C (Right to a healthy environment); or*

*(b) in making a decision, the public authority failed to give proper consideration to the human right set out in section 27C...*

It is both uncertain and insufficient that the Bill fails to establish a sunset clause, and rather opts for an open review after five years (see proposed s 43 of the Bill).

ALHR notes that the proposal to establish s 40C(5A) and (5B) does not preclude individuals from seeking redress for violation of the human right to a healthy environment via a human rights complaint and the conciliation procedure under the *Human Rights Commission Act 2005* (ACT), pursuant to the *Human Rights (Complaints) Legislation Amendment Act 2023* (ACT).

While access to the human rights complaints mechanism is welcome, it is insufficient to ensure the human right to a healthy environment is fully enforceable and impactful in the Territory. ALHR strongly opposes the inclusion of s 40C(5A) and (5B) in the Bill for the reasons that follow, and calls for the Standing Committee to recommend for the removal of those provisions.

### **The Bill should not create a hierarchy of human rights**

The practical effect of s 40C is that it renders the right to a healthy environment nonjusticiable, thereby treating the right differently to other human rights that are justiciable under the HRA. ALHR submits that this effectively creates a hierarchy of rights.

ALHR recognises and calls the Committee's attention to the following fundamental principles of international human rights law:

- All rights are equally valuable - there is no hierarchy of rights (the principle of indivisibility);
- All rights should be protected together (the principle of interdependence); and
- Any interference with a right must have a legitimate aim - the interference or restriction must be proportionate and necessary (the principle of proportionality).

It is antithetical to international human rights law and the human rights jurisprudence of the Territory to render some rights justiciable and other non-justiciable. To do so establishes a de facto hierarchy within the HRA, and is in **breach of the principle of indivisibility and interdependence**.

Humanrights laws cannot be selectively applied, they are not divisible nor hierarchical. All human rights are of equal importance and human rights laws can only achieve their objectives if they are applied completely to all human rights. This is not what would occur, should the Bill be passed in its current form, the inclusion of s 40C(5A) and (5B) renders the human right to a healthy environment a lesser human right, with less protection than other rights protected in the Act. This would set a dangerous precedent within the HRA and is strongly opposed by ALHR.

### **Non-Justiciability is in Breach of Procedural Aspects of the Human Right to a Healthy Environment**

A foundational element of the human right to a healthy environment is access to justice and to effective remedies. This is recognised in the *Framework Principles on Human Rights and the Environment*, as well as international environmental law instruments. For example, the *Rio Declaration* sets out the following (Principle 10):

*“Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. **Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.**”<sup>41</sup>*

At a regional level, the *Escazú Agreement (2021)*<sup>42</sup> establishes detailed obligations for the States of Latin America and the Caribbean to protect access to justice (see Article 8), including:

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<sup>41</sup> *Rio Declaration on Environment and Development*, 31 ILM 874 (12 August 1992) ('Rio Declaration').

<sup>42</sup> *Escazú Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean*, opened for signature 27 September 2018 (entered into force 22 April 2021).

- The obligation to guarantee the right of access to justice in environmental matters (Article 8(1));
- The obligation to provide access to judicial and administrative redress mechanisms for alleged breaches of both the procedural and substantive aspects of the right to a healthy environment (Article 8(2));
- The obligation to create and fund competent dispute resolution mechanisms with expertise in environmental matters and appropriate powers to award remedies, including precautionary and interim measures, as well as the power to make orders for restitution (Article 8(3)); and
- The requirement that parties specifically consider and ensure judicial and administrative redress mechanisms are accessible for vulnerable groups, including by funding “free technical and legal assistance” (Article 8(4)).

Globally, most States that provide for the protection of the human right to a healthy environment allow for open standing for its citizens to bring claims in relation to the right. This has contributed to positive outcomes in those jurisdictions, by allowing courts and tribunals to prevent backsliding of environmental standards and to strengthen the normative impact of the recognition of the human right to a healthy environment upon government administration.<sup>43</sup>

The UN Special Rapporteur on Human Rights and the Environment outlines that the first major barrier to protection of this element of the right is limitations upon standing to sue.<sup>44</sup>

ALHR also notes that litigation remains a rarely used complaints resolution mechanism in the ACT. Over the last 20 years of the HRA, the Territory has not developed an overly litigious approach or mentality in respect of human rights enforcement. Nor has the ACT Supreme Court proven to be interventionist in its approach to the interpretation and application of human rights law. It must be recalled that over a decade, the HRA has been mentioned on less than 200 occasions in judgements of the ACT Supreme Court and Court of Appeal, and that the ACT Supreme Court has ruled ACT legislation invalid for human rights non-compliance on two occasions.<sup>45</sup>

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<sup>43</sup> See generally David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012).

<sup>44</sup> UN Special Rapporteur on Human Rights and the Environment, *Right to a Healthy Environment: Good Practices*, UN GAOR, 43rd sess, 53<sup>rd</sup> mtg, Agenda Item 3, UN Doc A/HRC/43/53 (30 December 2019), [30].

<sup>45</sup> 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. See also: *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.

It is disappointing that the ACT's first act of recognising the human right to a healthy environment simultaneously breaches an aspect of that right by completely removing standing to sue.

### **Non-Justiciability Undermines the Potential Normative Impact of Recognising the Human Right to a Healthy Environment**

Even though litigation is a rarely engaged form of enforcing human rights in the Territory, it nonetheless plays an important accountability role in the Territory and has contributed to the development of a robust human rights dialogue model in the ACT.

This has been recognised by the ACT Government in numerous reviews of the HRA over the last 20 years. The ACT Government has previously recognised that the HRA has contributed to increased awareness of human rights issues within government, positively impacted policy debates and the scrutiny of legislation to be human rights compliant<sup>46</sup> and provided important accountability mechanisms, for example the audit powers of the ACT Human Rights Commission.<sup>47</sup>

Watchirs and McKinnon determined that the HRA had contributed to a more human rights compliant approach to legislative development and policy in the ACT, in their independent review of the HRA.<sup>48</sup> They emphasised that, despite limited recourse to litigation by individual Canberrans, the justiciability of the human rights protected by the HRA was important because it improved government accountability outcomes and contributed to the development of human rights law in the Territory. Notably, judicial interpretation of various human rights has provided important guidelines for the application of human rights considerations in government administration.<sup>49</sup>

Indeed, the ACT Government recognised the importance of access to remedies when it introduced legislation that established direct duties upon public authorities to comply with the HRS in 2008. The then ACT Attorney-General, the Hon Simon Corbell MLA stated, upon introduction of those provisions into the Assembly that:

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<sup>46</sup> ACT Justice and Community Safety Directorate, *Government Response: Australian National University Human Rights Research Project Report The Human Rights Act 2004 (ACT): The First Five Years of Operation* (March 2012).

<sup>47</sup> Helen Watchirs and Gabrielle McKinnon, "Five Years' Experience of the Human Rights Act 2004 (ACT): Insights for Human Rights Protection in Australia" (2010) 33(1) *UNSW Law Journal* 136.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*, 157.

*“In time, the government looks forward to the growth in the number of cases and the depth of argument on the issues. In due course, we may see the trickle of human rights case law turn into a stream. **This stream will be the evidence of the growing awareness of human rights in this jurisdiction and the strength of the underlying legal principles.**”<sup>50</sup>*

ALHR expects that recourse to litigation and judicial scrutiny will be an essential aspect of the interpretation and development of the right to a healthy environment under ACT law, and will ultimately assist the government in the integration of human rights considerations into climate, environmental and planning laws. Indeed, this positive relationship has been tracked by quantitative studies of the recognition of the human right to a healthy environment.

Explicit protection and enforceability of the human right to a healthy environment has contributed to positive human rights outcomes across the globe. A 2012 study, conducted by Boyd, UN Special Rapporteur on Human Rights and the Environment, on the constitutional protection of environmental rights found that countries that had enshrined the right to a healthy environment enjoyed greater environmental outcomes.<sup>51</sup> A further study in 2016, conducted by Jeffords and Minkler, found that the codification of environmental rights led to better scores on the Environmental Performance Index.<sup>52</sup>

ALHR submits that there is a proven connection between explicit protection and enforcement of the human right to a clean, healthy and sustainable environment and the achievement of that right in practice. ALHR is gravely concerned that the ACT Legislative Assembly would facilitate limitations upon the normative impact of the human right to a healthy environment by rendering it non-justiciable, risking important progress that could be made across a range of environmental indicators in the Territory.

### **Breaches of Environmental Rights May Still be Litigated Via Other Human Rights**

In any event, ALHR emphasises that environmental rights may still be litigated and enforced via other justiciability human rights already enshrined in the HRA, notably including the right to life

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<sup>50</sup> ACT, Parliamentary Debates, Legislative Assembly, 6 December 2007, 4031 (Simon Corbell).

<sup>51</sup> David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver, UBC Press, 2012) 20.

<sup>52</sup> Chris Jeffords and Lanse Minkler, ‘Do Constitutions Matter? The Effect of Constitutional Environmental Rights Provisions on Environmental Outcomes’ (2016) 69(2) *Kyklos* 294.

(s 9 of the HRA). This renders s 40C (5A) and (5B) inutile in practice, and is further justification for the removal of those provisions from the Bill.

Section 9 of the HRA enshrines the right to life, as articulated in Article 6 of the *International Covenant on Civil and Political Rights*. The HRA further establishes that the right to life is to be interpreted in light of ‘international law’ including the ‘judgments of foreign and international courts and tribunals’ (see s 31(1)). The ACT Supreme Court’s approach to s 31(1) of the HRA has been to prefer a broad interpretation. In *Eastman v Australian Capital Territory*, Justice Elkaim stated his preference for Victoria’s interpretative approach which seeks to define human rights in the ‘broadest possible way’,<sup>53</sup> and ACT Courts frequently engage with Human Rights Committee views and general comments to ascertain the content of a human right. For example, in *Council of the Law Society of the ACT v Bandarage*, the full ACT Supreme Court relied upon the HRC’s general comment on the right to a fair trial to determine the scope of s 24 of the Act.<sup>54</sup>

The ACT Supreme Court’s prevailing approach to s 31(1) is relevant because international interpretation of the right to life has steadily expanded to include protection from environmental degradation. In *General Comment No. 36*, the HRC emphasised that the duty to protect life obligates States to ‘address the general conditions’ that may prevent people ‘from enjoying their right to life in dignity’ including from ‘degradation of the environment’.<sup>55</sup> Similar language has been used when linking environmental health to an adequate standard of living and housing, and to the highest attainable standard of physical health.<sup>56</sup>

As set out by Reynolds and Bulling (2021), the HRA already enforces the protection of environmental rights by virtue of the recognition of the right to life, among other human rights:

*“The [Human Rights] Act does not explicitly protect the right to a healthy environment and reform to protect this right would be a key mechanism for the ACT Government to demonstrate its national leadership on human rights and environmental issues. However, we argue that the concept of a healthy environment as a precondition for the achievement of all human rights, informs the content of the human rights enshrined in the Act. Thus, the ACT Government’s substantive obligations under the Act already extend to the promotion of a healthy environment.”*<sup>57</sup>

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<sup>53</sup> *Eastman v The Australian Capital Territory* [2019] ACTSC 280 at [15] – [16].

<sup>54</sup> *Council of the Law Society of the ACT v Bandarage* [2019] ACTSCFC 1 at [123].

<sup>55</sup> UN Human Rights Committee, *General Comment No. 36: Article 6 (The Right to Life)*, CCPR/C/GC/35 (3 September 2019), [26].

<sup>56</sup> J Knox “Framework Principles on Human Rights and the Environment” *UN Human Rights Special Procedures*, 2018, 6.

<sup>57</sup> 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.

ALHR's position is therefore that environmental rights are already justiciable under the HRA, establishing the right to a healthy environment as a non-justiciable human right is likely to be an ineffective barrier to litigation. Nonetheless, rendering the human right to a healthy environment non-justiciable will have flow-on impacts - weakening the normative impact of the right and undermining the ACT's reputation and status as a human rights jurisdiction.

### **Proposed Amendments and Conclusion**

In summary, ALHR strongly opposes proposed s 40C(5A) and (5B) in the Bill, because it establishes a hierarchy of human rights within the Act which is contrary to international human rights law, and in breach of procedural aspects of the human right to a healthy environment. Furthermore, those provisions are likely to undermine the potential positive normative impacts of the human right to a healthy environment, and in any event, are inutile by virtue of the justiciability of the right to life.

ALHR recommends that s 40C(5A) and (5B) of the Bill be removed prior to the Bill's passage into law. The human right to a healthy environment should be justiciability upon entry into law.

ALHR would be willing to make further submissions to the Standing Committee in relation to alternative schemes for the progressive or limited justiciability of the human right to a healthy environment, should the Standing Committee seek specific submissions on this issue.

### **Ensuring a Meaningful and Accessible Human Rights Complaints Mechanism for Breach of Environmental Rights**

There are no rights without remedy. ALHR submits that the ACT Government must take steps to ensure an accessible human rights complaints mechanism for breaches of the right to a healthy environment.

The right to a remedy for victims of violations of international human rights law is an essential component of international human rights law

#### **ALHR, therefore submits that the ACT Government should:**

- (a) ensure that the ACT Human Rights Commission (HRC), is adequately resourced such that it can receive and conciliate complaints about breaches of the right to a healthy environment;

- (b) Ensure the delivery of a program of human rights education, aimed at fostering understanding of the right to a healthy environment across the community, with particular attention to marginalised or disadvantaged groups;
- (c) ensure adequate funding for legal advice services, community legal centres, and environment and climate non-government organisations to give individuals information, legal advice and assistance about their human right to a healthy environment; and
- (d) conduct an in depth consultation process engaging with the expertise of relevant bodies and stakeholders to receive guidance as to the precise nature of the resourcing that would be required to deliver (a), (b) and (c).

### **Ensuring Full and Meaningful Community and First Nations Consultation Consistently with Australia's binding international legal obligations.**

ALHR is concerned that the ACT Government ensures meaningful opportunities for consultation on the Bill and accompanying resourcing needs.

We note the relatively short time frame for receipt of submissions on the Bill.

Pursuant to Article 25 of the ICCPR the ACT Government should ensure that it upholds the right of all Canberrans to take conduct in public affairs.

#### **Further, the ACT Government has specific consultation obligations with respect to children, people with disabilities and First Nations peoples.**

As a party to the CRPD Australia is bound to uphold Article 4(3) which states:

*In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations.*

Further, Article 18 of the UNDRIP states that Indigenous peoples have the right to participate in decision-making in matters which affect their rights and Article 19 of the UNDRIP requires States to consult with First Nations through Indigenous representative institutions before adopting and implementing legislative or administrative measures that may affect them.

The UNDRIP further enshrines the right of First Nations peoples to maintain traditional connections to land and territory, conserve and protect the environment, protect traditional

knowledge, cultural heritage and expression; and the protection of traditions, sites and ceremonial objects.<sup>58</sup>

ALHR acknowledges that First Nations Indigenous legal systems across the globe have long recognised that humans are ecologically embedded beings who exist as part of ecosystems, and with responsibilities to protect those ecosystems. Kombumerri and Wakka Wakka scholar, Graham, explains the First Nations Indigenous relationship to Country in Indigenous law as follows:

*“The land is a sacred entity, not property or real estate; it is the great mother of all humanity. The Dreaming is a combination of meaning (about life and all reality), and an action guide to living. The two most important kinds of relationship in life are, firstly, those between land and people and, secondly, those amongst people themselves, the second being always contingent upon the first.”<sup>59</sup>*

The principles underpinning the human right to a healthy environment reflect many First Nations Indigenous legal systems, notably, that in order to live in dignity, humans require healthy ecosystems and have a responsibility to care for those ecosystems. The absence of recognition of the interrelationship between a healthy environment and human rights in many domestic jurisdictions may also be viewed as a legacy of colonialism, conquest, First Nations dispossession and the exploitation of vast tracts of land.<sup>60</sup>

The right to a healthy environment can only properly be developed in consultation and collaboration with First Nations communities in the ACT. As the ACT State of Environment Report states: “it is now increasingly recognised that Indigenous knowledge is vital to our understanding of how our environment works and the development of sustainable best practice in Australia.”<sup>61</sup> Consultation and co-design with First Nations peoples is not only necessary to respect and uphold the rights of Indigenous peoples to their land and Country, but will also give the drafters the benefit of this deep environmental knowledge.

Finally, Australia is a party to the CRC, Article 12 of which obliges State parties to “*assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the*

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<sup>58</sup> UNDRIP Articles 11 - 13, 25 - 32

<sup>59</sup> Mary Graham, ‘Some Thoughts about the Philosophical Underpinnings of Aboriginal Worldview’ (2008) 45 Australian Humanities Review 181, 181.

<sup>60</sup> Kelly Duquette, ‘Environmental Colonialism’ January 2020

<sup>61</sup> ACT State of the Environment | 2019 Report, Chapter 2, p 29

*age and maturity of the child.*” Children worldwide have been leading the fight against climate change; calling on their governments to take action to protect the planet and their future. Although children are more vulnerable to the effects of global warming, they have been largely left out of the policy and law reform debate. Children living in the Territory today will face increasing effects of climate change in the form of an increase in droughts, floods, bushfires and storms, air and water pollution, and climate related adverse health outcomes. They must be a part of the conversation about the right to a healthy environment in the ACT.

As noted above, the UNCRC’s General Comment No. 26 makes clear that governments have specific obligations towards children in relation to the environment and climate change:

*“Children identify environmental issues as being highly important to their lives. Children’s voices are a powerful global force for environmental protection, and their views add relevant perspectives and experience with respect to decision-making on environmental matters at all levels. Even from an early age, children can enhance the quality of environmental solutions..., Children’s views should be proactively sought and given due weight in the design and implementation of measures aimed at addressing the significant and long-term environmental challenges that are fundamentally shaping their lives.... Additional support and special strategies may be required to empower children in disadvantaged situations, such as children with disabilities, children belonging to minority groups and children living in vulnerable areas, to exercise their right to be heard. States must ensure that age-appropriate, safe and accessible mechanisms are in place for children’s views to be heard regularly and at all stages of environmental decision-making processes for legislation, policies, regulations, projects and activities that may affect them...*

*...children should be provided with environmental and human rights education, age-appropriate and accessible information, adequate time and resources and a supportive and enabling environment. They should receive information about the outcomes of environment-related consultations and feedback on how their views were taken into account and have access to child-sensitive complaint procedures and remedies when their right to be heard in the environmental context is disregarded.<sup>62</sup>*

The right to consultation is also an aspect of the human right to a healthy environment, forming part of the right’s procedural aspects.

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<sup>62</sup> General comment No. 26 (2023) on children’s rights and the environment, with a special focus on climate change \* CRC/C/GC/26

ALHR urges the ACT Government to ensure that it upholds Canberrans human rights to participation as part of enshrining the right to a healthy environment in the HRA.

## Conclusion

ALHR welcomes the opportunity to be able to contribute to deliberation of the Bill.

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

However, for this right to be meaningful and enforceable, it must be fully justiciable. This is necessary to uphold principles of international human rights law relating to the indivisibility and interdependence of all human rights, and to specifically protect procedural elements of the human right to a healthy environment.

In relation to access to the human rights complaints mechanism, we urge the Standing Committee to make recommendations that ensure the ACT Human Rights Commission and ACT Civil and Administrative Appeals Tribunal are adequately resourced to hear and resolve these matters, and that additional funding is provided for community legal centres and environmental non-government organisations to participate in the development and enforcement of the human right to a healthy environment.

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

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

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

ALHR would be happy to appear before the Committee in order to give further oral evidence.

If you would like to discuss any aspect of this submission, please contact Kerry Weste,  
President Australian Lawyers for Human Rights

Yours faithfully,

Kerry Weste

President, Australian Lawyers for Human Rights

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