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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Human Rights Law Centre

Submission on the Human Rights (Healthy Environment) Amendment Bill 2023 (ACT)

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Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

The Human Rights Law Centre acknowledges the people of the Kulin and Eora Nations, the traditional owners of the unceded land on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

1. Introduction

The Human Rights Law Centre welcomes the opportunity to provide a submission to the ACT Legislative Assembly Standing Committee on Justice and Community Safety's Inquiry into the Human Rights (Healthy Environment) Amendment Bill 2023 (**the Bill**).

The Human Rights Law Centre strongly supports placing human rights at the heart of all our laws. Human rights cannot be realised equally by everyone without a healthy environment.

We commend the ACT Government for introducing the Bill to incorporate the right to a clean, healthy, and sustainable environment (**right to a healthy environment**) in the *Human Rights Act 2004* (**HRA**), consistent with recommendations from our more-detailed submission on the ACT Government's Discussion Paper on this topic (**Discussion Paper**) last year.

However, we note that the Bill contains some shortcomings that will weaken the positive practical impact that inclusion of a right to a healthy environment could have on people and communities throughout the ACT. Of particular concern is:

- the limited engagement with Aboriginal and Torres Strait Islander people in the drafting of the Bill;
- the uncertainty and potentially limiting impact of distinguishing in Part 3A of the HRA between immediate and progressively realisable elements of the right; and
- the exclusion of the right for people to bring court proceedings where public authorities breach their obligations.

These shortcomings are particularly concerning given the urgent need for strong laws to address the climate and environmental crises that are having serious impacts on ACT communities.

1.1 Recommendations

The Human Rights Law Centre makes the following recommendations to strengthen the Bill:

1. The Committee proactively engage with Aboriginal and Torres Strait Islander representatives in the ACT and seek their views and recommendations on the Bill.

2. All aspects of the right to a healthy environment should be immediately applicable, particularly in light of the existing section 28 limitations test in the HRA. To that end:
    a. The distinction between immediate and progressively realisable aspects of the right in Part 3A in the notes to the Bill and Explanatory Statement should be removed.
    b. Proposed new section 27C(2) of the Bill, which will have an uncertain and potentially narrowing impact and which replicates the right to non-discrimination already in section 8 of the HRA, should be removed.

3. The right to a heathy environment should be fully enforceable by people whose rights are adversely impacted. To that end:
    a. Proposed new sub-sections 40C(5A) and (5B) of the Bill should be removed so the right to a healthy environment is enforceable in the courts immediately.
    b. Alternatively, the Bill should be amended so that the right to bring proceedings in the courts under section 40C automatically commences on a specified date, being no longer than six months from the commencement of this right.

2. The importance of recognising the right to a healthy environment in law

The Human Rights Law Centre strongly supports the inclusion of a right to a healthy environment in the HRA.

The realisation of all human rights is deeply interwoven with healthy environments. Rights to life, health, housing, water, food, self-determination, culture, and equality, among others, cannot be realised without a healthy environment.[1] We cannot fully enjoy our human rights in a world in which extreme weather and climate events are bringing ever more devastation and where clean water and adequate food are becoming inaccessible for many.[2]

Australia is on an unsustainable environmental trajectory.[3] Our natural environment is in an overall state of decline, and is not sufficiently resilient to withstand current, emerging, or future environmental threats, including climate change.[4] Climate change, pollution and biodiversity loss are well-recognised as being urgent and compounding threats to human wellbeing and life.

The climate crisis is already impacting the rights of many people, and in particular, communities that are already subjected to multiple and intersecting forms of discrimination, or who are marginalised because of structural inequalities, ingrained practices or official policies that unfairly distribute resources, power, and privilege.[5] Prolonged heatwaves are disproportionately impacting people in public housing, which often lack insulation and have limited access to air conditioning. Fresh water is precarious in Australia, and low rainfalls in recent years, combined with water used for agriculture, have depleted surface water, leading to inequity in access and increasing water restrictions.[6] Erratic climate patterns have directly impacted crop, livestock, fisheries, and aquaculture productivity, which ultimately leads to an increase in food prices, disproportionately impacting people living in poverty.[7]

The threats and impacts on Aboriginal and Torres Strait Islander peoples' connection to Country, culture and wellbeing are particularly acute and disproportionate, exacerbating the racialised environmental, social, and economic injustices that are the foundation of the Australian settler state. As the Lowitja Institute has explained:

> *Colonisation created disparities in health and wellbeing between Aboriginal and Torres Strait Islander and non-Indigenous Australians through dispossession of traditional land and waterways, suppression of culture and disempowerment. Climate change is compounding these historical injustices, increasing inequities and feelings of powerlessness as communities despair over the desecration of their land, water and seascapes.*[8]

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[1] See UN Human Rights Committee comment that States' implementation of the obligation to respect and ensure the right to life, in particular life with dignity, depends on measures taken by States to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors (Human Rights Committee, General Comment 36(2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc CCPR/C/GC/36 (30 October 2018)).
[2] Amnesty International, 'Stop Burning Our Rights' (Report, 2021) 30.
[3] Professor Graeme Samuel AC, 'Independent Review of the EPBC Act' (Final Report, October 2020), viii.
[4] Ibid ii.
[5] Amnesty International 7, above n 2.
[6] Dr Terri Janke et al, 'State of the Environment Report' (19 July 2022).
[7] United Nations Office of the High Commissioner, 'About the right to food and human rights' (Website) <https://www.ohchr.org/en/special-procedures/sr-food/about-right-food-and-human-rights>.
[8] Heal Network & CRE-SRIDE 2021, 'Climate Change and Aboriginal and Torres Strait Islander Health' (Discussion Paper, Lowitja Institute, November 2021) 9.

Indigenous peoples around the world have long understood and advocated for the environment to be cared for and nurtured as a living entity that we are part of, not separate to. It is beyond time for governments to listen.

The interconnected and interdependent relationship between human rights and the environment is the reality we live in, but it is not reflected in law.[9] Laws across Australia, including in the ACT, are failing us by failing to ensure environments that are conducive to our wellbeing and that of future generations.

The ACT's own *State of the Environment 2019* report found that average temperatures in the ACT have risen 1.5 degrees since 1926. Temperatures are predicted to continue increasing, with rainfall expected to decrease, exacerbating bushfire and drought risks, and posing significant risks to people's health and to ecosystems that are critical to human resilience to climate change.[10] This brings into sharp relief the immediate necessity for politicians, public servants and the judiciary in the ACT to be centring human rights and healthy environments into all decision-making.

The ACT Government has a significant opportunity to provide leadership in this space, as the first Australian state or territory to legislate the right to a healthy environment. With this opportunity comes the responsibility to legislate the right to its full extent, and in collaboration with Aboriginal and Torres Strait Islander people, so that all people in the ACT benefit from the right to a healthy environment.

3. Consultation with Aboriginal and Torres Strait Islander people

The impacts of climate and environmental injustice compound the ongoing impacts of colonisation and racism in Australia to pose acute threats to the health and wellbeing of Aboriginal and Torres Strait Islander people. However, as the Lowitja Institute noted in its submission to the Discussion Paper, Aboriginal and Torres Strait Islander people are sidelined too often from discussions about how to address climate change. This sidelining is one of the many ways in which colonisation continues to be enacted against Aboriginal and Torres Strait Islander people.[11]

We recommended in our original submission that the ACT Government should work closely with Aboriginal and Torres Strait Islander people in the ACT and centre their rights, expertise, and knowledge in the drafting of the right.

While the 'Your Say' report tabled in the Legislative Assembly refers to specific recommendations made by consultees about involving Aboriginal and Torres Strait Islander people, such as in decision-making and through decolonising approaches,[12] we not aware of any thorough consultation with Aboriginal and Torres Strait Islander people or organisations in the ACT. Nor are the above recommendations clearly reflected in the drafting of the Bill. Limited references are made in Explanatory Statement, which largely cross-reference Aboriginal peoples' rights already contained in s 27(2)(b) of the HRA.

We therefore urge the Committee to proactively engage with Aboriginal and Torres Strait Islander representatives in the ACT and seek their views and recommendations on the Bill.

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[9] A recent review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) has warned that the environment in Australia is "not sufficiently resilient" to withstand the effects of climate change.
[10] Commissioner for Sustainability and the Environment, 'ACT State of the Environment 2019' (Report, 2019).
[11] See also Lowitja Institute's submission to the ACT Justice and Community Safety Directorate, September 2022. See also Lowitja Report 9, above n 8.
[12] Legislative Assembly for the ACT, 'Your say report – right to a healthy environment – report on what we heard' (paper for tabling, November 2022), accessible <https://yoursayconversations.act.gov.au/right-healthy-environment/listening-report-released>.

4. All aspects of the right should be immediately applicable

We commend the ACT government for drafting the right in the Bill in broad principled terms, consistent with the UN General Assembly's landmark recognition of this right.

We note that we recommended that the right to a healthy environment not distinguish between immediate and progressive obligations in the HRA, as is the approach to rights set out in Part 3 of the Act.

Unfortunately, the right has been grouped with the right to work and the very limited right to education in Part 3A of the HRA, which are noted to have immediate obligations and progressively realisable obligations. The obligation of progressive realisation comes from the *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**), which recognises that limited resources may prevent the immediate realisation of certain aspects of rights. Progressive realisation requires government to take deliberate, concrete, and targeted measures towards protecting rights, but it gives government some discretion in deciding which means are appropriate, considering available resources.[13] Immediate obligations, on the other hand, require the government, no matter the level of resources at their disposal, to meet these obligations from commencement of the right.[14]

The Explanatory Statement accompanying the Bill also distinguishes between immediate and progressively realisable aspects of the right to a healthy environment, drawing on the work of the Special Rapporteur on Human Rights and the Environment. The Statement notes the following as two general immediate obligations:

- to ensure non-discrimination in the way the right is enjoyed; and
- avoid any unjustified retrogressive measures that may deprive people of rights currently enjoyed.

Further, the Bill includes proposed section 27C(2), which states that everyone is entitled to enjoy the right to a healthy environment without discrimination. Given the right to non-discrimination is already recognised in section 8 of the HRA, it is unclear whether this provision is intended to be an expression of what the legislature sees as the sole primary immediate obligation attached to the right to a healthy environment in the specific context of the ACT HRA. This would be concerning because it is likely to have a limiting effect.

4.1 Why all aspects of the right should be immediately realisable in the HRA

As outlined in our submission to the Discussion Paper, the right to a healthy environment should be treated like all other rights under Part 3 of the HRA for the following reasons:

- **The unique statutory context of ACT's Human Rights Act:** the inclusion of the right to a healthy environment in the HRA "would not require public authorities to provide all Canberrans with a healthy environment in all circumstances".[15] The legal obligations on public authorities are to "give proper consideration" of human rights in decision making and to not "act in a way that is incompatible" with human rights.[16] All human rights can be limited under the HRA so long as there is a good reason, being one that is lawful, reasonable and "demonstrably justified in a free and democratic society" (**the limitations test**).[17] This limitations test provides a robust framework for balancing competing rights and interests,

[13] Human Rights Council A/HRC/37/59, Special Rapporteur on Human Rights and the Environment, Framework principles on human rights and the environment, 24 January 2018.
[14] Ibid.
[15] ACT Justice and Community Safety Directorate, 'Right to a Healthy Environment' (Discussion Paper, June 2022) 10.
[16] *Human Rights Act 2004* (ACT) s 40B.
[17] *Human Rights Act 2004* (ACT) s 28.

including between people and government, and preventing unjustifiable retrogressive steps. These elements of the HRA recognise that there will be times when the ACT government needs to limit human rights, but it should have strong justification if it seeks to do so. The concept of progressive realisation is unnecessary in the context of these aspects of the HRA.

- **Interpretative uncertainty:** What 'progressive realisation' means in the context of the right to work in the HRA has not yet been tested. The broad references to progressive realisation in the notes of the Bill and the Explanatory Statement, alongside the existing limitations test and right non-discrimination in the HRA, are therefore likely to create interpretative uncertainty for public authorities, law makers, courts, and the public in determining what an institution's obligations are.
- **Human rights are indivisible and interdependent:** As the Discussion Paper noted, the distinction between the treatment of rights in the *International Covenant on Civil and Political Rights* and ICESCR is largely artificial. The right to a healthy environment, while drawing from ICESCR rights, as well as other treaties, has at this stage been recognised outside of the ICESCR framework. Regardless of how the right may evolve in international law in the future, the goal of Australian governments should be to create a human rights framework that best protects the rights and interests of local communities.
- **Following the example of Queensland's Human Rights Act:** The *Human Rights Act 2019* (Qld) has included two rights drawn from ICESCR – the right to education and to health services. Significantly, it treats the realisation of these as of equal importance as other human rights and does not distinguish between immediate and progressive obligations.[18]

We therefore recommend that the ACT Government remove the distinction between immediate and progressive realisation of the right in Part 3A in the notes to the Bill and the Explanatory Statement.

We also recommend removal of proposed new section 27C(2) of the Bill. As noted above, its inclusion as an obligation that requires "immediate action by the ACT Government"[19] in the context of the discussion about progressive realisation in the Explanatory Statement, seems to suggest (although it is unclear) that it is the only immediate obligation being expressly recognised in the HRA. This uncertainty is exacerbated by the fact that non-discrimination in the realisation of all human rights is already recognised in section 8 of the HRA. We are concerned that this may result in interpretations of the right that limit its practical application and benefit to ACT communities. Any narrowing of the right or uncertainty created will disproportionately impact on communities that already experience systemic discrimination and are therefore more vulnerable to the impacts of climate change and environmental degradation, such as Aboriginal and Torres Strait Islander people, people with disabilities, and children.

5. People should be able to enforce their rights in the courts

The ACT took the lead in Australia by allowing for a direct cause of legal action in cases where public authorities fail to comply with their duties under the HRA. As a result, people in the ACT can enforce their rights in the courts, and public authorities are more effectively held to their responsibilities.

However, the Bill proposes to exempt the right to a healthy environment from enforcement through the courts. This means that people will not be able to bring a direct legal action in the Supreme Court, or attached to other legal claims, where public authorities have violated their obligations to

[18] *Human Rights Act 2019* (Qld) ss 36 and 37.
[19] Legislative Assembly of the ACT, *Human Rights (Healthy Environment) Amendment Bill 2023, Explanatory Statement and Human Rights Compatibility Statement*, 14. It is noted that the Explanatory Statement does provide reassurance that "Expressly including the non-discrimination obligation in the new section 27C(2) is not intended to have any interpretative impact on *other* rights" (emphasis added).

properly consider and act compatibly with the right to a healthy environment. The Bill does this by inserting proposed new sub-sections 40C(5A) and (5B) in the HRA which provide that the right to bring legal proceedings under section 40C of the HRA will not apply to this right.

While the Bill provides for these sub-sections to be reviewed in five years, there is no guarantee that this denial of access to justice will be rectified.

The Explanatory Statement suggests that five years is needed for public authorities to fully understand, implement, and institutionalise the right to a healthy environment in decision-making, policies, and legislation. However, five years is an excessive period of time, particularly in light of the urgent climate and environmental challenges to be addressed. Internationally, the right to a healthy environment is not a new or novel human right,[20] and providing access to judicial remedies will not result in an influx of litigation upon commencement.[21] Locally, by way of comparison, remedies provisions for the *entire* Victorian *Charter of Human Rights and Responsibilities Act 2006,* containing some 20 rights, came into force 12 months after the rest of the Act commenced.[22] The Queensland *Human Rights Act 2019*, containing some 23 rights, commenced on 1 January 2020, less than one year after the Act was assented to.[23]

Access to justice is an essential procedural element of the right to a healthy environment. The current drafting of the Bill is inconsistent with this procedural element. It also creates a hierarchy within the HRA because the right to a healthy environment will have limited enforcement avenues compared to other rights in the Act.

Providing access to remedy is critical to increasing awareness of human rights and responsibilities across the community and public service. We recommend that sections 40C(5A) and (5B) be removed, and the right be enforceable immediately. As an alternative, the Bill should be amended so that the right to access section 40C remedy pathways commences on a specified date, being no longer than six months from the commencement of this right.

6. Conclusion

The ACT Government is commended for continuing to look at how the HRA can evolve and light the path for other jurisdictions in terms of ensuring human rights are fully and properly placed at the heart of all decision making.

Recognising the right to a healthy environment in the HRA will help ensure that those making important decisions, such as lawmakers and public authorities, recognise that the health and wellbeing of communities is deeply interconnected with clean, healthy, and sustainable environments.

As outlined in this submission, the right to a healthy environment in the Bill can be strengthened, in particular by ensuring that the right is fully realisable and enforceable immediately. This is critical given the urgency of the climate and environmental crises we all face and the need for certainty and

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[20] The right to a healthy environment was first recognised internationally over fifty years ago, in the 1972 Stockholm Declaration. Currently, over 80 percent of UN member states (156 of 193) legally recognise the right to a healthy environment in national constitutions, national legislation and/or regional treaties.

[21] Portugal was the first nation to recognise the right to a healthy environment in its Constitution in 1976, and it has only led to the advancement of strong environmental and climate laws. For example, the *Environmental Framework Law no 19/2014* (Portugal), which was introduced in 2014, enforces environmental rights through policies that promote sustainable development, and ensure the well-being and gradual improvement of citizens quality of life.

[22] See section 2 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

[23] The Act was assented to on 7 March 2019. Queensland Human Rights Commission, Queensland's Human Rights Act 2019 (Fact Sheet, 2019) <https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0020/23348/QHRC_combinedfactsheets_QldHumanRightsAct.pdf>.

access to justice, particularly for communities most at risk. The Bill would also be strengthened by deep listening to Aboriginal and Torres Strait Islander people and we urge the Committee to proactively engage with Aboriginal and Torres Strait Islander representative bodies to seek their views and recommendations on the Bill.