



Civil Law Team
Legislation, Policy and Programs
ACT Justice and Community Safety Directorate
Via civilconsultation@act.gov.au

9 September 2022

Dear Civil Law Team,

ACT Human Rights Commission submission – introduction of a right to a healthy environment in the *Human Rights Act 2004*

The ACT Human Rights Commission is pleased to provide a submission to this public consultation considering introducing a right to a healthy environment in the *Human Rights Act 2004*.

We strongly support integrating the right to a healthy environment into the ACT's human rights framework. Our submission outlines anticipated benefits of recognising the right to a healthy environment in the ACT and important considerations that should be addressed.

The Commission has benefited from the opportunity to consider an advance draft of the Human Rights Law Centre's submission and note that its recommendations substantially align with the views expressed in this submission. We are therefore pleased to endorse its submission as consistent with our own position.

Our submission should not be considered confidential; please be aware that we intend to make our feedback publicly available on our website at the time that it is provided to government.

Yours sincerely,

Dr Helen Watchirs OAM
President and Human Rights
Commissioner

Jodie Griffiths-Cook
Public Advocate and Children
and Young People
Commissioner

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

About the ACT Human Rights Commission

- i. The ACT Human Rights Commission is an independent agency established by the *Human Rights Commission Act 2005* (HRC Act). Its main object is to promote the human rights and welfare of people in the ACT. The HRC Act became effective on 1 November 2006 and the Commission commenced operation on that date. Since 1 April 2016, a restructured Commission has included:
 - The President and Human Rights Commissioner
 - The Discrimination, Health Services, Disability and Community Services (DHSDCS) Commissioner
 - The Public Advocate and Children and Young People Commissioner (PACYPC); and
 - The Victims of Crime Commissioner (VOCC)

- ii. The ***President and Human Rights Commissioner***, Dr Helen Watchirs, is responsible for the Commission's governance, finance, resources and administration and has various functions in relation to the *Human Rights Act 2004* (HR Act). These include providing community education and information about human rights, reviewing the effect of ACT laws on human rights; and advising the Minister for Human Rights on the operation of the HR Act. The Human Rights Commissioner may also intervene in legal proceedings that involve the application of the HR Act.

From January 2022, the Human Rights Commissioner has participated in an Inter-Directorate Committee about integrating the right to a safe, clean, health and sustainable environment in the HR Act. She has also sought to inform public discussion about introducing the right by participating in a Panel Discussion hosted by the Justice and Community Safety Directorate in June 2022,¹ and an Environment Exchange hosted by the Conservation Council ACT Region in November 2021.²

- iii. The ***DHSDCS Commissioner***, Karen Toohey, encourages and assists in the resolution of complaints made under the HRC Act by providing an independent, fair and accessible complaints-resolution process. She can handle concerns and complaints about a range of issues on behalf of the Commission, including discrimination, health services and health records and services for people with disability, children and young people and older people. The Commission does not presently have the ability to receive and conciliate complaints about alleged breaches of human rights by government agencies, but has regard to human rights when engaged and where relevant to complaints it receives.

- iv. The ***PACYPC***, Jodie Griffiths-Cook, advocates for the interests of people experiencing vulnerability in our community, which can include people with disabilities and children and young people. In her role as Children and Young People Commissioner, she consults with children and young people of all backgrounds and promotes their views and participation in decisions that affect them. This includes emphasising their unique perspective on climate, biodiversity and the environment.

- v. The Commission wishes to thank the Murrumbung Yurung Murra Network for sharing their unique insights with us, which we have sought to reflect in this submission. We have also welcomed the opportunity to discuss the consultation with the Human Rights Law Centre and consider an advance draft of their submission, which we endorse as consistent with our own.

¹ ACT Justice and Community Safety Directorate, 'Right to Healthy Environment – Panel Discussion' (30 June 2022), available at: <https://yoursayconversations.act.gov.au/right-healthy-environment>

² Conservation Council ACT Region, 'Environment Exchange 2021: What is the human right to a healthy environment and how does it affect the ACT region?' (16 November 2021), available at: <https://conservationcouncil.org.au/blog/2021/11/08/human-right-to-a-healthy-environment/>

Key points from our submission

- The Commission strongly supports recognising the right to a healthy environment in the *Human Rights Act 2004* as a matter of principle.
- Human rights are indivisible, interrelated, and interdependent. Many of our basic human rights, including rights to life, security of person, equality, privacy, rights of children and the distinct cultural rights of Aboriginal and Torres Strait Islander peoples rely on a safe, clean, healthy and sustainable environment. It is desirable that the Human Rights Act recognise it as a standalone human right, consistent with the recent endorsement of the human right to a healthy environment by the United Nations General Assembly.
- Enacting the right to a healthy environment would centre consideration of the environment, climate and biodiversity as part of the ACT's human rights framework. If implemented effectively, recognising the right would promote greener decision-making within ACT Government, and will provide impetus for more environmentally conscious laws, policies and action. A standalone right would inform statutory interpretation and may promote new and helpful human rights case law in the ACT Supreme Court.
- Recognising the right to a healthy environment would also establish an important foundation for the ACT to recognise the right to the highest attainable standard of physical and mental health in future, consistent with its incremental approach to including new rights in the Human Rights Act.
- The Commission supports the right to a healthy environment being framed broadly and as a statement of principle that is easily understandable: that "everyone has the right to a safe, clean, healthy and sustainable environment." Broad framing is consistent with the expression of most other rights in the Human Rights Act and does not risk inadvertently confining the scope or content of the right as it continues to develop in international human rights law.
- Obligations under the right to a healthy environment are drawn from both 'civil and political rights' and 'economic, social and cultural rights.' The Commission therefore cautions against recognising the right to a healthy environment solely as an economic, social and cultural right that is wholly capable of progressive realisation. To the extent that the right to equality and non-discrimination already applies to all human rights, non-discrimination obligations need not be expressly incorporated in the text of the right to a healthy environment.
- It is vital that the views of Aboriginal and Torres Strait Islander peoples guide recognition of the right to a healthy environment in the ACT. What is meant by 'a healthy environment' must be understood to include cultural understandings of a healthy Country, and reflect the profound, intangible and spiritual connection to Country that Aboriginal and Torres Strait Islander peoples share. Opportunities exist in the ACT to better realise a healthy Country, including earlier proactive consultation and greater opportunities for cultural land management and stewardship.
- Realising the right to a healthy environment must address physical and procedural barriers that groups who are experiencing vulnerability may face. This will include building reasonable adjustments into existing and proposed ways of obtaining information and contributing to decisions that affect the environment.
- The right to a healthy environment has special significance, given the ongoing climate crisis, for children and young people, who must be considered and involved in decision-making about recognising and realising the right to a healthy environment both now and for future generations.
- The Commission calls on the ACT Government to establish an accessible administrative pathway for all people, including diverse and marginalised groups, to complain about breaches of their human rights by government agencies. In the absence of a free, timely and accessible complaints mechanism, the Commission is seriously concerned that the ACT does not provide sufficiently effective access to remedies for the purposes of implementing the right to a healthy environment.

Discussion questions:

1. Should a right to a healthy environment be included in the Human Rights Act?

1. The Commission strongly supports enacting a right to a clean, safe, healthy and sustainable environment (henceforth, 'the right to a healthy environment') in the *Human Rights Act 2004* (HR Act). Canberrans have in recent years experienced firsthand the devastating effects of environmental damage: from violent winds, thunderstorms and hail to bushfires, smoke haze and significantly reduced air quality. As the effects of human-induced climate change have grown increasingly extreme, the dependence of our infrastructure, health and wellbeing on healthy ecosystems, biodiversity and a safe climate have become increasingly clearer and more urgent.
2. Introducing the right to a healthy environment in the HR Act cannot alone address the challenges posed by the adverse effects of climate change and environmental harms. Yet it should also not be thought of as a mere symbolic gesture or statement of values.³ Recognising the fundamental connection between environmental quality and the exercise of our basic human rights in the HR Act will provide a unifying principle to inform government laws, decisions, and actions in the ACT. Integrating this vital understanding as part of the HR Act is, in this way, key to embedding regard to environmental and climate impacts across all areas and activities of the ACT Government both now and for future generations.
3. The essential connection between the natural and built environment and individuals' enjoyment of basic human rights was first acknowledged in the Stockholm Declaration,⁴ published in 1972 in the wake of the United Nations First Conference on the Human Environment. While the HR Act is structured to have distinguished civil and political rights from economic, social, cultural and other rights, delineating between generations of rights is generally considered contentious and artificial. Irrespective of their classification, all human rights are indivisible, interrelated, and interdependent, as recognised in the Vienna Declaration and Programme of Action (1993).⁵ Environmental human rights are hence human rights,⁶ and should be recognised as such.
4. The UN Human Rights Council passed a historic resolution in October 2021, which recognised for the first time that the right to a safe, clean, healthy and sustainable environment is a human right.⁷ Even more recently, the UN General Assembly (UNGA) voted overwhelmingly to recognise the right to a healthy environment in July 2022, with 161 states in favour (including Australia), eight abstaining and none opposed.⁸ These resolutions represent the culmination of a significant program of work, research and analysis by Special Rapporteurs on Human Rights and the Environment ("the Special Rapporteur"), Dr David R Boyd and his predecessor, Mr John H Knox, that included mapping of the right's scope, content and application in international human rights

³ Dr David R Boyd, *The Environmental Rights Revolution* (UBC Press, 2012).

⁴ UN General Assembly, Declaration of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14 and UNGAOR Res 2994 (XXVII) UN Doc. A/RES/2994(XXVII) (15 December 1972).

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

⁶ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgment)* [1997] ICJ Rep 7, 114 (Separate Opinion of Judge Weeramantry).

⁷ UN Human Rights Council, *The human right to a safe, clean, healthy and sustainable environment*, UN Doc [A/HRC/48/L.23/Rev.1](#) (5 October 2021) [1]-[3].

⁸ UN General Assembly, *The human right to a clean, healthy and sustainable environment*, GA Res 76/300, UN GAOR, 76th sess, Agenda item 74(b), UN Doc. A/76/L.75 (26 July 2022).

law (IHRL),⁹ and development of related framework principles about the right's core obligations.¹⁰ Although not necessarily binding in treaties or customary IHRL, these resolutions – and the extensive research, analysis and commentary necessary to realise them – evidence the near-universal acceptance of a safe, clean, healthy and sustainable environment as a fundamental human right.

5. In February 2022, the ACT Legislative Assembly passed a motion calling on the ACT Government to actively investigate recognising the right to a healthy environment with bipartisan support.¹¹ The Environmental Defenders Office (EDO) has recently called on all state and territory governments to legislate the right to a healthy environment in its national report, *A Healthy Environment is a Human Right: Report on the Status of the Human Right to a Healthy Environment in Australia*, published in August 2022.¹² These and other calls attest to the broader community's interest in our laws directly affirming that basic human rights rely on the health of our environment.

What is the right to a healthy environment?

6. It is uncontroversial that environmental degradation adversely affects a broad range of human rights,¹³ including several recognised in the HR Act. As the consultation paper explores, a healthy environment has been read into a variety of human rights in international, foreign and domestic jurisprudence. This includes substantive environmental protections as an implied condition of the right to life,¹⁴ as well as rights to security, health and privacy, rights of children and the distinct cultural rights of Indigenous peoples. Procedural entitlements that facilitate citizens and groups to actively participate in environmental protection are also closely linked to human rights, like the freedom of expression and rights to participate in public affairs.¹⁵
7. The Special Rapporteur's initial mapping study of IHRL obligations relevant to a healthy environment (2014), framework principles (2018), and thematic reports, present an authoritative understanding of the right to a healthy environment to be drawn on in the ACT. In substantive terms, the right guarantees clean air, a safe climate, access to safe water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play and healthy biodiversity and ecosystems.¹⁶ This list is not, however, exhaustive and may advance as states' obligations under the right to a healthy environment are contested and/or examined or as further standards and commentary emerge.
8. Like other human rights drawn from IHRL, precisely what standard of environmental quality is protected and what constitutes a violation will vary based on the social, economic, cultural, political and environmental conditions of the society in which it is applied,¹⁷ including in the ACT.

⁹ John H Knox, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* ('Special Rapporteur Mapping Report'), 25th sess, UN Doc. A/HRC/25/53 (30 December 2013).

¹⁰ John H Knox (Special Rapporteur on Human Rights and the Environment), 'Framework principles on human rights and the environment' ('Special Rapporteur Framework Principles'), UN Doc. A/HRC/37/59 (24 January 2018).

¹¹ Legislative Assembly for the Australian Capital Territory, *Hansard*, 10 February 2022, 507-509 (Jo Clay MLA).

¹² Environmental Defenders Office, *A Healthy Environment is a Human Right: Report on the Status of the Human Right to a Healthy Environment in Australia* (Report, August 2022), 8.

¹³ John H Knox, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc. A/HRC/22/43 (24 December 2012), [34].

¹⁴ UN Human Rights Committee, *General Comment 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, UNHRC 124th sess, UN Doc. CCPR/C/GC/36 (30 October 2018), [62]; UN Human Rights Committee, *Decision: Communication 2751/2016 ('Portillo Cáceres and Others v Paraguay')* UN Doc. CCPR/C/126/D/2751/2016 (20 September 2019) [7.4]-[7.5].

¹⁵ HR Act, ss 16 and 17(a).

¹⁶ Special Rapporteur, Mapping Report, from [44].

¹⁷ Dr David R Boyd, *The Environmental Rights Revolution* (UBC Press, 2012) ('Boyd, 2012'), 25.

As the consultation paper rightly notes, the right “does not require public authorities to provide a healthy environment in all circumstances.”¹⁸ As with most human rights, the right to a healthy environment will be capable of having reasonable limitations or exceptions to accommodate competing interests and rights, in accordance with s 28 of the HR Act.

9. The right also includes procedural elements that offer flexible and enforceable tools to support individuals to assess and advocate for governments to respect, protect and fulfil the substantive elements.¹⁹ These procedural elements are access to information, public participation in decisions affecting the environment, and access to justice and effective remedies. As they partly overlap with rights already protected in the HR Act, such as the right to receive information in s 16(2) and to participate in public affairs (HR Act, s 17(a)), it may be tempting to conclude that these elements are already sufficiently upheld in existing ACT laws. However, as discussed in Question #6 from [71], we recommend specific attention be paid to the procedural elements in implementing the right.
10. As with all human rights, Governments must ensure that both substantive environmental protection and the procedural elements are enjoyed without discrimination of any kind.²⁰ This still enables special measure to achieve substantive equality for groups that have been traditionally marginalised in enjoying the right to a healthy environment. As discussed below at [45], however, the right to a healthy environment places additional obligations on Governments to take additional or positive measures to protect the rights of people who are at most, or particular risk, from environmental harm, including women, children and Indigenous peoples.²¹

Why should the ACT recognise the right to a healthy environment?

11. Recognising the right to a healthy environment will assist in promoting greater ecological consciousness within the ACT Public Service (ACTPS) by rendering the human right to a healthy environment a core consideration of its diverse functions. The dialogue model of human rights protection enacted by the HR Act provides a unifying framework to ensure that all areas of government, rather than just one or two lead or ‘relevant’ directorates, consider potential effects on climate and the environment. This includes when developing, implementing and interpreting draft legislation. Expressly recognising the right in the HR Act would, due to the public authority obligations in s 40B, lawfully oblige all public authorities (including Ministers, agencies and public servants) to properly consider and act compatibly with the right to a healthy environment. Integrating the right into the ACT’s human rights framework would valuably focus attention on whether laws, decisions or actions that would, or may, cause environmental harm are reasonable and demonstrably justified in accordance with s 28 of the HR Act.

Proposed laws

12. In the ACT human rights are considered an important part of the legislative process, both before and after a bill is introduced in the ACT Legislative Assembly.²² The Attorney-General is required, by s 37 of the HR Act, to issue statements indicating whether each government bill presented to the ACT Legislative Assembly is compatible with human rights. To exercise this role, the Attorney-

¹⁸ ACT Justice and Community Safety Directorate, *Right to a Healthy Environment: Discussion Paper* (Discussion Paper, June 2022), 10.

¹⁹ Malgosia Fitzmaurice and Jill Marshall, ‘The Human Right to a Clean Environment – Phantom or Reality? The European Court of Human Rights and English to date Perspective on Balancing Rights in Environmental Cases’ (2007) 76 *Nordic Journal of International Law*, 105-51.

²⁰ Special Rapporteur Framework Principles, Principle 3.

²¹ Special Rapporteur Framework Principles, Principle 14, [40].

²² See discussion in Helen Watchirs, Sean Costello and Renuka, Thilagaratnam in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (Thomson Reuters, 2020), 177.

General receives advice from a centralised human rights scrutiny unit within the Justice and Community Safety (JACS) Directorate, which reviews bills ahead of being presented to Cabinet.²³ Human rights are also routinely considered as part of submissions presented to Cabinet, as contemplated in the ACT Cabinet Handbook.²⁴

13. Section 38 of the HR Act, in turn, requires that a standing committee report on human rights issues raised by all bills introduced into the ACT Legislative Assembly, including those introduced by private members. To inform these assessments, agencies are obliged to examine the engagement of and justify any restrictions on human rights, and whether those limits are reasonable in accordance with section 28 of the HR Act, as part of accompanying explanatory statements.
14. Incorporating the right to a healthy environment should therefore encourage the broader ACTPS to consider environmental impacts as an early and routine part of developing of human rights-consistent legislation. If implemented effectively, the right to a healthy environment promises to stimulate greater awareness and dialogue between agencies about environmental impacts early in the development of proposed new laws. We are therefore hopeful that incorporating the right to a healthy environment in the HR Act will provide an ongoing impetus to institutionalise greater understanding of human rights and environmental considerations across the ACT Government.

Litigation

15. Enacting a right to a healthy environment would provide important confirmation that a person can directly challenge environmental harms that affect them under the HR Act. As the consultation paper notes, any person who considers that a public authority (including ministers, government agencies and public servants) has failed to properly consider or act consistently with their human rights can initiate proceedings in the ACT Supreme Court.²⁵ Where a breach of these duties is established, the court is able to grant any relief it considers appropriate, except damages.²⁶
16. Environmental human rights litigation, including strategic climate-based action, has the potential to energise the development of human rights jurisprudence and principle in the ACT. Notably, the first human rights-based climate litigation in Australia is presently underway in Queensland.²⁷ The plaintiffs, Youth Verdict and the Bimblebox Alliance, are relying on various human rights under the *Human Rights Act 2019* (Qld), including the right to life, rights of children and cultural rights, to prevent Waratah Coal Pty Ltd establishing a coal mine in the Galilee Basin. Though still ongoing, interlocutory challenges in this proceeding have already served to clarify the Queensland Land Court's jurisdiction to consider objections based on human rights grounds and to hear evidence on Country to uphold the cultural rights of litigants.²⁸
17. In the ACT, the Commission does not foresee a significant increase in human rights litigation in the ACT Supreme Court should the HR Act be amended to directly recognise the right to a healthy

²³ As described in, ACT Auditor-General, *Performance Audit: Recognition and implementation of obligations under the Human Rights Act 2004*, Report 2/2019, February 2019, available at: https://www.audit.act.gov.au/_data/assets/pdf_file/0018/1322460/Report-No-2-of-2019-Recognition-andimplementation-of-obligations-under-the-HRA-2004.pdf

²⁴ See ACT Chief Minister, Treasury and Economic Development Directorate, *ACT Cabinet Handbook* (Guide, January 2022), available at: https://www.cmtedd.act.gov.au/_data/assets/pdf_file/0006/1189383/ACT-Cabinet-Handbook.pdf

²⁵ HR Act, ss 40B and 40C(2).

²⁶ HR Act, s 40C(4).

²⁷ See *Waratah Coal Pty Ltd v Youth Verdict Ltd* (Queensland Land Court, MRA050-20 (ML70454) EPA051-20 (EPML00571313)).

²⁸ *Waratah Coal Pty Ltd v Youth Verdict Ltd; (No 1)* [2020] QLC 33; and *(No 5)* [2022] QLC 4.

environment. As discussed below at [75]-[78], the direct right of action in s 40C(2) of the HR Act is historically underused and may not be a suitably timely, cost-effective or accessible avenue to redress agencies' breaches of human rights. Though a healthy environment is an implied precondition of a broad range of human rights, the ACT Supreme Court has not, to our knowledge, ever heard a claim under the HR Act concerning harm to the environment.

18. By contrast, the HR Act has been raised several disputed development approvals before the ACT Civil and Administrative Tribunal (ACAT). Rather than environmental concerns, however, these decisions have primarily centred on whether limits on ACAT's jurisdiction to review certain planning decisions accord with the right to fair trial (s 21, HR Act).²⁹ In these circumstances, the ACAT has consistently taken account of whether alleged limitations are reasonable in the context of the broader planning framework and its objectives.³⁰ The ACAT would be required to actively consider the right to a healthy environment, if recognised, to the extent relevant in conducting administrative review of decisions.
19. Taking account of environmental harm within a dialogue model of human rights protection would also empower the ACT Supreme Court to declare laws that unreasonably impact on the human right to a healthy environment incompatible with the HR Act.³¹ Rather than invalidate the law (as if it never had any legal effect), this would require the Government to present and respond to the declaration of incompatibility in the ACT Legislative Assembly within a fixed timeframe and, should it choose, indicate how it proposes to rectify the issue.³² This safeguard provides an important answer to a common argument against justiciable environmental human rights; that they risk unelected judicial officers deciding inherently political questions about the appropriate balance between environmental protection or climate action, and other important public interests, such as economic or social issues.
20. The Dutch Supreme Court (DSC) addressed a similar argument in its landmark human rights decision in *Urgenda v The Netherlands*, in which it found less ambitious emissions reduction targets adopted by the Government of the Netherlands inconsistent with rights to life and private life under the European Convention of Human Rights.³³ The DSC emphasised that the role of a court in such proceedings is, properly executed, to consider evidence before it and evaluate whether a particular measure reasonably addresses the imminent risks to the human rights that the Government has committed to protect. It does not, however, enable it to dictate how that goal is to be achieved,³⁴ which reflects the approach enacted by the ACT's HR Act. This is an advantage of the HR Act as a legislative bill of rights, as in the United Kingdom and New Zealand, relative to constitutional models in place in the United States of America or Canada.

²⁹ See, for example, *Thomson v ACT Planning and Land Authority (Administrative Review)* [2009] ACAT 38 (2 October 2009) ('Thomson'); *Tran v ACT Planning and Land Authority & Iron Property Pty Limited (Administrative Review)* [2009] ACAT 46 (15 December 2009); *Noah's Ark Resource Centre Incorporated v ACT Planning and Land Authority & Anor (Administrative Review)* [2017] ACAT 44 (15 June 2017).

³⁰ Thomson, [103].

³¹ HR Act, s 32.

³² HR Act, ss 33(2)-(3).

³³ *Urgenda Foundation v The Netherlands ('Urgenda')* (The Supreme Court of the Netherlands, Civil Division, 19/000135, 20 December 2019); for more information, see Australian Government Solicitor, *Recent trends in climate change litigation* (Legal briefing, 1 June 2022), 9, available at: <https://www.ags.gov.au/sites/default/files/2022-06/lb-RecentTrendsInClimateChangeLitigation.pdf>

³⁴ *Urgenda*, [65].

Statutory interpretation, decision-making and enforcement

21. The HR Act requires that each Territory law must, as far as it is possible to do so consistently with its purpose, be interpreted consistently with human rights.³⁵ Expressly recognising the right to a healthy environment in the HR Act would consequently require ACT Courts and Tribunals to take account of environmental impacts in construing provisions of ACT laws and instruments. Importantly, a decision-maker would be unable to read down a provision's intended purpose in order to adopt an inconsistent meaning that better supports a healthy environment.³⁶ Various provisions that outline overarching objects and principles feature throughout ACT primary and subordinate legislation. As a number of these expressly refer to 'human rights',³⁷ their doing so will allow the right to a healthy environment, if recognised in the ACT, to form part of their interpretation.
22. The right to a healthy environment can therefore contextualise climate and environmental considerations in statutory decision-making at all levels of government. The Chief Justice of the NSW Land and Environment Court, Brian J Preston, has observed that:

"as attitudes to climate change continue to shift, assisted by the recognition of the importance of mitigating climate change in the Paris Agreement, existing legislative frameworks are more likely to be interpreted by the courts as requiring a decision-maker to take climate change into account."³⁸
23. Recognising the right to a healthy environment in the HR Act would, by virtue of the interpretive obligation and public authority obligations, similarly promote the need for statutory discretions and other decisions to have regard to climate mitigation and adaptation. Compliance activities and decisions about enforcing existing laws would also need to properly consider human rights, including the right to a healthy environment, with benefits for their consistency, transparency and accountability.
24. It must be acknowledged, however, that integrating a right to a healthy environment will involve changes in practice, given the need to share relevant expertise. In this regard, we expect consideration of the right will foster new working relationships and lines of communication between agencies, including the Commission, the Commissioner for Sustainability and the Environment, the Human Rights Unit in JACS, the Environment, Planning and Sustainability Directorate (EPSDD), and our respective stakeholders. Implemented effectively, proper consideration of the right to a healthy environment (as required by s 40B(2)) has potential to lead to better decision-making at all levels of government.

Groundwork to recognise the human right to health

25. The Commission has long advocated for the HR Act to be expanded to include other internationally recognised human rights, including the human rights to housing and the highest attainable standard of physical and mental health (commonly referred to as 'the right to health'). Importantly from the Commission's perspective, recognising the right to a healthy environment lays important groundwork for the ACT to recognise the right to health in the HR Act. As highlighted by the EDO³⁹ and evidenced by the Australian Institute of Health and Welfare,

³⁵ HR Act, s 30.

³⁶ *Slaveski v Smith* (2012) 34 VR 206; [2012] VSCA 25, [23]-[24], as applied in *R v QX (No 2)* [2021] ACTSC 244, [124].

³⁷ See, for example, the *Corrections Management Act 2007*, ss 9 and 12; *Children and Young People Act 2008*, ss 94 and 138; *Freedom of Information Act 2016*, s 2.2.

³⁸ Brian Preston, 'Influence of the Paris Agreement on Climate Change Litigation: Legal Obligations and Norms (Part I)' (2021) 33(1) *Journal of Environmental Law* 1, 27; Jacqueline Peel et al, 'Shaping the Next Generation of Climate Change Litigation in Australia' (2017) 41 *Melbourne University Law Review* 793, 28.

³⁹ Environmental Defenders Office, *A Healthy Environment is a Human Right: Report on the Status of the Human Right to a Healthy Environment in Australia* (Report, August 2022), 25.

environmental determinants play a role in a significant proportion of physical and mental health conditions and illness in Australia.⁴⁰

26. The UN Committee on Economic, Social and Cultural Rights (CESCR) has stated that “the right to health embraces a wide range of socioeconomic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as ... access to safe and potable water and ... a healthy environment.”⁴¹ Given these established links, foreign and international jurisprudence and commentary concerning the right to health, including that of the CESCR as it develops, may offer analogous guidance in applying the right to a healthy environment in the ACT. Insofar as it partly reflects obligations under the right to health, enacting the right to a healthy environment is consistent with the ACT’s incremental approach to implementing ESC rights to date, and reflects important preparatory steps to fully recognise the right to health within the HR Act in future.
27. In these ways, extending the dialogue model of human rights protection to encompass ecological impacts will enhance the contestability and systemic improvement of laws affecting our environment. An express right in the HR Act clarifies that individuals can defend their interest in a healthy environment, in the same way as they can any other right, and challenge laws that unreasonably undermine environmental quality. These established human rights safeguards ensure a dialogue between executive scrutiny, judicial oversight and democratic accountability without compromising the vital separation between them. There is no reason why such a regime should not also serve to respect, protect and fulfill the human right to a healthy environment.

2. Should the right to healthy environment be defined broadly with the right expressed general terms? Alternatively, should the definition of right to healthy environment be more specific and incorporate substantive aspects?

28. The Commission’s preference is that the right to a healthy environment be defined broadly in the HR Act. Consistent with the UNGA resolution, we favour the following construction:

“Everyone has the right to a clean, safe, healthy and sustainable environment.”

29. General framing of the right accords with the current framing of most rights incorporated into the HR Act and other statutory bills of rights in Australia.⁴² A broad construction would not risk confining the scope and content of the right as it is understood in IHRL, which is desirable for several reasons discussed below.
30. First, it is critical that the scope and content of the right not inadvertently be confined by the text of the provision. The ACT Supreme Court has confirmed, consistent with Victorian jurisprudence, that each human right is to be construed in “the broadest way possible.”⁴³ As discussed above at [21], all Territory laws must be interpreted consistently with their purpose and, as far as possible,

⁴⁰ Australian Institute of Health and Welfare, ‘4.1 Impacts of the natural environment on health’ in *Australia’s health 2018* (Report, 2018), available at: <https://www.aihw.gov.au/getmedia/cfd6abd4-32fb-4995-835f-5e94dac7a827/aihw-aus-221-chapter-4-1.pdf.aspx>

⁴¹ UN Committee on Economic, Social and Cultural Rights, ‘General Comment No 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)’, UN ESCOR, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000), [4]; see also [11].

⁴² See *Human Rights Act 2019* (Qld) and *Charter of Rights and Responsibilities Act 2006* (Vic).

⁴³ *Islam v Director-General, Justice and Community Safety Directorate* [2021] ACTSC 33, [79] (McWilliam AJ), endorsed in *Davidson v Director-General, Justice and Community Safety* [2022] ACTSC 83, [208] (Loukas-Karlsson J).

human rights. Because this ‘interpretive obligation’ applies to all Territory laws, the human rights recognised in the HR Act must themselves be read consistently with other rights to the extent permitted by its language, statutory context and intended purpose.⁴⁴ For this reason, it is important that the intent of a right is appropriately framed so not to accidentally suggest a narrower scope or content than intended. To fully incorporate the right as understood in IHRL, the Commission favours an open-textured statement of the right to a healthy environment. The explanatory memoranda and introduction and debate speeches will then provide appropriate vehicles in which to carefully express the intended scope, content and source of the right, including with reference to the Special Rapporteurs’ thematic reports.

31. Second, in progressing this important work, the ACT Government must be mindful that the meaning of ‘a healthy environment’ will not be the same for all Canberrans. As explored below at [59], it is important to understand that, for many Aboriginal and Torres Strait Islander people, the ‘environment’ forms but one part of Country; with connection to Country having deep spiritual and cultural connection to a person’s identity, health and wellbeing. Realising ‘a healthy environment’ also has profound significance for younger generations and children and young people whose idea of a ‘healthy environment’ will depend on ambitious action to address the increasingly pervasive impacts of human-induced climate change emerging over time. Given these perspectives, it is important that Government not impose a defined scope on understandings of ‘environment’ for the purposes of the human right to a healthy environment.
32. As a related third consideration, the application of the right to a healthy environment, as a standalone human right, may further evolve in state practice and jurisprudence and as new environmental impacts are identified or understandings of cultural practice develop. As the Special Rapporteur has observed, ‘the human right to a healthy environment is not an empty vessel waiting to be filled.’⁴⁵ As such, there is ample commentary, jurisprudence and analysis that provides a core understanding of the scope and content of the right in IHRL. As with all human rights, however, “our understanding of it will continue to grow for many years to come,”⁴⁶ including as related standards, treaties or principles emerge. Given the progressive understanding and forecasting of environmental risks over the previous fifty years, especially in the context of climate change, it is important any recognised right to a healthy environment can flexibly supplement gaps in legislation and respond to new knowledge in the expert fields such as science, health and ecology.⁴⁷ Broad framing will accordingly clarify that any enacted right is intended to accommodate any continuing developments in IHRL, cultural notions of Country and modern climate and environmental science.
33. Fourth, we note that the human rights protected in the HR Act to date are mostly modelled on equivalent provisions in the International Covenant on Civil and Political Rights,⁴⁸ as clarified by Schedule 1 of the HR Act.⁴⁹ Although the right to a healthy environment has not been recognised in any global human rights treaties or multilateral agreements to which Australia is a party,⁵⁰ its

⁴⁴ Per *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [69].

⁴⁵ John H Knox and David R Boyd, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc. A/73/188 (19 July 2018), [13].

⁴⁶ John H Knox, as quoted in Office of the High Commissioner for Human Rights, ‘UN expert calls for global recognition of the right to safe and healthy environment’ (Press Release, 5 March 2018), available at:

<https://www.ohchr.org/en/press-releases/2018/03/un-expert-calls-global-recognition-right-safe-and-healthy-environment?LangID=E&NewsID=22755>

⁴⁷ Boyd, 2012, 34.

⁴⁸ International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’).

⁴⁹ See HR Act, sch 1.

⁵⁰ For example, the ICCPR or the International Covenant on Economic, Social and Cultural Rights, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (‘ICESCR’).

status as ‘soft law’ should not, in our view, underpin any hesitancy to recognise the right in the HR Act as it is understood in IHRL.

34. The cultural rights of Aboriginal and Torres Strait Islander peoples, which were incorporated into the HR Act in 2016, for example, are similarly derived from a UNGA resolution, which approved the UN Declaration of the Rights of Indigenous Peoples.⁵¹ In this regard, s 27(2) of the HR includes an explanatory note signposting UNDRIP as the primary source of the right, which may here provide a useful template. Section 31 of the HR Act also permits reference to international law and the judgments of foreign and international courts where relevant to interpreting a human right.⁵² For these purposes, ‘international law’ is defined in the HR Act’s Dictionary to include ‘declarations and standards adopted by the UN General Assembly that are relevant to human rights.’⁵³ It follows that the right to a healthy environment in the HR ACT should be sourced in the UNGA resolution.
35. For these reasons, the Commission prefers that the thematic areas of focus are not specified under an enacted right to a healthy environment. Given the considerations discussed above at [31]-[34], the Commission would likely not support a novel framing of the right drawing on elements of constitutional rights to a healthy environment in other jurisdictions. Despite this, we agree there could be merit in reflecting, akin to the Aarhus Convention, that the right to a healthy environment is owed to every person of present and future generations.⁵⁴ We have not, however, examined the potential implications that a textual qualification of this kind may have for the interpretation of other rights within the HR Act. Should such framing be considered desirable, the Commission would welcome further consultation.

3. What additional obligations or duties should be included for government to ensure protection of individuals’ right to healthy environment?

Progressive realisation

36. Although our understanding of the right to a healthy environment broadly aligns with the elements described in the consultation paper, we respectfully differ regarding its categorisation as an economic, social and cultural (ESC) right. As a response to emerging challenges, the right to a healthy environment has in fact been said to fit within a third generation of ‘solidarity’ rights, alongside rights to peace and development. Such rights are described as “responses of the international community to changing circumstances and needs.”⁵⁵
37. As a proposition that has emerged in the negative space around other established human rights, the right to a healthy environment includes both positive and negative obligations derived from established human rights. Where various substantive elements are sourced in established ESC rights, like access to safe water and adequate sanitation, healthy and sustainably produced food and the highest attainable standard of physical and mental health (often just ‘the right to health’),

⁵¹ HR Act, s 27(2).

⁵² HR Act, s 31(1).

⁵³ HR Act, s 3.

⁵⁴ *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998 (‘Aarhus Convention’) 2161 UNTS 447 (entered into force 30 October 2001), art 1.

⁵⁵ VP Nada and G Pring, *International Environmental Law and Policy for the 21st Century*, (Transnational Publishers, New York, 2003), 455.

the Special Rapporteur recalls that these obligations are capable of progressive realisation.⁵⁶ This requires governments to take “deliberate, concrete and targeted measures toward progressively achieving the full realisation of ESC rights” and move as expeditiously and effectively as possible towards that goal.⁵⁷ Similarly, obligations based in civil and political rights (like rights to life, security, privacy and those of children) may permit governments some discretion to set appropriate levels of environmental protection in order to balance the prevention of *all* environmental harm with other social goals.⁵⁸

38. Based on this commentary, it is evident that some duties drawn from certain ESC rights, like rights to food, health and water, can be realised progressively.⁵⁹ However, it is far from settled in IHRL that obligations under the right to a healthy environment are wholly and uniformly capable of progressive realisation. Where duties under the human right to a healthy environment derive from particular civil and political rights, it is important that they are construed in that context. Further, we note that even ESC rights themselves delineate duties capable of progressive realisation to different degrees and in light of the resources available to States. The CESCR, for example, has generally adopted a view that a number of obligations under ESC rights can be realised with immediate effect (and are justiciable as such).⁶⁰
39. While normally inconsequential, categorising the right to a healthy environment as an ESC right in the HR Act may have implications for its interpretation and perceived enforceability. Because the ACT Supreme Court has not yet considered in detail progressive realisation for the purposes of the HR Act,⁶¹ it is unclear whether such categorisation might weaken the right to a healthy environment’s normative influence. It would be especially undesirable should arguments based on available resourcing persuade individuals to challenge environmental concerns under established human rights rather than a recognised right to a healthy environment. In addition, ESC status may further complicate existing pre-enactment human rights scrutiny, given their focus on the overall budgetary situation and interlocking legal frameworks rather than specific individual laws.⁶²
40. Based on these considerations and concerns the issues raised by the Human Rights Law Centre, we suggest that the right to a healthy environment not be characterised as an ESC right that is wholly subject to progressive realisation or situated within Part 3A of the HR Act. Rather, the right to a

⁵⁶ Special Rapporteur Framework Principles, Principle 11, [32]; UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14 (2000): The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 22nd sess, UN Doc. E/C.12/2000/4 (11 August 2000), [30].

⁵⁷ Committee on Economic, Social and Cultural Rights, ‘General Comment No 3: The Nature of States Parties’ Obligations (Art 2, Para 1, of the Covenant)’, UN Doc E/1991/23 (14 December 1990) 85, [9].

⁵⁸ See, for example, *Hatton and others v. United Kingdom* (European Court of Human Rights, Grand Chamber, Application No36022/97, 8 July 2003), [98].

⁵⁹ UN Committee on Economic, Social and Cultural Rights (‘CESCR’), *General Comment No. 15 (2002): The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)* UN ESCOR, 29th sess, Agenda Item 3, UN Doc. E/C.12/2002/11 (20 January 2003), [17]; CESCR, *General Comment No 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)* UN ESCOR, 22nd sess, Agenda Item 3, UN Doc. E/C.12/2000/4 (11 August 2000), [30]; and CESCR, *General Comment 12 (Twentieth session, 1999): The right to adequate food (art. 11)*, UN ESCOR 20th sess, Agenda Item 7, UN Doc. E/C.12/1999/5 (12 May 1999), [14] and [16].

⁶⁰ Boyd 2012, 24; CESCR, *General Comment No. 9: The domestic application of the Covenant*, UN ESCOR 19th sess, Agenda Item 3, UN Doc. E/C.12/1998 (3 December 1998), [4] and [10]; and CESCR, *General Comment No. 3: The nature of States parties’ obligations (art.2, para. 1 of the Covenant)*, UN ESCOR, 5th sess, UN Doc. E/1991/23 (14 December 1990).

⁶¹ Nb. *Islam v Director-General of the Department of Justice and Community Safety Directorate* [2018] ACTSC 322 considered, from [67], the limited right to education in s 27A of the HR Act.

⁶² Scott Calnan, ‘Codification and Innovation in the Queensland Human Rights Act: Have Human Rights Been Furthered?’ (2020) 26 *James Cook University Law Review* 141.

healthy environment indicates that the distinction between ‘positive’ and ‘negative’ rights has become increasingly less relevant as has the idea of ‘generations’ of rights.

Non-discrimination

41. Consistent with this position (at [40]), the Commission does not consider it necessary or desirable to outline the component obligations of the right to a healthy environment in the text of a new provision. Insofar as the substantive and procedural obligations are already recognised in IHRL, thematic and other reports of the Special Rapporteur on human rights and the environment offer ample guidance as to the content and scope of the right that may be relied on when interpreting the right under the HR Act without seeking to articulate these in the text of the right. In addition, we note that certain rights recognised in the HR Act already protect select procedural elements, like access to information⁶³ and participation in environmental decision-making.⁶⁴ These rights could be cross-referenced in the HR Act or explanatory statement to assist in their interpretation.
42. In our view, integrating the right to a healthy environment into the HR Act should also avoid specifying that the right is subject to obligations of non-discrimination. We are concerned in this regard that the normative benefits and practical effect of a right to a healthy environment (as outlined above (from [11]) risk being confined to the extent that it would distinguish immediately realisable obligations. In addition, s 8(2) of the HR Act already guarantees the right of everyone to enjoy their human rights without discrimination of any kind, and, in our view, need not be reflected in the content of each newly recognised human right. The consultation paper notes, in this regard, that expressly acknowledging obligations of non-discrimination would mirror the approach taken to other economic, social and cultural rights recognised in the HR Act; these being the right to education (s 27A) and the right to work and other work-related rights in (s 27B).
43. In its present form, s 27A of the HR Act only partly implements the right to education by expressly limiting its application to specified elements capable of immediate realisation, such as non-discrimination. By contrast, this principle’s repetition in s 27B appears to have stemmed from its passage as a Private Members Bill in May 2020, which drew on the framing of s 27A as a model. We note that the Commission queried this approach at the time in advice to the member and again in a subsequent submission to the related inquiry by the Standing Committee on Justice and Community Safety.⁶⁵ Consistent with our position at that time, we again suggest that any proposed provision recognising the right to a healthy environment not reiterate this aspect.
44. Instead, the content of the explanatory statement should be carefully framed and appropriately signpost the normative sources of the right, including the UNGA resolution. We would also recommend the explanatory statement acknowledge that the right to a healthy environment may be enjoyed both as an individual and as a member of a group, akin to rights to free assembly, freedom of thought, conscience, religion and belief (s 14, HR Act) and cultural and other rights of Aboriginal and Torres Strait Islander peoples (s 27, HR Act).

⁶³ HR Act, s 16.

⁶⁴ HR Act, s 17(a).

⁶⁵ ACT Human Rights Commission ‘Advice to Bec Cody MLA – *Human Rights (Workers Rights) Amendment Bill 2019*’ (26 November 2019), 5 available at: <https://hrc.act.gov.au/wp-content/uploads/2019/11/HRC-comments-Human-Rights-Workers-Rights-Amendment-Bill-2019-PMB.pdf>; ACT Human Rights Commission, ‘Submission to Standing Committee Inquiry into Human Rights (Workers Rights Amendment Bill 2019)’ (31 January 2020), 7 available at: https://www.parliament.act.gov.au/_data/assets/pdf_file/0010/1475254/01.-ACT-Human-rights-Commission.pdf

4. What additional measures should be considered to ensure protection of the right to healthy environment for vulnerable groups and specifically Aboriginal and Torres Strait Islander people?

45. Various human rights obligations require that governments take special measures to reduce structural inequalities faced by people from particular groups.⁶⁶ Certain individuals and groups may, due to their circumstances or personal attributes, be disproportionately affected by harmful environmental conditions or unable to fully engage with procedural elements without proactive and additional supports. Such people may be unusually susceptible to certain types of environmental harm or regularly be denied their human rights. The Special Rapporteur has noted, for example, that women, children, persons with disabilities, older people and Aboriginal and Torres Strait Islander peoples are among those at greater risk from environmental harm.⁶⁷
46. Framework Principle 14 affirms that the right to a healthy environment requires governments to take positive steps to remedy any structural inequalities that prevent people from exercising their right. In taking such steps, we suggest that Government carefully consider labels like ‘vulnerable’ or ‘disadvantaged’, which may risk treating individuals who require support in the same way and creating undue stigma that impedes access to necessary supports. Descriptors like ‘experiencing vulnerability’ may better recognise the unique situational factors over which a person can have little or no control that are best addressed by special measures.
47. Barriers to accessing the environment faced by people with physical and other disabilities reflect a recurring theme in complaints and concerns raised with the Commission. Often these relate to physical obstacles, such as a lack of accessible pathways and accessible facilities in natural environments. They can, however, also relate to issues with the built environment, such as were recently experienced during the COVID 19 pandemic where many people with a disability were effectively ‘locked out’ of many public spaces due to concerns about filtration systems and other protective measures. Similarly, during the bushfires in early 2020, many buildings’ air conditioning systems and structural features could not cope with the concentration of airborne particles, leaving many built environments in the ACT inaccessible, and potentially dangerous, to many people with disabilities. We note that the ACT Government is presently considering proposed changes to the *Discrimination Act 1991*, including a positive duty to eliminate discrimination, including to remove barriers preventing equal access to a healthy environment.⁶⁸
48. Access to easily understandable information about the environment is critical to equal enjoyment of the procedural elements of the right to a healthy environment. Information about environmental authorisations, development and planning can often be highly technical and, in some cases, require certain software to access. Procedures to obtain such information, like access applications under the FOI Act, or to comment on proposed developments or environmental impacts also tend to be procedurally complex, demanding and opaque. To ensure equal ability to

⁶⁶ See, for example, the role of witness intermediaries in upholding the right to a fair trial in *R v QX (No 2)* [2021] ACTSC 244; ACT Human Rights Commissioner (Intervenor), ‘Outline of Submissions – No SCC 58 of 2020’, (16 December 2020), [38]-[42], available at: [www.https://hrc.act.gov.au/wp-content/uploads/2022/04/Outline-of-submissions-by-the-ACT-Human-Rights-Commissioner-Intervener.pdf](https://hrc.act.gov.au/wp-content/uploads/2022/04/Outline-of-submissions-by-the-ACT-Human-Rights-Commissioner-Intervener.pdf)

⁶⁷ UN 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’ 73rd sess, UN Doc. A/73/188 (19 July 2018), [22].

⁶⁸ ACT Justice and Community Safety Directorate, *Inclusive, Progressive, Equal: Discrimination Law Reform* (Discussion Paper, October 2021), 42; *Discrimination Amendment Bill 2022, Clause 21* – New part 9 (Exposure draft, released for consultation 1 June 2022), available at: <https://yoursayconversations.act.gov.au/discrimination-law-reform>

engage in environmental decision-making under the right to a healthy environment, such processes must permit, and indeed implement, reasonable adjustments for people who may struggle to access consultation mechanisms.

49. Measures to implement the right to a health environment must build in supports for children and young people to ensure they can access appropriate information and contribute to decisions that affect them. The Convention on the Rights of the Child (CRC), which directly informs the rights of children recognised in s 11(2) of the HR Act, guarantees both:
- that a child’s best interests are a primary consideration in all actions that affect them;⁶⁹ and
 - that children are supported to freely express their views in all matters that affect them, with decision-makers required to give due weight to their views in accordance with their age and maturity.⁷⁰
50. Climate change and environmental welfare have been highlighted in consultations by Australian and New Zealand Children's Commissioners and Guardians as key issues of concern for children and young people, both nationally and locally. Realising a healthy environment is a public policy space in which children and young people – as the future custodians of the ACT and indeed the planet – have consistently sought to contribute their views (eg School Strike 4 Climate Australia) notwithstanding an absence of accessible channels to do so. It is therefore essential that the views of children and young people are sought and considered in deciding whether and how to recognise the right to a healthy environment in the ACT.
51. In June 2021, the UN Committee on the Rights of the Child decided to prepare a new general comment on children's rights and the environment, with a special focus on climate change.⁷¹ Although not yet endorsed, this General Comment is intended to clarify the relationship between children’s rights and the management of ecosystems, biodiversity and pollution, and outline the heightened obligations owed to children to protect them from climate and environmental harms.⁷² Should the ACT enact the right to a healthy environment, the proposed General Comment may later provide useful guidance for the ACT in considering further measures to uphold the specific rights of children to a healthy environment.
52. As a practical observation, we note that young children depend on adults to access, learn about and enjoy the natural environment, and its associated benefits. We therefore consider it important that the implementation of the right to healthy environment in the ACT give special attention to whether early childhood education and care services and settings provide suitable access to the natural environment for young children. Older children and young people may also experience barriers to their enjoyment of a healthy environment, depending on their ability to access places and spaces independently. Age-appropriate information and ensuring their participation in decisions, in accordance with the CRC, provide an important means of ensuring children and young people can identify and raise concern about such barriers.

⁶⁹ *Convention on the Rights of the Child* ('CRC'), opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 3.

⁷⁰ CRC, art 12.

⁷¹ UN Committee on the Rights of the Child, *Draft general comment No. 26 on children’s rights and the environment with a special focus on climate change* (9 December 2021), available at: <https://www.ohchr.org/en/documents/general-comments-and-recommendations/draft-general-comment-no-26-childrens-rights-and>

⁷² UN Committee on the Rights of the Child, *Concept note: General comment on children's rights and the environment with a special focus on climate change*, available at: <https://www.ohchr.org/en/treaty-bodies/crc/concept-note-general-comment-childrens-rights-and-environment-special-focus-climate-change>

53. Other broad measures that government may wish to consider in implementing the right to a healthy environment include ensuring the capture and publication of disaggregated data about environmental harms affecting groups that may experience vulnerability.⁷³ Aside from monitoring the disproportionate impacts of environmental conditions on diverse groups, disaggregated data may usefully support the design various special measures, such as gender-responsive adaptations to climate change or natural disasters.
54. We note as well that the creation of an accessible administrative pathway for all people to complain about breaches of their human rights by government, as discussed below at [71], would have particular benefit for those experiencing vulnerability.

5. How could the right to a healthy environment recognise the specific importance of 'country' for Aboriginal and Torres Strait Islander people?

55. As recognised in the consultation paper and by the Special Rapporteur, environmental impacts can have a significantly disproportionate impact on Indigenous peoples due to their traditionally close relationship with natural ecosystems, resources and places.⁷⁴ In Framework Principle 15, the Special Rapporteur sets out, non-exhaustively, some of the core obligations of the human right to a healthy environment with respect to its enjoyment by Indigenous peoples as understood in IHRL.
56. These obligations are closely related, but not identical, to the distinct cultural rights of Aboriginal and Torres Strait Islander peoples under UNDRIP, and recognised in the ACT. Section 27(2) of the HR Act recognises, for example, that Aboriginal and Torres Strait Islander peoples must not be denied the right:
- (a) To maintain, control, protect and develop their –
 - (i) Cultural heritage and distinctive spiritual practices, observances, beliefs and teachings; and
 - (ii) languages and knowledge; and
 - (iii) kinship ties; and
 - (b) to develop their material and economic relationships with the land and waters and other resources with which they have a connection under traditional laws and customs recognised and valued.
57. We acknowledge that the views advanced in this submission cannot, and do not, represent those of the Aboriginal and Torres Strait Islander community in the ACT. In preparing this submission, the Commission has benefited from hearing the insights of Aboriginal and Torres Strait Islander people working on programs 'on Country' within EPSDD. We have reflected a number of observations generously shared with us by the Murumbung Yurung Murra Network in responding to this question. Our response should not, however, be taken as representative of their views.
58. We also appreciate that diverse views may exist among the community that are not reflected in this submission and that should be afforded equal weight. Consistent with the principle of self-determination, it is critical that the ACT Government actively consider the views of Aboriginal and Torres Strait Islander peoples with respect to recognising the right to a healthy environment in the ACT and acknowledging the importance of Country. We understand the ACT Government is

⁷³ See, for example, Special Rapporteur Mapping Report, [71].

⁷⁴ Special Rapporteur Framework Principles, [47].

engaging First Nations Canberrans and Representative Aboriginal Organisations through targeted consultation and as part of the present public consultation.

59. Caring for, and being on Country, is intrinsically linked to Aboriginal and Torres Strait Islander understandings of health, identity and wellbeing.⁷⁵ For many Aboriginal and Torres Strait Islander people, perception of Country as a holistic, living entity encompassing their identity, knowledge and ancestors goes to the core of their identity.⁷⁶ Implementing the right to a healthy environment in the ACT must not lose sight of this intangible and spiritual connection to Country that Aboriginal and Torres Strait Islander peoples in the ACT share. Realising the right to a healthy environment must not only require that agencies distinguish culturally significant sites, knowledge and practices but that they also take time to understand their significance and meaning. The intangible cultural value of culturally important sites, practices and artefacts cannot be appreciated without trusting and actively seeking Aboriginal and Torres Strait Islander peoples' knowledge and insights. Agencies must value, respect and consider these cultural perspectives, even where they cannot be fully shared due to cultural obligation.
60. One example shared with us pointedly illustrates the loss of intangible cultural heritage caused by limited understanding of cultural purpose and significance. An Aboriginal scarred tree was identified as part of a development site in the northern ACT. Having identified it as culturally significant, the tree was built around in an attempt to preserve its intangible value. It was not understood, however, that its purpose as scarred tree had been as a marker for navigation. By building around and obscuring it, this intangible value as a marker was lost. Aboriginal and Torres Strait Islander cultural heritage is, in this regard, not just limited to remote sites in the bush – but may be engaged by decisions affecting the built environment as well (eg incorporating corridors fauna to navigate the built environment to access sources of food and water).

Realising a healthy Country

61. The following themes and observations provide important suggestions about the steps the ACT can take to fully realise a right to a healthy environment as it is understood by Aboriginal and Torres Strait Islander peoples.
62. Above all, the right to a healthy environment and cultural rights contemplates the free, prior, and informed consent of Aboriginal and Torres Strait Islander peoples about any measures that affect the lands, territory or resources they have traditionally occupied or used.⁷⁷ We understand that the ACTPS has made strides in terms of its consultation with Aboriginal and Torres Strait Islander peoples. Best practice examples that provide important models include the recent co-design of the Namarag Nature Reserve on the Molonglo River with the Ngunnawal community,⁷⁸ and the preservation of Gubur Dhaura ('Red Ochre') site as a park in Franklin.⁷⁹ Early advice from the Ngunnawal community, for example, raised significant concern about the effect of proposed soil scraping on the Namarag site intended as part of the restoration of native grasses. Having understood the community's concerns that the proposed soil scraping risked damaging any

⁷⁵ Lowitja Institute, *Climate Change and Aboriginal and Torres Strait Islander Health* (Discussion Paper, November 2021).

⁷⁶ See, for example, Dr Ian Cresswell, Dr Terri Janke and Professor Emma Johnston, 'Country and connections' in *Australia: State of the Environment Report 2021*, available at: <https://soe.dcccew.gov.au/indigenous/environment/country-and-connections>

⁷⁷ Special Rapporteur Framework Principles, [49].

⁷⁸ Mick Gentleman MLA, 'New reserve precinct opens in Molonglo' (Press Release, 3 November 2021); 'Namarag', available at: <https://www.parks.act.gov.au/find-a-park/molonglo-river-reserve/namarag>

⁷⁹ ACT Government, 'Gubur Dhaura', available at: <https://www.canberratracks.act.gov.au/heritage-trails/track-5-gungahlin/gubur-dhaura>

cultural artefacts beneath the soil, EPSDD was able to instead introduce a new layer of different soil that gave assisted the growth of native grasses.

63. Government agencies would, if the right to a healthy environment is enacted, be obliged to properly consider such impacts in accordance with s 40B of the HR Act. Its recognition should therefore stimulate earlier consultation with Aboriginal and Torres Strait Islander peoples about the design and ongoing development of government actions, policy and legislation. Recalling that Country, as a concept, includes more than just the natural environment, consultation about strategic targets and indicators is also relevant to realising healthy Country. It is therefore important that such targets are directly informed, if not determined, by Aboriginal and Torres Strait Islander peoples to ensure they are tailored, achievable and not unduly aspirational.
64. As noted above at [31], the right to a healthy environment encompasses cultural understandings of a healthy Country. Cultural land management and conservation should be prioritised as a key part of progressively realising a healthy environment in the ACT, as contemplated in Framework Principle 15. Documents like the *ACT Climate Change Strategy* and *Strategic Bushfire Management Plan 2019-2024*, for example, each commit to applying the cultural expertise of traditional custodians in sustainable landscape management. The Commission understands significant effort has been made to realise similar commitments in practice, yet there are still existing practices that may risk harming cultural heritage sites and objects (eg overuse of chemicals in fire management, scraping of soil to remove weeds). Progressive realisation of the right to a healthy environment and Country must, in this way, see Aboriginal and Torres Strait Islander peoples supported to exercise greater sovereignty and management of the lands, resources and territories with which they have a traditional connection.⁸⁰
65. Realising the right to a healthy environment should therefore motivate new and innovative ways to independently resource Aboriginal land and resource management over time. We understand that First Nations-led carbon reduction programs, for example, such as the sale of Australian Carbon Credit Units, can generate viable economies that financially support cultural stewardship of Country,⁸¹ and that may merit consideration in the ACT. We also understand, for example, that the ACT State of the Environment Report recommended the establishment of Indigenous heritage grants as a standalone category.⁸²
66. In the absence of a native title determination in the ACT (which we understand is being progressed), another pathway toward greater cultural management may be to work toward a dedicated Indigenous Protected Area (IPA) in the ACT.⁸³ We understand there have been some previous challenges in securing IPA funding due to prerequisite requirements, like having an established cultural land management division and evidencing a history of cultural land management in the area. Achieving these prerequisites would likely require progressive steps over a longer period, including funded support for cultural land management projects, governance and capability. Notwithstanding, doing so would, in the Commission's view, significantly contribute to realising the right to a healthy environment and greater respect for cultural rights in the ACT.

⁸⁰ Special Rapporteur Framework Principles, [52].

⁸¹ See, for example, Loulou Gebbie, Daniel Miller and Rod Keenan, 'Opportunities for Traditional Owners in the Carbon Economy' *Pursuit: Science Matters (University of Melbourne)* (1 November 2021), available at: <https://pursuit.unimelb.edu.au/articles/opportunities-for-traditional-owners-in-the-carbon-economy>

⁸² ACT Commissioner for Sustainability and the Environment, *ACT State of the Environment Report 2019* (Report, 2019), Recommendation 7.

⁸³ National Indigenous Australians Agency, 'Indigenous Protected Areas (IPAs)' at: <https://www.niaa.gov.au/indigenous-affairs/environment/indigenous-protected-areas-ipas>

67. We have understood that greater focus on protecting culturally significant *flora*, including funding for focused revival and replanting programs, must be required as part of safeguarding a healthy Country and cultural rights. Various threatened plant species play a central role in the practice and sharing of traditional knowledge, culture and sustainable land management for Aboriginal and Torres Strait Islander peoples. We are advised, for example, that the ACT is likely to experience an overwhelming loss of culturally modified trees in the ACT due to significant increases in dieback of Blakely's Red Gum (*eucalyptus blakelyi*), associated with climate change and reduced resilience.⁸⁴ As such, the ACT Government may wish to explore needed revival or restoration programs with the community, informed by similar New South Wales Government programs in the surrounding region (eg concerning the yam river daisy).
68. Similarly, we understand that there is room to strengthen prevention and compliance enforcement with respect to Aboriginal culture heritage protection under the *Heritage Act 2004*. Some of the issues we have learned about include limited ability to identify individuals who cause damage to significant cultural and/or resources and the need to identify sites that may benefit from appropriate preventive measures. Following media reports in August 2019 about the illegal felling of protected scarred trees, the Commission wrote to the then Minister for the Environment and Heritage, to support calls for greater enforcement options. Although people who damage an Aboriginal place or object can, as of, February 2020 be required to repair harms,⁸⁵ a broader conversation may still be needed about the enforcement of cultural heritage protections. We understand, in this regard, that individual responsibility for compliance within the ACTPS may potentially create more permissive culture of enforcement (eg cautions) than is considered appropriate. While the right to a healthy environment will need to be properly considered as part of future enforcement decisions, options to ensure greater transparency and consistency of enforcement should be examined as part of any baseline audit of current compliance with the right to a healthy environment.
69. As recognised by the Special Rapporteur, the right to a healthy environment also requires that Aboriginal and Torres Strait Islander people fairly and equitably share in the benefits of activities relating to their lands, territories or resources as well as effective remedies for harms resulting from those activities. Though we understand that some Aboriginal and Torres Strait Islander enterprises are seeing increased business with respect to activities on Country and cultural practice, we understand that economic participation is still the subject of discussion between the ACT Government and community. We are aware of suggestions that a proportion of receipts from economic activities within the Territory (such as new developments or major projects) could be directed to, and reinvested in, greater Aboriginal and Torres Strait Islander management and conservation on Country or otherwise for the community's benefit. The Commission would welcome any initiatives to ensure fair and equitable returns from activities on Country that support greater community stewardship consistent with the right to a healthy environment.
70. Implementing the right to a healthy environment presents an opportunity to better promote awareness of the cultural rights of Aboriginal and Torres Strait Islander peoples that are protected by s 27(2) of the HR Act. Investment in greater information, training and education about cultural rights, both within the ACTPS and the broader community, should be incorporated as part of any Communications Plan to realise the right to a healthy environment in the ACT. Aboriginal and Torres Strait Islander peoples might also be supported to share their traditional practices and

⁸⁴ ACT Environment, Planning and Sustainable Development Directorate, 'Dieback', available at: <https://www.environment.act.gov.au/act-nrm/biodiversity/biodiversity-investment-plan/climate-change-adaptation/dieback>

⁸⁵ *Heritage Act 2004*, Pt 11A (as inserted by the *Heritage Amendment Act 2020*).

knowledge of caring for country through dedicated support for cultural education programs for children and young people.

6. How should government go about fulfilling the right to a healthy environment? How could the right be fulfilled while balancing other socially and economically beneficial activities?

71. As the first jurisdiction to enact and implement a right to a healthy environment, the ACT would have a unique opportunity to inspire other states and territories to follow its example. As noted above at [2], the ACT Government should not, in implementing a right to a healthy environment, assume that its existing legislation, policies and actions are sufficient to discharge the right's obligations.
72. This consideration is particularly relevant with respect to the right's procedural obligations. Although the *Freedom of Information Act 2016*, for example, provides members of the public a right to access government information, average processing timeframes and broad discretions can potentially impact timely and effective access to environmental information.⁸⁶ This is particularly so as we understand, based on statements of the Special Minister of State during Estimates hearings, that policy options are being considered to ease demands on the ACT's Freedom of Information scheme.⁸⁷
73. We are conscious that new planning legislation is also in development as part of the ACT Planning System Review and Reform Project, and that an exposure draft bill has recently been subject to public consultation. To support the ACT to integrate the right to a healthy environment in the HR Act, it is essential that proposed reforms in these and other areas take account of the procedural elements of the right to a healthy environment. We note that the EDO has recently made a series of recommendations about realising access to environmental justice in their recent submission on the draft Planning Bill 2020, which merit consideration.⁸⁸
74. The Commission accordingly recommends that the ACT Government conduct a baseline audit of its existing legal framework against the obligations of the right to a healthy environment as part of its implementation. From our perspective, this review would ideally occur within the first twelve months of its inclusion in the HR Act as a part of promoting awareness of the right and its implications for the ACTPS. We note in this regard that ongoing due diligence to prevent environmental harm and reduce it to the extent possible aligns with the duties of the right.⁸⁹

Human rights complaints mechanism

75. A key procedural duty of the right to a healthy environment is to provide access to effective remedies for environmental harms. Framework Principle 10 expressly recognises that Governments must provide access to effective remedies for violations of human rights and laws related to the environment.

⁸⁶ See, for example, ACT Ombudsman, *A report on the operation of the Freedom of Information Act 2016 for 2020-21*, (Report, 2021), 10-12 (with respect to average processing times for access applications made to EPSDD).

⁸⁷ Evidence to Select Committee on Estimates 2022-2023, Legislative Assembly of the Australian Capital Territory, Canberra, 30 August 2022 (Special Minister of State, Chris Steel MLA and Daniel Ng – from 9:36:13:00am).

⁸⁸ Environmental Defenders Office, *Submission on the Planning Bill 2022* (Policy submission, 17 June 2022), available at: <https://www.edo.org.au/wp-content/uploads/2022/06/220617-EDO-Submission-on-the-ACTs-Planning-Bill-2022-1.pdf>

⁸⁹ Special Rapporteur Framework Principles, [5].

76. Of greatest concern for the Commission in this regard is the absence of an accessible mechanism for people to complain about a breach of their human rights in the ACT. Successive recommendations and findings by various bodies since 2009, including the Australian National University (ANU) Five-Year Review of the HR Act,⁹⁰ the former Law Reform Advisory Council's report on Canberra Becoming a Restorative City,⁹¹ and the ACT Auditor-General's Office⁹² reflect the need for a timely, free, informal and confidential forum to resolve breaches of public authorities' human rights duties. Critically, a complaints mechanism would provide an efficient, informal and practical forum for people to resolve concerns about agencies having limited their rights, without having to take lengthy and costly action against them in the ACT Supreme Court. As an additional benefit, we expect that a human rights complaints pathway, including access to conciliation where appropriate, would promote greater consciousness and understanding of human rights, including the right to a healthy environment, within both the ACTPS, and broader ACT community.⁹³
77. In June 2022, the ACT Legislative Assembly Standing Committee on Justice and Community Safety recommended that the ACT Government establish an accessible human rights complaints jurisdiction within the Commission, as exists in Queensland and Victoria.⁹⁴ This recommendation followed the Committee's inquiry into a grassroots petition calling on the ACT Government to:
- 'enable a complaint about any breach of the Human Rights Act to be made to the Human Rights Commission for confidential conciliation, and
 - if conciliation is unsuccessful, enable a complaint about a breach of the Human Rights Act to be made to the ACT Civil and Administrative Tribunal for resolution.'
78. We understand that the Government is presently preparing a response to the Committee's recommendation, which is due in October 2022. It is the Commission's view that litigation through the ACT Supreme Court, while important, is not sufficiently accessible to the majority of Canberrans to constitute an effective remedy. Absent a suitably accessible pathway for all people, including diverse and marginalised groups, to assert breaches of their human rights, the ACT may not satisfy the procedural obligation under the right to a healthy environment to provide effective access to remedies. Accordingly, we call on the ACT Government to promptly accept the Committee's recommendation and work toward implementing a human rights complaints pathway as an inherent component of implementing the right to a healthy environment.

⁹⁰ ANU Research Project Report, The Human Rights Act 2004 (ACT): The First Five Years of Operation (2009), 3 archived copy available at: https://justice.act.gov.au/sites/default/files/2019-08/report_HumanRightsAct_5YearReview_ANU_2009.pdf

⁹¹ ACT Law Reform Advisory Council, Canberra – becoming a restorative city, Final report, Reference 5 (October 2018) available at: [Law Reform Advisory Council Final Report – Canberra becoming a restorative city.pdf \(act.gov.au\)](https://www.act.gov.au/law-reform-advisory-council-final-report-canberra-becoming-a-restorative-city.pdf) 4

⁹² ACT Auditor-General's Office, Recognition and implementation of obligations under the Human Rights Act 2004, Report 2/2019, available at: https://www.audit.act.gov.au/data/assets/pdf_file/0018/1322460/Report-No-2-of-2019-Recognition-and-implementation-of-obligations-under-the-HRA-2004.pdf

⁹³ For more information, see ACT Human Rights Commission, *Submission to the Standing Committee on Justice and Community Safety's Inquiry into Petition 32-21 (No Rights Without Remedy)* (Policy submission, 13 April 2022), available at: https://www.parliament.act.gov.au/data/assets/pdf_file/0010/1990153/Submission-06-ACT-Human-Rights-Commission.pdf; ACT Human Rights Commission, *Supplementary submission to the Standing Committee on Justice and Community Safety's Inquiry into Petition 32-21 (No Rights Without Remedy)* (Policy submission, 13 May 2022), available at: https://www.parliament.act.gov.au/data/assets/pdf_file/0007/2004964/Submission-06a-ACT-Human-Rights-Commission-Supplementary.pdf

⁹⁴ Standing Committee on Justice and Community Safety, Legislative Assembly of the Australian Capital Territory, *Inquiry into Petition 32-21 (No Rights Without Remedy)* (Report, June 2022), 11.

Human rights scrutiny and relevant information

79. As a brief observation, we note that whether proposed actions, decisions and laws may have an adverse impact on ecosystems, biodiversity and care of Country will not always be self-evident and may, on occasion, require technical expertise to anticipate. Recognising environmental human rights in the HR Act may therefore present a unique, but not insurmountable, challenge to pre-enactment scrutiny processes, including review of draft Cabinet submissions by the Commission and centralised scrutiny of bills by officers in the Justice and Community Safety Directorate. In light of this, we recommend that implementation of the right expressly contemplate resourcing for information exchange and channels within Government that support scrutiny of the right to a healthy environment.
80. As noted above, full implementation of the right to a healthy environment will also require new partnerships, cooperation and sharing of knowledge between various agencies and groups, both within and outside the ACTPS. From the Commission's perspective, information should be provided through training for all relevant ACTPS staff about environmental and cultural rights, tailored communications materials and factsheets about the right, and access within the ACTPS to informal advice about environmental concerns, human rights principles and cultural knowledge.

Business and human rights

81. The HR Act primarily regulates the conduct of public authorities, although its obligations may apply to businesses and non-governmental organisations to the extent that they exercise functions of a public nature,⁹⁵ or otherwise choose to 'opt in'.⁹⁶ As such, recognising the right to a healthy environment will not, of itself, impose new duties or liability on businesses or other private organisations.
82. The obligation on Governments to protect against third party infringements of human rights may, however, necessitate direct regulation and intervention.⁹⁷ This duty is particularly pertinent in the context of environmental harms which are significantly linked to the industrial activities of private enterprises. For this reason, the UNGA resolution also recalls the responsibility of businesses to respect human rights, as set out in the UN Guiding Principles on Business and Human Rights.⁹⁸ This includes that business:
- avoid causing or contributing to environmental harms that adversely impact human rights,
 - address and remedy human rights impacts where they occur; and
 - seek to prevent or mitigate human rights impacts linked to their operations.
83. Though non-binding (except as otherwise required by ACT legislation), introducing a right to a healthy environment in the HR Act may provide a timely opportunity to engage local businesses and other organisations about respecting human rights, including the right to a healthy environment.

⁹⁵ HR Act, ss 40(1)(g) and 40A; eg social housing providers (*Canberra Fathers and Children Services Inc v Michael Watson* [2010] ACAT 74 (29 October 2010))

⁹⁶ HR Act, s 40D.

⁹⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), 'General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities', UN Doc. E/C.12/GC/24 (10 August 2017), [19].

⁹⁸ John Ruggie, Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 17th sess, UN Doc. A/HRC/17/31 (21 March 2001).