Submission on the Right to a Healthy Environment

31 August 2022

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

www.edo.org.au

About Healthy Environment & Justice Program

EDO's ACT Practice falls within EDO's Healthy Environment & Justice Program (**HEJ**). The goal of the HEJ Program is to empower overburdened communities to fight for environmental justice.

Acknowledgement of Contributions

EDO wishes to acknowledge with gratitude the assistance provided by many people in the researching, drafting and review of this submission including EDO colleagues, particularly Rachel Walmsley and Casey Kickett, and our fantastic volunteers Zoe Reeve, Elkanah Reyes, Kimberley Slapp, and Tahlia Curry. We also thank Dr Cristy Clark (University of Canberra) for sharing her expertise on the rights of nature and the right to a healthy environment.

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Acknowledgment of funding from ACT Government

We acknowledge and are grateful to the ACT Government for its ongoing funding of the EDO's ACT Practice, without which it would not be possible for the ACT Practice to run.

Acknowledgment of Country

The Environmental Defenders Office recognises the Traditional Owners and Custodians of the land, seas and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present and emerging, and aspire to learn from traditional knowledges and customs so that, together, we can protect our environment and cultural heritage through Western law.

A note on language on 'First Nations'

We acknowledge that there is a legacy of writing about First Nations without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. In the domestic context, where possible, we have used specific references. Further, when referring to First Nations in the context of a particular Country we have used the term 'Traditional Owners'. More generally, we have chosen to use the term 'First Nations'. We acknowledge that not all Aboriginal and Torres Strait Island Peoples will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

Submitted to:

Justice and Community Safety Directorate
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Executive Summary

All human rights ultimately depend on a healthy environment. Humans are part of nature and therefore, a healthy environment also contributes to human health.

In recognition of the interdependence between the environment and human health, the UN High Commissioner for Human Rights has described the triple planetary crises of climate change, biodiversity loss, and pollution as the *'single greatest challenge to human rights in our era'*.[1]

Fifty years ago, at the 1972 Stockholm Conference, governments declared that the environment is essential to our *'well-being and to the enjoyment of basic human rights'*[2] and that humanity has a *'fundamental right to... an environment of a quality that permits a life of dignity and well-being'*,[3] which must be safeguarded for present and future generations.[4]

In a landmark resolution on 28 July 2022, the UN General Assembly reaffirmed recognition of the human right to a clean, healthy and sustainable environment,[5] after this right was explicitly recognised by the UN Human Rights Council in October 2021.[6] The resolution passed with an overwhelming majority - with Australia voting in favour with another 160 UN Member States. The result is that the right to a healthy environment is now universally recognised as a human right that is important for the enjoyment of other human rights. However, despite voting in favour of the General Assembly resolution, Australia is among the minority 20% of UN Member States that do not expressly recognise the right to a healthy environment in their laws.

The ACT Government is the first Australian jurisdiction to formally investigate including the right to a healthy environment in its human rights law, the *Human Rights Act 2004* (ACT). Following international momentum on the right, this is an important opportunity for people in the ACT and for the ACT's natural environment, and we commend the ACT Government for taking the initiative to investigate legally recognising the right in the ACT.

In the ACT, we have a variety of laws, systems, and processes that protect components of our environment, and our human rights, to some extent. However, people in the ACT are witnessing unacceptable levels of harm to our natural environment and human health from pollution, unsustainable development practices, destruction of significant First Nations' cultural heritage, and climate change. Environmental harm has a disproportionate impact on overburdened people and communities – such as First Nations, culturally and linguistically diverse communities, LGBTIQA+ communities, older people, young people, women, and people with a disability – who are at the most risk of environmental harm, but who are often least responsible for such harm. It is clear that our existing laws – broad in subject matter though they may be – are not doing enough to fulfill our right to a healthy environment.

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[1] UN Office of the High Commissioner on Human Rights, 'Environmental Crisis: High Commissioner Calls for Leadership by Human Rights Council Member States' (Web Page, 13 September 2021) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27443>.
[2] Stockholm Declaration on the Human Environment: Report of the United Nations Conference on the Human Environment, UN Doc A/CONF.48/14 and Corr.1 (16 June 1972).
[3] Ibid, Principle 1.
[4] Ibid, Principle 2.
[5] UN General Assembly, The human right to a clean, healthy and sustainable environment, UN Doc. A/RES/76/300 (28 July 2022) (**UNGA Resolution 76/300**).
[6] UN HRC, The Human Right to a Clean, Healthy and Sustainable Environment, GA Res 48/13, UN Doc A/HRC/48/13 (18 October 2021) (**HRC Resolution 48/13**).

In these submissions, we address the scope of the ACT Government's current consultation, and we address the five questions in the *Right to a Healthy Environment Discussion Paper* of June 2022. We make 17 recommendations to ensure that, if the right to a healthy environment is included in the *Human Rights Act 2004,* it is appropriately defined and can be effectively implemented effectively.

We strongly recommend that the ACT Government include the right to a healthy environment in the *Human Rights Act 2004.* It is time to enshrine the right of all people in the ACT to live in a clean, healthy and sustainable environment in law.

Summary of Recommendations

Scope of ACT Government's consultation:

- **Recommendation 1:** Investigate incorporating the rights of nature into ACT law. The ACT Government should not strictly delineate the rights of nature from the right to a healthy environment in legislation, policies or other explanatory materials, as these rights are closely related and intertwined and should not be viewed separately.

Question (1) How could we define the right to a healthy environment?

- **Recommendation 2:** Amend the *Human Rights Act 2004* to include the right to a healthy environment.
- **Recommendation 3:** The right to a healthy environment should be defined broadly, and should include the right to a 'clean, healthy and sustainable' environment.
- **Recommendation 4:** The right to a healthy environment should be defined broadly, and not be limited to an exhaustive list of substantive and/or procedural elements of the right. Any guidance on interpreting the right should be contained in a policy and not in the *Human Rights Act 2004*.

Question (2) What duties could be included for the ACT Government and private entities to ensure respect for individuals' right to a healthy environment?

- **Recommendation 5:** Incorporate the five State obligations on the right to a healthy environment established in the Additional Protocol to the *American Convention on Human Rights in the area of Economic, Social and Cultural Rights* (Protocol of San Salvador).
- **Recommendation 6:** Legislate a duty in relevant ACT environment and planning legislation to consider the impacts on human rights of matters that affect the environment.
- **Recommendation 7:** Private entities should have the same obligations as public authorities under the *Human Rights Act 2004*.
- **Recommendation 8:** Implement the recommendations of the UN Special Rapporteur on Human Rights and the Environment on additional duties for private businesses.

Question (3) What additional measures could be considered to ensure protection of the right to healthy environment for vulnerable groups?

- **Recommendation 9:** Pursue the recommendations of the UN Special Rapporteur on Human Rights and the Environment in Principles 3 (obligation to prohibit discrimination) and 14 (obligation to take additional measures to protect overburdened people from environmental harm) of the Framework Principles on Human Rights and the Environment.
- **Recommendation 10:** Implement the recommendations of the UN Special Rapporteur on Human Rights and the Environment on additional measures to protect the right to a healthy environment for overburdened people and communities.
- **Recommendation 11:** The right to a healthy environment should be consistent with the principles of inter- and intragenerational equity.

Question (4) How could the right to a healthy environment recognise the importance of Country for Aboriginal and Torres Strait Islander people?

- N/A

Question (5) How could the Government go about fulfilling the right to a healthy environment?

- **Recommendation 12:** Review existing ACT laws and policies to assess their compatibility with the right to a healthy environment and undertake law and policy reform where necessary to ensure they are compatible with the right.
- **Recommendation 13:** Utilise the 16 Framework Principles on Human Rights and the Environment in order to implement the right to a healthy environment in accordance with international best practice. Further guidance can also be taken from reports of the Special Rapporteur on Human Rights on the Environment on best practices and on each of the currently recognised substantive elements of the right to a healthy environment.
- **Recommendation 14:** Implement the recommendations in EDO's national report *Implementing Effective Independent Environmental Protection Agencies in Australia: Best Practice Environmental Governance for Environmental Justice* (2022).
- **Recommendation 15:** Implement the recommendations in EDO's national report *A Roadmap for Climate Reform* (2022).
- **Recommendation 16:** Implement EDO's recommendations in our submission on the 'No Rights Without Remedy' petition to amend the *Human Rights Act 2004*, and our submission on the draft *Planning Bill 2022.*
- **Recommendation 17:** The right to a healthy environment should be treated as a relevant consideration that is weighted equally against other social and economic factors, interests and/or activities.

Right to a Healthy Environment

Submission from the Environmental Defenders Office

Introduction

The Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the ACT Government's investigation into including the right to a healthy environment in the *Human Rights Act 2004* (ACT) (**Human Rights Act**). **We strongly recommend that the ACT Government include the right to a healthy environment in the Human Rights Act** and commend the ACT Government's decision to investigate doing so.

In a landmark resolution on 28 July 2022, the UN General Assembly reaffirmed recognition of the human right to a clean, healthy and sustainable environment,[7] after this right was explicitly recognised by the UN Human Rights Council in October 2021.[8] The resolution passed with an overwhelming majority, with Australia voting in favour with another 160 UN Member States. The result is that the right to a healthy environment is now universally recognised as a human right that is important for the enjoyment of other human rights.

More than 80% of UN Member States legally recognise the right to a healthy environment either through constitutional recognition, ratification of regional treaties and/or national legislation.[9] However, despite voting in favour of the General Assembly resolution, Australia is among the minority 20% of UN Member States that does not expressly recognise the right to a healthy environment in its laws.

The EDO has advocated for the recognition of the human right to a clean, healthy and sustainable environment (the **'right to a healthy environment'**) in Australia for 20 years since a Bill of Rights was first considered for the ACT in 2002,[10] including during the statutory reviews of the Human Rights Act in 2005[11] and 2009,[12] and during the National Human Rights Consultation in 2009,[13] among other law reform processes.[14] More recently, EDO published a national report on the right to a healthy environment – *A Healthy Environment is a Human Right* – which advocates for recognition of the right in Australian laws at both the federal and state/territory levels of government, including in the ACT (**Annexure D**).

The ACT has a new and timely opportunity to amend the Human Rights Act to include the right to a healthy environment. If the right is included, the ACT will become the first jurisdiction in Australia

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[7] UNGA Resolution 76/300.
[8] HRC Resolution 48/13.
[9] David R. Boyd, Special Rapporteur on Human Rights and the Environment, *Right to a healthy environment: good practices*, UN Doc A/HRC/43/53 (30 December 2019) [10]-[13].
[10] Hanna Jaireth, Environmental Defenders Office ACT Inc., *Submission on the Need for an ACT Bill of Rights* (Submission #61, Bill of Rights Consultive Committee, 2002).
[11] Environmental Defenders Office ACT Inc., *Submission to the ACT Attorney General for Consideration under s 43 Review of Operation of the Human Rights Act 2004* (Submission, A-G Environment Related Human Rights, June 2005).
[12] Email from Kirsten Miller, Environmental Defenders Office ACT Inc., dated 22 October 2009, which reiterated our submission from the 2005 statutory review and our submission to the National Human Rights Consultation in 2009.
[13] Australian Network of Environmental Defender's Offices, *Submission to the National Human Rights Consultation* (Submission, National Human Rights Consultation, 15 June 2009).
[14] See e.g. *Proposed Charter of Human Rights for Tasmania* (Submission, Tasmania Human Rights Consultation, 2011); Environmental Defenders Office (Victoria) Inc., *Inquiry into Charter of Human Rights and Responsibilities Act 2006* (Submission No 271, 1 July 2011).

to expressly recognise the right in its laws. The ACT would become the Australian leader for this right on the international stage and would likely inspire similar law reform across Australia.

Structure of submission

In this submission, we:

- discuss the scope of the ACT Government's consultation on the right to a healthy environment; and
- provide EDO's views on the five key questions in the ACT Government's *Right to a Healthy Environment Discussion Paper* of June 2022 (**Discussion Paper**).

We have annexed copies of key documents relevant to the right to a healthy environment to these submissions as follows:

- **Annexure A:** John H Knox, Special Rapporteur on Human Rights and the Environment, *Framework principles on human rights and the environment*, UN Doc. A/HRC/37/59 (24 January 2018)
- **Annexure B:** Environmental Defenders Office, *Implementing effective independent Environmental Protection Agencies in Australia: Best practice environmental governance for environmental justice* (Report, January 2022)
- **Annexure C:** Environmental Defenders Office, *A Roadmap for Climate Reform* (Report, July 2022)
- **Annexure D:** Environmental Defenders Office, *A Healthy Environment is a Human Right* (Report, 25 August 2022)
- **Annexure E:** Environmental Defenders Office, *Submission to Inquiry into Petition 32-21 (No Rights Without Remedy),* Submission #22 to the ACT Legislative Assembly Standing Committee on Justice and Community Safety (7 April 2022)
- **Annexure F:** Environmental Defenders Office, *Submission on the Planning Bill 2022*, Submission to the Environment Planning and Sustainable Development Directorate (17 June 2022).

In addition to these submissions, we have already commented on the extent to which other ACT laws are consistent with the right to a healthy environment in the following submissions:

- our submission to the ACT Legislative Assembly Standing Committee on Justice and Community Safety on *Inquiry into Petition 32-21 (No Rights Without Remedy)* dated 7 April 2022, which addressed the extent to which the Human Rights Act is consistent with the procedural elements of the right (**Annexure E**); and
- our submission to the Environment Planning and Sustainable Development Directorate on the draft *Planning Bill 2022* dated 17 June 2022, which addressed the extent to which the proposed Bill promotes environmental justice and is consistent with substantive and procedural elements of the right (**Annexure F**).

However, in the time available to prepare these submissions, we have not had an opportunity to undertake a detailed review of other ACT environmental laws to identify opportunities for the ACT Government to implement the right to a healthy environment.

As a result, these submissions are relatively high level. We would be grateful for the opportunity to continue to be consulted on the right to a healthy environment as the ACT Government continues to investigate its inclusion in the Human Rights Act.

A note on First Laws and Indigenous world views

In making this submission, it is important to acknowledge that the ACT Government is operating on the unceded lands of First Nations Peoples, and that the present consultation process involves consideration of the Human Rights Act and other laws that are part of a Western, settler-colonial legal system. However, First Nations Peoples have lived under their own laws (First Laws) and customs as politically autonomous, self-determining nations within defined territories for millennia as the oldest continuous cultures on earth.[15] 'First Laws' refers to the laws generated within First Nations Peoples' communities to govern the sacred and reciprocal relationships between human and non-human entities across Australia. These laws go beyond simply recognising the importance of nature, and recognise that First Nations' cultures are an extension of the natural community of a place.[16]

All contemporary law reform processes in Australia must aim to repair and reform the injustices of the past that continue to impact First Nations Peoples today. Recognition of, and adherence to, First Laws should be central to this process.

For this reason, EDO encourages the ACT Government to ensure that it directly engages with First Nations Peoples at all stages of the present consultation process, and during any future consultation on the right to a healthy environment in the ACT, to ensure that First Laws and Indigenous world views are incorporated. Consultation with First Nations Peoples should be specifically tailored towards First Nations Peoples to ensure that the consultation process is accessible and culturally appropriate. In some circumstances, it may be appropriate for such consultation to take place in person on Country, allowing First Nations Peoples to provide their views to the ACT Government orally.

It is also important to acknowledge that EDO is not a First Nations organisation and therefore cannot speak on behalf of First Nations Peoples. However, throughout these submissions we have identified opportunities for the ACT Government to directly engage with First Nations Peoples to incorporate First Laws and Indigenous world views into the ACT Government's investigation into the right to a healthy environment.

[15] Professor the Hon Kevin Bell AM QC, 'Aspects of the Changing Face of Indigenous Rights in Australia', paper based on address to the Victoria Criminal Law Conference Law Institute in Melbourne (21 July 2022) 1.
[16] Nicole Redvers et al, 'Indigenous Natural and First Law in Planetary Health' (2020) 11(2) *Challenges* 29, 1-3.

Scope of ACT Government's consultation

Before addressing the questions in the Discussion Paper, below we have set out our views on the scope of the consultation process adopted by the ACT Government.

Scope of consultation

Recommendation 1: Investigate incorporating the rights of nature into ACT law. The ACT Government should not strictly delineate the rights of nature from the right to a healthy environment in legislation, policies or other explanatory materials, as these rights are closely related and intertwined and should not be viewed separately.

In the Discussion Paper, the ACT Government has stated that the present exploration of whether to include a right to a healthy environment in the Human Rights Act excludes consideration of the rights of nature and non-human species in their own right.[17]

The Human Rights Act provides that only individuals have human rights.[18]

However, as noted in the Discussion Paper, there is commentary on environmental rights that suggests that nature and natural phenomena such as rivers, lakes and trees share the right to exist and that the rights of nature should be protected in the same way as the rights of humans.[19] This concept is known as the 'rights of nature', through which the environment or its features are afforded legal personality, allowing the natural world to exist, thrive and evolve as an independent entity.

In the Parliamentary Agreement for the 10th Legislative Assembly of the ACT, the ACT Government committed to look at rights of nature, in addition to considering introducing the right to a healthy environment into the Human Rights Act.[20]

We submit that the ACT Government should investigate incorporating the rights of nature into ACT law, in addition to its investigation into the right to a healthy environment, as it committed in the Parliamentary Agreement. We further submit that the ACT Government should be careful not to strictly delineate between the right to a healthy environment and the rights of nature. Although the right to a healthy environment and the rights of nature can be viewed as separate rights, they are closely interrelated and intertwined. Strict separation of the rights would be inconsistent with the global movement on the rights of nature and is also likely to be inconsistent with the views of First Nations Peoples and with the right to culture.

The right to a healthy environment and the rights of nature are interrelated because, at its core, the right to a healthy environment recognises that there is an intrinsic link between human health and the health of our environment. Similarly, environmental harm interferes with the enjoyment of all human rights, and the exercise of human rights helps to protect the environment. It is also

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[17] ACT Government, *Right to a Healthy Environment Discussion Paper* (30 June 2022) 4.

[18] *Human Rights Act 2004* (ACT) s 6.

[19] ACT Government, *Right to a Healthy Environment Discussion Paper* (30 June 2022) 4, citing Mihnea Tanasescu, 'When a river is a person: From Ecuador to New Zealand, Nature Gets its Day in Court', *The Conversation* (News Article, 19 June 2017); David R Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (ECW Press, 2017); Elizabeth Macpherson, *The (human) rights of nature: a comparative study of emerging legal rights for rivers and lakes in the United States of America and Mexico* (2021) Duke Environmental Law and Policy Forum (Vol: XXXI) 327.

[20] *Parliamentary & Governing Agreement: 10th Legislative Assembly Australian Capital Territory*, Appendix 2, no. 17.

clear that human beings are part of the natural environment, as being one biological species. The rights of nature are therefore also our rights.

The rights of nature have emerged from a global movement that is growing and developing rapidly.[21] As this movement evolves, it is becoming increasingly clear that rights of nature are closely intertwined with human rights including the right to a healthy environment, the right to culture and the right to clean water.[22] As this body of international law evolves, the ACT Government will need to ensure that the ACT's laws develop and evolve consistently with international law.

Separating the rights of nature from the right to a healthy environment may also be inconsistent with Indigenous world views, which tend to view the environment in a holistic way and not compartmentalised into separate components of nature (air, land, water, biodiversity) and humans. For example, commentary on the rights of nature suggests that, consistent with First Laws, the fundamental rights of nature include the right to exist, the right to have a habitat, and to maintain and regenerate its cycles, structures, functions and evolutionary processes.[23] In the Discussion Paper, the ACT Government has asked for the public's views on how the right to a healthy environment can recognise the importance of Country for First Nations People (Question 4). Given the inextricable connection of First Nations Peoples with Country in the ACT, if the ACT Government is interested in incorporating First Nations viewpoints, then in our view it should also consider the rights of nature given its overlap with the right to a healthy environment.

For these reasons, ideally the ACT Government should consider the rights of nature concurrently with the right to a healthy environment. However, in the absence of a concurrent law reform process, the ACT Government should keep the interdependence of the right to a healthy environment and the rights of nature in mind throughout the present law reform process, to ensure that there is still scope to consider and incorporate the rights of nature at a later stage. It can do so by ensuring that it does not strictly delineate the rights of nature from the right to a healthy environment in legislation, policies or other explanatory materials.

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[21] Alessandro Pelizzon et al, 'Yoongoorrookoo: The Emergence of Ancestral Personhood' (2021) 30(3) *Griffth Law Review* 505, 505; Joshua Gellers, 'Earth System Law and the Legal Status of Non-Humans in the Anthropocene' (2021) 7 *Earth System Governance*, 2.

[22] For example, the Special Rapporteur's thematic reports for a healthy biosphere and clean water refer to the rights of nature as good practice in achieving the right to a healthy environment: *A healthy biosphere and the right to a healthy environment*, UN Doc A/75/161 (15 July 2020) at [80] and *Human rights and the global water crisis: water pollution, water scarcity and water-related disasters*, UN Doc A/HRC/46/28 (19 January 2021) at [85].

[23] Anne Poelina et al, 'Recognising the Martuwarra's First Law Right to Life as a Living Ancestral Being' (2020) 9(3) *Traditional Environmental Law* 1, 10.

Question (1) How could we define the right to a healthy environment?

The Discussion Paper asks how we could define the right to a healthy environment. It further asks whether the right to a healthy environment should be included in the Human Rights Act and, if so, whether the right to a healthy environment should be defined broadly or more specifically. We have set out our views on these questions below.

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

Recommendation 2: Amend the *Human Rights Act 2004* (ACT) to include the right to a clean, healthy and sustainable environment.

To answer this question directly, yes, the right to a healthy environment should be included in the Human Rights Act for the following reasons:

- the ACT's current environmental laws – including those listed in the Appendix to the Discussion Paper – do not adequately protect our environment or the impact of environmental degradation on our health and wellbeing;
- the Human Rights Act offers only piecemeal protection of the environment and our health and wellbeing;
- people in the ACT are experiencing unacceptable levels of harm to our natural environment, and to our health and wellbeing; and
- First Nations and other overburdened people and communities in the ACT experience disproportionate impacts on their health and wellbeing.

In contrast, expressly recognising the right to a healthy environment as a standalone right in the Human Rights Act will:

- offer comprehensive protection of the environment than is currently offered by the ACT's environmental and human rights law;
- place people and communities at the heart of environmental protection;
- be consistent with, and build on, the ACT's existing legal framework.

(a) Gaps in legal protection of the environment and human health

(i) The state of the ACT's planning and environmental laws

The ACT has a broad range of environmental, pollution and resource management laws that protect our environment to some extent. Some of these are listed in the Appendix to the Discussion Paper and include, broadly, laws relating to air pollution,[24] climate change,[25] renewable energy,[26] the emission of toxic substances on land,[27] access to safe drinking water,[28] water pollution,[29] food,[30] and biodiversity.[31]

[24] *Environment Protection 1997* (ACT) and *Environment Protection Regulation 2005* (ACT) Part 2.
[25] *Climate Change and Greenhouse Gas Reduction Act 2010* (ACT) ss 6(1), 7(1) and *Climate Change and Greenhouse Gas Reduction (Interim Targets) Determination 2018* (ACT) s 3.
[26] *Climate Change and Greenhouse Gas Reduction Act 2010* (ACT) s 9(1).
[27] *Environment Protection Act 1997* (ACT) and *Environment Protection Regulation 2005* (ACT).
[28] *Water Resources Act 2007* (ACT).
[29] *Environment Protection Act 1997* (ACT) and *Environment Protection Regulation 2005* (ACT) Part 4.
[30] *Food Act 2001* (ACT).
[31] *Nature Conservation Act 2014* (ACT).

However, it is likely that the ACT's laws do not satisfy all of the ACT Government's obligations under international human rights law as they relate to the enjoyment of healthy environment. For example, the EDO's views on the extent to which the Human Rights Act and the draft *Planning Bill 2022* are consistent with substantive and procedural elements of the right to a healthy environment are set out in our recent submissions on these laws (**Annexures E and F**). However, we note that in the time available to prepare this submission, we have not undertaken a comprehensive review of all of the ACT's environmental laws.

Reviews into Australian cultural heritage laws also show that these laws are not working to protect First Nations cultural heritage from destruction. In 2020, the Senate Joint Standing Committee on Northern Australia conducted an inquiry into the destruction of 46,000-year-old caves at Juukan Gorge in the Pilbara region of Western Australia. The inquiry report, presented to the Senate in October 2021, highlighted the serious deficiencies across Australia's Aboriginal and Torres Strait Islander cultural heritage legislative framework nationally and in all states and territories, including in the ACT.[32]

EDO's submission on the draft *Planning Bill 2022* (**Annexure F**) also identified aspects of the Bill that are not consistent with the ACT Government's obligations in relation to First Nations Peoples. In particular, our submission highlighted that there are no provisions in the Bill that require direct consultation with First Nations at any stage of the reformed planning system, meaning that there is no requirement for the ACT Government to engage in effective consultation with First Nations before it makes decisions that may have an impact on their Country.[33] Similarly, the Bill does not implement the principle of free, prior and informed consent relating to First Nations.[34] Our recommendations include, for example, that:

- the Bill should include provisions requiring decision-makers to consult with representative Aboriginal organisations for key planning decisions including development applications, and should incorporate the principle of free, prior and informed consent (Recommendation 22);
- the ACT Government should develop specific guidelines for consultation with First Nations, which should be culturally safe and developed through consultation with First Nations peoples and communities (Recommendation 23); and
- the Bill should introduce a duty on decision-makers to refuse development applications for proposals that will have a significant adverse impact on Aboriginal cultural heritage (Recommendation 24).

In relation to procedural rights, EDO recently undertook a detailed analysis of the extent to which procedural rights are protected under environmental and planning laws across all Australian jurisdictions, including the ACT. Following this comprehensive review, EDO concluded that procedural rights are fairly well protected in the ACT, which performed the highest when compared to other jurisdictions in Australia. However, we identified several deficiencies in protection of procedural rights in the ACT's environmental framework. These include, for example, a lack of provisions in environmental legislation that guarantee a publicly available written statement of reasons as a matter of course, issues with how community views are taken into account during public consultation processes, and lack of provisions that require authorities to publicly disclose relevant information regarding environmental risks arising from activities that

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[32] Parliament of the Commonwealth of Australia Joint Standing Committee on Northern Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (October 2021).
[33] Annexure F, *Submission on the Planning Bill 2022,* 32-33.
[34] Ibid*,* 34.

the government is responsible for managing and approving. The results of our analysis will be contained in a forthcoming report published by The Wilderness Society which we will provide to the ACT Government after it has been published.

As can be seen from the above summary, the ACT's environmental laws are piecemeal and do not offer comprehensive protection of the environment. Stronger laws are urgently needed to address trajectories of environmental decline. In addition, the ACT's environmental laws tend to focus on facilitating development and controlling pollution and other activities that impact the environment, and not on increasing health and wellbeing. Without the right to a healthy environment, there are no laws in the ACT that provide environmental benefits as a human right.

(ii) The state of the ACT's human rights law

In 2009, a comprehensive review into Australian human rights law by the National Human Rights Consultation Committee, chaired by Father Frank Brennan, identified that human rights are not properly protected in our laws.[35] Australia's Constitution contains very few human rights protections, and we do not have national human rights legislation.

Because we have the Human Rights Act in the ACT, human rights are better protected in the ACT than they are in other parts of Australia without human rights legislation. However, the Act offers limited protection of human rights because:

- it protects people in the ACT from the actions of ACT public authorities, but not necessarily private entities or businesses, and not from the actions of our national government;
- while it protects most of the civil and political rights that are enshrined in the *International Covenant on Civil and Political Rights* (**ICCPR**),[36] there are a number of civil and political rights that are not protected;
- it protects only two of the economic, social and cultural rights (**ESC rights**) that are enshrined in the *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**), namely the right to education and the right to work;[37]
- it does not encompass or contemplate environmental rights;[38] and
- the Act does not currently include any accessible remedies for breaches of human rights in the ACT.[39]

The result is that human rights are not fulsomely protected in the ACT.

(iii) The state of the ACT's environment

Despite the legal protections that the environment and people in the ACT have, we continue to witness unacceptable levels of harm to our physical and mental health and to our natural

[35] National Human Rights Consultation Committee, *National Human Rights Consultation* (Report, September 2009).
[36] *Human Rights Act 2004* (ACT) Schedule 1.
[37] Ibid, Schedule 2.
[38] Although we acknowledge that the ACT Government's factsheet on the right to life may encourage decision-makers implementing the Human Rights Act to consider the right to a healthy environment in interpreting the right to life: ACT Government, *FACTSHEET: Right to life - s 9 Human Rights Act 2004*, 2 citing General Comment No. 36, [62].
[39] See Annexure E, *Submission to Inquiry into Petition 32-21 (No Rights Without Remedy)*, Submission #22 to the ACT Legislative Assembly Standing Committee on Justice and Community Safety (7 April 2022).

environment, including through toxic pollution, natural disasters driven by climate change, destruction of First Nations cultural heritage, and losses of our iconic and native species.

The most recent *ACT State of the Environment Report 2019* prepared by the ACT's Commissioner for Sustainability and the Environment reported a number of impacts on the ACT's environment including:

- impacts on our climate, including a 1.5°C increase in mean maximum temperatures since 1926 and an increased occurrence of hot days, with most recent years being drier than average;[40]
- impacts on the ACT's unique biodiversity including from urban development, climate change, invasive plants and animals, vegetation loss, habitat fragmentation, use of chemicals and pesticides, and changes to bushfire regimes;[41]
- impacts on ACT's protected species including from invasive plants and animals, higher temperatures, loss of habitat due to deforestation, and urban development, which has led to a decline in populations;[42]
- impacts on air quality in the ACT, including 31 days between 2015 and 2018 when records of PM2.5 - fine particulate matter – exceeded the daily standard set by the *National Environment Protection (Ambient Air Quality) Measure*;[43] and
- impacts from planning and development – including a 57% increase in urban land between 1991 and 2016 compared to a 46% increase in population – which continue to pose a threat to the health of the ACT's lakes, waterways and general environment.[44]

In 2022, the ACT witnessed species like the koala (Queensland, New South Wales and the ACT populations) and the Gang-gang Cockatoo - the ACT's faunal emblem – being listed as endangered species on the national list of threatened species.[45]

The ACT has also seen an increase in devastating climate-related bushfires caused by higher average temperatures, reductions in rainfall and increased occurrence of severe heatwaves.[46] During the 2003 Canberra bushfires, fires burned nearly 70% of the ACT, resulting in damage to 90% of Namadgi National Park, with lost forestry valued at $1.494 billion.[47] During the Black Summer bushfires of 2019/2020, the Orroral Valley bushfire destroyed 78% of the total area of Namadgi National Park (82,700 ha) and 22% of the Tidbinbilla Nature Reserve (1,444 ha).[48] During this time, the ACT consistently experienced significantly worsened air quality conditions. At times,

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[40] Commissioner for Sustainability and the Environment, *ACT State of the Environment Report* (Report, 2019), 102-103.
[41] Ibid, 213.
[42] Ibid, 207-208.
[43] Ibid, 94.
[44] Ibid, 91; 186.
[45] Department of Climate Change, Energy, the Environment and Water, 'Callocephalon fimbriatum – Gang-gang Cockatoo', *Species Profile and Threats Database* <http://www.environment.gov.au/cgi-bin/sprat/public/publicspecies.pl?taxon_id=768>; 'Phascolarctos cinereus (combined populations of Qld, NSW and the ACT) – Koala (combined populations of Queensland, New South Wales and the Australian Capital Territory)', *Species Profile and Threats Database* <http://www.environment.gov.au/cgi-bin/sprat/public/publicspecies.pl?taxon_id=85104>.
[46] Commissioner for Sustainability and the Environment, *ACT State of the Environment Report* (Report, 2019), 320.
[47] Ibid, 21.
[48] ACT/NSW Rapid Risk Assessment Team, *Orroral Valley Fire Rapid Risk Assessment Namadgi National Park* (Report, March 2020) 6-7.

Canberra's air quality was recorded as the worst if any city in the world,[49] and overall Canberrans spent more than one third of that summer living in hazardous air quality conditions.[50]

A 2022 report by the Commissioner into the *State of the Lakes and Waterways in the ACT* further identified a number of impacts on water in the ACT including from hotter conditions and less rainfall, resulting in less water flowing into our lakes, ponds, and wetlands, higher rates of erosion where bare ground is left uncovered by vegetation, and greater levels of pollutants and contaminants in waterways when drought-breaking rains wash accumulated organic matter off impervious surfaces into lakes and rivers.[51]

(iv) The state of the ACT's health and wellbeing

Environmental harm harms our health. As stated in the national *Australia State of the Environment Report of 2021*, '[e]*nvironmental degradation is now considered a threat to humanity, that could bring about societal collapses with long-lasting and severe consequences'*.[52]

The indivisibility of the health of the environment and human health and wellbeing is increasingly being acknowledged globally. There is a growing consensus that ensuring human health and prosperity requires the safeguarding of the planet's rich biodiversity and ecological integrity,[53] and biocultural diversity.[54] The COVID-19 global pandemic has served as a prescient reminder of the interdependence of human rights and the environment, with scientists warning of the clear link between environmental degradation and loss of biological diversity and the occurrence of dangerous zoonotic diseases which pose an existential threat to human health and rights more broadly.[55]

The *ACT State of the Environment Report 2019* shows that environmental degradation has an impact on our health and wellbeing, including for example:

- deaths and injuries caused by climate-related bushfires, for example 4 deaths and 435 injuries were caused by the 2003 Canberra bushfires;[56]

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[49] Amy Remeikis, 'Canberra chokes on the world's worst air quality as city all but shut down' *The Guardian* (online, 3 January 2020) < https://www.theguardian.com/australia-news/2020/jan/03/canberra-chokes-on-worlds-worst-air-quality-as-city-all-but-shut-down>.
[50] Andrew Brown, 'Canberra air quality: more than a third of all summer days had hazardous air quality' *Canberra Times* (online, 6 March 2020) <https://www.canberratimes.com.au/story/6665438/just-how-bad-was-the-air-quality-in-canberra-this-summer/>.
[51] Office of the Commissioner for Sustainability and the Environment, *State of the Lakes and Waterways in the ACT* (Report, May 2022), 86.
[52] Ian Cresswell, Terri Janke and Emma L Johnston, *Australia State of the Environment Report 2021*, p 18.
[53] See, eg, UN General Assembly, *Towards a Global Pact for the Environment,* UN Doc A/RES/72/277 (10 May 2018).
[54] Biocultural diversity recognises the link between human diversity and biodiversity. Different cultures and peoples perceive and appreciate biodiversity in different ways because of their distinct heritage and experience. In this way, human diversity plays a role in biodiversity conservation: M. L. Cocks, 'Biocultural diversity: Moving beyond the realm of "indigenous" and "local" people' (2006) 34(2) *Human Ecology* 185–200.
[55] World Health Organisation, 'WHO's 10 calls for Climate Change to Assure Sustained Recovery from Climate Change' (Web page, 11 October 2021) < https://www.who.int/news/item/11-10-2021-who-s-10-calls-for-climate-action-to-assure-sustained-recovery-from-covid-19>.
[56] Commissioner for Sustainability and the Environment, *ACT State of the Environment Report* (Report, 2019), 21.

- an increase in heat related illness and hospital admissions from climate change causing heat waves and higher temperatures;[57]
- instances of decreased lung function and respiratory issues, cardiovascular disease; asthma attacks, impaired mental and physical performance, anxiety and depression, low birth weight and headaches caused by poor air quality;[58]
- detrimental impacts on human health from poor recreational water quality due to harmful bacteria such as enterococci or blue-green algae.

More recently, during the Black Summer bushfires of 2019/20, impacts on air quality in the ACT had considerable consequences on the health of people in the ACT, with increased numbers of hospitalisations across the ACT for respiratory conditions, asthma, heart, stroke and vascular conditions, chest pain, burns and mental-health related issues.[59] For example, there was a 52% increase in hospitalisations for respiratory conditions in the ACT during the week beginning 5 January 2020.[60] A 58% increase was observed in presentations at the emergency department (ED) for respiratory conditions in the same week which coincide with high levels of air pollution due to bushfire smoke.[61] Staggeringly, in the week beginning 29 December 2019, there was a 230% increase in ED presentation for asthma related issues and conditions.[62] Late January 2020 saw a 90% increase in ED presentations for burns. This coincided with increased fire activity in the Orroral Valley in the ACT.[63] It has also been reported that the smoke caused by the Black Summer bushfires may have been responsible for 31 deaths in the ACT.[64]

There also appeared to be an increase in access to mental health services throughout the duration of the Black Summer bushfires.[65] The presentation rate to ED in the ACT for mental-health related conditions increased by 35% in late January of 2020.[66] In the week beginning 29 December 2019, where the fire conditions were comparatively worse than at the end of January, there was a 60% increase in ED presentations.[67]

However, it is important to note that these health statistics likely do not accurately represent all people whose health was negatively impacted by the bushfires, as the statistics reflect those people who presented at hospital. A survey conducted by the ANU found that 97% of participants had experienced at least one symptom of physical ill-health as a result of the bushfires, and half of

[57] Ibid, 113.
[58] Ibid, 311.
[59] Australian Institute of Health and Welfare, *Data Update: Short term health impacts of the 2019-20 Australian bushfires* (Report, 12 November 2021) 7.
[60] Ibid, 9.
[61] Ibid, 27.
[62] Ibid, 29.
[63] Ibid, 42.
[64] Daniella White, 'Bushfires: Canberra smoke blamed for 31 deaths this summer' *The Canberra Times* (online, March 24 2020) <https://www.canberratimes.com.au/story/6693337/summer-smoke-haze-blamed-for-31-deaths-in-canberra/>.
[65] Australian Institute of Health and Welfare, *Data Update: Short term health impacts of the 2019-20 Australian bushfires* (Report, 12 November 2021) 18.
[66] Ibid, 40.
[67] Ibid, 41.

the participants had experienced deteriorated mental health in the form of anxiety, depression, and poor sleep.[68] However, only 1 in 5 participants had sought medical assistance.[69]

(v) The disproportionate impact on overburdened people and communities

Overburdened people and communities – including women, children, people who are financially disadvantaged, First Nations Peoples and communities, LGBTIQA+ communities, older people, people with disabilities, people from a racial or ethnic minority, and people displaced by natural disasters – are at the most at risk of environmental harm, with subsequent impacts on their health and wellbeing.

First Nations are particularly at risk of environmental harm from destroyed, degraded and polluted environments because of the intimate spiritual and cultural connection they have to their lands, territories and resources. Environmental burdens are disproportionately felt by First Nations, through impacts to their Country, cultural practices and the resources that they depend on. This burden is a direct consequence of colonisation, as historical and ongoing decisions around land management, ownership and environmental impacts have been highly destructive to First Nations and their culture, livelihoods and connection to Country and community. The disproportionate impact of environmental injustices on First Nations is a clear example of environmental racism. Environmental racism can be seen to be perpetrated against First Nations communities through the ongoing impacts of colonisation, dispossession, and destruction of First Nations lands for settler purposes.

A recent IPCC report identified that changing climate conditions are expected to exacerbate many of the social, economic and health inequalities already faced by First Nations in Australia,[70] including from loss of bio-cultural diversity, nutritional changes through availability of traditional foods and forced diet change, water security, and loss of land and cultural resources through erosion and sea-level rise.[71] As an example in the ACT, the Orroral Valley bushfire in 2020 destroyed much of Tidbinbilla and Namadgi National Parks, which are home to significant and sacred cultural sites for the Ngunnawal People,[72] and would have likely resulted in a significant loss of Ngunnawal cultural heritage, both tangible and intangible.

However, existing laws do not adequately protect First Nations cultural heritage. Degradation to Country and destruction of First Nations heritage – including cultural landscapes and other intangible heritage – is particularly detrimental to First Nations Peoples' physical and mental health and wellbeing.

(b) The case for a standalone right to a healthy environment

The right to a healthy environment should be expressly included as a standalone right in the Human Rights Act for the following reasons:

(i) it provides comprehensive protection of all components of the environment, which are not adequately protected under current environmental or human rights laws;

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[68] Rachael M. Rodney et al, *Physical and Mental Health Effects of Bushfires and Smoke in the Australian Capital Territory 2019-20* (Report, 14 October 2021).
[69] Ibid.
[70] IPCC 6th Assessment Report, Ch 11, 69.
[71] Ibid.
[72] 'Aboriginal Heritage and the Cultural Landscape of the ACT' *ACT Government* (Web Page) < https://www.tidbinbilla.act.gov.au/learn/tidbinbilla?a=396477>.

(ii) it places people and communities at the heart of environmental protection, empowering citizens to pursue environmental justice and achieve better outcomes for the environment;
(iii) it is consistent with, and a logical extension of, partial protections that people in Australia already have under current laws; and
(iv) it will not open the floodgates for vexatious litigation.

We explain these reasons in further detail below.

(i) It provides comprehensive protection of all components of the environment

The ACT's environmental laws offer some protection of the various components of the environment. However, these laws are piecemeal and do not offer comprehensive protection of the environment.

In international law, the right to a healthy environment has been recognised in a growing body of environmental human rights law as a precondition to the enjoyment of other human rights. International and regional courts and tribunals, UN treaty bodies and UN special rapporteurs have considered several matters where other human rights – such as the right to life, the right to health, and the right to culture – have been applied to environmental issues. These matters have successfully established that there is an explicit link between degradation of the environment, and its impact on people's enjoyment of a wide range of human rights. As a result, there are now numerous decisions, recommendations, and reports from international bodies that environmental harm interferes with the enjoyment of other human rights. This is referred to as the 'greening' of existing human rights.[73]

Similarly, in the ACT, the right to a healthy environment could be implied as a precondition to rights that are necessary for the enjoyment of other human rights that are protected in the Human Rights Act, which includes the right to life and the right to culture.[74] For example, the ACT Government has produced guidance material on human rights, which recognise that environmental degradation may have an impact on the right to life.[75]

However, protection of the right to a healthy environment in this way is not guaranteed because human rights are not fulsomely protected in the ACT. To the extent that human rights are protected, the application of human rights to environmental issues in the ACT could ensure that some discrete components of our environment are protected. However, this protection will be piecemeal, ad hoc, and dependent on case-by-case explanation of how environmental harm interferes with the enjoyment of specific rights.

In contrast, the right to a healthy environment protects all components of the environment, including air, water, soil, the atmosphere, biodiversity, ecosystems, cultural heritage, people and communities.

The protection it offers is more comprehensive in scope than the piecemeal protection of environmental issues offered by human rights law.

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[73] 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) at [13].
[74] *Human Rights Act 2007* (ACT) ss 9 and 27 respectively.
[75] ACT Government, *FACTSHEET: Right to life - s 9 Human Rights Act 2004*, 2 citing General Comment No. 36, [62].

(ii) It places people and communities at the heart of environmental protection

As a human right, the right to a healthy environment places individuals and communities at the heart of environmental protection. The right provides clear recourse for public participation in environmental decision-making and for pursuing remedies for environmental harms.

By putting humans at the centre of environmental protection, the right to a healthy environment can be used to empower citizens to pursue environmental justice.[76] In turn, the pursuit of environmental justice leads to better outcomes for both citizens and our environment.

In addition, introducing a human rights-based approach to environmental protection will clearly show that protecting the environment will positively benefit people and communities. Nature has intrinsic value in and of itself, however for some people, government authorities, and businesses in the ACT, this link may make it easier to support recognition of the right to a healthy environment, and in turn could result in tangible positive environmental outcomes.[77]

We note that, earlier in this submission, we have explained that the right to a healthy environment is inherently linked with the rights of nature. We do not consider that this viewpoint is inconsistent with our view that placing humans at the heart of environmental protection is a benefit of recognising the right to a healthy environment. Although the right to a healthy environment is often seen as an anthropogenic (human-centred) right, which could be contrasted with the rights of nature (which are nature-centred), this does not mean that they are mutually exclusive. In our view, humans are part of the natural environment and therefore the rights of nature are also our rights. Viewed in this way, placing humans at the heart of environmental protection can ensure greater protection of both the natural environment and of humankind.

(iii) It is consistent with ACT's existing legal frameworks

As outlined earlier, the ACT has a broad range of environmental, pollution and resource management laws that protect our environment to some extent. By passing these laws, the ACT Government has already taken steps to legislate protection of the environment. Express recognition of the right to a healthy environment builds on this existing legal framework and is a necessary and logical extension of the partial protections that the environment and people in the ACT already have under current laws.

Some ACT laws already recognise that there is a clear link between environmental degradation and the impacts this has on human health. For example, the objects of the *Environment Protection Act 1997* (ACT) includes protection of, or prevention of harm to, both the environment and human health.[78]

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[76] United Nations Environment Programme, *New Frontiers in Environmental Constitutionalism* (Report, May 2017) 165.

[77] Rachel Pepper and Harry Hobbs, 'The Environment is All Right: Human Rights, Constitutional Rights and Environmental Rights' (2020) 44(2) *Melbourne University Law Review* 634, 640.

[78] *Environment Protection Act 1997* (ACT) s 3C(1)(b).

The three procedural elements of the right to a healthy environment – access to information,[79] participation in decision-making,[80] and access to judicial remedies[81] – are protected in most ACT environmental legislation, although these rights are not always available to third parties or members of the general public.

(iv) It will not open the floodgates for vexatious litigation

Finally, it is important to recognise that it is not the case that introducing the right to a healthy environment will open the floodgates for individuals to bring vexatious litigation challenging government decisions and ACT laws. In 2020-21, the Environment, Planning and Sustainable Development Directorate (**EPSDD**) made 1,678 development application (**DA**) decisions in the merit track (including decisions to determine DAs, DA amendment applications, and applications to satisfy conditions of approval), in addition to decisions on DA exemption applications and decisions to determine DAs in the impact track.[82] However, during that year, only 20 planning matters were decided before the ACT Civil and Administrative Tribunal (**ACAT**),[83] which from our calculations is around 1.2% of the decisions made. Similarly, in 2020-21, the Conservator for Flora and Fauna made 3351 decisions under the *Tree Protection Act 2005* (ACT). Of these decisions, only 3 were challenged before ACAT – 2 decisions changed following ACAT review, and 1 was withdrawn by the applicant.[84] From our calculations, this is only 0.09% of total decisions made. It is clear from this snapshot that only a negligible number of planning and environment decisions in the ACT are challenged.

Even to the extent that decisions have been challenged, court proceedings taken in the public interest have and continue to play an important role in upholding the rule of law, increasing government accountability, improving government decision-making, and making a positive contribution to jurisprudence on a wide range of legal issues.

If the right to a healthy environment were introduced, it would play a similarly important role. It is critical that people in the ACT have access to remedies that permit incorrect or unlawful government decisions to be brought to the attention of independent tribunals and courts, and for government decision-makers to be held to account for correct implementation of the law.

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[79] For example, the ACT has freedom of information laws: *Freedom of Information Act 2016* (ACT). In some circumstances, government agencies are required under legislation to provide information to the public during a decision-making process. In addition, some government agencies are required to provide decision notices, which sometimes include detailed statements of findings of fact and reasons, to the applicant for a decision and other people whose interests are affected by a decision. The ACT Commissioner for Sustainability and the Environment also undertakes periodic 'state of the environment' reporting: *Commissioner for Sustainability and the Environment Act 1993* (ACT) s 19.

[80] Most environmental or natural resources legislation mandates public consultation processes including, for example, during development applications under the *Planning and Development Act 2007* (ACT). In addition, some legislation also allows for public inquiries to be conducted to investigate environmental and planning matters including, for example, the *Environment Protection Act 1997* (ACT) s 94 and *Planning and Development Act 2007* (ACT), Part 8.3.

[81] Access to justice in environmental decision-making encompasses judicial review (review for legality), administrative or merits review (review for a correct or preferable decision), and civil enforcement of environmental laws against individuals, corporations and governments where they are failing to comply with obligations.

[82] Environment, Planning and Sustainable Development Directorate, *Annual Report 2020-2021* (2021) 66-67.

[83] Ibid, 297.

[84] Ibid, 320.

(c) Benefits of recognising the right to a healthy environment

Evidence from decades of experience in other countries that already recognise the right to a healthy environment shows that express recognition of the right to a healthy environment will be a catalyst for a number of important benefits.

This evidence shows that if the Human Rights Act was amended to recognise the right to a healthy environment, this would achieve better outcomes for our environment and our health in the ACT.

There are four key benefits of recognising the right to a healthy environment in the Human Rights Act:

(i) it will lead to better health outcomes for people and ecosystems in the ACT;
(ii) it will encourage stronger environmental laws and governance;
(iii) it will improve access to justice for environmental harms; and
(iv) it will reduce environmental injustices, which is particularly important for First Nations Peoples and other overburdened people and communities who are most at risk of environmental harm.

These benefits are further explored and explained in our national report on the right to a healthy environment, *A Healthy Environment is a Human Right* (**Annexure D**).[85]

(2) Could the right to a healthy environment be defined broadly with the right expressed general terms?

Recommendation 3: The right to a healthy environment should be defined broadly, and should include the right to a 'clean, healthy and sustainable' environment.

Yes, the right to a healthy environment should be defined broadly.

In July 2022, the UN General Assembly passed a resolution that recognises the right to a clean, healthy and sustainable environment as a human right.[86]

We recommend that the right to a healthy environment is defined to include the right to a 'clean', 'healthy' and 'sustainable' environment, consistent with the General Assembly's resolution.

'Clean', 'healthy' and 'sustainable' are drawn from the practice of various UN Member States, which have adopted these terms in constitutions and legislation, as well as regional human rights instruments. While there are similarities between these terms, they each make distinctive contributions.

Clean is most frequently used in the context of air quality and water quality. Clean also is an important descriptor in the context of plastic pollution, waste and other forms of pollution that may detract from the aesthetic quality of the environment without necessarily affecting human health.

Healthy is especially critical. It is the most widely used term in relation to the right, codified in more than 80 constitutions and more than 80 national laws. It is essential because it has an important dual meaning, as it refers to the health of both humans and ecosystems, so that it protects nature's health as well as human health. 'Healthy' does not mean pristine, or perfectly free of any pollutant or contaminants. It means free from levels of pollution or contaminants that

[85] Annexure D, *A Healthy Environment is a Human Right* (Report, 25 August 2022), Section 4, 24-41.
[86] UNGA Resolution 76/300.

could harm human or ecosystem health. For example, the *National Environment Protection (Ambient Air Quality) Measure* sets Australia's air quality standards for fine particulate matter.

Sustainable is essential because it emphasises prevention, namely ensuring that human activities do not deplete resources or degrade biodiversity and ecosystems.

Although there is arguably some degree of overlap, each of these adjectives has independent utility and a strong historical foundation in regional human rights treaties, national constitutions, and domestic legislation. These terms have also been the subject of judicial consideration in regional human rights tribunals and domestic courts over the past three decades. Therefore, we recommend that if the right is included in the Human Rights Act, the right is defined to include the right to a 'clean, healthy and sustainable environment'.

Characterisation of the right to a healthy environment

The Discussion Paper states that the Human Rights Act protects a number of civil and political rights, which are primarily drawn from the ICCPR, and some ESC rights, which are primarily drawn from the ICESCR.[87] The Discussion Paper states that ESC rights have aspects that are immediately realisable, and aspects that must be progressively realised by the Government over time, and subject to available resources.[88]

The Discussion Paper states that the right to a healthy environment is understood to fall within the category of ESC rights,[89] however does not provide a basis for this. It concludes that some aspects of the right to a healthy environment would require immediate action by the Government, while other aspects of the right would be subject to progressive realisation.

However, the distinction between civil and political rights and ESC rights is artificial,[90] which the Discussion Paper acknowledges. [91] Traditionally, a distinction was drawn between civil and political rights as 'first generation' rights that comprise negative obligations (obligations to *not* do something), while ESC rights are 'second generation' rights that comprise positive obligations (obligations to *do* something).[92] ESC rights are subject to progressive realisation, which means that governments are required to implement those rights over time, using the best available resources.[93]

However, many human rights include aspects that impose both negative and positive obligations on governments. For example, the right to a healthy environment is a human right that includes both negative and positive duties for governments. There is a negative right to be free from exposure to toxic substances produced by the government or government-sanctioned activities. There is a positive right to clean air, safe water, and healthy ecosystems, which may require extensive system regulation, implementation, and enforcement as well as remediation efforts in

[87] ACT Government, *Right to a Healthy Environment Discussion Paper* (30 June 2022) 3.
[88] Ibid, 3-4.
[89] Ibid, 12.
[90] Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on Economic, Social and Cultural Rights, Fact Sheet no. 33* (UN OHCHR 2008) 8.
[91] ACT Government, *Right to a Healthy Environment Discussion Paper* (30 June 2022) 12 at footnote 35.
[92] Spasimir Domaradzki, Margaryta Khvostova and David Pupovac, 'Karel Vasak's Generation of Rights and the Contemporary Human Rights Discourse' (2019) 20 *Human Rights Review* 423.
[93] *International Covenant on Economic, Social and Cultural Rights,* art 2(1).

polluted areas. Thus the right to a healthy environment illustrates that the distinction between positive and negative rights is increasingly outdated.[94]

To the extent that aspects of the right to a healthy environment are derived from ESC rights, such aspects may be subject to progressive realisation. For example, the substantive right to safe water and sanitation is recognised as a prerequisite for the realisation of other human rights,[95] and is derived from the ESC rights of the right to an adequate standard of living (art 11 of the ICESCR) and the right to the highest attainable standard of health (art 12 of the ICESCR).[96] The right to breathe clean air is similarly derived from the ESC rights to an adequate standard of living and the right to health (in addition to the right to life, which is often viewed as a civil and political right).[97]

In addition, although some environmental human rights experts have characterised the right to a healthy environment as an ESC right,[98] the majority of available commentary on the right instead characterises it as a 'third generation' right (collective or solidarity rights).[99] Arguably, third generation rights are also subject to progressive realisation to the extent that they require governments to take positive actions.

In our view, it is unnecessary to categorically define the right to a healthy environment as an ESC and/or collective right and therefore whether it is subject to progressive realisation, as section 28 of the Human Rights Act can operate to limit its implementation of the right in accordance with the government's best available resources. Section 28 of the Human Rights Act provides that all human rights protected under the Act may be subject to *'reasonable limits set by laws that can be demonstrably justified in a free and democratic society'*,[100] and that in deciding whether a limit is reasonable, all relevant factors must be considered including the nature of the right affected, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose, and any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.[101]

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[94] David R Boyd, *The Environmental Human Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press, 2011), 24.
[95] Committee on Economic, Social and Cultural Rights, *General Comment No. 15 (2002): The right to water (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/2002/11 (20 January 2003) [1].
[96] Ibid, [3] citing Committee on Economic, Social and Cultural Rights, *General Comment No. 6 (1995): The Economic, Social and Cultural Rights of Older Persons*, UN Doc E/1996/22 (8 December 1995).
[97] David R Boyd, Special Rapporteur on Human Rights and the Environment, Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc. A/HRC/40/55 (8 January 2019), [44]-[45].
[98] John H. Knox and David R. Boyd, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN GAOR, 73rd sess, Item 74(b), UN Doc A/73/188 (19 July 2018), 17 [47].
[99] Karel Vasak, 'A 30-year struggle: the sustained efforts to give force of law to the Universal Declaration of Human Rights' (November 1977) *UNESCO Courier* 29; Spasimir Domaradzki, Margaryta Khvostova and David Pupovac, 'Karel Vasak's Generation of Rights and the Contemporary Human Rights Discourse' (2019) 20 *Human Rights Review* 423, 430; Australian Panel of Experts on Environmental Law, 'Democracy and the Environment' (Technical Paper No 8, 2017) 7 – 9; The Council of Europe - 'The evolution of human rights', *The Council of Europe* (Web Page) < https://www.coe.int/en/web/compass/the-evolution-of-human-rights>.
[100] *Human Rights Act 2004* (ACT) s 28(1).
[101] Ibid, s 28(2).

(3) Alternatively, could the definition of right to a healthy environment be more specific and incorporate substantive aspects?

Recommendation 4: The right to a healthy environment should be defined broadly, and not limited by an exhaustive list of substantive and/or procedural elements of the right. Any guidance on interpreting the right should be contained in a policy and not in the *Human Rights Act 2004*.

(a) Substantive elements

We recommend that the definition of the right to a healthy environment should not incorporate the substantive elements of the right to a healthy environment.

The Special Rapporteur on Human Rights and the Environment **(Special Rapporteur)** defines the right to a healthy environment as being comprised of six **substantive elements**:[102]

- clean air,[103]
- a safe climate,[104]
- access to safe drinking water and sanitation,[105]
- healthy biodiversity and ecosystems,[106]
- toxic free environments in which to live, work and play,[107] and
- healthy and sustainably produced food.[108]

The reason why these substantive elements should not be included in a legislated right to a healthy environment is because the list of elements is not exhaustive and will evolve as our understanding of State obligations under international human rights law in relation to the environment evolves, noting that human rights treaties are considered living instruments that must evolve over time and be interpreted in light of present conditions.[109]

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[102] See David R Boyd, Special Rapporteur on Human Rights and the Environment, *Right to a Healthy Environment: Good Practices*, UN DOC A/HRC/43/53 (30 December 2019).
[103] David R Boyd, Special Rapporteur on Human Rights and the Environment, *Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/HRC/40/55 (8 January 2019).
[104] David R Boyd, Special Rapporteur on Human Rights and the Environment, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/74/161 (15 July 2019).
[105] David R Boyd, Special Rapporteur on Human Rights and the Environment, *Human rights and the global water crisis: water pollution, water scarcity and water-related disasters,* UN Doc A/HRC/46/28 (19 January 2021).
[106] David R Boyd, Special Rapporteur on Human Rights and the Environment, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/75/161 (15 July 2020).
[107] David R Boyd, Special Rapporteur on Human Rights and the Environment, *The right to a clean, healthy and sustainable environment: non-toxic environment*, UN Doc A/HRC/49/53 (12 January 2022).
[108] David R Boyd, Special Rapporteur on Human Rights and the Environment, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/76/179 (19 July 2021).
[109] See e.g regional human rights courts and expressing this view in: *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A), European Court of Human Rights (23 March 1995); Inter-American Court of Human Rights, *Advisory opinion on the interpretation of the American Declaration of the Rights and Duties of Man*, Advisory Opinion OC-10/89 (14 July 1989); *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-American Court of Human Rights (31 August 2001).

For example, the right of First Nations Peoples to carry out cultural obligations to look after Country and be with Country is not captured in the Special Rapporteur's list of substantive elements. However, this right is critical to keeping Country not only healthy but also happy as a living entity, and is therefore intrinsic to the notion of a healthy environment from First Nations perspectives.

If the substantive elements of the right are specifically delineated in the Human Rights Act, there is a risk that the definition of the right will become outdated as international and local understandings of the right develop. The Human Rights Act would then require further amendments to incorporate best practice, which can be a time-consuming process and requires the use of public resources. As human rights law is constantly evolving, the ACT Government may be required to review and amend the Human Rights Act frequently.

It is preferable for the right to a healthy environment to be defined broadly. If it is necessary for the ACT Government to provide further guidance for interpreting the right to a healthy environment, we recommend that such guidance is contained in a policy rather than in the Human Rights Act itself.

(b) Procedural elements

We recommend that the definition of the right to a healthy environment should not incorporate the procedural elements of the right to a healthy environment. Rather, we recommend that the Human Rights Act be consistent with the procedural elements of the right to a healthy environment.

The Special Rapporteur recognises that the substantive elements of the right to a healthy environment must be accompanied by corresponding **procedural elements**, without which it is not possible to achieve recognition of substantive rights, which are the right to information, the right to participate in decision-making, and access to justice.[110]

These procedural rights reflect rights in the ICCPR and developments in international environmental law, such as Principle 10 of the *Rio Declaration*,[111] the *Aarhus Convention,*[112] and the *Escazú Agreement*.[113]

Aspects of each of these procedural elements are already included in the Human Rights Act. to some extent but should be strengthened. For example, the right to access information is derived from art 19(2) of the ICCPR,[114] which is reflected in s 16(2) of the Human Rights Act. The right to participate in decision-making is derived from art 25(a) of the ICCPR,[115] which is reflected in s 17(a) of the Human Rights Act. We recommend any policies, guidelines or factsheets on these rights be

[110] David R Boyd, Special Rapporteur on Human Rights and the Environment, *Right to a Healthy Environment: Good Practices*, UN DOC A/HRC/43/53 (30 December 2019) 5-8.
[111] *Rio Declaration on Environment and Development*, 31 ILM 874 (12 August 1992),
[112] *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (Aarhus Convention), opened for signature 25 June 1998 (entered into force 30 October 2021).
[113] *Escazú Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean,* opened for signature 27 September 2018 (entered into force 22 April 2021).
[114] Article 19 protects the right of everyone to hold opinions without interference, and to freedom of expression including the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, whether orally, or in writing or in print, in the form of art, or through any other media.
[115] Article 25 protects the right of all citizens to have the opportunity to take part in the conduct of public affairs directly or through freely chosen representatives, to vote and to be elected at genuine periodic elections, and to have access on general terms of equality to public service.

updated to be consistent with the *Aarhus Convention* and the *Escazú Agreement* as international best practice.

The right to access justice is derived from art 2(3) of the ICCPR,[116] however it is not reflected in the Human Rights Act. In EDO's recent submission on the Human Rights Act, we have identified the extent to which the Act protects the right to access justice can be improved (**Annexure E**). In our submission, we made a number of recommendations which, if implemented by the ACT Government, would improve access to justice under the Human Rights Act.

[116] Article 2(3) of the ICCPR provides that State parties must ensure that any person whose rights or freedoms are violated shall have an affected remedy, to ensure that any person claiming a remedy shall have their rights determined by competent authorities and to develop the possibilities of judicial remedy, and to ensure that competent authorities will enforce such remedies when granted.

Question (2) What duties could be included for the Government and private entities to ensure respect for individuals' right to a healthy environment?

The Discussion Paper asks what duties could be included for the Government and for private entities to ensure respect for individuals' right to a healthy environment. The Discussion Paper clarifies that the ACT Government is seeking input from the public about *additional* obligations or duties that could be included, in addition to obligations or duties that already exist. In this section, we identify current obligations and duties that already exist under the Human Rights Act for both ACT Government and private entities, and make recommendations for additional obligations and duties that could be included in the Human Rights Act to protect the right to a healthy environment.

(1) Current obligations and duties

(a) ACT Government

The Discussion Paper identifies obligations and duties that already exist under the Human Rights Act. For example, public authorities have a duty to ensure that everyone is entitled to enjoy the right to education and the right to work without discrimination.[117] In addition, obligations and duties already exist under environmental protection legislation, listed at Appendix A of the Discussion Paper. For example, a person administering the *Environment Protection Act 1997* (ACT) (**EP Act**) must have regard to the principle of inter-generational equity (among other principles),[118] which means that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.[119]

In addition to the obligations and duties described in the Discussion Paper, the Human Rights Act also includes a positive duty for public authorities to act consistently with human rights, and to give proper consideration to relevant human rights when making decisions.[120] Public authority is defined to mean ACT Government bodies and people including ACT authorities, ACT Ministers, police officers exercising functions under ACT laws, and ACT Government employees, among others,[121] but does not include the ACT Legislative Assembly or a court (except when acting in an administrative capacity).[122] If the right to a healthy environment were included in the Human Rights Act, public authorities would be required to act consistently with, and consider, the right to a healthy environment in addition to other rights that are protected under the Act.

In addition, new ACT legislation is required to be scrutinised for its compatibility with the rights protected in the Human Rights Act.[123] If the right to a healthy environment were included in the Human Rights Act, this would mean that new legislation would be scrutinised for its compatibility with the right.

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[117] *Human Rights Act 2004* (ACT) s 27A(3)(a) and 27B(5), which relate to the right to education and the right to work respectively.
[118] *Environment Protection Act 1997* (ACT) s 3D(1).
[119] Ibid, s 3D(2).
[120] *Human Rights Act 2004* (ACT), s 40B(1).
[121] Ibid, s 40(1).
[122] Ibid, s 40(2).
[123] Ibid, Part 5.

(b) Private entities

Other entities, including private entities, can choose to be subject to the obligations of public authorities.[124] However, there is no requirement for them to do so. The result is that most private entities in the ACT do not have an obligation to act consistently with, or consider, the human rights protected under the Human Rights Act.

(2) Recommendations on additional obligations and duties

In response to Question 5 of these submissions, we have recommended that the ACT Government implement the recommendations from our Environment Protection Agency (**EPA**) report (**Annexure B**) (**recommendation 14**), our report on climate reform (**Annexure C**) (**recommendation 15**), and our submission on the draft Planning Bill 2022 (**Annexure F**) (**recommendation 16**). If the ACT Government implements these recommendations, this would involve introducing additional duties for the ACT Government. These are as follows:

Consistent with recommendation 3 of our national report on EPAs (**Annexure B**) and recommendation 16 of our national report on climate reform (**Annexure C**), we recommend amending the *Environment Protection Act 1997* (ACT) to establish additional duties for the ACT EPA to:

- protect and improve the state of the environment and human health from the harmful effects of pollution, destruction and waste through assessment, enforcement, monitoring and reporting and standard setting, which is not overridden by other departments;
- achieve environmental justice;
- act consistently with the right to a healthy environment;
- implement legislation in accordance with principles of ecologically sustainable development; and
- to take action to prevent and mitigate greenhouse gas pollution and take all actions necessary to reduce the impacts of climate change.

Consistent with our national report on climate reform (**Annexure C**), we recommend that the ACT Government consider implementing the following additional duties:

- amend relevant legislation to legislate a clear duty to require that decision-makers must act consistently with the greenhouse gas emissions and renewable energy targets legislated in the *Climate Change and Greenhouse Gas Reduction Act 2010* (ACT) (**CCGGR Act**) (recommendation 6);
- amend the *Public Sector Management Act 1994* (ACT) to insert additional public sector duties to consider and report on climate change risks and impacts, and to act consistently with the best-available science, when exercising powers (recommendation 7);
- amend the CCGGR Act to include a general obligation to ensure that consideration of climate change (mitigation and adaptation) and prohibition on acting inconsistently with the best available science are integrated into a wide range of decision-making processes under other relevant laws, which should include recognition of First Nations and Indigenous knowledge and science (recommendation 8);
- amend relevant legislation to require decision-makers to act consistently with advice provided by the ACT Climate Change Council (recommendation 15);
- require Climate Impacts Statements for new laws and policies, and require Climate Impact Statements to include impacts on human rights (recommendation 56).

[124] Ibid, s 40D.

Consistent with our submission on the Planning Bill 2022 (**Annexure F**), we recommend:

- climate change should be a mandatory consideration for all decisions made, and powers and functions exercised, under the Bill (recommendation 14);
- decision-makers should be required to consider the cumulative impacts of a proposed development (recommendation 19);
- the Bill should include provisions requiring decision-makers to consult with representative Aboriginal organisations for key planning decisions including development applications, and should incorporate the principle of free, prior and informed consent (recommendation 22);
- the Bill should introduce a duty on decision-makers to refuse development applications for proposals that will have a significant adverse impact on Aboriginal cultural heritage (recommendation 24);
- the Territory Planning Authority should be required to continuously disclose environmental risks of development to the public (recommendation 27).

In addition to recommending the above additional duties, we make the following recommendations.

(a) ACT Government

Recommendation 5: Incorporate the five State obligations on the right to a healthy environment established in the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador).

Article 11 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights signed at San Salvador in 1988 (**Protocol of San Salvador**) establishes the right to a healthy environment. Article 11 provides that everyone shall have the right to live in a healthy environment and to have access to basic public services, and that the States Parties shall promote the protection, preservation, and improvement of the environment.

The Working Group on the Protocol of San Salvador – established in 2010 to examine the periodic reports of the States Parties established in the Protocol - indicated that the right to a healthy environment involved the following five State obligations:[125]

(a) guaranteeing everyone, without any discrimination, a healthy environment in which to live;
(b) guaranteeing everyone, without any discrimination, basic public services;
(c) promoting environmental protection;
(d) promoting environmental conservation; and
(e) promoting improvement of the environment.

We recommend that the ACT Government incorporate these obligations into the right to a healthy environment if it is included in the Human Rights Act.

[125] Working Group on the Protocol of San Salvador, *Progress Indicators: Second Group of Rights*, OEA/Ser.L/XXV.2.1, GT/PSS/doc.9/13 (5 November 2013) at [26].

Recommendation 6: Legislate a duty in relevant ACT environment and planning legislation to consider the impacts on human rights of matters that affect the environment.

The UN Special Rapporteur on Human Rights and the Environment has identified 16 Framework Principles on Human Rights and the Environment (**Framework Principles**) (**Annexure A**). The Framework Principles are 16 basic obligations of States under international human rights law as they relate to the enjoyment of a clean, healthy and sustainable environment. The Framework Principles do not establish new legal obligations. Rather, they are derived from obligations that States already have under international human rights treaties and other sources of international law.[126] In **recommendation 13** (our response to **Question 5**) we recommend that the ACT Government utilise the Framework Principles as a guide in implementing the right to a healthy environment.

Framework Principle 8 is that, in order to avoid undertaking or authorising actions with environmental impacts that interfere with the full enjoyment of human rights, States should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights. This obligation arises out of a number of international human rights sources including commentary from the Committees for the ICESCR and for the *International Convention on the Elimination of All Forms of Racism* (**ICERD**) to which Australia is a party, and environmental treaties to which Australia is a party such as the *Convention on Biological Diversity*.[127] These sources bind the federal government, and it would therefore be consistent with best practice for the ACT Government to implement this recommendation.

In the ACT context, this could include, for example, amending the *Planning and Development Act 2007* (ACT) (**P&D Act**) – or the Planning Bill 2022 (which is intended to replace the P&D Act) – to include an additional duty for decision-makers to consider the impacts of a proposed development on human rights, and for proponents to report on human rights impacts when preparing environmental impact statements.

(b) Private entities

Recommendation 7: Private entities should have the same obligations as public authorities under the Human Rights Act.

As noted above, most private entities in the ACT do not have an obligation to act consistently with, or consider, the human rights protected under the Human Rights Act. This leaves people in the ACT vulnerable to breaches of their human rights by private entities, but no recourse to an accessible remedy for such breaches.

In the environmental context, it is particularly vital for remedies to be available for violations of human rights. Private businesses are a major contributor to the destruction of ecosystems and the loss of biodiversity, through deforestation, land-grabbing, extracting, transporting and burning fossil fuels, industrial agriculture, intensive livestock operations, industrial fisheries, large-scale mining and the commodification of water and nature.

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[126] See *Selected Sources for Framework Principles on Human Rights and the Environment* (February 2018) accessible at <https://www.ohchr.org/sites/default/files/Documents/Issues/Environment/SREnvironment/ListSourcesFrameworkPrinciples.pdf>.

[127] *Ibid,* Principle 8, 14-16.

In the absence of clear laws that require businesses to protect the right to a healthy environment, businesses should endeavour to act consistently with human rights including the right to a healthy environment, and to take human rights into account when making decisions or taking actions that will have an impact on the environment. As noted in the *UN Guiding Principles on Business and Human Rights*, businesses play an important role as specialised organs of society performing specialised functions, and are required to comply with all applicable laws and to respect human rights.[128] Private entities ought to have regard to the *UN Guiding Principles on Business and Human Rights* for guidance on how to comply with these obligations.

However, the *UN Guiding Principles on Business and Human Rights* also confirm that States have obligations under international human rights law to respect, protect and fulfil human rights and fundamental freedoms, and to protect against human rights abuse within their territory by third parties including businesses.[129]

For example, the UN Human Rights Committee has declared that, in order for States to fulfil their obligation to respect and ensure the right to life under Article 6 of the ICCPR, States must preserve the environment and protect it against harm, pollution and climate change caused by both public and private actors. The right to life is protected in the Human Rights Act.[130] Therefore, this obligation also extends to the ACT Government.

For these reasons, the ACT Government must take steps to ensure that the Human Rights Act applies to private businesses as well as government bodies.

In April 2022, EDO submitted a submission to the ACT Legislative Assembly's Standing Committee on Justice and Community Safety, which was investigating amending the Human Rights Act to introduce an accessible and informal complaints mechanism (**Annexure E**). One of our recommendations was that private entities should have the same obligations as public authorities under the Human Rights Act and should be capable of being the subject of a human rights complaint (Recommendation 3). As this recommendation has not been adopted by the ACT Government, we are re-stating this recommendation here.

Recommendation 8: Implement the recommendations of the UN Special Rapporteur on Human Rights and the Environment on additional duties for private businesses.

The UN Special Rapporteur on Human Rights and the Environment has produced thematic reports in relation to each of the current substantive elements of the right to a healthy environment. We have reviewed these reports to identify the Special Rapporteur's recommendations for businesses with respect to the right to a healthy environment. The results of our review are below.

We encourage the ACT Government to review each of the Special Rapporteur's thematic reports and consider implementing the Special Rapporteur's recommendations on additional duties for businesses.

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[128] UN Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (United Nations, 2011), endorsed by the UN Human Rights Council, *Resolution 17/4 – Human rights and transnational corporations and other business enterprises*, UN Doc A/HRC/RES/17/4 (6 July 2011).

[129] Ibid, p 3.

[130] *Human Rights Act 2004* (ACT), s 9.

Safe climate[131]

The Special Rapporteur recommends that State governments impose responsibilities on businesses to reduce greenhouse gas emissions from their activities and their subsidiaries, products and services, suppliers, and to publicly disclose their emissions, climate vulnerability and risk stranded assets.[132] The Special Rapporteur also recommends that governments ensure that they provide accessible remedies to people affected by the activities of private businesses.[133]

Access to safe drinking water and sanitation[134]

The Special Rapporteur recommends that businesses should shift economic activities away from water-consumption sectors, and increase efficiency in water-use, particularly in agriculture when, for example, utilising wastewater.[135]

The Special Rapporteur also recommends that State governments should require businesses to pay for water treatment, and to incorporate green measures such as rainwater harvesting in construction.[136]

Healthy biodiversity and ecosystems[137]

The Special Rapporteur recommends that businesses:[138]

- must adopt human rights policies, conduct human rights due diligence, establish transparent and effective grievance mechanisms, remedy human rights violations for which they are directly responsible and work to influence other actors to respect human rights where relationships of leverage exist;
- should comply with the *UN Guiding Principles on Business and Human Rights*, implementing the UN "Protect, Respect and Remedy" Framework as they apply to activities carried out by the business, its subsidiaries or its supply chain that could damage or degrade the biosphere;
- should prioritise respect for the rights of Indigenous Peoples and local communities and refuse to seek or exploit concessions in protected areas;
- should reduce adverse impacts on ecosystems and biodiversity from their own activities, subsidiaries and suppliers, reduce adverse impacts on nature from the use of their products and services, and publicly disclose their adverse impacts on nature;
- should support, rather than oppose, laws and policies intended to effectively conserve, protect, restore and ensure the sustainable use of ecosystems and biodiversity.

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[131] David R Boyd, Special Rapporteur on Human Rights and the Environment, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/74/161 (15 July 2019).
[132] Ibid, [72].
[133] Ibid.
[134] David R Boyd, Special Rapporteur on Human Rights and the Environment, *Human rights and the global water crisis: water pollution, water scarcity and water-related disasters*, UN Doc A/HRC/46/28 (19 January 2021)
[135] Ibid, [89](p).
[136] Ibid, [89](q) and (s).
[137] David R Boyd, Special Rapporteur on Human Rights and the Environment, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/75/161 (15 July 2020).
[138] Ibid, [76]-[77].

Healthy and sustainably produced food[139]

The Special Rapporteur recommends that businesses must adopt human rights policies, conduct human rights due diligence, establish transparent and effective grievance mechanisms, remedy human rights violations for which they are directly responsible, and work to influence other actors to respect human rights where relationships of leverage exist.[140]

Other substantive elements

The Special Rapporteur's thematic reports on clean air[141] and toxic free environments[142] do not appear to contain any guidance on duties for businesses.

[139] David R Boyd, Special Rapporteur on Human Rights and the Environment, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/76/179 (19 July 2021).
[140] Ibid, [77]-[78].
[141] David R Boyd, Special Rapporteur on Human Rights and the Environment, *Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/HRC/40/55 (8 January 2019).
[142] David R Boyd, Special Rapporteur on Human Rights and the Environment, *The right to a clean, healthy and sustainable environment: non-toxic environment*, UN Doc A/HRC/49/53 (12 January 2022).

Question (3) What additional measures could be considered to ensure protection of the right to healthy environment for overburdened people and communities?

The Discussion Paper asks what additional measures could be considered to ensure protection of the right to a healthy environment for vulnerable groups.

As noted earlier in these submissions, overburdened people and communities – including women, children, people who are financially disadvantaged, First Nations Peoples and communities, LGBTIQA+ communities, older people, people with disabilities, people from a racial or ethnic minority, and people displaced by natural disasters – are at the most at risk of environmental harm, with subsequent impacts on their health and wellbeing. However, they are also often the least responsible for perpetuating such harms.

We have set out below relevant general principles of international law and the ACT Government's obligations with respect to overburdened people and communities.

(1) Current obligations and duties

As noted earlier in these submissions, the UN Special Rapporteur on Human Rights and the Environment has developed the Framework Principles, which are 16 basic obligations of States under international human rights law as they relate to the enjoyment of a clean, healthy and sustainable environment (**Annexure A**). The Framework Principles do not establish new legal obligations. Rather, they are derived from obligations that States already have under international human rights treaties and other sources of international law.[143] In **recommendation 13** (our response to **Question 5**) we recommend that the ACT Government utilise the Framework Principles as a guide in implementing the right to a healthy environment.

Relevantly to Question 3, **Framework Principle 14** is that States have an obligation to take additional measures to protect those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities.[144] This obligation arises out of a number of international human rights sources, including art 27 of the ICCPR.[145] Art 27 is incorporated into s 27 of the Human Rights Act, which protects the rights of minorities.[146] Therefore, the ACT Government also has an obligation to take additional measures to protect people who are at the most risk of environmental harm.

In addition, **Framework Principle 3** is that States should prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment.[147] This obligation arises out of international human rights sources such as art 2(1) and art 26 of the ICCPR.[148] Arts 2(1) and 26 are incorporated into s 8 of the

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[143] See *Selected Sources for Framework Principles on Human Rights and the Environment* (February 2018) accessible at <https://www.ohchr.org/sites/default/files/Documents/Issues/Environment/SREnvironment/ListSourcesFrameworkPrinciples.pdf>.

[144] John H Knox, Special Rapporteur on Human Rights and the Environment, *Framework principles on human rights and the environment*, UN Doc. A/HRC/37/59 (24 January 2018), Principle 14, pp 16-18.

[145] *Selected Sources for Framework Principles on Human Rights and the Environment* (February 2018), Principle 14, pp 26-29.

[146] *Human Rights Act 2004* (ACT), Schedule 1, items 30 and 31.

[147] John H Knox, Special Rapporteur on Human Rights and the Environment, *Framework principles on human rights and the environment*, UN Doc. A/HRC/37/59 (24 January 2018), Principle 3, pp 8-9.

[148] *Selected Sources for Framework Principles on Human Rights and the Environment* (February 2018), Principle 3, pp 3-6.

Human Rights Act, which protects the right to enjoy rights without distinction and the right to equality before the law and equal protection.[149]

(2) Recommendations on additional measures to protect overburdened people and communities

In response to Question 5 in these submissions, we have recommended that the ACT Government implement all of EDO's recommendations in our national report *Effective Independent Environmental Protection Agencies in Australia* (**Annexure B**) (**recommendation 14**). We note that these recommendations are aimed at improving environmental justice which, if implemented by government, will improve substantive and procedural rights of overburdened people and communities who are at the greatest risk of environmental harm. For example, recommendation 2 of this report is that EPAs in Australia (including the ACT EPA) should be underpinned by an environmental justice framework that acknowledges and addresses environmental racism, meaningfully defines 'environmental justice', legislatively enshrines mechanisms to achieve environmental justice, and has a proper foundation in principles of human rights under international law.

We make the following recommendations in addition to recommendation 14.

Recommendation 9: Pursue the recommendations of the UN Special Rapporteur on Human Rights and the Environment in Principles 3 (obligation to prohibit discrimination) and 14 (obligation to take additional measures to protect overburdened people from environmental harm) of the *Framework Principles on Human Rights and the Environment*.

As a starting point, we recommend that the ACT Government consider pursuing the Special Rapporteur's recommendations in Principles 3 and 14, which are:[150]

- States should ensure that their laws and policies take into account the ways that some parts of the population are more susceptible to environmental harm, and the barriers some face to exercising their human rights related to the environment;
- States should develop environmental education, awareness and information programmes to overcome obstacles such as illiteracy, minority languages, distance from government agencies and limited access to information technology, in order to ensure that everyone has effective access to such programmes and to environmental information in forms that are understandable to them;
- States should also take steps to ensure the equitable and effective participation of all affected segments of the population in relevant decision-making, taking into account the characteristics of the vulnerable or marginalized populations concerned;
- States should ensure that their legal and institutional frameworks for environmental protection effectively protect those who are in vulnerable situations; and
- States must comply with their obligations of non-discrimination, as well as any other obligations relevant to specific groups.

In implementing these recommendations, it is important to acknowledge that overburdened people and communities may experience consultation fatigue from being frequently consulted to provide input on a variety of government programs and policies. Consultation takes up time and resources, which may already be limited, and is often done without financial incentive or support.

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[149] *Human Rights Act 2004* (ACT), Schedule 1, items 2 and 3.

[150] John H Knox, Special Rapporteur on Human Rights and the Environment, *Framework principles on human rights and the environment*, UN Doc. A/HRC/37/59 (24 January 2018), Principle 14, [42]-[45].

However, the Human Rights Act should at least be designed to facilitate participation by overburdened people and communities.

We further note that implementation of these recommendations will vary between each of the ACT's laws and policies.

For example, overburdened people and communities often experience greater barriers to accessing the procedural elements of the right to a healthy environment, namely the right to access environmental information, the right to participate in environmental decision-making, and the right to access remedies for environmental harms.

In June 2022, EDO submitted a submission to the ACT Government in relation to the draft *Planning Bill 2022* (ACT) (**Annexure F**), in which we identified that the Bill – and the ACT's planning system more generally – appears to be designed to be accessible by certain types of people in the ACT, to the exclusion of other overburdened people and communities.[151] We made a total of 35 recommendations that, if incorporated, will ensure that planning and development in the ACT is consistent with human rights including the right to a healthy environment. Our key recommendations include, for example, the Bill should be designed to enable overburdened individuals and communities to enjoy access to environmental benefits and access to procedural rights, including the ability to participate in the planning system and to have their voices heard (Recommendation 13). At the time of writing these submissions, we are still waiting to see how the ACT Government will address and, if appropriate, incorporate our recommendations into the next iteration of the Bill.

Recommendation 10: Implement the recommendations of the UN Special Rapporteur on Human Rights and the Environment on additional measures to protect the right to a healthy environment for overburdened people and communities.

The UN Special Rapporteur on Human Rights and the Environment has produced thematic reports in relation to each of the current substantive elements of the right to a healthy environment. We have reviewed these reports to identify the Special Rapporteur's recommendations for additional measures to protect the right to a healthy environment for overburdened people and communities. The results of our review are below.

We encourage the ACT Government to review each of the Special Rapporteur's thematic reports and consider implementing the Special Rapporteur's recommendations on these additional measures.

Clean air[152]

The Special Rapporteur recommends that States should:

- provide warnings when pollution poses an acute threat, especially for overburdened people and communities;[153]
- ensure the availability of free public transport;[154]

[151] Environmental Defenders Office, *Submission on the Planning Bill 2022*, Submission to the Environment Planning and Sustainable Development Directorate (17 June 2022).
[152] David R Boyd, Special Rapporteur on Human Rights and the Environment, *Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/HRC/40/55 (8 January 2019).
[153] Ibid, [67].
[154] Ibid, [99].

- implement building codes, rules and standards that substantially increase energy efficiency in buildings;[155]
- create laws, policies and programmes to discourage or prohibit burning of crop residue or agricultural waste, and assist farmers to shift to cleaner practices;[156] and
- accelerate programmes to replace solid fuels and kerosene with cleaner energy and clean technologies.[157]

Safe climate[158]

The Special Rapporteur recommends that State governments must:[159]

- avoid discriminatory and retrogressive measures; and
- ensure fair, legal, and durable solutions for migrants and displaced persons.

Non-toxic environments[160]

The Special Rapporteur recommends that State governments must:[161]

- maintain substantive environmental standards that are non-discriminatory and non-retrogressive;
- make full reparation to victims and community members who suffer harm from environmental degradation, which includes compensation;
- consider close consultation with communities for remedying environmental degradation acts and prevent similar transgressions in the future;
- provide adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution.

Access to safe drinking water and sanitation[162]

The Special Rapporteur recommends, in relation to Indigenous Peoples, that States should:[163]

- enable Indigenous Peoples to apply customary laws and traditional ecological knowledge when managing water resources;
- pass legislation requiring free, prior, and informed consent from Indigenous groups in regard to projects that could damage water resources in their territories.

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[155] Ibid, [112](p).
[156] Ibid, [122](r).
[157] Ibid, [114].
[158] David R Boyd, Special Rapporteur on Human Rights and the Environment, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/74/161 (15 July 2019).
[159] Ibid, [65]-[68].
[160] David R Boyd, Special Rapporteur on Human Rights and the Environment, *The right to a clean, healthy and sustainable environment: non-toxic environment*, UN Doc A/HRC/49/53 (12 January 2022).
[161] Ibid, para [51]-[59].
[162] David R Boyd, Special Rapporteur on Human Rights and the Environment, *Human rights and the global water crisis: water pollution, water scarcity and water-related disasters*, UN Doc A/HRC/46/28 (19 January 2021)
[163] Ibid, [89](v) and (w).

Healthy biodiversity and ecosystems[164]

In relation to First Nations Peoples, the Special Rapporteur recommends:

- First Nations Peoples can make large contributions to sustainable ecosystem use through the recognition of their rights, and that recognition of traditional knowledge and systems has proved effective at conserving nature;[165]
- biodiversity financing mechanisms should have human rights safeguards including payments for ecosystem services;[166]
- States should give priority to recognising land title, tenures, and rights, acknowledging different customs and systems;[167]
- States should ensure effective participation of First Nations Peoples in creating protected areas and continuing access to traditional territories;[168]
- a fair share of benefits from conservation initiatives should be provided;[169]
- States should promote and protect traditional knowledge;[170]
- States should provide effective and fair redress should be provided for communities that have had their rights violated in the past.[171]

In relation to women, the Special Rapporteur recommends that specialised knowledge from women can be used to address biodiversity conservation through empowerment initiatives, and that States should ensure a gender-based approach to public participation and all conservation efforts.[172]

Healthy and sustainably produced food[173]

The Special Rapporteur recommends that States:

- implement specific legal and policy measures to protect the land rights of those who practice nomadic, transhumance and hunter-gatherer lifestyles, including their right to have access to traditional forest habitats and to use land seasonally for grazing;[174]
- take appropriate measures to promote and protect the traditional knowledge, innovation and practices of peasants and other people working in rural areas;[175]
- promote agroecological practices to improve environmental impacts and improve the livelihoods of overburdened people and communities.[176]

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[164] David R Boyd, Special Rapporteur on Human Rights and the Environment, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/75/161 (15 July 2020).
[165] Ibid, [57] and [69](g).
[166] Ibid [69](e).
[167] Ibid, [72]
[168] Ibid.
[169] Ibid.
[170] Ibid.
[171] Ibid [92](c).
[172] Ibid, [58] and [69](b) and (f).
[173] David R Boyd, Special Rapporteur on Human Rights and the Environment, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/76/179 (19 July 2021).
[174] Ibid, [61].
[175] Ibid, [73].
[176] Ibid, [80].

Recommendation 11: The right to a healthy environment should be consistent with the principles of inter- and intragenerational equity.

Intergenerational equity is defined in the EP Act as meaning that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.[177] Intragenerational equity does not appear to be defined in any ACT legislation (that we are aware of), but it is defined by the UN as being concerned with equity between people of the same generation, and that it aims to assure justice among human beings that are alive today.[178]In relation to intergenerational equity, the UN Special Rapporteur on Human Rights and the Environment has produced a report on the relationship between children's rights and the environment, in which the Special Rapporteur reports on the obligations of States and private entities with respect to children.

With respect to State obligations, the Special Rapporteur reports that States should:

- ensure, through children's rights impact assessments, that decision-making will not unacceptably harm children's rights;[179]
- consider and implement advice from expert agencies such as the World Health Organisation and UNICEF;[180]
- provide children with the ability to influence policy and protect themselves from harm including by:
    - providing environmental education to children;[181]
    - collecting information on the effects of environmental harm on children and publishing information in a manner that is accessible, relevant and understandable for children and adults;[182]
    - facilitating consultation with children to allow them to provide their perspectives on environmental matters freely and without risk of reprisal;[183]
    - providing effective remedies to children including by providing child-appropriate information, advocacy and procedures, with regard to the fact that children are more vulnerable than adults to the abuse of their rights.[184]

We encourage the ACT Government to consider implementing these recommendations in order to ensure that the right to a healthy environment is consistent with the principle of intergenerational equity. We further note that the ACT Government already has obligations with respect to children under the Human Rights Act,[185] and that implementation of the Special Rapporteur's recommendations would be consistent with the ACT Government's existing obligations.

[177] *Environment Protection Act 1997* (ACT) s 3(2).
[178] UN Environment Programme, 'intragenerational equity', LEO Thesaurus accessed online at <https://leap.unep.org/knowledge/glossary/intragenerational-equity>.
[179] Ibid, [58].
[180] Ibid, [73].
[181] Ibid, [40]-[41].
[182] Ibid, [44]-[45].
[183] Ibid, [47]-[50].
[184] Ibid, [51]-[53].
[185] *Human Rights Act 2004* (ACT) ss 11, 20, 22(3) and 27A.

Question (4) How could the right to a healthy environment recognise the importance of Country for First Nations Peoples?

The Discussion Paper asks how the right to a healthy environment could recognise the importance of Country for First Nations Peoples. We have set out our views on this question below.

First Nations are at greater risk of environmental harm from destroyed, degraded and polluted environments, due to their intimate spiritual, cultural and historical connection to their Country. The Special Rapporteur also identifies First Nations Peoples as often at greater risk of environmental harm, particularly because they rely on Country for their material and cultural existence, but face increasing pressure from government and businesses seeking to exploit their resources and are often marginalised from decision-making processes and their rights are often ignored or violated.[186]

According to the 2021 Census, 8,949 people, or 3.2% of the ACT population, identify as Aboriginal and/or Torres Strait Islander.[187]

As noted earlier in these submissions, it is not the role of EDO to speak on behalf of First Nations People. However, we have set out below relevant principles of international law and the ACT Government's obligations with respect to First Nations People.

(1) Current obligations and duties

The ACT Government's obligations with respect to First Nations People arise from a number of sources, including the following:

- section 27(1) of the Human Rights Act, which protects the right of all people in the ACT to enjoy culture, religion and/or language; and
- section 27(2) of the Human Rights Act, which protects the distinct cultural rights of First Nations Peoples in the ACT to maintain, control, protect and develop their cultural heritage and distinctive spiritual practices, observances, beliefs and teachings, languages and knowledge, and kinship ties, and to have 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;
- the ACT Aboriginal and Torres Strait Islander 2019-2028 Agreement, pursuant to which the ACT Government has agreed to deliver a number of outcomes aimed at improving quality of life for First Nations Peoples;
- the ACT Reconciliation Action Plan, which contains the ACT Government's reconciliation initiatives;
- the ACT Government's Implementation Plan for the National Agreement on Closing the Gap; and
- international human rights law, as explained in Framework Principle 15 (discussed below).

[186] John H Knox, Special Rapporteur on Human Rights and the Environment, *Framework principles on human rights and the environment*, UN Doc. A/HRC/37/59 (24 January 2018) at [41](d), p 17.
[187] Australian Bureau of Statistics, *Australian Capital Territory: 2021 Census Aboriginal and/or Torres Strait islander people QuickStats* <https://www.abs.gov.au/census/find-census-data/quickstats/2021/IQS8>.

Framework Principle 15 of the Special Rapporteur's Framework Principles is that States have obligations to indigenous peoples and members of traditional communities, including to:[188]

- recognise and protect their rights to the lands, territories and resources that they have traditionally owned, occupied or used;
- consult with them and obtaining their free, prior and informed consent before relocating them or taking or approving any other measures that may affect their lands, territories or resources;
- respect and protect their traditional knowledge and practices in relation to the conservation and sustainable use of their lands, territories and resources;
- ensure that they fairly and equitably share the benefits from activities relating to their lands, territories or resources.

In relation to the last point above, it is important to clarify that this recommendation is to be interpreted as requiring governments to ensure that any benefits from activities relating to the use of First Nations lands, territories or resources – including extraction activities and the agreed use of traditional knowledges, which remains the property of First Nations Peoples – are to be fairly and equitably shared with First Nations Peoples.[189]

The obligations in Framework Principle 15 arise out of international human rights sources including the UN Declaration on the Rights of Indigenous Peoples (**UNDRIP**) and art 27 of the ICCPR.[190] The primary sources of s 27 of the Human Rights Act, which protects the rights of minorities, are art 25 and 31 of UNDRIP, and s 27 of the ICCPR.[191] Therefore, the obligations in Framework Principle 15 also apply to the ACT Government. In addition, the ACT Government also has obligations under Framework Principle 3, which we set out in response to **Question 3** of these submissions, and which, as we explained earlier, are incorporated into s 8 of the Human Rights Act.

(2) Recommendations on how the right to a healthy environment can recognise the importance of Country to First Nations Peoples

The EDO cannot make any recommendations on behalf of local First Nations Peoples and the importance of Country in the ACT to them. However, we note that the Special Rapporteur has made some broad recommendations addressing how States may meet their obligations under Framework Principle 15, which are as follows:[192]

- States must recognise and protect the rights of First Nations Peoples to the lands, territories and resources that they have traditionally owned, occupied or used, including those to which they have had access for their subsistence and traditional activities;
- even without formal recognition of property rights and delimitation and demarcation of boundaries, States must protect against actions that might affect the value, use or enjoyment of the lands, territories or resources, including by instituting adequate penalties against those who intrude on or use them without authorisation;

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[188] John H Knox, Special Rapporteur on Human Rights and the Environment, *Framework principles on human rights and the environment*, UN Doc. A/HRC/37/59 (24 January 2018), Principle 15, pp 18-20.
[189] *Indigenous and Tribal Peoples Convention*, 1989 (No. 169) Art 15(2); *Convention on Biological Diversity*, 1992, Art 8(j); John H Knox, Special Rapporteur on Human Rights and the Environment, *Framework principles on human rights and the environment*, UN Doc. A/HRC/37/59 (24 January 2018) at 20 [53].
[190] *Selected Sources for Framework Principles on Human Rights and the Environment*, Principle 14, pp 30-32.
[191] *Human Rights Act 2004* (ACT), Schedule 1, items 30 and 31; also see the note to Schedule 1.
[192] John H Knox, Special Rapporteur on Human Rights and the Environment, *Framework principles on human rights and the environment*, UN Doc. A/HRC/37/59 (24 January 2018), Principle 15, [49]-[53].

- States must ensure the full and effective participation of First Nations Peoples in decision-making on the entire spectrum of matters that affect their lives;
- States should assess the environmental and social impacts of proposed measures and ensure that all relevant information is provided to First Nations Peoples in understandable and accessible forms (see also Framework Principles 7 and 8);
- consultations with First Nations Peoples should be in accordance with their customs and traditions, and occur early in the decision-making process (see also Framework Principle 9);
- the free, prior and informed consent of First Nations Peoples is generally necessary before the adoption or implementation of any laws, policies or measures that may affect them, and in particular before the approval of any project affecting their lands, territories or resources, including the extraction or exploitation of mineral, water or other resources, or the storage or disposal of hazardous materials;
- States should respect and protect the knowledge and practices of First Nations Peoples in relation to the conservation and sustainable use of their lands, territories and resources;
- States must ensure that any benefits from activities relating to the use of First Nations lands, territories or resources are to be fairly and equitably shared with First Nations Peoples;
- States must provide for effective remedies for violations of First Nations Peoples' rights (see also Framework Principle 10), and just and fair redress for harm resulting from any activities affecting their lands, territories or resources;
- First Nations Peoples should have the right to restitution or, if this is not possible, just, fair and equitable compensation for their lands, territories and resources that have been taken, used or damaged without their free, prior and informed consent.

In addition to the above, the ACT Government should ensure that Indigenous world views are incorporated into the right to a healthy environment. In order to do so, the ACT Government must consult with First Nations Peoples in a manner that is accessible and culturally appropriate. Some guidance on Indigenous world views can be taken the statement from the Indigenous authors of the *2021 State of the Environment Report*, which states:

> *In Indigenous world views, the health of the land, water, sky and people are deeply interconnected. If Country is sick, our people are sick. Healing Country means healing ourselves. Western systems of environmental management and science divide things into categories. The structure of the state of the environment (SoE) report reflects this western approach of categorisation. Writing the report involved many challenges for Indigenous authors, because Indigenous knowledge systems and ways of knowing, being and doing are holistic and do not always fit easily into western categories and systems that are too often perceived as superior. The Indigenous co-authors have worked to raise many issues, such as the gaps in the data and reporting on what the challenges are to ultimately assess the state of our countries through our eyes.*[193]

It is clear from this guidance that Indigenous world views are closely related to the rights of nature. If the ACT Government is interested in seeking the public's views on how the right to a healthy environment can recognise the importance of Country for First Nations People, it must

[193] Ian Cresswell, Terri Janke, Emma L. Johnston, 'Statement from the Indigenous Authors of the 2021 State of the Environment report' in Chapter titled 'Indigenous: Outlook and impact' in the *Australia State of the Environment 2021* (Report, 2021) accessed online at <https://soe.dcceew.gov.au/indigenous/outlook-and-impact>.

incorporate First Nations viewpoints into the right to a healthy environment, and should also consider the rights of nature (as recommended in **recommendation 1**).

In addition, we note that we have earlier recommended that the ACT Government implement all of EDO's recommendations in our national report *Effective Independent Environmental Protection Agencies in Australia* (**Annexure B**) (**recommendation 14**). We note that these recommendations are aimed at improving environmental justice which, if implemented by government, will improve substantive and procedural rights of First Nations Peoples who are often at the greatest risk of environmental harm. For example, recommendation 1 of this report is that EPAs in Australia (including the ACT EPA) should have a duty to develop and act in conformity with cultural protocols based on First Nations Lore and must have an underpinning in UNDRIP, in particular the principles of free, prior and informed consent and of self-determination.

Question (5) How could the ACT Government go about fulfilling the right to a healthy environment?

The Discussion Paper asks how the ACT Government could go about fulfilling the right to a healthy environment. It further asks how the right could be fulfilled while balancing other socially and economically beneficial activities. We have set out our views on this question below.

(1) How could the Government go about fulfilling the right to a healthy environment?

Recommendation 12: Review existing ACT laws and policies to assess their compatibility with the right to a healthy environment, and undertake law and policy reform where necessary to ensure they are compatible with the right.

As we have recommended in these submissions, the ACT Government should include the right to a healthy environment in the ACT Human Rights Act (see **Recommendation 2**, discussed in our response to **Question 1** in these submissions).

As also noted earlier in these submissions, if the right to a healthy environment is included in the Human Rights Act, public authorities will have a duty to act consistently with the right to a healthy environment, and to start taking the right to a healthy environment into account when making decisions under ACT laws. In addition, new ACT laws will be scrutinised for their compatibility with the right.

We also recommend that the ACT Government undertake a review into its existing laws and policies to assess their compatibility with the right to a healthy environment, and undertake law and policy reform where necessary to ensure they are compatible with the right. In doing so, each ACT Government directorate will need to undertake work to assess the laws and policies that they are responsible for administering. This should be a coordinated and methodical process across all directorates.

In particular, ACT Government directorates will need to consider whether existing laws and policies adequately protect or promote substantive elements of the right to a healthy environment – for example, whether the law adequately protects the rights of people in the ACT to a safe climate, the right to clean air, or the right to toxic free environments. They would also need to consider whether existing laws and policies protect and promote procedural elements of the right – for example, whether the law promotes public access to environmental information, or access to remedies for environmental harms.

Most of the relevant laws and policies to be reviewed are listed in the Appendix to the Discussion Paper, however we also recommend including consideration of the *Freedom of Information Act 2016* (ACT), the *Water Resources Act 2007* (ACT) and the CCGGR Act..

Recommendation 13: Utilise the 16 Framework Principles on Human Rights and the Environment in order to implement the right to a healthy environment in accordance with international best practice. Further guidance can also be taken from reports of the Special Rapporteur on Human Rights on the Environment on best practices and on each of the currently recognised substantive elements of the right to a healthy environment.

As noted earlier in these submissions, the UN Special Rapporteur on Human Rights and the Environment has developed the Framework Principles, which are 16 basic obligations of States under international human rights law as they relate to the enjoyment of a clean, healthy and

sustainable environment.[194] The Framework Principles do not establish new legal obligations. Rather, but are derived from obligations that States already have under international human rights treaties and other sources of international law.[195]

We recommend that the ACT Government utilises the Framework Principles as a guide in implementing the right to a healthy environment, as following the guidance in the Framework Principles will ensure that the ACT Government's implementation is consistent with international best practice.

Further guidance can also be taken from reports of the Special Rapporteur on Human Rights on the Environment on best practices,[196] and on each of the currently recognised substantive elements of the right to a healthy environment, namely clean air,[197] a safe climate,[198] access to safe drinking water and sanitation,[199] healthy biodiversity and ecosystems,[200] toxic free environments in which to live, work and play,[201] and healthy and sustainably produced food.[202]

Recommendation 14: Implement the recommendations in EDO's national report *Implementing Effective Independent Environmental Protection Agencies in Australia: Best Practice Environmental Governance for Environmental Justice* (2022).

In January 2022, EDO published a report on implementing effective EPAs in Australia, titled: *Implementing Effective Independent Environmental Protection Agencies in Australia: Best practice environmental governance for environmental justice* (**Annexure B**). The report makes nine key recommendations for how EPAs in Australia can be implemented and reformed to better protect the environment and human health, with a particular focus on achieving environmental justice.

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[194] John H Knox, Special Rapporteur on Human Rights and the Environment, *Framework principles on human rights and the environment*, UN Doc. A/HRC/37/59 (24 January 2018).
[195] See *Selected Sources for Framework Principles on Human Rights and the Environment* (February 2018) accessible at <https://www.ohchr.org/sites/default/files/Documents/Issues/Environment/SREnvironment/ListSourcesFrameworkPrinciples.pdf>.
[196] UN Special Rapporteur on Human Rights and the Environment, Right to a healthy environment: good practices, UN Doc A/HRC/43/53 (30 December 2019); *Annex III: Additional good practices in the implementation of the right to a safe, clean, healthy and sustainable environment,* UN Doc A/HRC/43/53/Annex III (13 December 2019).
[197] David R Boyd, Special Rapporteur on Human Rights and the Environment, *Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/HRC/40/55 (8 January 2019).
[198] David R Boyd, Special Rapporteur on Human Rights and the Environment, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/74/161 (15 July 2019).
[199] David R Boyd, Special Rapporteur on Human Rights and the Environment, *Human rights and the global water crisis: water pollution, water scarcity and water-related disasters,* UN Doc A/HRC/46/28 (19 January 2021).
[200] David R Boyd, Special Rapporteur on Human Rights and the Environment, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/75/161 (15 July 2020).
[201] David R Boyd, Special Rapporteur on Human Rights and the Environment, *The right to a clean, healthy and sustainable environment: non-toxic environment*, UN Doc A/HRC/49/53 (12 January 2022).
[202] David R Boyd, Special Rapporteur on Human Rights and the Environment, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/76/179 (19 July 2021).

Environmental justice is a social movement that addresses the disproportionate impact of environmental harms – including harm from climate change, pollution, extractive industries, and natural disasters – on overburdened people and communities.

Environmental justice requires that the right to a healthy environment be recognised and implemented equitably for all citizens.[203]

Given the inherent links between environmental justice and the right to a healthy environment, law reform aimed at improving environmental justice in the ACT will also lead to improvements in the ACT's implementation of the right to a healthy environment. Further, an effective independent EPA would help realise the substantive elements of the right to a safe climate, clean air, safe drinking water, and toxic-free environments in which to live, work and play.

For this reason, we encourage the ACT Government to consider implementation of the recommendations in our national report on *Implementing Effective Independent Environmental Protection Agencies in Australia*.

Recommendation 15: Implement the recommendations in EDO's national report *A Roadmap for Climate Reform* (2022).

One of the substantive elements of the right to a healthy environment is a safe climate.[204]

In July 2022, EDO published a national report on climate change titled *A Roadmap for Climate Reform* (**Annexure C**). The report sets out five opportunities, comprising 58 recommendations which are EDO's proposed solutions to the climate crisis and establishing strong national climate law.

We note that most of our recommendations are aimed at national law reform. In addition, to the extent that our recommendations can be incorporated into ACT laws and policies, we further note that many of our recommendations have already been implemented in the ACT, which is a leading jurisdiction on climate change.

In addition to the steps that the ACT Government has already taken in relation to climate change, we encourage the ACT Government to consider implementation of the recommendations in our national report.

Recommendation 16: Implement EDO's recommendations in our submission on the 'No Rights Without Remedy' petition to amend the *Human Rights Act 2004*, and our submission on the draft *Planning Bill 2022.*

As noted earlier in these submissions, EDO's submission to the ACT Legislative Assembly Standing Committee on Justice and Community Safety on *Inquiry into Petition 32-21 (No Rights Without Remedy)* dated 7 April 2022 (**Annexure E**) addresses the extent to which the Human Rights Act is consistent with the procedural elements of the right to a healthy environment. Our submission EPSDD on the draft *Planning Bill 2022* dated 17 June 2022 (**Annexure F**) addresses the extent to

[203] UN Development Programme, *Environmental Justice: Comparative Experiences in Legal Empowerment* (Report, June 2014) 7.
[204] David R Boyd, Special Rapporteur on Human Rights and the Environment, Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc A/74/161 (15 July 2019).

which the proposed Bill promotes environmental justice and is consistent with substantive and procedural elements of the right.

We recommend that the ACT Government considers implementing the recommendations contained in these submissions in order to fulfil the right to a healthy environment in the ACT.

(2) How could the right be fulfilled while balancing other socially and economically beneficial activities?

Recommendation 17: The right to a healthy environment should be treated as a relevant consideration that is weighted equally against other social and economic factors, interests and/or activities.

The ACT Government could fulfil the right to a healthy environment by ensuring that it is a relevant consideration that is weighted equally against other social and economic factors. For example, the goal of ecologically sustainable development is to integrate environmental, economic, social and equitable considerations in decision making. However, historically, an imbalance has led to environmental and social considerations being set aside for economic outcomes. The ACT Government must ensure that the same does not occur with the right to a healthy environment.

In any event, it is unlikely that balancing the right to a healthy environment with other social and economic factors will lead to a promotion of environmental human rights to the detriment of other interests or activities. All humans depend on a healthy environment, and so ultimately it is in everyone's interests to promote the right to a healthy environment.

For example, there is no evidence that recognising the right to a healthy environment has adverse effects on the economy. On the contrary, it contributes to ecologically sustainable development, which is impossible without a healthy environment. The right to a healthy environment has been used to prevent some unsustainable projects from going forward, such as proposed mines or tourism developments in sensitive ecosystems. In these circumstances, implementation of the right to a healthy environment may cause short-term economic costs - although these are often outweighed by social and environmental benefits. However, the capital that would have been invested in these unsustainable projects remains available and should be redirected towards greener alternatives, where the overall societal benefits are maximised and the principle of ecologically sustainable development is respected.

Similarly, the right to a healthy environment does not conflict with other human rights including the human right to development.[205] On the contrary, the international community has long recognised that sustainable development is only possible when environmental protection is fully integrated. Fifty years of experience with the right to a healthy environment makes clear that it works in harmony with other human rights, including the right to development. As the Special Rapporteur has illustrated with his report on more than 500 good practices related to recognising and implementing the right to a healthy environment,[206] the practice of many States demonstrates

[205] The right to development is recognised as a human right in the *Declaration on the Right to Development* (adopted by the UN General Assembly in resolution 41/128 on 4 December 1986).
[206] UN Special Rapporteur on Human Rights and the Environment, *Right to a healthy environment: good practices*, UN Doc A/HRC/43/53 (30 December 2019); *Annex III: Additional good practices in the implementation of the right to a safe, clean, healthy and sustainable environment,* UN Doc A/HRC/43/53/Annex III (13 December 2019).

how development and environmental protection can be pursued with positive results for a broad range of human rights.

To the extent that there are concerns about the right to a healthy environment being promoted to the detriment of other interests or activities, we note that section 28 of the Human Rights Act already operates to limit the implementation of human rights to *'reasonable limits set by laws that can be demonstrably justified in a free and democratic society'* and that this limitation would also apply to the right to a healthy environment. However, it is important to clarify that the reference in section 28 to laws that are demonstrably justified in a democratic society is a reference to laws that are made within a colonial legal system, however it may not always be appropriate for colonial law to limit the rights of First Nations Peoples.

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Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, in which he presents framework principles on human rights and the environment, addresses the human right to a safe, clean, healthy and sustainable environment and looks ahead to the next steps in the evolving relationship between human rights and the environment.

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Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

I. Introduction

1. The present report is the final report of the Special Rapporteur to the Human Rights Council. It presents framework principles on human rights and the environment, addresses the human right to a healthy environment and looks forward to the next steps in the evolving relationship between human rights and the environment.

2. The mandate was established in March 2012 by the Council in its resolution 19/10, in which it decided to appoint an independent expert with a mandate to study the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment and to identify and promote best practices relating to the use of human rights obligations and commitments to inform, support and strengthen environmental policymaking. John H. Knox was appointed to the position in August 2012. In his first report, presented to the Council in March 2013, he emphasized that human rights and the environment are interdependent (A/HRC/22/43). A safe, clean, healthy and sustainable environment is necessary for the full enjoyment of a vast range of human rights, including the rights to life, health, food, water and development. At the same time, the exercise of human rights, including the rights to information, participation and remedy, is vital to the protection of the environment.

3. Over the first two years of the mandate, the Independent Expert sought to map the human rights obligations relating to the environment in more detail. He held a series of regional consultations around the world and, with the help of attorneys and academics working pro bono, reviewed hundreds of statements of treaty bodies, regional human rights tribunals, special procedure mandate holders and other human rights authorities that had applied human rights norms to environmental issues. He described the statements in 14 reports, each of which addressed one source or set of sources. He found that despite the diversity of the sources, their views on the relationship of human rights law and the environment were remarkably coherent. His second report, presented in March 2014, summarized these views (A/HRC/25/53). Virtually every source reviewed identified human rights whose enjoyment was infringed or threatened by environmental harm, and agreed that States had obligations under human rights law to protect against such harm. The obligations included procedural obligations (such as duties to provide information, facilitate participation and provide access to remedies), substantive obligations (including to regulate private actors) and heightened obligations to those in particularly vulnerable situations.

4. On the basis of his research and regional consultations, the Independent Expert also identified good practices in the use of these obligations, and in his next report to the Council, presented in March 2015, he described more than 100 such good practices (A/HRC/28/61). He published more detailed descriptions of each of the good practices on the website of the Office of the United Nations High Commissioner for Human Rights (OHCHR), and made them available in a searchable database at http://environmentalrightsdatabase.org/.

5. In March 2015, in its resolution 28/11, the Human Rights Council decided to extend the mandate of John H. Knox as a special rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment for a period of three years. The Council encouraged him to continue to study the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment and to identify and promote good practices relating to those obligations. He has submitted reports on specific aspects of that relationship, including a report on climate change and human rights in 2016 (A/HRC/31/52), a report on biodiversity and human rights in 2017 (A/HRC/34/49), and a report on children's rights and the environment to the current session of the Council (A/HRC/37/58).

6. In resolution 28/11, the Council also encouraged the Special Rapporteur to promote and report on the realization of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, to disseminate his findings by continuing to give particular emphasis to practical solutions with regard to their implementation and to work on identifying challenges and obstacles to the full realization of such obligations. The Special Rapporteur presented a report in March 2016 with specific recommendations on implementation of the human rights obligations relating to the environment (A/HRC/31/53). In his second term, he has promoted implementation of the obligations in many ways, including by partnering with the United Nations Environment Programme on a series of judicial workshops on constitutional rights to a healthy environment, supporting the United Nations Institute for Training and Research in the development of an online course on human rights and the environment and working with the Universal Rights Group to develop a website for environmental human rights defenders, https://www.environment-rights.org/, as well as by undertaking country visits and receiving communications on violations.

II. Framework principles on human rights and the environment

7. To facilitate implementation of the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, the Special Rapporteur was urged to develop and disseminate guidance that clearly describes the relevant norms and is easy to understand and apply (see A/HRC/31/53, para. 69). In October 2017, the Special Rapporteur published draft guidelines on human rights and the environment and invited written comments. He also held a public consultation and an expert seminar, which included representatives of Governments, international organizations, civil society organizations and academics. He took into account the input received at the consultation and the seminar, as well as more than 50 written comments, in preparing the framework principles on human rights and the environment that are annexed to the present report.

8. The 16 framework principles set out basic obligations of States under human rights law as they relate to the enjoyment of a safe, clean, healthy and sustainable environment. Each framework principle has a commentary that elaborates on it and further clarifies its meaning. The framework principles and commentary do not create new obligations. Rather, they reflect the application of existing human rights obligations in the environmental context. As the Special Rapporteur stated in the mapping report (A/HRC/25/53), he understands that not all States have formally accepted all of these norms. While many of the obligations described in the framework principles and commentary are based directly on treaties or binding decisions from human rights tribunals, others draw on statements of human rights bodies that have the authority to interpret human rights law but not necessarily to issue binding decisions.[1]

9. The coherence of these interpretations, however, is strong evidence of the converging trends towards greater uniformity and certainty in the understanding of human rights obligations relating to the environment. These trends are further supported by State practice, including in international environmental instruments and before human rights bodies. As a result, the Special Rapporteur believes that States should accept the framework principles as a reflection of actual or emerging international human rights law. He is confident that, at a bare minimum, States will see them as best practices that they should move to adopt as expeditiously as possible.

[1] To avoid making the document too long and unwieldy, the framework principles and commentary do not cite all of the human rights sources on which they rely. A more complete list of sources is available on the OHCHR website. Although the framework principles and commentary do not attempt to restate obligations in areas other than human rights law, they do take into account relevant international environmental sources, such as the Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (the Bali Guidelines), adopted by the Governing Council of the United Nations Environment Programme in 2010.

10. After consideration, the Special Rapporteur chose the name "framework principles" because he thought that it best reflected the nature of the document. The framework principles and commentary provide a sturdy basis for understanding and implementing human rights obligations relating to the environment, but they are in no sense the final word. The relationship between human rights and the environment has countless facets, and our understanding of it will continue to grow for many years to come. These framework principles do not purport to describe all of the human rights obligations that can be brought to bear on environmental issues today, much less attempt to predict those that may evolve in the future. The goal is simply to describe the main human rights obligations that apply in the environmental context, in order to facilitate their practical implementation and further development. To that end, the Special Rapporteur urges States, international organizations and civil society organizations to disseminate and publicize the framework principles, and to take them into account in their own activities.

III. The human right to a safe, clean, healthy and sustainable environment

11. An unusual aspect of the development of human rights norms relating to the environment is that they have not relied primarily on the explicit recognition of a human right to a safe, clean, healthy and sustainable environment — or, more simply, a human right to a healthy environment. Although this right has been recognized, in various forms, in regional agreements and in most national constitutions, it has not been adopted in a human rights agreement of global application, and only one regional agreement, the African Charter on Human and Peoples' Rights, provides for its interpretation in decisions by a review body.

12. Treaty bodies, regional tribunals, special rapporteurs and other international human rights bodies have instead applied human rights law to environmental issues by "greening" existing human rights, including the rights to life and health. As the mapping report explained and the framework principles demonstrate, this process has been quite successful, creating an extensive jurisprudence on human rights and the environment. In retrospect, this development is not as surprising as it may have seemed when it first began, over two decades ago. Environmental harm interferes with the full enjoyment of a wide spectrum of human rights, and the obligations of States to respect human rights, to protect human rights from interference and to fulfil human rights apply in the environmental context no less than in any other.

13. Explicit recognition of the human right to a healthy environment thus turned out to be unnecessary for the application of human rights norms to environmental issues. At the same time, it is significant that the great majority of the countries in the world have recognized the right at the national or regional level, or both. Based on the experience of the countries that have adopted constitutional rights to a healthy environment, recognition of the right has proved to have real advantages. It has raised the profile and importance of environmental protection and provided a basis for the enactment of stronger environmental laws. When applied by the judiciary, it has helped to provide a safety net to protect against gaps in statutory laws and created opportunities for better access to justice. Courts in many countries are increasingly applying the right, as is illustrated by the interest in the regional judicial workshops held by the United Nations Environment Programme and the Special Rapporteur.

14. On the basis of this experience, the Special Rapporteur recommends that the Human Rights Council consider supporting the recognition of the right in a global instrument. A model could be the rights to water and sanitation, which, like the right to a healthy environment, are not explicitly recognized in United Nations human rights treaties but are clearly necessary to the full enjoyment of human rights. In 2010, in its resolution 64/292, the General Assembly recognized "the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights". The

General Assembly could adopt a similar resolution that recognizes the right to a safe, clean, healthy and sustainable environment, another right that is essential for the full enjoyment of life and all human rights.[2]

15. States may be understandably reluctant to recognize a "new" human right if its content is uncertain. To be sure that a right will be taken seriously, it is important to be clear about its implications. The Special Rapporteur notes that one of the primary goals of his work on the mandate has been to clarify what human rights law requires with respect to environmental protection, including through the mapping project and these framework principles. As a result, the "human right to a healthy environment" is not an empty vessel waiting to be filled; on the contrary, its content has already been clarified, through recognition by human rights authorities that a safe, clean, healthy and sustainable environment is necessary for the full enjoyment of the human rights to life, health, food, water, housing and so forth. Here, too, the right is similar to the rights to water and sanitation, whose content had been addressed in detail by the Committee on Economic, Social and Cultural Rights and Catarina de Albuquerque, the first Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation, before the General Assembly acted in 2010.

16. Even without formal recognition, the term "the human right to a healthy environment" is already being used to refer to the environmental aspects of the entire range of human rights that depend on a safe, clean, healthy and sustainable environment. The use of the term in this way — and, for that matter, the adoption of a resolution recognizing the right — does not change the legal content of obligations that are based on existing human rights law. Nevertheless, it has real advantages. It raises awareness that human rights norms require protection of the environment and highlights that environmental protection is on the same level of importance as other human interests that are fundamental to human dignity, equality and freedom. It also helps to ensure that human rights norms relating to the environment continue to develop in a coherent and integrated manner. Recognition of the right in a General Assembly resolution would further strengthen all of these benefits.

IV. Looking forward

17. Although the relationship of human rights and the environment has evolved rapidly over the past two decades, and even more so over the past five years, much remains to be done to clarify and implement the human rights obligations relating to a safe, clean, healthy and sustainable environment. The Special Rapporteur encourages the Human Rights Council to continue to be actively involved in the development of this relationship, including by renewing the mandate.

18. For example, more work is necessary to clarify how human rights norms relating to the environment apply to specific areas, including issues of gender and other types of discrimination, the responsibilities of businesses in relation to human rights and the environment, the effects of armed conflict on human rights and the environment, and obligations of international cooperation in relation to multinational corporations and transboundary harm.

19. More work, too, can be done to institutionalize support for capacity-building, including by instituting an annual forum on human rights and environmental issues; holding conferences for national human rights institutions on environmental matters; continuing to hold judicial workshops on human rights and the environment; instituting similar workshops for officials at environmental, mining and other agencies; strengthening

[2] A resolution by the General Assembly is not the only possible instrument through which a right to a healthy environment could be formally recognized. The Special Rapporteur notes that at the seventy-second session of the General Assembly, the Government of France presented for consideration a Global Pact for the Environment, article 1 of which indicates that "Every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment". However, a resolution may be adopted more quickly and easily than an international agreement.

accountability mechanisms for human rights violations in connection with conservation activities; and mainstreaming human rights into the work of international institutions working on development and environmental issues. In this last respect, the Special Rapporteur applauds the recent announcement by the United Nations Environment Programme of a new "environmental rights initiative", designed in part to support environmental human rights defenders. He encourages OHCHR and the United Nations Environment Programme to continue to build on their partnership.

20. As Victor Hugo famously said, it is impossible to resist an idea whose time has come. The interdependence of human rights and the environment is an idea whose time is here. Over the past five years, the Special Rapporteur has made over 50 trips, to approximately 25 countries. Everywhere he has gone, he has met people who are bringing human rights to bear on environmental threats, often at great personal risk. From attorneys in Mexico to park rangers in Mongolia, from professors in China to community activists in Madagascar, from a mother who founded an environmental organization in Kenya to conservationists in Sweden to judges in Costa Rica, from indigenous leaders in Brazil to climate negotiators in Paris to international civil servants in Geneva and Nairobi, people in every country are striving for a world in which everyone can enjoy the human rights that depend upon a safe, clean, healthy and sustainable environment. It has been a great honour to support them in their efforts.

Annex

Framework principles on human rights and the environment

1. Human beings are part of nature, and our human rights are intertwined with the environment in which we live. Environmental harm interferes with the enjoyment of human rights, and the exercise of human rights helps to protect the environment and to promote sustainable development.

2. The framework principles on human rights and the environment summarize the main human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. They provide integrated and detailed guidance for practical implementation of these obligations, and a basis for their further development as our understanding of the relationship of human rights and the environment continues to evolve.

3. The framework principles are not exhaustive: many national and international norms are relevant to human rights and environmental protection, and nothing in the framework principles should be interpreted as limiting or undermining standards that provide higher levels of protection under national or international law.

Framework principle 1

States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights.

Framework principle 2

States should respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment.

Commentary on framework principles 1 and 2

4. Human rights and environmental protection are interdependent. A safe, clean, healthy and sustainable environment is necessary for the full enjoyment of human rights, including the rights to life, to the highest attainable standard of physical and mental health, to an adequate standard of living, to adequate food, to safe drinking water and sanitation, to housing, to participation in cultural life and to development, as well as the right to a healthy environment itself, which is recognized in regional agreements and most national constitutions.[1] At the same time, the exercise of human rights, including rights to freedom of expression and association, to education and information, and to participation and effective remedies, is vital to the protection of the environment.

5. The obligations of States to respect human rights, to protect the enjoyment of human rights from harmful interference,[2] and to fulfil human rights by working towards their full realization[3] all apply in the environmental context. States should therefore refrain from violating human rights through causing or allowing environmental harm; protect against harmful environmental interference from other sources, including business enterprises,

[1] See Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, art. 1; African Charter on Human and Peoples' Rights, art. 24; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 11; Arab Charter on Human Rights, art. 38; and ASEAN Human Rights Declaration, art. 28. More than 100 States have recognized the right at the national level.

[2] See, for example, Human Rights Committee, general comment No. 6 (1982) on the right to life, para. 5.

[3] See, for example, Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000) on the right to the highest attainable standard of health, para. 33.

other private actors and natural causes; and take effective steps to ensure the conservation and sustainable use of the ecosystems and biological diversity on which the full enjoyment of human rights depends. While it may not always be possible to prevent all environmental harm that interferes with the full enjoyment of human rights, States should undertake due diligence to prevent such harm and reduce it to the extent possible, and provide for remedies for any remaining harm.

6. At the same time, States must fully comply with their obligations in respect of human rights, such as freedom of expression, that are exercised in relation to the environment. Such obligations not only have independent bases in human rights law; they are also required in order to respect, protect and fulfil the human rights whose enjoyment depends on a safe, clean, healthy and sustainable environment.

Framework principle 3

States should prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment.

Commentary

7. The obligations of States to prohibit discrimination and to ensure equal and effective protection against discrimination[4] apply to the equal enjoyment of human rights relating to a safe, clean, healthy and sustainable environment. States therefore have obligations, among others, to protect against environmental harm that results from or contributes to discrimination, to provide for equal access to environmental benefits and to ensure that their actions relating to the environment do not themselves discriminate.

8. Discrimination may be direct, when someone is treated less favourably than another person in a similar situation for a reason related to a prohibited ground, or indirect, when facially neutral laws, policies or practices have a disproportionate impact on the exercise of human rights as distinguished by prohibited grounds of discrimination.[5] In the environmental context, direct discrimination may include, for example, failing to ensure that members of disfavoured groups have the same access as others to information about environmental matters, to participation in environmental decision-making, or to remedies for environmental harm (framework principles 7, 9 and 10). In the case of transboundary environmental harm, States should provide for equal access to information, participation and remedies without discriminating on the basis of nationality or domicile.

9. Indirect discrimination may arise, for example, when measures that adversely affect ecosystems, such as mining and logging concessions, have disproportionately severe effects on communities that rely on the ecosystems. Indirect discrimination can also include measures such as authorizing toxic and hazardous facilities in large numbers in communities that are predominantly composed of racial or other minorities, thereby disproportionately interfering with their rights, including their rights to life, health, food and water. Like directly discriminatory measures, such indirect differential treatment is

[4] For example, International Covenant on Civil and Political Rights, arts. 2 (1) and 26; International Covenant on Economic, Social and Cultural Rights, art. 2 (2); International Convention on the Elimination of All Forms of Racial Discrimination, arts. 2 and 5; Convention on the Elimination of All Forms of Discrimination against Women, art. 2; Convention on the Rights of the Child, art. 2; Convention on the Rights of Persons with Disabilities, art. 5. The term "discrimination" here refers to any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. Human Rights Committee, general comment No. 18 (1989) on non-discrimination, para. 7.

[5] See Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, para. 10.

prohibited unless it meets strict requirements of legitimacy, necessity and proportionality.[6] More generally, to address indirect as well as direct discrimination, States must pay attention to historical or persistent prejudice against groups of individuals, recognize that environmental harm can both result from and reinforce existing patterns of discrimination, and take effective measures against the underlying conditions that cause or help to perpetuate discrimination.[7] In addition to complying with their obligations of non-discrimination, States should take additional measures to protect those who are most vulnerable to, or at particular risk from, environmental harm (framework principles 14 and 15).

Framework principle 4

States should provide a safe and enabling environment in which individuals, groups and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation and violence.

Commentary

10. Human rights defenders include individuals and groups who strive to protect and promote human rights relating to the environment (see A/71/281, para. 7). Those who work to protect the environment on which the enjoyment of human rights depends are protecting and promoting human rights as well, whether or not they self-identify as human rights defenders. They are among the human rights defenders most at risk, and the risks are particularly acute for indigenous peoples and traditional communities that depend on the natural environment for their subsistence and culture.

11. Like other human rights defenders, environmental human rights defenders are entitled to all of the rights and protections set out in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders), including the right to be protected in their work and the right to strive for the protection and realization of human rights at the national and international levels. To that end, States must provide a safe and enabling environment for defenders to operate free from threats, harassment, intimidation and violence. The requirements for such an environment include that States: adopt and implement laws that protect human rights defenders in accordance with international human rights standards;[8] publicly recognize the contributions of human rights defenders to society and ensure that their work is not criminalized or stigmatized; develop, in consultation with human rights defenders, effective programmes for protection and early warning; provide appropriate training for security and law enforcement officials; ensure the prompt and impartial investigation of threats and violations and the prosecution of alleged perpetrators; and provide for effective remedies for violations, including appropriate compensation (see A/71/281, A/66/203 and A/HRC/25/55, paras. 54–133).

[6] Ibid., para. 13.

[7] Ibid., para. 8.

[8] See Model Law for the Recognition and Protection of Human Rights Defenders, at www.ishr.ch/sites/default/files/documents/model_law_full_digital_updated_15june2016.pdf.

Framework principle 5

States should respect and protect the rights to freedom of expression, association and peaceful assembly in relation to environmental matters.

Commentary

12. The obligations of States to respect and protect the rights to freedom of expression, association and peaceful assembly[9] encompass the exercise of those rights in relation to environmental matters. States must ensure that these rights are protected whether they are being exercised within structured decision-making procedures or in other forums, such as the news or social media, and whether or not they are being exercised in opposition to policies or projects favoured by the State.

13. Restrictions on the exercise of these rights are permitted only if they are provided by law and necessary in a democratic society to protect the rights of others, or to protect national security, public order, or public health or morals. These restrictions must be narrowly tailored to avoid undermining the rights. For example, blanket prohibitions on protests surrounding the operations of mining, forestry or other resource extraction companies are unjustifiable (see A/HRC/29/25, para. 22). States may never respond to the exercise of these rights with excessive or indiscriminate use of force, arbitrary arrest or detention, torture or other cruel, inhuman or degrading treatment or punishment, enforced disappearance, the misuse of criminal laws, stigmatization or the threats of such acts. States should never hinder the access of individuals or associations to international bodies, or their right to seek, receive and use resources from foreign as well as domestic sources.[10] When violence occurs in an otherwise peaceful assembly or protest, States have a duty to distinguish between peaceful and non-peaceful demonstrators, take measures to de-escalate tensions and hold the violent individuals — not the organizers — to account for their actions. The potential for violence is not an excuse to interfere with or disperse otherwise peaceful assemblies (see A/HRC/29/25, para. 41).

14. States must also protect the exercise of these rights from interference by businesses and other private actors. States must ensure that civil laws relating to defamation and libel are not misused to repress the exercise of these rights. States should protect against the repression of legitimate advocacy by private security enterprises, and States may not cede their own law enforcement responsibilities to such enterprises or other private actors.

Framework principle 6

States should provide for education and public awareness on environmental matters.

Commentary

15. States have agreed that the education of the child shall be directed to, among other things, the development of respect for human rights and the natural environment.[11] Environmental education should begin early and continue throughout the educational process. It should increase students' understanding of the close relationship between humans and nature, help them to appreciate and enjoy the natural world and strengthen their capacity to respond to environmental challenges.

16. Increasing the public awareness of environmental matters should continue into adulthood. To ensure that adults as well as children understand environmental effects on their health and well-being, States should make the public aware of the specific environmental risks that affect them and how they may protect themselves from those risks.

[9] See Universal Declaration of Human Rights, arts. 19–20; International Covenant on Civil and Political Rights, arts. 19 and 21–22.

[10] See Declaration on Human Rights Defenders, arts. 9 (4) and 13.

[11] See Convention on the Rights of the Child, art. 29.

As part of increasing public awareness, States should build the capacity of the public to understand environmental challenges and policies, so that they may fully exercise their rights to express their views on environmental issues (framework principle 5), understand environmental information, including assessments of environmental impacts (framework principles 7 and 8), participate in decision-making (framework principle 9) and, where appropriate, seek remedies for violations of their rights (framework principle 10). States should tailor environmental education and public awareness programmes to the culture, language and environmental situation of particular populations.

Framework principle 7

States should provide public access to environmental information by collecting and disseminating information and by providing affordable, effective and timely access to information to any person upon request.

Commentary

17. The human right of all persons to seek, receive and impart information[12] includes information on environmental matters. Public access to environmental information enables individuals to understand how environmental harm may undermine their rights, including the rights to life and health, and supports their exercise of other rights, including the rights to expression, association, participation and remedy.

18. Access to environmental information has two dimensions. First, States should regularly collect, update and disseminate environmental information, including information about: the quality of the environment, including air and water; pollution, waste, chemicals and other potentially harmful substances introduced into the environment; threatened and actual environmental impacts on human health and well-being; and relevant laws and policies. In particular, in situations involving imminent threat of harm to human health or the environment, States must ensure that all information that would enable the public to take protective measures is disseminated immediately to all affected persons, regardless of whether the threats have natural or human causes.

19. Second, States should provide affordable, effective and timely access to environmental information held by public authorities, upon the request of any person or association, without the need to show a legal or other interest. Grounds for refusal of a request should be set out clearly and construed narrowly, in light of the public interest in favour of disclosure. States should also provide guidance to the public on how to obtain environmental information.

Framework principle 8

To avoid undertaking or authorizing actions with environmental impacts that interfere with the full enjoyment of human rights, States should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights.

Commentary

20. Prior assessment of the possible environmental impacts of proposed projects and policies is generally required by national laws, and the elements of effective environmental assessment are widely understood: the assessment should be undertaken as early as possible in the decision-making process for any proposal that is likely to have significant effects on the environment; the assessment should provide meaningful opportunities for the public to participate, should consider alternatives to the proposal, and should address all potential

[12] See Universal Declaration of Human Rights, art. 19; International Covenant on Civil and Political Rights, art. 19.

environmental impacts, including transboundary effects and cumulative effects that may occur as a result of the interaction of the proposal with other activities; the assessment should result in a written report that clearly describes the impacts; and the assessment and the final decision should be subject to review by an independent body. The procedure should also provide for monitoring of the proposal as implemented, to assess its actual impacts and the effectiveness of protective measures.[13]

21. To protect against interference with the full enjoyment of human rights, the assessment of environmental impacts should also examine the possible effects of the environmental impacts of proposed projects and policies on the enjoyment of all relevant rights, including the rights to life, health, food, water, housing and culture. As part of that assessment, the procedure should examine whether the proposal will comply with obligations of non-discrimination (framework principle 3), applicable domestic laws and international agreements (framework principles 11 and 13) and the obligations owed to those who are particularly vulnerable to environmental harm (framework principles 14 and 15). The assessment procedure itself must comply with human rights obligations, including by providing public information about the assessment and making the assessment and the final decision publicly available (framework principle 7), facilitating public participation by those who may be affected by the proposed action (framework principle 9), and providing for effective legal remedies (framework principle 10).

22. Business enterprises should conduct human rights impact assessments in accordance with the Guiding Principles on Business and Human Rights, which provide that businesses "should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships", include "meaningful consultation with potentially affected groups and other relevant stakeholders", "integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action" (see Guiding Principles 18–19).

Framework principle 9

States should provide for and facilitate public participation in decision-making related to the environment, and take the views of the public into account in the decision-making process.

Commentary

23. The right of everyone to take part in the government of their country and in the conduct of public affairs [14] includes participation in decision-making related to the environment. Such decision-making includes the development of policies, laws, regulations, projects and activities. Ensuring that these environmental decisions take into account the views of those who are affected by them increases public support, promotes sustainable development and helps to protect the enjoyment of rights that depend on a safe, clean, healthy and sustainable environment.

24. To be effective, public participation must be open to all members of the public who may be affected and occur early in the decision-making process. States should provide for the prior assessment of the impacts of proposals that may significantly affect the environment, and ensure that all relevant information about the proposal and the decision-making process is made available to the affected public in an objective, understandable, timely and effective manner (see framework principles 7 and 8).

25. With respect to the development of policies, laws and regulations, drafts should be publicly available and the public should be given opportunities to comment directly or

[13] United Nations Environment Programme, *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach* (2004), p. 42.

[14] See Universal Declaration of Human Rights, art. 21; International Covenant on Civil and Political Rights, art. 25.

through representative bodies. With respect to proposals for specific projects or activities, States should inform the affected public of their opportunities to participate at an early stage of the decision-making process and provide them with relevant information, including information about: the proposed project or activity and its possible impacts on human rights and the environment; the range of possible decisions; and the decision-making procedure to be followed, including the time schedule for comments and questions and the time and place of any public hearings.

26. States must provide members of the public with an adequate opportunity to express their views, and take additional steps to facilitate the participation of women and of members of marginalized communities (framework principle 14). States must ensure that the relevant authorities take into account the expressed views of the public in making their final decisions, that they explain the justifications for the decisions and that the decisions and explanations are made public.

Framework principle 10

States should provide for access to effective remedies for violations of human rights and domestic laws relating to the environment.

Commentary

27. The obligations of States to provide for access to judicial and other procedures for effective remedies for violations of human rights[15] encompass remedies for violations of human rights relating to the environment. States must therefore provide for effective remedies for violations of the obligations set out in these framework principles, including those relating to the rights of freedom of expression, association and peaceful assembly (framework principle 5), access to environmental information (framework principle 7) and public participation in environmental decision-making (framework principle 9).

28. In addition, in connection with the obligations to establish, maintain and enforce substantive environmental standards (framework principles 11 and 12), each State should ensure that individuals have access to effective remedies against private actors, as well as government authorities, for failures to comply with the laws of the State relating to the environment.

29. To provide for effective remedies, States should ensure that individuals have access to judicial and administrative procedures that meet basic requirements, including that the procedures: (a) are impartial, independent, affordable, transparent and fair; (b) review claims in a timely manner; (c) have the necessary expertise and resources; (d) incorporate a right of appeal to a higher body; and (e) issue binding decisions, including for interim measures, compensation, restitution and reparation, as necessary to provide effective remedies for violations. The procedures should be available for claims of imminent and foreseeable as well as past and current violations. States should ensure that decisions are made public and that they are promptly and effectively enforced.

30. States should provide guidance to the public about how to seek access to these procedures, and should help to overcome obstacles to access such as language, illiteracy, expense and distance. Standing should be construed broadly, and States should recognize the standing of indigenous peoples and other communal landowners to bring claims for violations of their collective rights. All those pursuing remedies must be protected against reprisals, including threats and violence. States should protect against baseless lawsuits aimed at intimidating victims and discouraging them from pursuing remedies.

[15] See, for example, Universal Declaration of Human Rights, art. 8; International Covenant on Civil and Political Rights, art. 2 (3).

Framework principle 11

States should establish and maintain substantive environmental standards that are non-discriminatory, non-retrogressive and otherwise respect, protect and fulfil human rights.

Commentary

31. To protect against environmental harm and to take necessary measures for the full realization of human rights that depend on the environment, States must establish, maintain and enforce effective legal and institutional frameworks for the enjoyment of a safe, clean, healthy and sustainable environment. Such frameworks should include substantive environmental standards, including with respect to air quality, the global climate, freshwater quality, marine pollution, waste, toxic substances, protected areas, conservation and biological diversity.

32. Ideally, environmental standards would be set and implemented at levels that would prevent all environmental harm from human sources and ensure a safe, clean, healthy and sustainable environment. However, limited resources may prevent the immediate realization of the rights to health, food, water and other economic, social and cultural rights. The obligation of States to achieve progressively the full realization of these rights by all appropriate means[16] requires States to take deliberate, concrete and targeted measures towards that goal, but States have some discretion in deciding which means are appropriate in light of available resources.[17] Similarly, human rights bodies applying civil and political rights, such as the rights to life and to private and family life, have held that States have some discretion to determine appropriate levels of environmental protection, taking into account the need to balance the goal of preventing all environmental harm with other social goals.[18]

33. This discretion is not unlimited. One constraint is that decisions as to the establishment and implementation of appropriate levels of environmental protection must always comply with obligations of non-discrimination (framework principle 3). Another constraint is the strong presumption against retrogressive measures in relation to the progressive realization of economic, social and cultural rights.[19] Other factors that should be taken into account in assessing whether environmental standards otherwise respect, promote and fulfil human rights include the following:

(a) The standards should result from a procedure that itself complies with human rights obligations, including those relating to the rights of freedom of expression, freedom of association and peaceful assembly, information, participation and remedy (framework principles 4–10);

(b) The standard should take into account and, to the extent possible, be consistent with all relevant international environmental, health and safety standards, such as those promulgated by the World Health Organization;

(c) The standard should take into account the best available science. However, the lack of full scientific certainty should not be used to justify postponing effective and proportionate measures to prevent environmental harm, especially when there are threats of serious or irreversible damage.[20] States should take precautionary measures to protect against such harm;

[16] See International Covenant on Economic, Social and Cultural Rights, art. 2 (1).

[17] See Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990) on the nature of States parties' obligations.

[18] See, for example, European Court of Human Rights, *Hatton and others v. United Kingdom* (application No. 36022/97), judgment of 8 July 2003, para. 98. See also Rio Declaration on Environment and Development, principle 11.

[19] See Committee on Economic, Social and Cultural Rights, general comment No. 3, para. 9.

[20] See Rio Declaration on Environment and Development, principle 15.

(d) The standard must comply with all relevant human rights obligations. For example, in all actions concerning children, the best interests of the child must be a primary consideration;[21]

(e) Finally, the standard must not strike an unjustifiable or unreasonable balance between environmental protection and other social goals, in light of its effects on the full enjoyment of human rights.[22]

Framework principle 12

States should ensure the effective enforcement of their environmental standards against public and private actors.

Commentary

34. Governmental authorities must comply with the relevant environmental standards in their own operations, and they must also monitor and effectively enforce compliance with the standards by preventing, investigating, punishing and redressing violations of the standards by private actors as well as governmental authorities. In particular, States must regulate business enterprises to protect against human rights abuses resulting from environmental harm and to provide for remedies for such abuses. States should implement training programmes for law enforcement and judicial officers to enable them to understand and enforce environmental laws, and they should take effective steps to prevent corruption from undermining the implementation and enforcement of environmental laws.

35. In accordance with the Guiding Principles on Business and Human Rights, the responsibility of business enterprises to respect human rights includes the responsibility to avoid causing or contributing to adverse human rights impacts through environmental harm, to address such impacts when they occur and to seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships. Businesses should comply with all applicable environmental laws, issue clear policy commitments to meet their responsibility to respect human rights through environmental protection, implement human rights due diligence processes (including human rights impact assessments) to identify, prevent, mitigate and account for how they address their environmental impacts on human rights, and enable the remediation of any adverse environmental human rights impacts they cause or to which they contribute.

Framework principle 13

States should cooperate with each other to establish, maintain and enforce effective international legal frameworks in order to prevent, reduce and remedy transboundary and global environmental harm that interferes with the full enjoyment of human rights.

Commentary

36. The obligation of States to cooperate to achieve universal respect for, and observance of, human rights[23] requires States to work together to address transboundary and global threats to human rights. Transboundary and global environmental harm can have severe effects on the full enjoyment of human rights, and international cooperation is

[21] See Convention on the Rights of the Child, art. 3 (1).

[22] For example, a decision to allow massive oil pollution in the pursuit of economic development could not be considered reasonable in light of its disastrous effects on the enjoyment of the rights to life, health, food and water. See African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Centre and Centre for Economic and Social Rights v. Nigeria*, communication No. 155/96 (2001).

[23] See Charter of the United Nations, arts. 55–56; International Covenant on Economic, Social and Cultural Rights, art. 2 (1).

necessary to address such harm. States have entered into agreements on many international environmental problems, including climate change, ozone depletion, transboundary air pollution, marine pollution, desertification and the conservation of biodiversity.

37. The obligation of international cooperation does not require every State to take exactly the same actions. The responsibilities that are necessary and appropriate for each State will depend in part on its situation, and agreements between States may appropriately tailor their commitments to take account of their respective capabilities and challenges. Multilateral environmental agreements often include different requirements for States in different economic situations, and provide for technical and financial assistance from developed States to other States.

38. Once their obligations have been defined, however, States must comply with them in good faith. No State should ever seek to withdraw from any of its international obligations to protect against transboundary or global environmental harm. States should continually monitor whether their existing international obligations are sufficient. When those obligations and commitments prove to be inadequate, States should quickly take the necessary steps to strengthen them, bearing in mind that the lack of full scientific certainty should not be used to justify postponing effective and proportionate measures to ensure a safe, clean, healthy and sustainable environment.

39. States must also comply with their human rights obligations relating to the environment in the context of other international legal frameworks, such as agreements for economic cooperation and international finance mechanisms. For example, they should ensure that agreements facilitating international trade and investment support, rather than hinder, the ability of States to respect, protect and fulfil human rights and to ensure a safe, clean, healthy and sustainable environment. International financial institutions, as well as State agencies that provide international assistance, should adopt and implement environmental and social safeguards that are consistent with human rights obligations, including by: (a) requiring the environmental and social assessment of every proposed project and programme; (b) providing for effective public participation; (c) providing for effective procedures to enable those who may be harmed to pursue remedies; (d) requiring legal and institutional protections against environmental and social risks; and (e) including specific protections for indigenous peoples and those in vulnerable situations.

Framework principle 14

States should take additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities.

Commentary

40. As the Human Rights Council has recognized, while the human rights implications of environmental damage are felt by individuals and communities around the world, the consequences are felt most acutely by those segments of the population that are already in vulnerable situations.[24] Persons may be vulnerable because they are unusually susceptible to certain types of environmental harm, or because they are denied their human rights, or both. Vulnerability to environmental harm reflects the "interface between exposure to the physical threats to human well-being and the capacity of people and communities to cope with those threats".[25]

41. Those who are at greater risk from environmental harm for either or both reasons often include women, children, persons living in poverty, members of indigenous peoples and traditional communities, older persons, persons with disabilities, ethnic, racial or other

[24] See Human Rights Council resolution 34/20.

[25] United Nations Environment Programme, *Global Environment Outlook 3* (2002), p. 302.

minorities and displaced persons.[26] The many examples of potential vulnerability include the following:

(a) In most households, women are primarily responsible for water and hygiene. When sources of water are polluted, they are at greater risk of exposure, and if they travel longer distances to find safer sources, they are at greater risk of assault (see A/HRC/33/49). Nevertheless, they are typically excluded from decision-making procedures on water and sanitation;

(b) Children are vulnerable for many reasons, including that they are developing physically and that they are less resistant to many types of environmental harm. Of the approximately 6 million deaths of children under the age of 5 in 2015, more than 1.5 million could have been prevented through the reduction of environmental risks. Moreover, exposure to pollution and other environmental harms in childhood can have lifelong consequences, including by increasing the likelihood of cancer and other diseases (see A/HRC/37/58);

(c) Persons living in poverty often lack adequate access to safe water and sanitation, and they are more likely to burn wood, coal and other solid fuels for heating and cooking, causing household air pollution;

(d) Indigenous peoples and other traditional communities that rely on their ancestral territories for their material and cultural existence face increasing pressure from Governments and business enterprises seeking to exploit their resources. They are usually marginalized from decision-making processes and their rights are often ignored or violated;

(e) Older persons may be vulnerable to environmental harm because they are more susceptible to heat, pollutants and vector-borne diseases, among other factors;

(f) The vulnerability of persons with disabilities to natural disasters and extreme weather is often exacerbated by barriers to receiving emergency information in an accessible format, and to accessing means of transport, shelter and relief;

(g) Because racial, ethnic and other minorities are often marginalized and lack political power, their communities often become the sites of disproportionate numbers of waste dumps, refineries, power plants and other polluting facilities, exposing them to higher levels of air pollution and other types of environmental harm;

(h) Natural disasters and other types of environmental harm often cause internal displacement and transboundary migration, which can exacerbate vulnerabilities and lead to additional human rights violations and abuses (see A/66/285 and A/67/299).

42. To protect the rights of those who are particularly vulnerable to or at risk from environmental harm, States should ensure that their laws and policies take into account the ways that some parts of the population are more susceptible to environmental harm, and the barriers some face to exercising their human rights related to the environment.

43. For example, States should develop disaggregated data on the specific effects of environmental harm on different segments of the population, conducting additional research as necessary, to provide a basis for ensuring that their laws and policies adequately protect against such harm. States should take effective measures to raise the awareness of environmental threats among those persons who are most at risk. In monitoring and reporting on environmental issues, States should provide detailed information on the threats to, and status of, the most vulnerable. Assessments of the environmental and human rights impacts of proposed projects and policies must include a careful examination of the impacts on the most vulnerable, in particular. In the case of indigenous peoples and local communities, assessments should be in accord with the guidelines adopted by the Conference of Parties to the Convention on Biological Diversity.[27]

[26] Many persons are vulnerable and subject to discrimination along more than one dimension, such as children living in poverty or indigenous women.

[27] The Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on,

44. States should develop environmental education, awareness and information programmes to overcome obstacles such as illiteracy, minority languages, distance from government agencies and limited access to information technology, in order to ensure that everyone has effective access to such programmes and to environmental information in forms that are understandable to them. States should also take steps to ensure the equitable and effective participation of all affected segments of the population in relevant decision-making, taking into account the characteristics of the vulnerable or marginalized populations concerned.

45. States should ensure that their legal and institutional frameworks for environmental protection effectively protect those who are in vulnerable situations. They must comply with their obligations of non-discrimination (framework principle 3), as well as any other obligations relevant to specific groups. For example, any environmental policies or measures that may affect children's rights must ensure that the best interests of children are a primary consideration.[28]

46. In developing and implementing international environmental agreements, States should include strategies and programmes to identify and protect those vulnerable to the threats addressed in the agreements.[29] Domestic and international environmental standards should be set at levels that protect against harm to vulnerable segments of the population, and States should use appropriate indicators and benchmarks to assess implementation. When measures to safeguard against or mitigate adverse impacts are impossible or ineffective, States must facilitate access to effective remedies for violations and abuses of the rights of those most vulnerable to environmental harm.

Framework principle 15

States should ensure that they comply with their obligations to indigenous peoples and members of traditional communities, including by:

(a) **Recognizing and protecting their rights to the lands, territories and resources that they have traditionally owned, occupied or used;**

(b) **Consulting with them and obtaining their free, prior and informed consent before relocating them or taking or approving any other measures that may affect their lands, territories or resources;**

(c) **Respecting and protecting their traditional knowledge and practices in relation to the conservation and sustainable use of their lands, territories and resources;**

(d) **Ensuring that they fairly and equitably share the benefits from activities relating to their lands, territories or resources.**

Commentary

47. Indigenous peoples are particularly vulnerable to environmental harm because of their close relationship with the natural ecosystems on their ancestral territories. The United Nations Declaration on the Rights of Indigenous Peoples and the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169), as well as other human rights and conservation agreements, set out obligations of States in relation to the rights of indigenous peoples. Those obligations include, but are not limited to, the four highlighted here, which have particular relevance to the human rights of indigenous peoples in relation to the environment.

Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities.

[28] See Convention on the Rights of the Child, art. 3 (1).

[29] See, for example, Minamata Convention on Mercury, art. 16 (1) (a), annex C.

48. Traditional (sometimes called "local") communities that do not self-identify as indigenous may also have close relationships to their ancestral territories and depend directly on nature for their material needs and cultural life. Examples include the descendants of Africans brought to Latin America as slaves, who escaped and formed tribal communities. To protect the human rights of the members of such traditional communities, States owe them obligations as well. While those obligations are not always identical to those owed to indigenous peoples, they should include the obligations described below (see A/HRC/34/49, paras. 52–58).

49. First, States must recognize and protect the rights of indigenous peoples and traditional communities to the lands, territories and resources that they have traditionally owned, occupied or used, including those to which they have had access for their subsistence and traditional activities.[30] The recognition of the rights must be conducted with due respect for the customs, traditions and land tenure systems of the peoples or communities concerned.[31] Even without formal recognition of property rights and delimitation and demarcation of boundaries, States must protect against actions that might affect the value, use or enjoyment of the lands, territories or resources, including by instituting adequate penalties against those who intrude on or use them without authorization.[32]

50. Second, States must ensure the full and effective participation of indigenous peoples and traditional communities in decision-making on the entire spectrum of matters that affect their lives. States have obligations to consult with them when considering legislative or administrative measures which may affect them directly, before undertaking or permitting any programmes for the exploration or exploitation of resources pertaining to their lands or territories and when considering their capacity to alienate their lands or territories or otherwise transfer their rights outside their own community.[33] States should assess the environmental and social impacts of proposed measures and ensure that all relevant information is provided to them in understandable and accessible forms (framework principles 7–8). Consultations with indigenous peoples and traditional communities should be in accordance with their customs and traditions, and occur early in the decision-making process (framework principle 9).

51. The free, prior and informed consent of indigenous peoples or traditional communities is generally necessary before the adoption or implementation of any laws, policies or measures that may affect them, and in particular before the approval of any project affecting their lands, territories or resources, including the extraction or exploitation of mineral, water or other resources, or the storage or disposal of hazardous materials.[34] Relocation of indigenous peoples or traditional communities may take place only with their free, prior and informed consent and after agreement on just and fair compensation and, where possible, with the option of return.[35]

52. Third, States should respect and protect the knowledge and practices of indigenous peoples and traditional communities in relation to the conservation and sustainable use of their lands, territories and resources.[36] Indigenous peoples and traditional communities have the right to the conservation and protection of the environment and the productive capacity of their lands, territories and resources, and to receive assistance from States for such

[30] See ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), arts. 14–15; United Nations Declaration on the Rights of Indigenous Peoples, arts. 26–27.

[31] See United Nations Declaration on the Rights of Indigenous Peoples, art. 26 (3).

[32] See ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), art. 18.

[33] Ibid., arts. 6, 15 and 17.

[34] See United Nations Declaration on the Rights of Indigenous Peoples, arts. 19, 29 (2) and 32. See also Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity, arts. 6–7 (consent required for access to genetic resources and traditional knowledge).

[35] See ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), art. 16; United Nations Declaration on the Rights of Indigenous Peoples, art. 10.

[36] See Convention on Biological Diversity, arts. 8 (j) and 10 (c).

conservation and protection.[37] States must comply with the obligations of consultation and consent with respect to the establishment of protected areas in the lands and territories of indigenous peoples and traditional communities, and ensure that they can participate fully and effectively in the governance of such protected areas.[38]

53. Fourth, States must ensure that indigenous peoples and traditional communities affected by extraction activities, the use of their traditional knowledge and genetic resources, or other activities in relation to their lands, territories or resources fairly and equitably share the benefits arising from such activities.[39] Consultation procedures should establish the benefits that the affected indigenous peoples and traditional communities are to receive, in a manner consistent with their own priorities. Finally, States must provide for effective remedies for violations of their rights (framework principle 10), and just and fair redress for harm resulting from any activities affecting their lands, territories or resources.[40] They have the right to restitution or, if this is not possible, just, fair and equitable compensation for their lands, territories and resources that have been taken, used or damaged without their free, prior and informed consent.[41]

Framework principle 16

States should respect, protect and fulfil human rights in the actions they take to address environmental challenges and pursue sustainable development.

Commentary

54. The obligations of States to respect, protect and fulfil human rights apply when States are adopting and implementing measures to address environmental challenges and to pursue sustainable development. That a State is attempting to prevent, reduce or remedy environmental harm, seeking to achieve one or more of the Sustainable Development Goals, or taking actions in response to climate change does not excuse it from complying with its human rights obligations.[42]

55. Pursuing environmental and development goals in accordance with human rights norms not only promotes human dignity, equality and freedom, the benefits of fulfilling all human rights. It also helps to inform and strengthen policymaking. Ensuring that those most affected can obtain information, freely express their views and participate in the decision-making process, for example, makes policies more legitimate, coherent, robust and sustainable. Most important, a human rights perspective helps to ensure that environmental and development policies improve the lives of the human beings who depend on a safe, clean, healthy and sustainable environment — which is to say, all human beings.

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[37] See United Nations Declaration on the Rights of Indigenous Peoples, art. 29 (1).

[38] See ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), art. 15 (1).

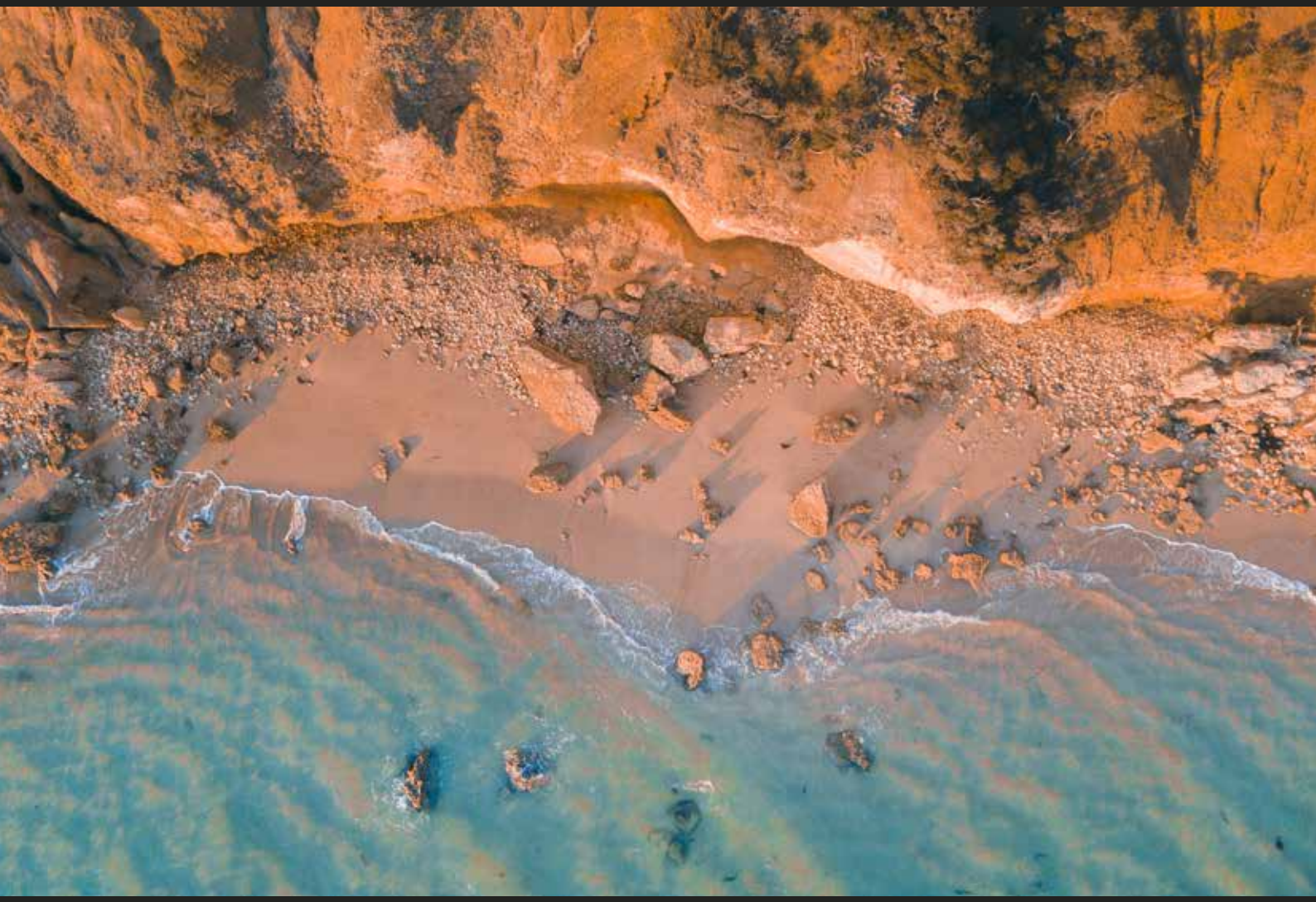
[39] Ibid., art. 15 (2); Convention on Biological Diversity, art. 8 (j); Nagoya Protocol, art. 5; United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, art. 16 (g).

[40] See United Nations Declaration on the Rights of Indigenous Peoples, art. 32 (3).

[41] Ibid., art. 28.

[42] See Paris Agreement, eleventh preambular para.

Environmental Defenders Office



Implementing effective independent Environmental Protection Agencies in Australia

Best practice environmental governance for environmental justice

January 2022

A Note on Language

We acknowledge that there is a legacy of writing about First Nations without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. In the domestic context, where possible, we have used specific references. Further, when referring to First Nations in the context of particular country we have used the term 'Traditional Owners'. More generally, we have chosen to use the term 'First Nations'. We acknowledge that not all Aboriginal and Torres Strait Islander peoples will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

This report also discusses and makes a number of recommendations in relation to the development of Cultural Protocols based on First Nations Lore. While the word 'Lore' has been chosen, it is not intended to diminish the importance or status of the customs, traditions, kinship and heritage of First Nations in Australia, and the EDO acknowledges that First Nations Lore should be respected in the same way that western laws are respected.

Contents

Executive Summary

Environmental Protection Agencies (**EPAs**) can play an important role in ensuring human impact on the environment, human health and other species is sustainable and just, for the health of the environment and humans in the current and long term. They are typically intended to act as a regulator of development, managing pollution, environmental destruction and waste and ensuring that the health of the public and the environment is maintained.

Many states and territories in Australia already have EPAs that are responsible for environmental regulation, although each varies greatly in its functions, powers, structure and effectiveness. Queensland is currently the only state or territory that does not have an EPA, and there is currently no national EPA.

However, EPAs in Australia are currently primarily focused on supporting industry to operate through licensing environmental impacts, with industry being considered their 'customers' in the business of environmental regulation. Standard setting and enforcement action by EPAs is similarly industry or polluter focused.

This report recommends that the focus of EPAs must shift to being more centered on protecting communities and the environment from environmental impacts, particularly ensuring there is environmental justice for individuals and communities that are disadvantaged by how society is structured. Individuals and communities can face structural disadvantage on the basis of race or colour, ethnicity, nationality, age, gender identity, disability or income. In the environmental context, communities and individuals that may face structural disadvantage include, for example, persons with disability, the elderly and young people who may be at higher risk from the impacts of heat and other extreme weather exacerbated by climate change. Low income communities that live in close proximity to polluting industries can be structurally disadvantaged where they are reliant on an industry for their economic stability which may also be impacting their health and environment, or where they cannot afford to live elsewhere. Environmental justice frameworks are necessary to ensure that EPAs equally protect individuals and communities who are vulnerable to environmental harm because of structural disadvantage.

Environmental burdens are also disproportionately felt by First Nations, through impacts to their Country, cultural practices and the resources that they depend on. Governance throughout Australia since colonisation has been highly destructive to First Nations and their culture, livelihoods and connection to Country and community. Decisions around land management, ownership and environmental impacts have been instrumental tools of this destructive colonisation. Any improvements to environmental governance in Australia must recognise that environmental racism is occurring in Australia and must ensure that environmental regulation is developed in a manner that recognises the unique status of First Nations as distinct communities with both individual rights and collective cultural rights. Environmental management and decision-making must also recognise and respect the self-determination of First Nations and be underpinned by the principle of free, prior and informed consent.

None of the EPAs in Australia have a grounding in environmental justice, nor do they explicitly act in conformity with Cultural Protocols based on First Nations Lore. They also lack proper foundations in

principles of international law relating to the rights of individuals in communities and groups that are structurally disadvantaged – in particular the rights and principles in the United Nations Declaration on the Rights of Indigenous Peoples, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, and the International Covenant on Economic, Social and Cultural Rights.

In addition, humans are facing three crises globally - climate change, biodiversity loss and pollution. Having effective and independent EPAs that are grounded in environmental justice, Cultural Protocols based on First Nations Lore, and international law, both nationally and in every state and territory, is essential to ensure that we are taking the necessary steps to protect the environment and prevent the worst impacts of these crises, and to ensure that we address the structures that have led to structurally disadvantaged groups suffering disproportionately from the impacts of these crises.

This report explores the importance of environmental governance that is grounded in environmental justice, Cultural Protocols based on First Nations Lore, and international law, details key facets of strong environmental governance needed to achieve environmental justice and equity, and makes recommendations for EPAs at the state, territory and national level. We have identified nine key best practice themes that should apply to both new and existing EPAs. The recommendations involve policy and operational improvements for existing agencies, and also reform of relevant legislation (or establishing new legislation) in each jurisdiction.

Summary of Recommendations

The EDO recommends that for effective environmental governance in Australia that promotes and upholds environment justice, state, territory and national EPAs must be implemented or reformed with the following nine key elements.

Recommendation 1: Duty to develop and act in conformity with Cultural Protocols which are based on First Nations Lore, and to uphold internationally recognised First Nations rights of free, prior and informed consent and self-determination

EPAs in Australia must have a duty to develop and act in conformity with Cultural Protocols based on First Nations Lore, and must have an underpinning in the United Nations Declaration on the Rights of Indigenous Peoples, in particular the principles of free, prior and informed consent and self-determination.

Recommendation 2: Underpinned by an environmental justice framework to ensure equality in environmental protection

All EPAs in Australia should be underpinned by environmental justice frameworks that:

- acknowledge and address environmental racism;
- meaningfully define environmental justice;
- legislatively enshrine mechanisms to achieve environmental justice; and
- have a proper foundation in principles of human rights under international law.

Recommendation 3: A clearly defined role and duties to ensure objectives are achieved

An EPA should have a clearly defined role to ensure it achieves its objectives, including:

- a duty to protect and improve the state of the environment and human health from the harmful effects of pollution, destruction and waste through assessment, enforcement, monitoring and reporting and standard setting, which is not overridden by other departments;
- a duty to achieve environmental justice;
- a duty to act consistently with the human right to a healthy environment for all;
- a duty to implement legislation in accordance with principles of ecologically sustainable development; and
- a duty to take action to prevent and mitigate greenhouse gas pollution and take all actions necessary to reduce the impacts of climate change.

Recommendation 4: Independence from Ministerial influence, other government agencies and industry capture

An EPA should be established as an independent statutory authority that has:

- a clear independent governance structure, supported by a Board to provide strategic advice and direction;
- freedom from ministerial influence or being overridden by other agencies; and
- policies and procedures to manage conflicts of interest.

Recommendation 5: Accountability mechanisms to ensure responsibilities are discharged with integrity in the public interest

An EPA should be accountable to the public, which includes:

- well-defined and clear criteria for decision-making;
- mechanisms to review decision-making, including open standing for judicial review and merits review;
- the regular publication of State of the Environment Reports; and
- powers to scrutinise performance, both of the government and itself.

Recommendation 6: Transparency in decision-making through disclosure and community engagement to support accountability

An EPA should be transparent in its decision-making processes to ensure accountability to the public, which should be achieved through:

- active and mandatory public disclosure of environmental information; and
- community engagement via guaranteed rights to make written submissions and meaningful engagement in decision-making processes.

Recommendation 7: Sufficiently empowered to protect the environment and human health

An EPA should be sufficiently empowered to fulfil its role to protect the environment, including the following powers:

- environmental monitoring and reporting to identify risks early;
- standard setting in accordance with the best available science;
- clear assessment criteria and decision-making powers; and
- compliance and enforcement.

Recommendation 8: Sufficient and certain funding to fulfil their functions

An EPA should have sufficient and certain funding to meet its operating needs and fulfil its functions adequately, with the majority of funding sourced from a combination of the polluter pays model and general budget allocations.

Recommendation 9: Relevant expertise to support decision making that is science-based and provides for First Nations justice and environmental justice broadly

An EPA should have the relevant expertise to effectively protect the environment and human health through informed and expert decision-making, with support from a Chief Environmental Scientist and experienced Board members which bring a diverse range of perspectives. EPAs must also recognise and value First Nations knowledge and views and ensure that this knowledge is considered meaningfully alongside and equally with western science and expertise.

Introduction

The current state of the environment

Australia is blessed with unique and precious species, ecosystems and natural resources, and is home to 20 World Heritage Sites,[2] over 600,000 native species[3] and two out of the 36 areas identified as biodiversity hotspots by the Critical Ecosystem Partnership Fund.[4] However, over the last two centuries, Australia has suffered the largest recorded degeneration in biodiversity across the globe, and continues to be threatened by the impacts of climate change.[5] There is increasing pressure on the biodiversity, ecosystem services, clean air, clean water and natural resources upon which Australians all depend.

Humanity is also currently facing three crises globally[6] - climate change, biodiversity loss and pollution. Multiple reports have highlighted the degraded state of environments and fauna and flora species population health in Australia. In a review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), it was discovered that the current provisions are inadequate; since 1999, only 0.7% of fauna and flora species have been removed from the threatened species list,[7] while more species continue to be added. In Queensland, specifically, it has been calculated that 26% of remaining fauna habitat had been cleared between 2013 and 2015.[8]

A Senate Inquiry into the Fauna Extinction Crisis highlighted that the ecological, cultural and economic impacts are likely to worsen if the inadequate conservation provisions are not addressed.[9] Further, the impacts of climate change are already being seen in drastic reality, through multiple bleaching events of the Great Barrier Reef, death of wetland areas caused by reduced rainfall and the increasing occurrence of extreme weather events. The recent independent statutory review of the EPBC Act found that 'Australia's

natural environment and iconic places are in an overall state of decline and are under increasing threat. The environment is not sufficiently resilient to withstand current, emerging or future threats, including climate change'.[10]

The Intergovernmental Panel on Climate Change (**IPCC**) Sixth Assessment Report released on 9 August 2021 documented the urgent need for stronger environmental governance to ward against the increasing risk of climate change. The IPCC Report unequivocally states that unless there are immediate, rapid and large-scale reductions in greenhouse gas (**GHG**) emissions, it will be nearly impossible to limit global warming to close to 1.5°C or even 2°C.[11] This report has been dubbed a 'code red' for humanity by the United Nations Secretary-General, who has called for immediate action to limit temperature rise to 1.5°C.[12] Few areas of regulation have been so deeply held up by political interference as action to mitigate climate change impacts.

The current state of environmental governance and First Nations and environmental justice

It is clear that Australia has a generation of environmental policies, politics and governance that do not work. In order to improve the state of environmental regulation and governance in Australia, we are recommending the development of an environmental justice framework that is implemented to underpin EPA operations, to address not only failures to protect the environment, but also to protect and improve human health and environmental outcomes equally for all communities.

While there are EPAs in most states and territories in Australia, none of them has a grounding in environmental justice, particularly as a framework to address environmental racism; nor have they developed Cultural Protocols based on First Nations Lore. EPA functions are also not underpinned by principles of international law which should apply to environmental regulation. These include the rights and principles in the United Nations Declaration on the Rights of Indigenous Peoples, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, and the International Covenant on Economic, Social and Cultural Rights. These international laws have been carefully drafted to support human rights and environmental justice in environmental regulation, but they are only effective if they are reflected meaningfully in domestic law.

First Nations justice and environmental justice require that EPAs focus their regulation and administration on equally protecting all communities and the environment from environmental impacts, while recognising and respecting First Nations distinct individual and collective cultural rights.

As a result of the failure to implement environmental justice to date, environmental burdens, such as pollution, environmental degradation or the impacts of climate change, are disproportionately felt by individuals and communities that are structurally disadvantaged on the basis of race or colour, ethnicity, nationality, age, gender identity, disability or income.

Environmental racism, being any environmental policy, practice or directive that differentially affects or disadvantages individuals, groups or communities based on race or colour, can be clearly seen in Australia, emphasising the importance of environmental regulation being underpinned by an environmental justice framework. Environmental racism can particularly be seen in Australia to be perpetrated against First Nations, particularly First Nations communities and individuals in rural and remote Australia. Examples of environmental racism against First Nations in Australia include:[13]

- the proposed siting of nuclear dump sites in the South Australian desert without consulting the Traditional Owners, the Barngarla People;[14]
- the impacts of asbestos mining at Baryulgil in northern New South Wales on the Bundjalung People, who formed the core of the workforce of the mine;[15]
- lead poisoning in Mount Isa, where there is a large First Nations community;[16] and
- drinking water that does not meet Australian standards in First Nations communities in the Kimberly region.[17]

EPAs in Australia must recognise that First Nations are distinct communities with both individual and collective cultural rights, which are codified in the United Nations Declaration on the Rights of Indigenous Peoples.[18] The principles of free, prior and informed consent and self-determination must also be meaningfully implemented into decision-making by EPAs, so that First Nations have an ability to withhold consent to environmental decision-making that will significantly affect their individual and collective cultural interests.

Environmental racism can also be seen to be perpetrated in Australia against culturally and linguistically diverse communities, further emphasising the importance of an environmental justice framework. Examples of environmental racism against culturally and linguistically diverse communities in Australia include:

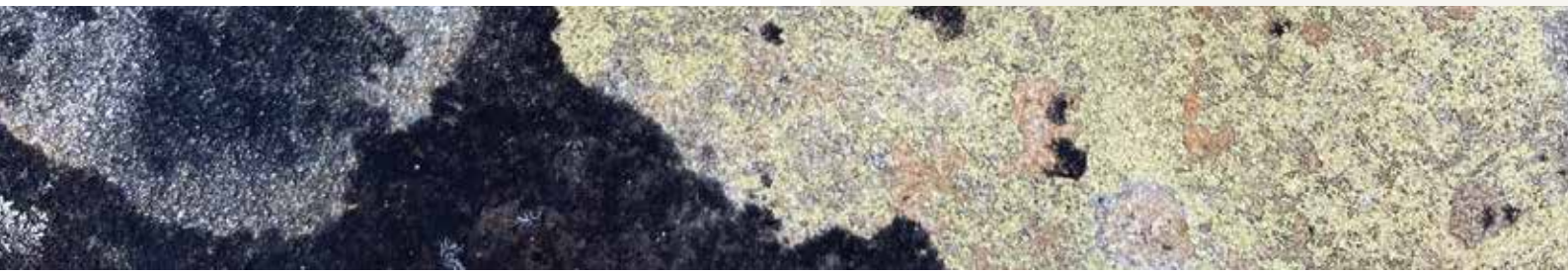
- the reopening of a polluting copper smelter in Port Kembla, in close proximity to a multicultural community with a large migrant population;[19]
- heat islands in Western Sydney suburbs caused by rising global average temperatures and poor development choices compared to more affluent and less diverse suburbs in Sydney's east;[20] and
- the East Perth Redevelopment Project, which transformed a previously industrial area into a 'contemporary urban landscape', leading to the displacement and marginalisation of the former majority migrant and Aboriginal population.[21]

Structural disadvantage that leads to environmental injustice can be caused by many sources, in addition to environmental racism. Individuals and communities can face structural disadvantage on the basis of race or colour, ethnicity, nationality, age, gender identity, disability or income. For example, communities in close proximity to polluting industries can be structurally disadvantaged where they are reliant on an industry for their economic stability that is also adversely impacting their health and environment.

A 2018 report by the Australian Conservation Foundation found that low-income families in Australia are disproportionately exposed to air pollution, with 90% of polluting facilities being located in low to middle income suburbs.[22] Low-income populations are also exposed to higher levels of toxic air pollution, either because polluting facilities are built in their neighbourhoods due to cheaper land or because these communities are only able to afford to live in areas near polluting facilities.[23]

Case study: Port Pirie, South Australia

Citizens in Port Pirie, South Australia, for example, have raised concerns about the exposure of their community to lead pollution which has built up over 50 years from the lead smelter in town in their dirt, dust and rainwater. High lead levels in blood can reportedly lead to a higher risk of miscarriages, impacts on growth, learning difficulties and reduced intelligence. The South Australian Government has responded to these impacts with health directives to the community. However, the response has been focused on citizen behavioural changes, such as avoiding rainwater, washing clothes and hair frequently, not hugging a baby until having a shower after engaging in lead-exposing work, and alerting citizens to the risks of drying clothes outside. Unfortunately, many citizens of the Port town are employed at the lead smelter or rely on the economic benefits of it to their town, meaning speaking out may threaten their livelihoods and positions in the community, placing these citizens at serious risk of disadvantage if they wish to take action to protect their environment and health, and the environment and health of their family and future generations.



Environmental justice requires recognition and understanding of the causes of structural disadvantage, highlighting who may be most susceptible, and addressing these systemic causes to provide for equal access to human health and the enjoyment of a healthy environment by all citizens.

In recognition of the importance of such equal access, the United Nations Human Rights Council (**HRC**) adopted a resolution on 8 October 2021 recognising the human right to a safe, clean, healthy and sustainable environment.[26] In particular, the HRC recognised that the consequences of environmental damage are felt 'most acutely' by those most vulnerable to those consequences, including Indigenous Peoples.[27] The United Nations High Commissioner for Human Rights called on States to take 'bold action' to ensure the resolution acts 'as a springboard to push for transformative economic, social and environmental policies that will protect people and nature'.[28]

The need for strong environmental governance

EPAs can play an important role in ensuring that human impact on the environment, human health and other species is sustainable and just, for the health of the environment and humans in the current and long term. They are intended to act as a regulator of development, managing pollution and waste, whilst ensuring that the health of the public and the environment is maintained.

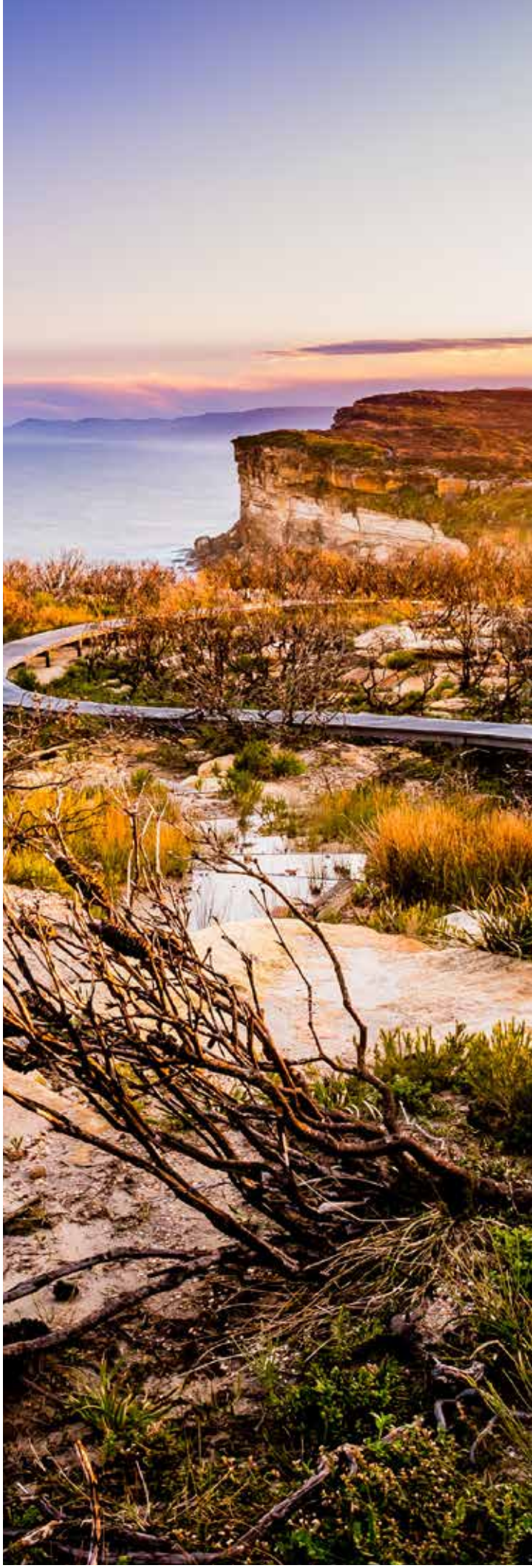
However, history has shown that the mere existence of an EPA does not guarantee that the environment will be protected, nor that development will be regulated appropriately without undue external influence. An environmental regulator established without sufficient independence mechanisms, resources or strong governance can lead to significant resource expenditure without a corresponding improvement to environmental governance outcomes.

Environmental governance that is not strongly focused on achieving environmental justice may also lead to inequity in environmental outcomes, such that those who are most vulnerable to the negative impacts of environmental degradation, pollution and climate change do not have a voice in the environmental regulatory process and continue to be disproportionately impacted by the adverse outcomes of environmental decision-making.[29]

Many Australian states and territories provide cautionary tales regarding the risks of establishing an EPA without strong governance. For example:

- In Queensland, an EPA was operational from 1998 to 2009. It plainly lacked meaningful independence mechanisms, a shortcoming which led to significant resource expenditure without improvements to environmental governance outcomes. The Department of Environment and Science (**DES**) now acts as Queensland's environmental regulator. DES often has its decision-making and advice overruled or interfered with by the Coordinator-General and the State Assessment and Referral Agency (**SARA**), including for the highest impact development proposed in the state.[30]
- In Tasmania, the regulatory arm of the EPA is not statutorily independent from the government. The EPA Board has also failed to take substantive action to protect the environment: for example, the Tasmania EPA has yet to publish Water Quality Objectives (**WQO**) for Tasmania's waterways in the 24 years since the commencement of the State Policy on Water Quality Management 1997, which requires WQOs to be identified by the EPA and factored into decision making in relation to water pollution and management.[31] The Tasmanian EPA has also failed to publish Emissions Limits Guidelines for a range of polluting activities, or statutory Codes of Practice for any industry or polluting activity.

- In the Northern Territory, a single person held three conflicting positions, being the Water Controller, responsible for water allocation and licensing, the CEO of the Department of Environment, Parks and Water Security, responsible for drafting and implementing water allocation plans, and also a board member of the Northern Territory Land Corporation, which benefits from water licensing decisions and the development and interpretation of water allocation plans.[32] While not in the context of an EPA, this provides a key example of the dangers of weak environmental governance resulting in major conflicts of interest with regards to environmental decision-making.
- In New South Wales, while there is an established EPA, it has not implemented certain legislative powers as required, or at all. For example, the NSW EPA has had the power to make Protection of the Environment Policies since 1997 but to date has not made a single policy.[33] This power could be used to implement policies to address the impacts of climate change on human health and the environment, by creating a goal of reducing GHG emissions. Further, it took survivors affected by the devastating 2019/20 bushfire season in NSW taking court action against the NSW EPA to ensure the EPA develops policies to address climate change in accordance with its legislative powers and obligations. The NSW Land and Environment Court has now recognised the NSW EPA has a duty to develop environmental policies to ensure environmental protection from climate change.[34] **See the EDO's recommendations for empowering the NSW EPA at: Empowering the NSW EPA to Prevent Climate Pollution.**



Unlike other comparable democracies such as the USA, Scotland and New Zealand,[35] there is currently no national EPA in Australia. National environmental decision-making is made by the Commonwealth Minister for the Environment under the not fit for purpose EPBC Act, which has been highly criticised because of its failure to protect the environment.[36] There have been many calls for a Federal EPA to improve environmental regulation nationally,[37] particularly given the scathing comments made about the operation of the EPBC Act in the 2020 independent review by Professor Graeme Samuel AC.[38]

If Australia is to see meaningful improvements in environmental and community health outcomes, a reduction of climate change risk and pollution, and an increase in public trust in environmental governance where confidence is low,[39] effective EPAs are required at a state, territory and national level that are independent, well-resourced and sufficiently empowered.

Establishing EPAs with strong governance arrangements has the potential to provide greater integrity and trust in environmental regulation in Australia, and thus ensure better regulatory outcomes for developers, community, government and the environment.[40]

EPAs must also have a strong grounding in environmental justice that recognises and addresses environmental racism, is developed in conformity with Cultural Protocols based on First Nations Lore, and has proper foundations in international law, to ensure that the benefits of environmental protection are felt equally by all and to ensure positive actions are taken to redress past and ongoing inequality.

This is particularly pertinent given that the worst impacts of climate change will be felt the most by those who have contributed the least to global emissions. Given the Secretary-General's 'code red' for humanity, strong environmental governance is now more necessary than ever if we are to avert climate catastrophe and protect the environment for future generations to come.

Elements of Strong Governance

1 Providing for First Nations Justice

Recommendation 1: Duty to develop and act in conformity with Cultural Protocols which are based on First Nations Lore, and to uphold internationally recognised First Nations rights of free, prior and informed consent and self-determination

EPAs in Australia must have a duty to develop and act in conformity with Cultural Protocols based on First Nations Lore, and must have an underpinning in the United Nations Declaration on the Rights of Indigenous Peoples, in particular the principles of free, prior and informed consent and self-determination.

First Nations in Australia have a unique relationship with Country, which is sacred and spiritual. This close relationship provides First Nations with a unique perspective on environmental protection and land management, as well as unique obligations to care for Country. This close relationship means that First Nations are often more vulnerable to environmental harm, and environmental racism in the development and application of environmental regulation. As a result, First Nations often suffer disproportionately from the adverse impacts of environmental harm, pollution and climate change.[41]

EPAs should have a duty to develop and act in conformity with Cultural Protocols based on First Nations Lore, and to ensure that First Nations knowledge, experience and opinions are prioritised when fulfilling their roles, whether it be monitoring, assessment, approvals, or compliance. This duty should be underpinned by the United Nations Declaration on the Rights of Indigenous Peoples and should acknowledge that First Nations are distinct communities with both individual and collective cultural rights. The principles of free, prior and informed consent and self-determination must be meaningfully implemented into decision-making by EPAs, so that First Nations have an ability to withhold consent to environmental impacts that will significantly affect their individual and collective cultural interests.

This duty should be meaningfully supported by requiring First Nations to be in decision-making positions of the EPA (discussed further in **Recommendation 9**), including on the Board or in an advisory role, and through key criteria requiring the views of the relevant First Nations to be centred in all land management, conservation and development decisions. Engagement with First Nations should not be limited only to Native Title holders and claimants, but should instead properly represent the knowledge and interests of all First Nations affected by those decisions.

a. Develop and act in accordance with Cultural Protocols based on First Nations Lore

Colonisation and dispossession have resulted in First Nations in Australia being structurally disadvantaged, including in the environmental context. As a result, environmental burdens such as pollution, environmental degradation and the impacts of climate change are disproportionately felt by First Nations. If EPAs are to protect the environment and human health, they must, at a minimum, develop Cultural Protocols in accordance with First Nations Lore and principles of free, prior and informed consent and self-determination.

First Nations Lore refers to the 'learning and transmission of customs, traditions, kinship and heritage'. First Nations Lore 'is a way of living and

interacting with Country that balances human needs and environmental needs'.[43] For First Nations, Country is sacred and spiritual, with Culture, Law, Lore, spirituality, social obligations and kinship all stemming from relationships to and with the Land.[44]

Cultural Protocols are accepted standards and procedures for all dealings between organisations such as an EPA and First Nations and are essential to ensure that respectful and meaningful partnerships and relationships are developed with First Nations communities and individuals.[45]

Cultural Protocols must be developed through extensive consultation and co-design with First Nations in the relevant jurisdiction in accordance with the principles of free, prior and informed consent, and self-determination, which must form the basis of all work with First Nations. These principles are discussed further below in the context of the United Nations Declaration on the Rights of Indigenous Peoples.

Cultural Protocols must also be developed in conformity with First Nations Lore. There is no 'one size fits all' approach to the development of Cultural Protocols, and what a specific Cultural Protocol involves and addresses will depend on the specific First Nations community that is being engaged with.

A duty to develop and act in accordance with Cultural Protocols based on First Nations Lore will require direct consultation with First Nations communities in all aspects of environmental regulation. This includes during the development of environmental standards and policies, monitoring of air and water quality, undertaking of environmental assessment, approval of development and setting of conditions, rehabilitation and remediation of land, and enforcement of breaches. Such consultation and engagement must be underpinned by principles of free, prior and informed consent, and self-determination.

The EDO has called for a modern framework to manage Flying-foxes in North Queensland which is 'developed in conformity to First Nations' Cultural Protocols'.[46] This would involve the co-design, development and implementation of Management Plans for Flying-fox roosts with local First Nations 'to ensure conformance with Cultural Protocols'.[47] **See the EDO's recommendations for a Flying-fox roost management framework developed in conformity with First Nations Cultural Protocols: *Flying-fox roost management reform for Queensland.***[48] Similar approaches are required for all aspects of environmental regulation, so that First Nations are directly involved in any decisions, policies or standards that will impact on their land and culture.

A duty to act in accordance with Cultural Protocols based on First Nations Lore also requires the protection of cultural heritage. Environmental and land management issues are often inseparable from First Nations cultural heritage, and so the regulatory and decision-making framework governing these two areas should be integrated, with First Nations perspectives and rights to self-determination privileged. This would also align with article 11 of the United Nations Declaration on the Rights of Indigenous Peoples, which recognises the right to 'maintain, protect and develop' cultural heritage,[49] demonstrating the importance of including cultural heritage protection in Australia's environmental regulatory framework (discussed more below). Substantial recommendations have been made in *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge*[50] and the *Independent Review of the EPBC Act – Final Report*[51] about how First Nations cultural heritage could be better protected in jurisdictions around Australia. These recommendations should be closely considered in any reform of EPAs.

Case study: Destruction of Juukan Gorge Aboriginal Heritage Sites

On 24 May 2020, Rio Tinto destroyed 46,000+ year-old rock shelters in Juukan Gorge, located in Western Australia, causing profound and immeasurable cultural and spiritual harm to the Puutu Kunti Kurrama and Pinikura Peoples. This destruction was approved under Western Australian legislation, with no involvement of First Nations in the assessment process.[52] For further information on this incident and recommended cultural heritage reforms to avoid future destruction, see *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge*.[53]

While this deplorable incident did not occur under environmental legislation, it demonstrates the importance of a legislative mandate to involve First Nations in decision-making that may have devastating impacts on Country, such as environmental impact assessment and development approvals to avoid incidents like this occurring.[54]

First Nations in Western Australia and in other jurisdictions often raise strong concerns with the EDO that their cultural heritage has not been protected due to the inadequacies of cultural heritage legislation. Yet, cultural heritage is also often not considered under environmental assessment processes by the EPA as it is deemed to be 'dealt with' under cultural heritage legislation. Currently, in both scenarios, First Nations are denied the opportunity to be involved in decision-making and to have their cultural heritage acknowledged and adequately protected. The relationship between cultural heritage and environmental legislation needs to be revised such that First Nations are involved in decision making in relation to both cultural heritage and the environment, so that cultural heritage is adequately protected under cultural heritage and development laws which speak to each other.

b. Implementing the United Nations Declaration on the Rights of Indigenous Peoples

The rights of Indigenous Peoples have been internationally recognised, with the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) being adopted by the United Nations General Assembly on 13 September 2007[55] and endorsed by Australia on 3 April 2009.[56] As discussed above, First Nations in Australia have been structurally disadvantaged through colonisation and dispossession of land. As a result, environmental burdens such as pollution, environmental degradation and the impacts of climate change are disproportionately felt by First Nations communities, who often have little or no say in the way that decisions are made about their Country. It is therefore essential that EPAs are underpinned by and implement the rights of Indigenous Peoples protected in UNDRIP.

This requires recognition of First Nations as distinct communities with individual rights as citizens, as well as collective cultural rights as a peoples. In order to properly implement the rights of Indigenous Peoples protected in UNDRIP, EPAs must recognise 'that [First Nations] are equal to all other peoples, while recognising the right of all [First Nations] to be different, to consider themselves different, and to be respected as such'.[57] This is affirmed by article 1 of UNDRIP, which provides that Indigenous Peoples have the right to full enjoyment of all human rights both as a collective and as individuals.[58]

The unique status of First Nations as having both individual and collective cultural rights has been recognised in Queensland's *Human Rights Act 2019* (Qld),[59] Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic),[60] and the ACT's *Human Rights Act 2004* (ACT).[61] Other Australian jurisdictions introducing human rights legislation should similarly recognise the distinct cultural rights of First Nations, both at a national and subnational level.

Of particular importance in the context of environmental regulation and decision-making is the principle of free, prior and informed consent (**FPIC**), enshrined in articles 19 and 32 of UNDRIP.[62] FPIC is the right of Indigenous Peoples to give or withhold consent to any project that may affect them or their lands, and to negotiate conditions for the design, implementation and monitoring of projects.[63] The terms in this principle are defined as follows:[64]

> **Free:** implies that consultations should be conducted in the absence of any form of coercion, intimidation or manipulation.
>
> **Prior:** requires consent to be sought sufficiently in advance of any authorisation or commencement of activities and that relevant agents should guarantee enough time for indigenous consultation processes to take place.
>
> **Informed:** means that Indigenous Peoples should receive satisfactory information in relation to certain key elements, including the nature, size, pace, reversibility and scope of the proposed project, the reasons for launching it, its duration and a preliminary assessment of its economic, social, cultural and environmental impact.
>
> **Consent:** includes the option to withhold consent. Consultation and participation are crucial components of a consent process.

FPIC is also interrelated with the right of self-determination, which is expressed in article 4 of UNDRIP as the right to 'autonomy or self-government in matters relating to their internal and local affairs'.[65] Self-determination is particularly important for First Nations in Australia, who are still overcoming the impacts

of colonisation and dispossession. The work of EPAs must be underpinned by FPIC and the right of self-determination, particularly in the context of development assessment and approval, and in ongoing management or rectification of environmental harm on their lands. First Nations must be involved in these decision-making processes, and ultimately must be able to withhold consent for development activities that will significantly affect their cultural interests.

Other rights of Indigenous Peoples protected in UNDRIP that must be implemented by EPAs include the right to be free from discrimination,[66] the right to participation in decision-making that will affect their rights,[67] the right to own, use, develop and control traditional lands,[68] and the right to conserve and protect the environment of traditional lands.[69] In order for these rights protected in international law to be given effect they must be implemented via the objectives, structures and operations of national and subnational agencies, particularly EPAs where environmental decision making can have significant impacts on First Nations and their Country.

2 Underpinned by an environmental justice framework

Recommendation 2: Underpinned by an environmental justice framework to ensure equality in environmental protection

All EPAs in Australia should be underpinned by environmental justice frameworks that:

- acknowledge and address environmental racism;
- meaningfully define environmental justice;
- legislatively enshrine mechanisms to achieve environmental justice; and
- have a proper foundation in principles of human rights under international law.

An environmental justice framework is needed to underpin environmental regulation by EPAs in Australia, to ensure that disproportionate environmental burdens are not imposed on communities and individuals that face structural disadvantage on the basis of race or colour, ethnicity, nationality, age, gender identity, disability or income. Structural disadvantage refers to the disadvantage experienced by some individuals and communities as a result of how society is structured and functions.[70] Development of an environmental justice framework is intended to ensure that those communities facing structural disadvantage are not disproportionately impacted by adverse consequences of environmental degradation, pollution, and climate change, and are involved in environmental decision-making that impacts them.

The development of any environmental justice framework must acknowledge that environmental justice as a movement was developed to address environmental racism. An environmental justice framework must also meaningfully define environmental justice, legislatively enshrine mechanisms to achieve environmental justice, and be underpinned by international law.

A private members Bill introduced in Canada in 2021 provides an example of how environmental justice frameworks can be meaningfully developed and implemented by EPAs in Australia. The Bill, which did not pass, recognised in its preamble that a disproportionate number of people who live in environmentally hazardous areas are members of an Indigenous, racialised or other marginalised community. The Bill required the Minister of the Environment to develop a national strategy to assess, prevent and address environmental racism and to advance environmental justice. EPAs in Australia should similarly require the development of an environmental justice framework or strategy, which acknowledges and addresses environmental racism, meaningfully defines environmental justice in the Australian context, legislatively enshrines mechanisms to achieve environmental justice, and which is underpinned by international law.

EPAs in Australia should, in addition to being required to develop environmental justice frameworks, have a duty to achieve environmental justice by identifying and addressing any disproportionate environmental burdens imposed on structurally disadvantaged communities and individuals. This is further explored in **Recommendation 3**, which provides that a duty to achieve environmental justice should be placed on all EPAs.

a. Acknowledging and addressing environmental racism

An environmental justice framework cannot truly achieve justice unless it addresses environmental racism.

The term 'environmental racism' was coined by African American civil rights leader Dr Benjamin Chavis in 1982, who defined it as:

'Racial discrimination is the deliberated targeting of ethnic and minority communities for exposure to toxic and hazardous waste sites and facilities, coupled with the systematic exclusion of minorities in environmental policy making, enforcement, and remediation'.[72]

Dr Robert Bullard, who is considered the 'Father of environmental justice', defines environmental racism as:

'any policy, practice or directive that differentially affects or disadvantages (where intended or unintended) individuals, groups or communities based on race or colour'.[73]

If EPAs in Australia are to truly protect the environment and human health, they must also acknowledge and address past and ongoing racial inequality in the application of environmental regulation. In the US context, the environmental justice movement emerged to address environmental racism experienced by African American, Native American and Latinx communities. In the Australian context, environmental racism can be seen to be perpetrated against First Nations communities through the ongoing impacts of colonisation and dispossession, as well as the destruction of First Nations lands for settler purposes. For example, atomic tests were performed on the land of the Anangu People between 1955 and 1963, with many Anangu People being forcibly removed from their land. The atomic tests caused not only significant environmental harm to the land, but also severe cultural harm as the Anangu People could not continue to practice their traditions and culture on Country.[74]

Environmental racism can also be seen in the contamination of water in First Nation's communities in the Kimberly region of Western Australia. A 2015 report by the Western Australian Auditor-General found that water quality in First Nations communities did not meet Australian standards, with dangerous microbes found in the drinking water in 68 communities at least once over a two-year period.[75] A follow-up report in 2021 found that, despite the Western Australian government committing to address these water quality issues, 37 First Nations communities still tested positive for contaminants, including E. coli, nitrates and uranium.[76]

Environmental racism can also be seen to be perpetrated in Australia against culturally and linguistically diverse communities. This can be seen in Western Sydney, which is one of the most diverse regions in Australia and has large migrant communities.[77] Suburbs in Western Sydney have become 'heat islands' due to a deadly combination of rising global average temperatures caused by climate change and poor development choices such as dense buildings, a lack of trees and large expanses of black asphalt. Extreme heat particularly endangers children, elderly people, and people with disability and existing health conditions. For example, Penrith, a Western Sydney suburb, was the hottest place on Earth on 4 January 2020 at 48.9°C.[78] This is compared to more affluent and less diverse suburbs in Sydney's east, such as Mosman, which has moderately high vegetation cover compared to the western suburbs, lowering average temperatures and potential adverse health impacts.[79]

It is clear that environmental racism is occurring in Australia, in particular against First Nations communities and culturally and linguistically diverse communities. EPAs in Australia must, when developing an environmental justice framework to underpin their structure and activities, ensure that environmental racism is acknowledged and addressed.

b. Defining environmental justice

As a concept, environmental justice is difficult to define. However, in order to develop environmental justice frameworks that address the disproportionate environmental burdens placed on structurally disadvantaged communities, EPAs must develop a meaningful definition of environmental justice that underpins their functions and powers.[80]

The US EPA's definition of environmental justice is arguably the most cited, and defines environmental justice as:

> '[T]he fair treatment and meaningful involvement of all people, regardless of race, colour, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies'.[81]

The US EPA further defines 'fair treatment' and 'meaningful involvement' as follows:[82]

> 'Fair treatment' means that 'no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies.'
>
> 'Meaningful involvement' means that people have an opportunity to participate in decisions about activities affecting their health or environment, that the public can influence regulatory decision-making, that community concerns will be considered in decision-making, and that decision-makers will seek out and facilitate the involvement of those potentially affected.

A number of theories also underlie environmental justice as a concept, including distributive justice,[83] procedural justice,[84] corrective justice,[85] social justice,[86] justice as recognition[87] and justice as capabilities[88]. Justice Preston, Chief Judge of the New South Wales Land and Environment Court, emphasises three of these theories when defining environmental justice: distributive justice, procedural justice and justice as recognition.

Distributive justice

Distributive justice is concerned with the distribution of environmental goods (or benefits) and environmental bads (or burdens).[89]

Procedural justice

Procedural justice is concerned with the ways in which decisions, including regarding distribution of environmental benefits and burdens, are made, and who is involved and who has influence in those decisions.[90]

Justice as recognition

Justice as recognition is concerned with who is given respect and who is and is not valued. Justice as recognition requires the recognition of different social groups and communities, and of the natural environment and components of it.[91]

Case study: The Rocky Hill Coal Project and Distributive Justice

In the 2019 decision of Justice Preston in *Gloucester Resources Limited v Minister for Planning*[92] in the NSW Land and Environment Court, his Honour applied the principle of distributive justice in deciding whether to approve the Rocky Hill Coal Project (see paragraphs 398-416). His Honour stated that:

'distributive justice concerns the just distribution of environmental benefits and environmental burdens of economic activity. Distributive justice is promoted by giving substantive rights to members of the community of justice to share in environmental benefits (such as clean air, water and land, a quiet acoustic environment, scenic landscapes and a healthy ecology) and to prevent, mitigate, remediate or be compensated for environmental burdens (such as air, water, land and noise pollution and loss of amenity, scenic landscapes, biological diversity or ecological integrity). Issues of distributive justice not only apply within generations (intra-generational equity) but also extend across generations (inter-generational equity)'.[93]

His Honour went on to find that the Rocky Hill Coal Project will raise issues of distributive equity, both intra-generational equity and inter-generational equity, finding that:

- the burdens of the Project, the various negative environmental, social and economic impacts, will be distributed to people in geographical proximity to the Project;[94]
- the physical impacts of the Project, such as the high visual impact and the particulate, noise and light pollution, will be experienced by people in geographical proximity to the Project;[95]
- the Project will have particular negative impacts on Aboriginal people whose Country is to be mined. They have strong cultural and spiritual connections to Country, which will be severely damaged by the Project. This will cause negative social impacts to a disadvantaged and vulnerable group in society;[96]
- the Project may also impact on other disadvantaged groups within the community, such as lower socio-economic groups and people over the age of 55 years;[97]
- there is inequity in the distribution between current and future generations, where the economic and social benefits of the Project will last only for the life of the Project (less than two decades), but the environmental, social and economic burdens of the Project will endure not only for the life of the Project but some will continue for long after.[98] The benefits of the Project are therefore distributed to the current generation but the burdens are distributed to the current as well as future generations (inter-generational inequity).[99]

The principles of distributive justice therefore provided a helpful framework to assess the Project against, with regard to who would be most impacted by the approval of the mine and the fairness of how those impacts would be distributed.

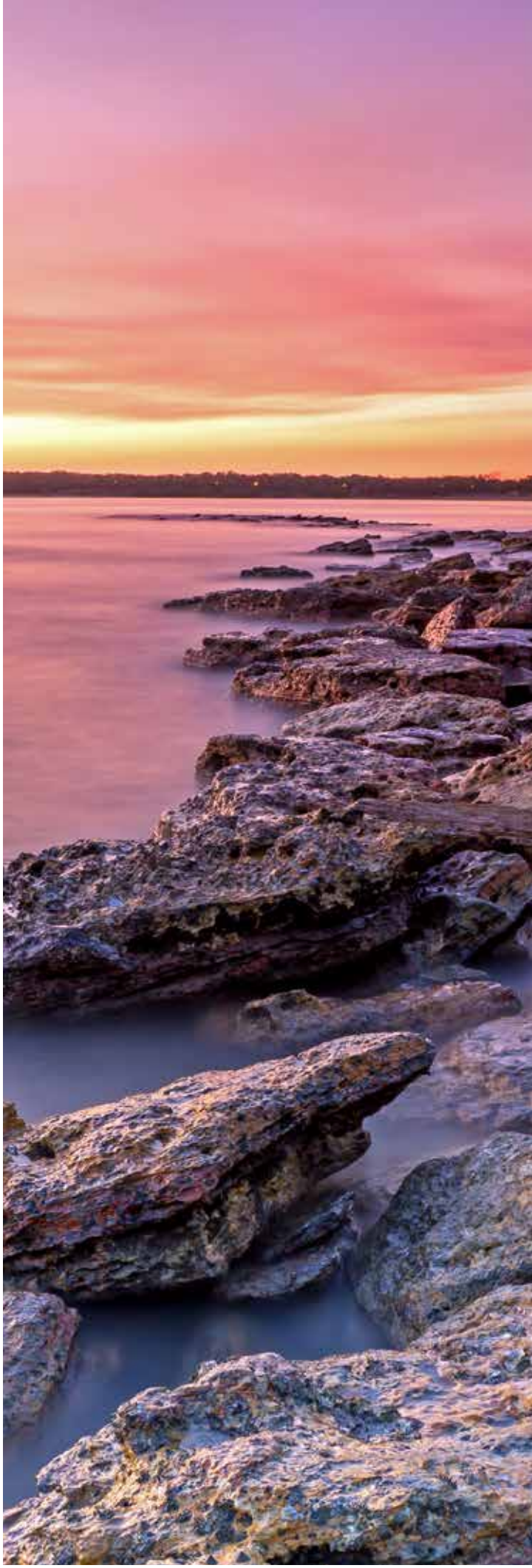
These definitions and theories of environmental justice discussed above should be used by EPAs in Australia to develop their own robust environmental justice definitions and frameworks.

c. Legislatively enshrining mechanisms to achieve environmental justice

If an EPA is to protect the environment and human health equally for all people, it must have legislatively enshrined mechanisms for achieving environmental justice. This should involve mechanisms to identify communities with environmental justice concerns, so that they can be directly consulted and engaged in decision-making that impacts them, with criteria that requires that their views and the causes of the injustice they experience be addressed in decision-making. For example, key communities likely to have environmental justice concerns are those at risk of structural disadvantage in Australia, including people of colour, culturally and linguistically diverse communities, low-income communities and First Nations communities.

Once communities with environmental justice concerns are identified and consulted, the injustices that they face must be addressed by the environmental regulator. This involves ensuring there is equity so that all people are treated equally in environmental decision-making processes, as well as ensuring there is justice by addressing the systemic causes of those inequities. Both equity and justice are required to achieve environmental justice.

Equity may be achieved through grants programs or resource allocations that target communities with environmental justice concerns, as well as policies that ensure decision-making is not discriminatory in its effect. Achieving justice requires that the root causes of the inequities faced by disadvantaged communities are addressed, which may involve structural or systemic change.[100]



Case study: Environmental Justice in the United States of America

By Executive Order 12898 of 11 February 1994, President Clinton ordered the US EPA to 'make achieving environmental justice part of its mission'.[101] The US EPA provides examples of how environmental justice can be implemented in practice by an environmental regulator, including through grants programs, a strategic plan and guidelines for federal agencies to address environmental justice concerns.

The US EPA has various grant programs available to communities with environmental justice concerns:[102]

- The EJ Collaborative Problem-Solving Cooperative Agreement Program provides funding for eligible applicants for projects that address local environmental and public health issues within an affected community;
- The EJ Small Grants Program supports and empowers communities working on solutions to local environmental and public health issues;
- The State Environmental Justice Cooperative Agreement Program provides funding to eligible applicants to support and/or create model state activities that lead to measurable environmental or public health results in communities disproportionately burdened by environmental harms and risks.

The US EPA's strategic plan, *EJ 2020 Action Agenda*, outlines how the agency is integrating environmental justice into its programs and practices. The strategic plan includes three key goals:

1. Deepen environmental justice practice within EPA programs to improve the health and environment of overburdened communities.
2. Work with partners to expand the EPA's positive impact within overburdened communities.
3. Demonstrate progress on significant national environmental justice challenges.

The US EPA also has a National Environmental Justice Advisory Council, whose role is to advise the EPA on how to integrate environmental justice into its programs, policies and activities, how to meaningfully engage with communities that have environmental justice concerns, and how to improve the operations of laws and policies to better protect the health and environment of vulnerable communities.[103]

d.Implementing international law

An environmental justice framework must be underpinned by principles of international law relating to the rights of individuals in communities and groups that are structurally disadvantaged, particularly the principles and rights found in UNDRIP (discussed above in **Recommendation 1**), the Convention on the Rights of the Child (**CRC**), the Convention on the Rights of Persons with Disabilities (**CRPD**), and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**).

Convention on the Rights of the Child

The CRC was adopted by the United Nations General Assembly on 20 November 1989 and ratified by Australia in December 1990.[104] It is essential that the development of an environmental justice framework is underpinned by the rights of the child enshrined in the CRC, as children are disproportionately affected by changes in their environment.[105]

An analytical study conducted by the Office of the United Nations High Commissioner for Human Rights found that children are disproportionately impacted by climate change, particularly girls, children with disability, children on the move, poor children, children separated from their families, and Indigenous children.[106] It is therefore essential that EPAs, which are responsible for the protection of the environment and human health, develop an environmental justice framework that is underpinned by and implements the rights of children.

Rights protected by the CRC of particular importance for the development of an environmental justice framework include the right to life,[107] the right to an adequate standard of living,[108] the right to culture,[109] and the right to rest, leisure, play and recreation.[110]

Convention on the Rights of Persons with Disabilities

The CRPD was adopted by the United Nations General Assembly on 13 December 2006 and ratified by Australia on 17 July 2008.[111] Disabilities cover a wide range of impairments, and the CRPD recognises 'that disability is an evolving concept that results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'.[112]

EPAs that are developing an environmental justice framework must ensure that they implement the rights of people with disability, particularly given that people with disability are more vulnerable to the adverse impacts of environmental degradation, pollution, and climate change.[113]

As part of their responsibility for protection of the environment and human health, EPAs must develop an environmental justice framework underpinned by the rights of people with disability. While all rights expressed in the CRPD should be implemented by EPAs, article 3 provides a general overview of the key principles that must underpin any environmental justice framework, including respect for inherent dignity and individual autonomy, non-discrimination, respect for difference, equality of opportunity, and accessibility.[114]

International Covenant on Economic, Social and Cultural Rights

The ICESCR was adopted by the United Nations General Assembly on 16 December 1966 and ratified by Australia on 10 December 1975.[115] The ICESCR enshrines a number of economic, social and cultural rights including, most relevantly in the context of environmental regulation, the right to an adequate standard of living,[116] and the right to the enjoyment of the highest attainable standard of physical and mental health.[117]

It is essential that EPAs develop an environmental justice framework that is underpinned by these rights, particularly given the responsibility of EPAs for protection of the environment and human health. The ICESCR creates obligations for States to address the impacts of environmental harm, pollution and climate change, particularly for those communities and individuals who are disproportionately impacted due to structural disadvantage.[118]

3 Role clarity

Recommendation 3: A clearly defined role and duties to ensure objectives are achieved

An EPA should have a clearly defined role to ensure it achieves its objectives, including:

- a duty to protect and improve the state of the environment and human health from the harmful effects of pollution, destruction and waste through assessment, enforcement, monitoring and reporting and standard setting, which is not overridden by other departments;
- a duty to achieve environmental justice;
- a duty to act consistently with the human right to a healthy environment for all;
- a duty to implement legislation in accordance with principles of ecologically sustainable development; and
- a duty to take action to prevent and mitigate greenhouse gas pollution and take all actions necessary to reduce the impacts of climate change.

Role clarity is essential for regulators to fulfill their functions effectively. Having a clearly defined role reduces actual or perceived conflicts and enables regulators to fulfil their purposes without duplicating or detracting from the role of other entities.[119]

Role clarity requires that:

- a regulator is clearly defined in terms of its objectives, functions, and co-ordination with other entities;[120]
- a regulator's purposes and the regulatory scheme's objectives are clear to staff and stakeholders;[121] and
- the functions of a regulator are assigned so that the performance of any one function should not limit or appear to compromise the regulator's ability to fulfil its other functions.[122]

For an EPA, role clarity must involve a clearly defined duty to protect the environment and human health from the harmful effects of pollution, destruction and waste. The role of an EPA should also involve a duty to achieve environmental justice, a duty to act consistently with a right to a healthy environment, a duty to implement the principles of ecologically sustainable development, and a duty to take action to prevent and mitigate GHG pollution and take action to reduce the impacts of climate change.

a. A duty to protect the environment and human health, which prevails over all other legislative obligations and agencies

If an EPA is to protect the environment and human health, it must have a clearly defined duty to which it can be held accountable. The primary role of an EPA should be to protect the environment and human health from the harmful effects of pollution, destruction and waste, including air, land and water pollution caused by emissions, destruction of ecosystems and habitats, production and discharge of waste, including GHG emissions. Having the role of the EPA clearly legislated is essential to ensure that it is clearly distinguished from other parts of government, so that the EPA can focus on achieving its objectives.

Further, the duty to protect the environment and human health should be paramount. The EPA and its duties must not be overridden by other departments or agencies. This duty should be expressed to prevail over other legislation. Having multiple environmental regulators is ineffective and can undermine and confuse the role of the EPA. The EPA should be the primary environmental regulator responsible for regulating activities that may have an impact or present a risk to the environment and for preventing pollution, avoiding environmental destruction and managing waste[123] Role clarity is essential for effective regulation, particularly in the complex realm of environmental regulation and management, where environmental protection can be undervalued as against imperatives of development.[124]

This duty also needs to form part of the environmental decision-making process, so that it is required to be considered when assessing environmental impacts or issuing development approvals and licenses. The duty of the EPA to protect the environment and human health from the harmful effects of pollution, environmental destruction and waste must also be supported by sufficient compliance and enforcement mechanisms and actions. While many EPAs in Australia have clear objectives to protect the environment and human health, many EPAs do not undertake effective compliance and enforcement activities to ensure laws are respected and upheld in practice.

b. A duty to achieve environmental justice

In addition to a requirement to develop an environmental justice framework, as discussed above in **Recommendation 2**, an EPA should have a duty to achieve environmental justice, as part of its role in protecting the environment and human health. A duty to achieve environmental justice should require an EPA to identify and address 'disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations' in its jurisdiction.[125]

The US EPA provides an example of a strong duty to address environmental justice, as it is under an obligation to:[126]

- identify and address the disproportionately high and adverse human health or environmental effects of their actions on minority and low-income populations, to the greatest extent practicable and permitted by law;
- develop a strategy for implementing environmental justice; and
- promote nondiscrimination in federal programs that affect human health and the environment, as well as provide minority and low-income communities access to public information and public participation.

A duty to achieve environmental justice is necessary for EPAs in Australia, as there is evidence of environmental burdens being placed disproportionately on communities and individuals who are structurally disadvantaged on the basis of race or colour, ethnicity, nationality, age, gender identity, disability or income.

c. A duty to act consistently with the human right to a healthy environment for all

Environmental justice also requires that the right to a healthy environment be recognised and implemented equitably for all citizens.[127] Given the recent international recognition of the right to a healthy environment by the United Nations Human Rights Council,[128] the EDO considers that there is 'a unique opportunity for Australian governments to take bold action' and legislatively recognise the right to a healthy environment.[129] Jurisdictions with an existing human rights legislative framework – currently only Victoria, Queensland and the Australian Capital Territory – should use this opportunity to enshrine the right to a healthy

environment and better provide for the protection of the environment and the health and wellbeing of their residents.[130]

The objectives of an EPA should also expressly recognise that the right to a safe, clean, healthy and sustainable environment is a human right, and should be charged with protecting this right. Enshrining the protection of the right to a healthy environment both in human rights legislation as well as in the objectives of an EPA would provide for stronger environmental laws and policies, improved implementation and enforcement, greater public participation in environmental decision-making, and reduced environmental injustices.[131]

d. A duty to implement legislation in accordance with principles of ecologically sustainable development

Ecologically sustainable development (**ESD**) is a long-standing and internationally recognised concept. The 'National Strategy for Ecologically Sustainable Development' (**National Strategy**), which sets out the broad framework under which governments will pursue ESD in Australia, was endorsed by the Council of Australian Governments in 1992.[132]

ESD is defined in the National Strategy as:

> 'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased'.

The National Strategy includes a number of Guiding Principles, also known as the principles of ESD. Many of these principles, expanded upon below, are already incorporated into environmental regulation in Australia.[133]

The precautionary principle

Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

Inter-generational equity

The present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations.

Conservation of biological diversity and ecological integrity

Conservation of biological diversity and ecological integrity should be a fundamental consideration in environmental planning and decision-making processes.

Improved valuation, pricing and incentive mechanisms

Environmental factors should be included in the valuation of assets and services.

Given the commitment by government at all levels in Australia to pursue ESD, as well as Australia's international obligations[134], an EPA must include the principles of ESD as a meaningful mandatory element of its regulatory and decision-making frameworks. An effective and independent EPA should be required to take into account or have regard to the principles of ESD when making key environmental decisions.

e. A duty to take action to reduce the risks of climate change

Climate change poses the greatest existential threat to the world's collective environment and health. While the main focus of EPAs is generally on regulating pollution, environmental destruction and waste, these issues are inseparable from climate change, which is a phenomenon caused by a diverse range of environmentally harmful activities. GHG emissions are a major contributor to climate change, and are emissions to the air from industrial processes. They are a form of air pollution. While, historically the regulation of air pollutants by some EPAs has been silent on GHG emissions, others such as the Victorian EPA have regulated GHG emissions. It is beyond doubt that GHG emissions have the character of a pollutant and should be regulated by EPAs as such.[135] For example, in Victoria the EPA has regulated GHG emissions as pollution, with the *Environment Protection Act 2017* (Vic) expressly including 'a greenhouse gas substance emitted or discharged into the environment' in the definition of waste.[136]

EPAs should therefore have a duty to take action to reduce the risks of climate change. As a result of this interrelation between pollution, environmental destruction, waste, and climate change, reducing the risks of climate change through mitigation and adaptation is a natural part of the mandate of an EPA. This duty must specifically include mitigating scope 1, 2 and 3 emissions, being emissions directly from and related to an industry and as a result of downstream outcomes of an industry. Scope 3 emissions must be included in emissions reductions efforts, to ensure that we are taking responsibility for the emissions from products that we are profiting from exploiting and to ensure we are not promoting their continued use.

This is particularly important given that EPAs are responsible for development approvals and licences in several jurisdictions, which typically have the most significant responsibility for emissions. A mandate to address climate change is also necessary to ensure that environmental justice is achieved, as climate change disproportionately impacts those most vulnerable to environmental harm, both in Australia and overseas. For example, Torres Strait Islanders have been experiencing the impacts of sea level rise from climate change for decades, yet they are one of the smallest contributors globally to the cause of this climate change.[137] A mandate to address climate change is also essential to achieve intergenerational equity, given that the worst impacts of climate change will be felt by future generations who have not contributed to global emissions and pollution.

An effective EPA should regulate climate impact mitigation through legislated targets and effective GHG emissions reductions regulation, which all agencies must be required to achieve and not compromise. This could be achieved through a Climate Act which implements key elements of needed climate action such as whole-of-government obligations to meet targets and oversight mechanisms.

See the EDO's recommendations for climate action in three key reports:

- ***A Climate Act for Queensland***
- ***A Climate Change Act for the Northern Territory***
- ***Climate-ready planning laws for NSW: Rocky Hill and beyond.***

Victoria's *Climate Change Act 2017* (Vic) provides a prime example of a strong legislative requirement to consider the impacts of climate change in environmental decision-making. The Victorian EPA is required to have regard to the potential impacts of climate change and the potential contribution to Victoria's GHG emissions when making decisions about development licences and permits.[139] This includes a requirement to consider direct, indirect, and cumulative impacts of climate change and GHG emissions, as well as long-and short-term impacts of climate change.

The New South Wales Land and Environment Court recently held that the New South Wales EPA has a duty to develop objectives, guidelines, and policies to ensure the protection of the environment in New South Wales from climate change.[140] This duty stems from the New South Wales EPA's legislative mandate to 'develop environmental quality objectives, guidelines and policies to ensure environment protection'.[141]

The duty to protect the environment and human health from the existential impact of climate change should be express. Implied duties should not be relied upon to create an obligation to address climate change. An effective EPA must:

- be under a clear, legislated duty to prevent, mitigate, monitor and report GHG pollution and take all actions necessary to avoid and reduce the impacts of climate change and to meet clear emissions reductions targets, which must extend also to all relevant agencies; and
- have a duty to not compromise the achievement of emissions reductions targets in all decision making.

4 Independence

Recommendation 4: Independence from Ministerial influence, other government agencies and industry capture

An EPA should be established as an independent statutory authority that has:

- a clear independent governance structure, supported by a Board to provide strategic advice and direction;
- freedom from Ministerial influence or being overridden by other agencies; and
- policies and procedures to manage conflicts of interest.

Independence helps achieve actual and perceived objective, impartial and consistent decision-making. This is because it reduces risks of conflict, bias, and improper influence. Establishing an EPA with a high degree of independence, both from those it regulates and from government, can provide greater confidence and trust that regulatory decisions are made with integrity and in the public interest. Independence is of particular importance for the regulatory integrity of an EPA because it regulates both government and non-government entities and engages in decision-making that has the potential to significantly impact on the interests of many stakeholders, including industry, the community, First Nations and other government bodies.[143]

An EPA should be formally established as an independent statutory authority, free from Ministerial influence. This includes implementation of a Board to provide strategic direction and oversight, made up of independent expert specialists in environmental regulation and science with strict legislated restrictions around conflicts of interest that are enforceable.

a. A clear, independent governance structure

The OECD identifies three main governance structures for independent regulators:[144]

- Governance Board model – the board has primary responsibility for providing oversight, guidance and policy to the regulator, with decision-making functions largely delegated by the Chief Executive Officer (**CEO**);
- Commission model – the board itself makes most substantive regulatory decisions;
- Single member regulator model – an individual is appointed as the regulator, and either makes most substantive regulatory decisions themselves or delegates them to staff.

The Governance Board model is recommended for an effective EPA, as it will ensure the EPA is supported by a number of experts who can provide guidance and strategic direction to the regulator.

The Governance Board model is recommended over the Commission model, as it will allow the board to delegate responsibility for implementation to the CEO and staff so that it can focus on providing strategic guidance, approval and oversight.

The Governance Board model is also recommended over the Single Member Regulator model, as it will ensure that there is less opportunity for corruption as may occur with a single board member and will also ensure the EPA is supported by a number of Board members with specialist expertise in a range of areas.

Under the Governance Board model, an EPA would be established as an independent statutory authority, with an appointed Board of at least 4 members responsible for strategic direction and oversight, each specialising in different areas of expertise. The regulatory and decision-making functions of the EPA would be vested in the CEO, who would be required to act in conformity with Cultural Protocols and on the advice of the Board, the Environmental Justice Group, the Chief Environmental Scientist and, as relevant, the Environmental Health Group. The CEO may have the power to delegate those powers as necessary, with the delegate subject to the same advice and obligations as the CEO.

The governance structure should reflect the status of the EPA as a specialist, science-based regulator. Board members should be required to meet particular expertise relevant to the governance of the EPA, including First Nations representation, scientific expertise and regulatory experience.

As has been discussed in **Recommendations 1 and 2**, EPAs should have a duty to act in conformity with Cultural Protocols that are consistent with First Nations Lore, and should also develop and implement an underlying environmental justice framework. As a result, there should be First Nations representation in the governance of an EPA, as well as substantive engagement with First Nations communities and communities that experience structural disadvantage on all aspects of environmental regulation.

The Board should sit alongside and meaningfully engage with the relevant Health Department in the shared purposes of protecting human health, ensuring meaningful air and water pollution standards and mitigating climate impacts.

Internally, there are three key roles that should be established:

- **A Chief Environmental Scientist** (**CES**) should be appointed as a legislated position with scientific qualifications, with the function of advising the CEO on regulatory decisions and standards and advising the Chief Health Officer or equivalent on environmental health matters.
- **An Environmental Justice Group**, with First Nations membership, should be established that advises the CEO on whether the environmental justice framework is being implemented by the EPA, and whether the EPA's various duties in relation to environmental justice and Cultural Protocols are being meaningfully complied with.
- **An Environmental Health Group** should be established, to lead monitoring and evaluation activities, to interpret data and advise the CES and CEO. This group could also work with the relevant Health Department on environmental health outcomes.

b. Freedom from Ministerial influence or being overridden by other agencies

An independent EPA must hold independent power and sufficient resources to assess and decide applications without intervention from Ministerial influence or being overridden by other Departments or bodies. Such freedom from Ministerial control or direction should be expressly provided for in legislation, as is the case with the EPAs in Western Australia and the Northern Territory. The roles of the responsible Minister and the EPA with respect to environmental decision-making should also be clearly defined to ensure that there is no confusion or overlap.[146]

However, we do note that merely legislating the independence of an EPA is not enough, and such independence needs to be implemented in practice. For example, while the WA EPA is formally free from Ministerial control, a report by organisation 350 Perth raised questions about whether this is the case in practice.[147] The WA EPA's Greenhouse Gas Assessment Policy was withdrawn only 8 days after publication, allegedly following a discussion with the WA Premier who raised the concerns of resources companies who were opposed to the policy.[148] Later versions of the policy removed the requirement for proponents to offset all residual (net) direct emissions.[149]

An EPA must be established with sufficient independence from other entities and branches of government, to ensure that there is integrity in and respect for its functions, powers and duties, including but not limited to the need for a rigorous and independent environmental impact assessment process.

Case study: Queensland Coordinator-General Overrides and Impedes Expert Agency and Court in Environmental Decision Making[150]

In Queensland, the Coordinator-General is responsible for coordinating and evaluating environmental assessment of declared 'coordinated projects', which are projects that typically pose the greatest environmental impacts. The Coordinator-General has the power to mandate environmental conditions which no other decision-maker can be inconsistent with, including the Court. This can lead to perverse outcomes where mandated conditions are implemented which are based on information that was found to be lacking, incorrect or inadequate on expert scientific enquiry, for instance, by the Department of Environment and Science (**DES**) or on Court review.

A Right to Information application by ABC News unveiled that the Queensland Coordinator-General made a decision inconsistent with the expert scientific advice of DES in the assessment of the Olive Downs coal mine, a coordinated project in central Queensland. DES advised the Coordinator-General that the draft environmental impact statement provided insufficient detail to properly assess the impacts to the environment of leaving final voids in the floodplain, and that the proposal was considered to pose a significant impact to the Isaac River floodplain and associated ecology. Yet, the Coordinator-General reportedly did not request the further information DES stated was necessary to properly assess the environmental risks of the project, and instead mandated conditions which provided for the final voids to be left in the floodplain. DES are unable to act inconsistently with mandated conditions imposed by the Coordinator-General.

This case study demonstrates the importance of establishing an environmental regulator that is able to conduct independent environmental impact assessment of major projects free from the unfettered involvement and decisions of other agencies.

c. Management of conflicts of interest

Managing conflicts of interest is essential for an environmental regulator, to ensure both that decisions are actually made in a fair and unbiased manner, in the public interest, without external influence, and to ensure that these decisions are seen and perceived by the public to be made free from influence.[152] This is particularly important in the context of environmental decision-making, where decisions can have wide reaching implications for the community and there is large scope for vested interests to otherwise impact decision-making.[153]

Environmental legislation should provide for measures to remove the risk of conflicts of interest in decision making, including clear definitions of what constitutes a real or perceived conflict of interest, disclosure requirements, risk mitigation and ongoing management and review requirements. This policy should be reviewed regularly, and the integrity of decision-making by an EPA should be regularly monitored through an external audit process.[154]

5 Accountability

Recommendation 5: Accountability mechanisms to ensure responsibilities are discharged with integrity in the public interest

An EPA should be accountable to the public, which includes:

- well-defined and clear criteria for decision-making;
- mechanisms to review decision-making, including open standing for judicial review and merits review;
- the regular publication of State of the Environment Reports; and
- powers to scrutinise performance, both of the government and itself.

Environmental regulators such as EPAs need to be held accountable for their decisions and actions. This is important to ensure that the EPA properly undertakes its functions and duties and, if it does not, that those impacted by any resulting environmental injustice, in the form of pollution, environmental degradation or climate change, are able to take action.[155] A system of accountability ensures that a regulator feels compelled to undertake and demonstrate the efficient and effective discharge of its responsibilities with integrity, honesty, and objectivity.[156] For an EPA, this includes clearly articulating the criteria for decision-making, the ability of the public to make submissions that will be meaningfully taken into account and to scrutinise decisions via merits and judicial review, the undertaking of published environmental monitoring and reporting for each project at a localised, regional and state/territory-wide level, and the scrutiny of performance via external audit.

a. Well-defined and clear decision-making criteria

Well-defined decision-making procedures and clear criteria are essential to ensure consistency, transparency and accountability for environmental decision-making.[157] Decision-making criteria should require consideration of the EPA's objective of protecting the environment and human health, as well as the implementation of the principles of ESD, environmental justice, First Nations justice and human rights obligations. The criteria should be clearly specified as criteria for environmental decision-making, and other key criteria should be well-defined, so that the EPA can be held accountable to its mandate.

Where decision-making criteria rely on the EPA setting standards, the standards required should be clearly prescribed and certain, should be set based on the best available science, be published in a timely manner, and reviewed regularly. There should be a mechanism to address if the EPA fails to produce or review standards.

b. Mechanisms for review of decision-making

External review of decision-making by an EPA should be available, with legislated open standing provisions for judicial and merits review to ensure that any person is able to seek redress given the public interest nature of EPA decisions. While in most Australian jurisdictions, judicial review is generally available for administrative decisions made under an enactment, whether legislated or at common law, all applicants must demonstrate standing and are subject to adverse costs orders. Further, while most decisions made by an EPA will be susceptible to judicial review, this form of review is generally limited to technical legal and procedural matters, and not the merits of the decision being challenged.

Given the limitations of judicial review and the importance of critical evaluation of environmental decision making free of political influence, merits review should separately be available for decisions made by an EPA in a no costs jurisdiction, with open standing provisions given the inherent public interest nature of EPA decisions.[158] Open standing must be provided for judicial review of decision-making by the EPA, in recognition of the public interest nature of these decisions, and there must be public interest costs provisions so that this form of redress is accessible.

c. State of the Environment Reports

The preparation of a State of the Environment Report is an internationally accepted method for assessing environmental performance and is a key means by which an independent EPA can ensure a government can be held accountable for the protection of the environment. While the preparation of a State of the Environment Report need not be the responsibility of an independent EPA, it should be the responsibility of an independent body rather than a government department.[159] The State of the Environment Report should be published annually with meaningful, consistent, legislated key indicators tracked and reported on that give a guide as to how well environmental and community health and integrity in environmental governance are tracking.

d. Scrutiny of performance

An EPA should have both the power and responsibility to evaluate the effectiveness of its own and other departmental regulatory interventions that impact on environmental matters. Regular reviews should be conducted of environmental regulatory regimes to ensure that objectives are being achieved and that areas in need of improvement are identified and acted upon.[160]

Regular scrutiny of the performance of EPAs is particularly important to ensure that any environmental injustice and environmental racism is monitored and documented. The collection and analysis of this data is essential to addressing the disproportionate burden of environmental harm on First Nations and structurally disadvantaged communities.

6 Transparency

Recommendation 6: Transparency in decision-making through disclosure and community engagement to support accountability

An EPA should be transparent in its decision-making processes to ensure accountability to the public, which should be achieved through:

- active and mandatory public disclosure of environmental information; and
- community engagement via guaranteed rights to make written submissions and meaningful engagement in decision-making processes.

A key concept underpinning environmental justice is procedural justice, which requires transparent, informed, and inclusive environmental decision-making processes.[161] For an EPA, this means ensuring that those most vulnerable to suffering any adverse impacts of this decision-making, such as pollution, environmental degradation and climate change, are able to meaningfully participate in and fully understand these processes.

One method of achieving this legal empowerment, and thus ensuring environmental justice is implemented, is through improved transparency mechanisms. The importance of transparency in environmental regulation has been emphasised internationally, with the 1992 Rio Declaration stating that individuals should have 'appropriate access to information concerning the environment… and the opportunity to participate in decision-making processes'.[162] It is also a recognised principle of the human right to a healthy environment.[163]

To be an effective environmental regulator, an EPA must be transparent in its decision-making processes. Transparency improves the efficiency and quality of regulatory operations, as the availability of information holds a regulatory body accountable for its activities, expenditure, and any potential undue influence on its regulatory practice.[164]

An EPA should provide for public disclosure of key environmental information, including decision-making processes and outcomes. There should also be meaningful, well-informed community engagement in decision-making processes. Such engagement should be actively pursued by the EPA to ensure that all relevant stakeholders are consulted and aware of decisions that may impact them.

Pursuant to principles of self-determination and FPIC, First Nations should be actively involved in environmental decision-making processes and should be able to withhold consent for activities that will significantly affect their cultural interests. There should also be emphasis on ensuring engagement and consultation is undertaken with environmental justice groups and individuals who may otherwise be disenfranchised from the decision-making process due to structural disadvantage, a lack of access to technology, a lack of understanding of environmental regulatory processes, a lack of scientific training, or because English is not their first language.

a. Public disclosure of environmental information

To be transparent and accountable, an EPA should provide public access to a broad range of environmental information, particularly relating to environmental decision-making processes and environmental impacts from activities it regulates.[165] This can be achieved through easily accessed and up-to-date public registers which record key information on development assessment and approvals, licensing, compliance and enforcement. This includes all management plans and similar plans approved under a permit, licence or approval. Monitoring data must be easily accessible so that the public can understand potential impacts pollution is having on their health and environment.

b. Community engagement

An EPA must be obliged to meaningfully engage communities in environmental decision-making, and ensure those communities are adequately informed by comprehensive information and within reasonable timeframes. First Nations should be directly involved in decision-making pursuant to principles of self-determination and FPIC, and structurally disadvantaged communities with environmental justice concerns should be actively engaged with pursuant to environmental justice frameworks and the duty to achieve environmental justice. This includes early engagement and the ability to make submissions on environmental decision-making, particularly where the decision will have wide ranging implications for the community.[166]

While environmental decision-making differs greatly between jurisdictions, consultation should broadly occur at the following stages: standard setting and review of standards and policies; decisions on whether proposals are clearly unacceptable or ineligible; drafting of terms of reference for assessments; assessment of proposals; and review and appeal of decisions, as discussed above under **Recommendation 5**.

7 Sufficiently empowered

Recommendation 7: Sufficiently empowered to protect the environment and human health

An EPA should be sufficiently empowered to fulfil its role to protect the environment, including the following powers:

- environmental monitoring and reporting to identify risks early;
- standard setting in accordance with the best available science;
- clear assessment criteria and decision-making powers; and
- compliance and enforcement.

A regulator's powers and functions should be adequate to enable the regulator to effectively fulfill its objectives.[167] A wide range of regulatory tools should be made available to the EPA to enable it to most effectively protect the environment and human health, such as general enforceable environmental duties, environment protection standards, approvals powers, economic instruments, environmental monitoring powers, remedial measures and sanctions.[168]

An EPA should have the remit of governing centrally over all environmental impacts – rather than areas of concern being split between various departments. As discussed earlier, these decision-making powers should be subject to merits review with open standing, so that the EPA is held accountable when exercising these powers and does so transparently, with full community engagement. The community should also have power and availability of mechanisms to enforce compliance with environmental legislation, such as environmental duties, when the EPA fails to do so.

a. Environmental monitoring and reporting

Proactive environmental monitoring powers are essential to identify and manage risks early, rather than relying on reactive measures to address environmental harm. This monitoring must be done regularly, on a legislated basis, with clear benchmarks and regular mandatory publication of data to view trends and understand current, prior and future impacts. It is important that there be monitoring and assessment of environmental quality, including of air and water quality and GHG emissions, undertaken by an independent regulator such as an EPA to ensure that there is accountability in the monitoring and assessment process.[169] Real time publication of data should be provided as much as possible, particularly for air and water pollutants and in high risk areas, such as areas with industry close to residential locations.

Environmental monitoring should include air quality, GHG emissions and water quality. The goal of such monitoring is to ensure that the EPA is aware of the current state of the environment and able to address any immediate threats to human health and the environment, and to enable the EPA to predict future threats or risks and take preventative action.[170]

b. Standard setting

An EPA should be responsible for setting legally enforceable environmental standards. Environmental standards should have statutory force and should be able to be easily updated to reflect new and emerging risks, new technologies and new risk-management approaches.[171] It is currently a major limitation in a number of jurisdictions that environmental standards or guidelines created by EPAs are not enforceable.

For example, in Western Australia the EPA has created a number of Environmental Factor Guidelines to assist in conducting environmental impact assessments, such as the Greenhouse Gas Emissions Guideline and the Air Quality Guideline. These guidelines are policy instruments and not legally binding, meaning that it is unclear how they will be applied by the EPA.[172] Such guidelines should be legally enforceable so that there is clarity in the assessment process, and so that proposals being assessed can be held accountable to these standards.

As a science-driven regulator, an EPA should also have the relevant expertise to set environmental standards, as well as an understanding of how those standards operate in the environmental regulatory framework.[173] As discussed in **Recommendation 9**, a Chief Environmental Scientist should be appointed to advise on environmental standards, to ensure that they reflect the most up-to-date scientific expertise.

c. Clear assessment criteria and decision-making powers

To be effective, an EPA must have substantive decision-making powers in relation to the environment. Ultimate decision-making power in relation to development approvals and environmental impact assessment should be clearly vested in the EPA, and not in a Minister or separate body. Such clarity about the relationship between the EPA, the Minister and other bodies is essential to maintaining the integrity of the regulatory structure that has been created.[174] Other agencies should not be empowered to override the decision making of the EPA, particularly where those agencies have pro-development mandates.

These decision-making powers should be clearly articulated so that all members of the community can clearly understand environmental regulation processes. All decisions of the EPA should also be subject to merits review, with broad standing provisions so that all concerned community members are able to challenge them, given the inherent public interest in EPA decisions.

Case study: Approval of Gas and Mining Projects in Western Australia

The Western Australian EPA is responsible for undertaking environmental impact assessments and preparing a report on whether the project may be implemented. However, the ultimate decision-making power to approve a project lies with the Minister for Environment, and not the EPA.[176]

In 2006, the WA EPA published a report finding that the Gorgon Gas Project, a proposed liquified natural gas plant, was environmentally unacceptable due to risks of impacts to flatback turtle populations, impacts on the marine ecosystem from dredging, risk of introduction of non-indigenous species and potential loss of subterranean and short-range endemic invertebrate species.[177] Despite these findings, the project was approved by the Minister for Environment on the basis that it would 'boost the Australian economy and provide jobs for thousands of Western Australians' and that the state government had 'worked tirelessly to facilitate major developments, particularly the massive Gorgon project'.[178]

More recently, in August 2016 the WA EPA published a report recommending against the implementation of a uranium mining project at Yeelirrie as it would be likely to cause the extinction of up to 11 species of subterranean fauna. Despite this recommendation, and a subsequent appeal decision in which the Minister for Environment upheld the EPA's recommendation, the Minister approved the project for implementation.[179]

These case studies demonstrate the importance of an EPA having substantive decision-making powers in relation to development approvals that will significantly impact the environment.

d.Compliance and enforcement

An EPA must also have power and sufficient resources to undertake compliance monitoring and ensure enforcement of all environmental conditions and activities, with a mandate to enforce the law without political influence. Compliance and enforcement policies should be developed and made publicly available to clearly articulate how the EPA is to conduct itself and how it will achieve regulatory outcomes. This will ensure that reactive enforcement measures are not pursued at the expense of proactive environmental regulation.

Achieving compliance with environmental regulation should not be seen by the EPA as an objective in its own right, but rather as one tool of many available to achieve the ultimate goal of protecting the environment.[180] Compliance and enforcement activities of the EPA should also be reported upon publicly, to demonstrate that the EPA is undertaking its role in ensuring compliance with the law, and to demonstrate to the public where the law has been breached and the remedy and repercussions from this breach.

While it is expected that an EPA will properly fulfil its compliance and enforcement functions, there should be powers for community members and people affected to enforce the Act and instruments such as approvals through civil enforcement mechanisms. Members of the community should be given standing to seek civil enforcement to ensure compliance and remedy any non-compliance and environmental harm.

These powers should not be limited to individuals directly affected by the non-compliance, and civil enforcement proceedings should be able to be brought in the public interest with public interest costs protections. An example of more expansive third-party enforcement rights is seen in Victoria, where the *Environment Protection Act 2017* (Vic) allows any person to seek leave to bring an application for a civil remedy where the application would be in the public interest, and the person has requested the Victorian EPA take enforcement or compliance action but they have failed to do so within a reasonable time.[181] Similar powers of third party enforcement exist in Queensland under the *Environmental Protection Act 1994* (Qld).[182]

People affected by environmental harm should also have immediate powers to seek relief to remedy or restrain pollution without needing to await action by the regulator, which can frustrate or delay enforcement action. Public interest cost protections are important for civil enforcement, to ensure that any person seeking to remedy environmental harm may do so without being open to a risk of adverse costs. For example, in the NSW Land and Environment Court Rules the Court may decide not to make an order for the payment of costs against an unsuccessful applicant if it is satisfied that the proceedings have been brought in the public interest.[183]

8 Adequate funding from mixed sources

Recommendation 8: Sufficient and certain funding to fulfil their functions

An EPA should have sufficient and certain funding to meet its operating needs and fulfil its functions adequately, with the majority of funding sourced from a combination of the polluter pays model and general budget allocations.

A lack of adequate funding can significantly hamper the ability of the EPA to fulfil its functions, and thus impact on the quality of the environment. The effects of inadequate funding have been seen in the USA, where budget allocation for the national EPA has not been adjusted in two decades and so has been significantly devalued and hampered.[184] The result of this funding deficit has been reduced enforcement capabilities, limited resources for providing environmental justice, and an inability to assist state environment programs.[185] A failure to fund an environmental regulator properly most affects disadvantaged communities as they are less likely to have the means to be able to protect their interests in decision making processes, monitoring pollutants and through seeking enforcement of laws and are more likely to be exposed to environmental harms such as pollution, environmental degradation and climate change.

In the Australian context, budget allocation for the environment has historically been inadequate, with an economic analysis of environmental spending by the Australian Conservation Foundation finding that between 2013-14 and 2016-17 the proportion of total state budget expenditure invested in environment and biodiversity had decreased by 16%, while Federal investment decreased by 35% in that time.[186] For example, the Victorian EPA did not receive an annual appropriation from the state budget between 2012 and 2020, relying instead on a landfill levy for the majority of its funding.[187] The Victorian EPA has only received a significant budget allocation in the 2021-22 budget following an independent inquiry and significant legislative reforms.[188]

a. Polluter pays model

A regulator's funding should be sufficient to meet operating needs and certain enough to enable planning for the future.[189] An EPA must have funding certainty and stability, with little to no reliance on funding sources that create conflicts of interest. It may be appropriate to fund development assessment and compliance activities via application fees, annual fees and cost recovery while development authorities are active, by way of implementing a 'polluter pays' model. However, this should not be the only source of funding for EPA programs.

b. Government appropriations

EPAs in Australia generally rely either on government appropriations, or on money collected from levies, penalties, fines and fees which are held in an Environment Protection Fund.[190] However, significant reliance on revenues from fines and penalties for environmental offences may discourage an EPA from actively preventing environmental pollution from occurring, and instead encourage it to pursue environmental offences at the expense of fulfilling its core functions, which would be a perverse outcome.[191]

The primary source of funding for an independent statutory authority like the EPA should be through direct government appropriations. This provides for a simplified and certain funding arrangement and also better satisfies community expectations for an independent regulator.[192]

9 Appropriate expertise

Recommendation 9: Relevant expertise to support decision making that is science-based and provides for First Nations justice and environmental justice broadly

An EPA should have the relevant expertise to effectively protect the environment and human health through informed and expert decision-making, with support from a Chief Environmental Scientist and experienced Board members which bring a diverse range of perspectives. EPAs must also recognise and value First Nations knowledge and views and ensure that this knowledge is considered meaningfully alongside and equally with western science and expertise.

An EPA needs to have the relevant expertise to provide effective protection of health and the environment by making robust, informed judgments about the underlying causes of adverse environmental impacts and seeking to avoid harms where possible.[193] See **Recommendation 4** for more information on the best governance structure.

a. First Nations Knowledge implemented through Board representation, an Environmental Justice Group and throughout EPA operations

EPAs must also recognise, value and implement the knowledge and experiences of First Nations in their operations and decision making. As was recognised in the independent review of the EPBC Act, environmental regulation often heavily prioritises and centres the views of western science, with Indigenous knowledge and views diminished and often dismissed.[194] Again, the importance of an environmental justice framework and a duty to develop and act in conformity with Cultural Protocols based on First Nations Lore is demonstrated. EPAs must develop mechanisms to ensure that First Nations that speak for and have traditional knowledge of Country are able to contribute to environmental decision-making, and to further ensure that First Nations knowledge is valued and considered alongside western science. This includes through identified positions on the Board, on an Environmental Justice Group and other advisory bodies, as well as through recruitment and retention of First Nations staff within EPAs more generally. The *Our Knowledge, Our Way* guidelines provide an example of a First Nations developed and led mechanism to ensure First Nations knowledge is valued and integrated in environmental management.[195]

b. Experienced Board Members

As stated above, the EPA should be a science-driven regulator, led by individuals with the necessary expertise to provide balanced advice and direction. Board members should be required to have experience and skills in relevant areas, including environmental regulation, management, science and law. Board members should also have diverse perspectives and experiences, to ensure that the views of structurally disadvantaged groups are equally represented.

c. Chief Environmental Scientist

The EPA should also establish a Chief Environmental Scientist (**CES**) as a legislated position with scientific qualifications, with the function of advising the CEO on regulatory decisions and standards and advising the Chief Health Officer on environmental health matters. Victoria is currently the only jurisdiction which requires a CES to be appointed. The CES is responsible for providing advice to the EPA relating to the objectives, duties and functions of the EPA.[196]

d. Environmental Health Group

As stated above at **Recommendation 4**, an Environmental Health Group should be established, to lead monitoring and evaluation activities, to interpret data and advise the CES and CEO on health focused matters. This group could also work with the relevant Health Department on environmental health outcomes. This will ensure a closer acknowledgment, awareness and mitigation of the community health impacts of environmental decision making.

Conclusion

Strong and independent EPAs will promote positive human health and environmental outcomes. To most effectively achieve their objectives of protecting the environment and human health and duties to identify and address environmental justice and First Nations justice, EPAs must be backed by strong governance arrangements that allow them to effectively regulate the environment without undue influence from political or economic interests. Strong environmental governance in Australia requires a regulatory body that has a First Nations justice and environmental justice framework, has a clearly articulated role, is independent, accountable and transparent, is adequately empowered to fulfil its role, has sufficient and certain funding, and is supported by scientific expertise.

As a priority, EPAs must achieve First Nations justice by developing and acting in conformity with Cultural Protocols based on First nations Lore, as well as the rights protected in the United Nations Declaration on the Rights of Indigenous Peoples. EPAs must also develop environmental justice frameworks to ensure that there is equal access to protection from environmental degradation, pollution and climate change, as well as equal access to the benefits of environmental regulation and to a healthy environment. This is essential to ensure that environmental burdens, such as pollution, environmental degradation and the impacts of climate change, are not disproportionately felt by structurally disadvantaged communities with environmental justice concerns, including First Nations, people with disability, elderly and young people, low-income communities and people of colour. It is also essential to ensure that the right to a healthy environment and human health can be experienced equally by all.

Given the urgent call to action delivered by the UN Secretary-General, and the necessity to ensure 'immediate, rapid and large-scale reductions in greenhouse gas emissions' if we are to limit global warming to close to 1.5°C or even 2°C,[197] it is imperative that Australia has robust and effective environmental regulation and regulators at both national and subnational levels. Improved environmental governance is essential to ensure that EPAs fulfil their main objective of protecting the environment and human health from the harmful effects of pollution and waste, which many EPAs in Australia have often failed to fulfil.

Australian governments, both federally and in states and territories, must commit to implementing or bolstering existing independent EPAs with strong governance arrangements and First Nations justice and environmental justice frameworks, to ensure equal access to a safe and healthy environment for all Australians, today and in the future.

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Environmental
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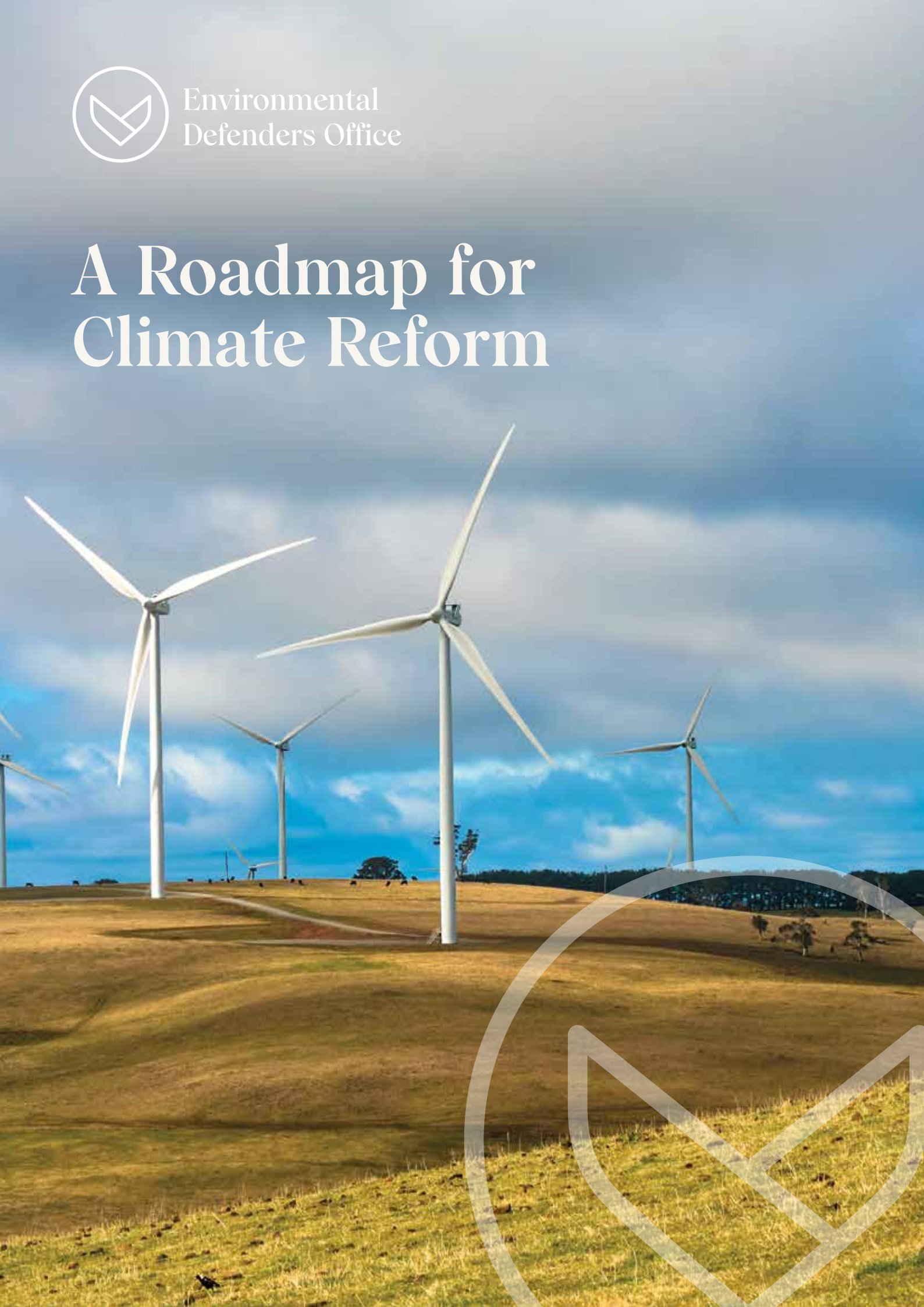
A Roadmap for Climate Reform



About EDO

Environmental Defenders Office (EDO) is the largest environmental legal centre in the Australia-Pacific, dedicated to protecting our climate, communities and shared environment by providing access to justice, running groundbreaking litigation and leading law reform advocacy. We are an accredited community legal service and a non-government, not-for-profit organisation that uses the law to protect and defend Australia's wildlife, people and places.

EDO recognises the Traditional Owners and Custodians of the land, seas and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present and emerging, and aspire to learn from traditional knowledges and customs so that, together, we can protect our environment and cultural heritage through law.

Contents

Executive Summary

Australia needs climate-ready laws. Global emissions are still rising, and climate change is already impacting our environment, economy, health, security, and way of life. False and empty promises are no longer an option. Making national laws to address the climate challenge will help reduce the risks and impacts of a changing climate, set us on a path to sustainability, ensure a just transition for communities, and give our iconic environmental assets like the Great Barrier Reef a fighting chance of survival. There are many innovative and necessary solutions to the climate crisis, and establishing strong national climate law is the foundation for success.

This is the critical decade. We need a strong legal framework in Australia to define when and how we will get to real net zero greenhouse gas emissions. A mid-century policy aspiration based on assumptions and false narratives is simply not sufficient. The climate risks must be addressed, and renewable opportunities must be embraced, in order to avoid extreme financial costs and environmental impacts, take advantage of Australia's ability to be a renewable energy leader, and ensure a just energy transition.

The scientific, social, economic, human rights and environmental imperatives are clear. Bushfire and flood-affected communities are increasingly at risk. Impacts on First Nations Peoples and our neighbours in the Pacific are increasing with further temperature rise. Unique ecosystems and iconic species are on the brink. Action and timeframes for achieving real net zero must be embraced now and must be linked to the temperature goal of limiting increase to 1.5°C. That means establishing enforceable targets, mechanisms, duties and accountability in law now.

Australia currently has over 80 pieces of legislation relating to energy and various elements of climate policy, however the sum of these parts does not equal an effective legal framework. It is time for a national Climate Act to set the path to real net zero, define responsibilities, galvanise transition and incentivise innovation in meeting our targets to stay within a carbon budget that will limit warming to 1.5°C.

There is no more time to lose, but so many benefits to be gained by making climate-ready laws now.

This Roadmap identifies **5 opportunities** for Australia and makes **58 recommendations** for the reform of Australian climate law. These recommendations are designed to be acted upon in the first term of the new Australian parliament - the next three critical years.

Opportunity 1:

Climate Act now

Opportunity 2:

Provide clarity and certainty for business and community by charting a path to real net zero

Opportunity 3:

Define leadership and responsibility for meeting targets

Opportunity 4:

Incentivise innovation and galvanise our energy transition

Opportunity 5:

Plan for and measure success

Opportunity 1: Climate Act now

For decades, climate policy in Australia has been over-politicised, unduly influenced by the fossil fuel industry, inconsistent, piecemeal, uncertain, and therefore ineffective in reducing emissions and reducing impacts. Despite having (eventually) ratified the Kyoto Protocol and now being a signatory to the Paris Agreement under the United Nations Framework Convention on Climate Change (**UNFCCC**), domestic implementation of climate policy has been plagued by inadequate policy and absent law.

The lack of overarching national climate legislation or cohesive policy has left communities; industries; ecosystems; and built and natural assets exposed, reducing our ability to maximise and benefit from energy transition opportunities.

This gaping hole in our legal and policy landscape has been brought into sharp focus again and again as we have tallied up the impacts of drought, bushfire, floods and other extreme weather events on our environment, community and economy.

Now is the time to end the political climate wars and provide certainty and a pathway forward. It is time for a nationally coordinated legislative framework for achieving real net zero emissions and limiting warming to 1.5°C.

The climate science could not be clearer. The Inter-governmental Panel on Climate Change (**IPCC**) Sixth Assessment Report (**IPCC AR6 Report**)[1] confirms it is unequivocal that human influence has heated the atmosphere, ocean and land; and that this unprecedented human-induced climate change is already affecting many weather and climate extremes in every region across the globe. IPCC AR6 Report confirms that every tonne of carbon dioxide (CO_2) emissions adds to global warming, and concludes that limiting human-induced global warming to a specific level requires limiting cumulative CO_2 emissions and reaching at least net zero emissions, including driving strong reductions in other greenhouse gas (**GHG**) emissions. The IPCC has also confirmed that to avoid the worst impacts and costs, we need to **limit warming of average surface temperatures to no more than 1.5°C above pre-industrial levels**. The window of time to achieve this goal is closing, we need to act now.

"It's all about our future generations. That's what I worry for. What are they going to have, who are they going to be? Our lives are not just lived on the land, but in the sea – this home that we have loved for thousands of generations."

Plaintiff and Munupi Senior Lawman, Dennis Tipakalippa, Tiwi Islands.

Limiting global temperature increase to 1.5°C provides the best opportunity for us to avoid the worst impacts of climate change. It is also critical for the survival and sovereignty of Indigenous and First Nations Peoples[2], including in the Torres Strait Islands and Pacific Island States, who, even at the current level of 1.1°C warming, are already suffering extensive climate harms.[3] The Climate Act should recognise and include human rights considerations consistent with Australia's obligations under international agreements.

Limiting global temperature increase to 1.5°C is also necessary to uphold our obligations under other international agreements, including to protect internationally recognised world heritage assets such as the Great Barrier Reef,[4] the Wet Tropics, and the Blue Mountains World Heritage Area (extensively burnt in the Black Summer bushfires); and to prevent further climate-induced extinctions of Australian biodiversity.[5]

Australia also has obligations under international human rights law (including the United Nations Declaration on the Rights of Indigenous Peoples, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women). The United Nations Human Rights Council recently adopted resolution 48/13 recognising that a clean, healthy and sustainable environment is a human right. This right includes a right to a safe climate.[6] Climate change action is also necessary to meet Australia's obligations regarding the right to life.[7] The right to a safe climate is independent of Australia's obligations under the Paris Agreement. As Australians are already experiencing harm due to 1.1°C temperature increase, human rights oblige the Australian Government to take action by limiting further global temperature increases and, certainly, to no more than 1.5°C.

There are significant costs that could be saved by stronger action now. The Climate Council estimates that by 2038, extreme weather events alongside the impacts of a higher sea level will cost the Australian economy $100 billion every year.[8] The Reserve Bank of Australia, the Australian Securities and Investment Commission and the Australian Prudential Regulation Authority have cited risks posed by climate change as a central concern for the economy and financial stability. In addition, eighty-five per cent of Australians live within 50km of the coast, meaning billions of dollars are at risk from increased natural disasters.[9] Decisive action now could help ameliorate these financial impacts.

It is time for a national Climate Act

To effectively limit warming, maximise transition opportunities, and ensure we have the right mix of tools, rules and incentives to meet our targets, Australia needs an overarching Climate Act coordinate our climate change response.

We need a Climate Act to deliver a clear, strategic and accountable plan to achieve the necessary GHG emissions reductions; to send a clear signal of the government's intention, commitment and level of ambition to limit warming; drive low-carbon investment and innovation; enable effective remedies to ensure Australia's climate action by both Government and business is consistent with human rights obligations; lower the cost of a just transition to a low-carbon economy; provide certainty and confidence for business and civil society, with positive influence on investor confidence; and deliver a range of positive economic and social benefits.

We recommend that a new national Climate Act include the elements set out below:

- **Objects:** Set a clear overarching objective to reduce GHG emissions and make decisions consistent with limiting the increase in global warming to no more than 1.5°C above pre-industrial levels. The objects should also refer to planning for a rapid and just transition (including supporting workers to transition) away from fossil fuel production and use, consistent with IPCC advice, and establishing a whole-of-government approach to addressing climate change impacts (*see Opportunity 2*);
- **Targets:** Impose duties on government minister/s to set periodic and long-term GHG emissions reduction targets and carbon budgets in line with limiting warming to 1.5°C and a legislated renewable energy target for electricity use, based on the best available science and the principles of ecologically sustainable development (*see Opportunity 2 and 3*);
- **Duties:** Create a duty on ministers and relevant decision makers to make decisions consistent with relevant climate change legislative objects and targets when exercising prescribed functions (*see Opportunity 3*);
- **Governance:** Allocate ministerial responsibility specifically for climate change, and create a Climate Change Division in the Department of Prime Minister and Cabinet that administers an overarching Climate Act and supports interagency collaboration on emissions reduction and adaptation. Establish a national Environment Protection Authority (EPA) to, amongst other responsibilities, collate data, develop and set national standards, and undertake compliance and enforcement activities (*see Opportunity 3*);
- **Independent expert advice:** Formalise a skills-based independent statutory Climate Change Advisory Council to advise the government and the parliament on the best available science for climate mitigation and adaption, and to assess and report on progress in relation to meeting targets. Require decision makers to act consistently with this advice (*see Opportunity 3*);
- **National standards:** Establish national standards and guidance on a range of issues including climate impact assessments, mandatory climate considerations; emissions reporting (including scope 3 and fugitive emissions); land sector carbon accounting, energy efficiency, and renewable energy project pathways (*see Opportunity 4*);
- **Transition plan and authority:** Consult on and establish a plan for a rapid and just transition for effected communities and workers. Establish a statutory body to coordinate transition planning and implementation, with transition costs funded in part by the redirection of current fossil fuel subsidies. The plan for Australia's policy commitments must ensure First Nations Peoples and our neighbours in the Pacific region are included in energy transition policies (*see Opportunity 4*);
- **Risk assessment:** Adopt a high-level process for a national climate risk assessment, and require specific policies and initiatives for sectors identified at high risk from climate change impacts (e.g. housing, infrastructure, agriculture, energy, insurance, tourism, health) (*see Opportunity 5*);

- **Adaptation Plans:** Require a national Adaptation Plan to be made, published, and periodically reviewed by the Minister on advice from the Climate Change Advisory Council. Sectoral and regional adaptation plans should also be made consistent with the national Adaptation Plan (*see Opportunity 5*); and,
- **Monitoring and reporting progress:** Develop national indicators of success, including for emissions reduction in line with set targets, adaptation planning and climate readiness of legislation; and regularly report against those indicators (*see Opportunity 5*).

These elements are explored further throughout this Report.

Recommendation

Provide a clear path forward for effective and coordinated action on climate change by:

1. Establishing a national Climate Act – including objects, legislated targets and timeframes, duties, governance, independent expert advisory body, national standards, transition authority, national risk assessment, adaptation planning, and monitoring and reporting.

Opportunity 2: Provide clarity and certainty for business and community by charting a path to real net zero

Providing certainty starts with establishing clear legally enforceable targets based on the science, and then providing the tools and rules for how the targets will be met.

Legislating a clear and ambitious target is a critical first step in national climate reform. The target is the hook on which to hang the multitude of necessary climate legal and policy reforms.

Many jurisdictions are committing to a long-term target of net zero GHG emissions by 2050 and adopting various approaches to implementing short and medium term targets to meet the goal of the Paris Agreement, including by setting interim 'emissions budgets'. Some states such as Victoria, South Australia, Tasmania and the ACT have legislated targets, but we have no national legislated target.

It is time to legislate a real national net zero target.

There are multiple "net zero" scenarios examined in IPCC reports. Some of these scenarios rely on assumptions about unviable technologies like carbon capture and storage, and controversial proposals like carbon offsetting, to justify increased production of fossil fuels, even as global emissions and temperatures keep rising. International Energy Agency (**IEA**) analysis confirms the inevitable fact that there must be no new coal and gas projects.[10] There is only one solution to the climate crisis, and that is genuine and rapid emissions reductions. There is no credible evidence that production of Australian fossil fuels for export will reduce global emissions to safe levels, or alleviate poverty. Quite the opposite is true. Genuine or real net zero targets and pathways do not rely on these assumptions or false narratives. They do require a stop to development of new fossil fuels, and a phase out of existing fossil fuels consistent with the science. A new Climate Act needs to set a real net zero target linked to actual verifiable emissions reduction.

While it is important, a 'Net-Zero by 2050' target on its own does not regulate how many GHGs can be emitted before 2050, nor the rate at which emissions must decline, in order to meet the goal of limiting the temperature increase to 1.5°C. In this regard, it is the volume of emissions that are permitted to be released before net zero, and the rate at which emissions decline, that will determine the ultimate level of global warming that Australia, and the world, will have to endure. For example, if emissions are permitted to continue at high levels for too long into the future, the corresponding rate and depth of emissions reductions required to achieve the goal of the Paris Agreement will become impossible to achieve (both technologically and economically).

Any real Net-Zero by 2050 target must therefore function in the context of meeting a carbon budget[11] corresponding to a level of global warming of no more than 1.5°C above pre-industrial levels. Mechanisms in climate legislation for emissions budgets and interim and long-term targets should clearly link to a temperature outcome corresponding to the goal of the Paris Agreement – ie, to be well below 2 and preferably 1.5°C. As stated above, limiting heating to no more than 1.5°C is consistent with Australia's human rights obligations.

Australia lodged an updated Nationally Determined Contribution (**NDC**) to the Paris Agreement in June 2022, increasing the 2030 target to reducing GHG emissions by 43% below 2005 levels by 2030, and reiterating a target of net zero by 2050.[12] This is an important first step in re-establishing global credibility on climate action, but must be imminently strengthened in accordance with the science. The Climate Change Authority calculated that to limit global warming to less than 2°C above pre-industrial levels, Australia needs a 45%-65% reduction in emissions by 2030 from 2005 levels.[13] However, we note that this calculation does not accord with the goal of the Paris Agreement, which requires warming to be limited to between 1.5°C to well below 2°C. Therefore a more ambitious interim target is required.

Updated analysis indicates that to save assets such as the Great Barrier Reef, Australia needs to reduce greenhouse gas emissions by **74% of 2005 levels by 2030** and achieve **net zero by 2035**.[14] The more time that passes before we take significant action, the stricter the reduction targets must be if we are to meet the goal of the Paris Agreement.[15]

A clear and ambitious science-based **2030 target** is therefore necessary to ensure a real net-zero by 2050 target, aligned with the Paris Agreement temperature goals, is possible to meet. It is imperative that a sufficiently ambitious and binding 2030 target is established in law as soon as possible to require Australia to take immediate action to deeply reduce its GHG emissions.

A 2021 federal parliament inquiry reported that legislating a GHG emissions reduction target would:[16]

- provide long-term policy certainty and reduce legal and regulatory risks;
- improve investor confidence and certainty for business;
- be consistent with the work of the IPCC and broad international scientific consensus;
- align with the same commitment made by many of Australia's international trading partners such as New Zealand, the United Kingdom, Japan and South Korea;[17]
- align with the same commitment made by many international and domestic corporations; and
- improve human health.

The Law Council of Australia summarised the benefits of a legislated net zero goal:

> *"...a legislated target would provide certainty to policy makers about the guiding policy goal and timing. This will be essential when developing emissions reduction and adaptation plans and assessing the relative merits of different policy options. This assessment is an essential part of the law-making process. For the business and community sectors, a legislated target would provide certainty about the long-term policy framework and reduce legal and regulatory risks."*[18]

The Australian Government must legislate a pathway for achieving real net zero in line with a carbon budget that is consistent with the goal of limiting global temperature rise to 1.5°C, and to setting interim targets and goals that specify the rate at which emissions must decline, including 5-yearly carbon budgeting. A clear and ambitious **2030 target** is necessary to ensure a real net-zero target aligned with the Paris Agreement temperature goals is achievable. Such a target, translated into the next **Nationally Determined Contribution** to the Paris Agreement, would confirm to the international community, including our Pacific neighbours that Australia takes seriously its obligations to act on climate change.

Recommendations

Provide clarity and certainty by legislating a path to real net zero by:

2. Legislating a clear and ambitious **2030 and real net zero target** pathway aligned with the Paris Agreement temperature goals – experts recommend that to save assets like the Great Barrier Reef, the target needs to be at least 74 percent emissions reduction below 2005 levels by 2030 and net zero by 2035.
3. Designing and legislating a process to achieve targets aligned with Australia limiting itself to a fair share of the remaining 1.5°C **carbon budget**, including interim targets and goals that specify the rate at which emissions must decline. The initial budget should be set for the period to 2025, followed by interim **5 yearly carbon budgets** for 2030 and 2035.
4. Confirming and communicating a strengthened **Nationally Determined Contribution** (**NDC**) to the Paris Agreement specifying a revised 2030 target consistent with achieving real net zero in line with a carbon budget that limits global temperature rise to 1.5°C (ie at least 74% reduction below 2005 levels by 2030).
5. Establishing a process to include other targets under the new Climate Act, including for example, in relation to methane. This process must include consultation with affected industries.

Opportunity 3: Define leadership and responsibility for meeting targets

To ensure that strengthened emissions reduction targets and temperature goals are met, clear **duties** must be identified in law. This requires establishing relevant duties for decision makers and policy makers in legislation to consider climate impacts and to ensure decisions are made consistent with legislated targets and carbon budgets. Broader **governance** arrangements also need to be reformed to clarify leadership and responsibility.

Duties

Australian courts are recognising climate change duties exist, for example, in *Sharma v Minister for the Environment* (Sharma), the Federal Court initially held that the Commonwealth Environment Minister owed all Australian children a duty of care when she decided whether to approve or refuse an extension to an existing coal mine under Australia's Commonwealth environmental law. However, this ruling was not upheld on appeal. At the state level, in a case brought by Bushfire Survivors for Climate Action, the NSW Land and Environment Court held the NSW EPA has a duty to develop policies, objectives and guidelines to regulate GHG emissions and protect NSW communities from the impacts of climate change. Rather than relying on brave communities and individuals to bring public interest cases to have these duties considered and confirmed by the courts, it would be better for all stakeholders to have specific duties clearly set out in legislation.[19]

Legislated duties are not unprecedented – already existing in Victoria and in the laws of over 30 other countries including New Zealand, Canada and the UK.[20] A clear duty should be established in a new Climate Act to require that decision makers must act consistently with emissions targets and carbon budgets.[21]

Duties should extend to all relevant decision makers, not just a Climate or Environment Minister. Relevant public authorities and entities should be required to consider the potential risks of climate change and report on material risks when performing their duties or exercising their powers.[22] A general obligation

Our members have been working for years to rebuild their homes, their lives and their communities. This ruling means they can do so with confidence that the EPA must now also work to reduce greenhouse gas emissions in the state. Global warming is creating the conditions that can lead to hotter and fiercer fires, and all of us need to work to make sure we're doing everything we can to prevent a disaster like we saw during 2019 and 2020.

Jo Dodds – Bushfire Survivors for Climate Action

should be included in a national Climate Act to ensure that consideration of climate change (both mitigation and adaptation) is integrated into a wide range of decision making processes under other relevant laws. Mechanisms could include setting clear legal duties to consider climate change in exercising decision-making functions and developing institutional guidance and support on technical matters. To assist decision makers, guidelines should be developed to specify the ways in which climate change should be taken in account in decision-making processes – for example, how the decision will impact on climate change and how climate change will impact on the subject matter of the decision. The question of whether the decision will contribute to Australia's GHG emissions, and whether it is consistent with any relevant emissions reduction targets and carbon budget, should also be a mandatory consideration. Guidelines could be used to assist decision makers across portfolios to understand their statutory obligations.

Relevant climate considerations should include potential risks from, and impacts of, factors including: biophysical impacts; long and short term economic, environmental, health, social, cultural and human rights impacts (and specific considerations of the human rights impacts on First Nations and Indigenous Peoples); direct and indirect impacts; and cumulative impacts.[23]

In addition to establishing duties, it is also important to provide effective remedies consistent with human rights obligations. The Act should include a justiciable right to a safe climate and a safe, clean, healthy and sustainable environment which is available in relation to mitigation, adaptation and climate change loss and damage. This would help meet Australia's obligations under international human rights law and international environmental law principles and agreements (i.e., polluter pays principle), which are currently not being met by Australia's legal system. The Full Court's decision in Sharma exposed the failings of the Australian legal system to hold accountable decision-makers for decisions which place health, lives and property at risk. It is especially important for the Government to consider this given Allsop CJ's consideration in Sharma that harm (loss and damage) from climate change is a political question and thus Government should be providing effective remedies consistent with its human rights obligations at international law.

"To comply with their international human rights obligations, States should apply a rights-based approach to all aspects of climate change and climate action, noting that states have procedural and substantive obligations...Enable affordable and timely access to justice and effective remedies for all, to hold States and businesses accountable for fulfilling their climate change obligations"... "Respect the rights of indigenous peoples in all climate actions, particularly their right to free, prior and informed consent" and "With respect to substantive obligations, States must not violate the right to a safe climate through their own actions; must protect that right from being violated by third parties, especially businesses; and must establish, implement and enforce laws, policies and programmes to fulfil that right. States must avoid discrimination and retrogressive measures. These principles govern all climate actions, including obligations related to mitigation, adaptation, finance and loss and damage."

Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/74/161, 15 July 2019.[24]

Climate Leadership

Australia must be a leader in climate policy and have laws implementing a commitment to do our fair share towards meeting not only domestic targets, but global targets under the Paris Agreement. Our Pacific neighbours are already suffering at 1.1 degrees of warming, and have increased vulnerability to further temperature rises, while contributing the least to the climate crisis.

It is therefore important that a national Climate Act is not limited to setting a target for Australia's domestic scope 1 and 2 emissions, but must also address the emissions Australia exports to other countries (scope 3). Consistent with the commitment to pursue efforts to limit warming to 1.5°C above pre-industrial levels, a national Climate Act should include a net zero emissions target for exported (scope 3) emissions.

The Australian Government has international obligations to ensure that it does not cause transboundary harm to its neighbours, particularly the states most vulnerable to climate change in the Pacific. This is the well-established 'no harm' rule of customary international law and is included in international agreements to which Australia has ratified (for example the Convention on Biological Diversity). Under a new Climate Act, environmental assessments, such as Climate Impact Statements, must include assessment of the impact of scope 3 emissions on these Pacific states as part of Australia's due diligence obligations under international law, and more comprehensive climate reporting is needed to track progress towards achieving goals, targets and benefits for the region.

The Pacific covers a third of the earth and is home to vibrant and diverse cultures that speak a quarter of the world's languages. We should not have to bear the burdens of climate change when we are the least responsible for it. Our emissions are historically and currently negligible. The harm that we face is existential, with so many communities facing displacement from our ancestral homes. We need Australia to comply with its international law obligations, including the 'no harm' rule, which makes Australia duty bound to prevent, reduce and control the risk of environmental harm to other states. This includes Scope 1, 2 and 3 emissions. Scope 3 emissions are within the jurisdiction or control of Australia, regardless of where they are ultimately emitted. Australia has an obligation to Pacific Island States to assess and mitigate against transboundary harm with respect to any project which contributes to global greenhouse gas emissions (including Scope 3 emissions) and this should be a requirement of every environmental impact statement.

Fleur Ramsay, Samoan and Acting Manager of EDO's Pasifika (Pacific) Program.

Governance

There are a large number of statutory corporations, government departments and agencies that currently have responsibility for mitigation and adaptation to climate change and/or for tracking GHG emissions, including but not limited to, the Climate Change Authority, Clean Energy Finance Corporation (CEFC), Australian Renewable Energy Agency (ARENA), Clean Energy Regulator, the new Department of Climate Change, Energy, the Environment & Water.[25] To ensure that Australia's climate change policies are consistent and coordinated, it is imperative that a climate change framework is introduced to ensure that emissions standards information and policies are consistent and consistently applied, and that relevant agencies are supported to galvanise the renewable energy transition.

In terms of governance more broadly, a Climate Act will help coordinate and enshrine the necessary whole-of-government approach to addressing climate change. Climate change considerations and analysis need to be fully built-in to mainstream policy making across all relevant agencies and all levels of government. Government departments need additional climate literacy, particularly departments that set strategic direction, as well as economic advisory and natural resource management (NRM) agencies such as the Treasury, Department of Prime Minister & Cabinet, the Productivity Commission and departments responsible for infrastructure, transport, agriculture and water.

Climate change has implications for the economy, health, agriculture, infrastructure, insurance, tourism, national security, environment, natural resources and a range of portfolios. To ensure an effective and coordinated inter-governmental approach to addressing climate change, a national Climate Act should be administered by a Climate Change portfolio, sitting under the Prime Minister and Cabinet. This would ensure that implementation and administration of the legislation is coordinated across relevant portfolios.

Additionally, a national Environment Protection Authority (EPA) will be critical in collating data and information; developing and setting national standards, for example for emissions and energy efficiency; and for compliance and enforcement of climate related legislation. EDO has made detailed recommendations for a national EPA including that legislation establish a range of duties – see EDO's report: *'Implementing effective independent Environmental Protection Agencies in Australia'* available at edo.org.au.

Recommendations

Establish clear **duties** on relevant decision-makers by:

6. Legislating a clear duty to require that decision makers must act consistently with legislated Emissions Budgets and Targets designed to achieve real net zero emissions in line with a carbon budget that limits global temperature rise to 1.5°C.

7. Amending the Public Governance Performance and Accountability Act 2013 to insert duties to consider and report on climate change risks and impacts, and to act consistently with the best available science, when exercising powers.

8. Including a general obligation in a new national Climate Act to ensure consideration of climate change (mitigation and adaptation), and a prohibition on acting inconsistently with the best available science, are integrated into a wide range of decision-making processes under other relevant laws (see also *Opportunity 4*). This should include recognition of First Nations and Indigenous knowledge and science.

9. Legislating a non-exhaustive list of relevant climate considerations in decision making recognising that the potential risks from, and impacts of, climate change may include: biophysical impacts; long and short term economic, environmental, health, social, cultural and human rights impacts (particularly those on First Nations and Indigenous Peoples); direct and indirect impacts; and cumulative impacts.

10. Developing guidelines to assist decision-makers specifying the ways in which climate change should be taken into account in decision making.

11. Including a justiciable right to a safe climate and a safe, clean, healthy and sustainable environment which is available in relation to mitigation, adaptation and climate change loss and damage.

12. Legislating and implementing a real net zero emissions target for exported (scope 3) emissions consistent with the commitment to pursue efforts to limit warming to 1.5°C above pre-industrial levels. This is essential to assist global markets to achieve real net zero, to assist our Pacific neighbours, to comply with our international obligations and do our fair share in facilitating the planned and just transition away from fossil fuels in Australia and globally.

Improve climate **governance** by:

13. Allocating Ministerial responsibility specifically for climate change, and creating a Climate Change Division in the Department of Prime Minister and Cabinet that administers an overarching Climate Act (assisted by advice from an independent Climate Change Advisory Council) and supports interagency collaboration on emissions reduction and adaptation.

14. Formalising a skills-based independent statutory Climate Change Advisory Council to advise the Government and the Parliament on the best available science for climate mitigation, and assess and report on progress in relation to meeting targets and implementing adaptation plans.

15. Require decision makers to act consistently with advice provided by the Climate Change Advisory Council.

16. Establishing a national Environment Protection Authority (EPA) to administer an environmental justice framework to address climate impacts on overburdened communities. Relevant EPA duties to enshrine in legislation include:

- A duty to protect the environment and human health from the harmful effects of pollution (including climate pollution), through assessment, enforcement, monitoring and reporting and standard setting;
- a duty to act consistently with the human right to a healthy environment and rights to enjoy and benefit from culture;
- a duty to achieve environmental justice;
- a duty to implement legislation in accordance with principles of ecologically sustainable development;
- a duty to take action to prevent and mitigate greenhouse gas pollution and support ecologically sustainable adaptation to manage the impacts of climate change; and
- a duty to consider the impacts on First Nations Peoples, including impacts on cultural practices as well as Country and to act in accordance with First Nations' Lore and Cultural Protocols when addressing impacts of climate change.

Opportunity 4: Incentivise innovation and galvanise our energy transition

Australian climate law and policy must include the mechanisms and policy drivers needed to ensure that GHG emissions are reduced in line with emissions targets and carbon budgets. Once targets, budgets and duties are established in law, there is considerable scope to design policy settings and legal mechanisms that galvanise emissions reduction and incentivise renewable energy transition using a combination of regulatory 'sticks and carrots.' As the most recent IPCC advice identified, we need "substantial and deep [emissions] cuts this decade to all sectors of the economy". There are a range of related legislative reforms needed to reduce emissions across sectors, enhance adaptation, and facilitate the energy transition.

Incentivising the renewable energy transition

It is critical that a national Climate Act addresses the transition away from fossil fuels and towards renewable and low-emission technology. This includes legislating an explicit **object** to *"facilitate the transition of Australia's energy use and production away from fossil fuels and towards renewable energy and low-emission technology.* The definition of "low emissions technology" in a national Act should explicitly exclude technology relying on fossil fuels, and exclude unproven technology that supports the continued use of fossil fuels.

Creating investor certainty through reinvigorating a national Renewable Energy Target (RET); incentivising renewables (for example, by restoring feed in tariffs and providing subsidies for increasing storage capacity); providing a clear pathway for assessment and approval of ecologically sustainable renewable energy projects and associated transmission infrastructure, including requirements for free, prior, informed consent from First Nations Peoples; extending the roles of the CEFC and ARENA to support development of renewables (not fossil fuel-based energy sources); and strengthening and incentivising energy efficiency solutions are all commitments that the Australian Government can make now. There are also significant opportunities in transport reform, including legislating mandatory vehicle emissions standards, removing the fuel tax credit scheme (rebate), and incentivising uptake of electric vehicles.[26]

Reinstating a strengthened and certain RET has been demonstrated to be one of the most effective tools in climate legislation. As noted by the Australian Panel of Experts in Environmental Law (APEEL):

> *Standards such as the RET are both effective and efficient, because, while prescribing socially preferred outcomes, they leave the means of achieving them up to regulatees, thereby providing incentives for least cost solutions. This appears to be the case in practice as well as in theory, with the available evidence suggesting that the RET is one of the most cost effective emissions reductions policies available.*

While some states and territories have legislated RETs, we recommend a robust national RET should be reinstated and strengthened to incentivise genuine renewable energy investments (excluding options such as burning forest biomass). This should also include an explicit **Renewable Energy Storage Capacity Target**, for example, as recommended by the Victoria Energy Policy Centre.[27]

We further recommend maintaining and strengthening the use of feed in tariffs (FITs). As noted by APEEL, FITs are the most widely used policy in the world for accelerating renewable energy deployment, and there are a considerable number of success stories.[28] Instead of amendments to revise the RET downward and policies to reduce feed-in tariffs for technologies such as roof-top solar, Australia needs to provide investment certainty and incentives using these proven mechanisms.

A critical part of incentivising the energy transition is to instigate an independent review of government subsidies for high-emissions activities – including fossil fuel production, power generation and use. Schemes to examine include fuel tax credits, royalty exemptions, and accelerated depreciation of fossil fuel producing

assets. The independent review should be tasked to recommend how to reduce or phase-out subsidies and tax concessions that create incentives to pollute, or act as a barrier to emissions reduction. Subsidies should be redirected to emissions reduction, renewable energy storage technology development, environment protection, economic transition and community development.

Identifying and removing subsidies to environmentally harmful activities, including fossil fuel production and consumption, is consistent with various international bodies' recommendations, including the Organisation for Economic Co-operation and Development (OECD), World Bank, International Energy Agency and the G20. There is positive value in redesigning grants, concessions and incentives so that they encourage environmental improvement and discourage (not subsidise) harm.

More broadly, the legislative and policy settings should prohibit public financing – the use of tax payer money – for new fossil fuel projects.

While the costs of low-emissions technologies, including solar photovoltaics (PV), wind, lithium-ion batteries and electric vehicles, have fallen and technological progress continues to accelerate, we need to remove barriers and redirect subsidies towards renewable energy uptake at all scales.

Recommendations

Incentivise **renewable energy** by:

17. Legislating an explicit **object** in a new Climate Act to facilitate the transition of Australia's energy use and production away from fossil fuels and towards renewable energy and low-emission technology.
18. Setting a clear legislative definition of renewable energy (which does not include fossil fuels in any form).
19. Reinvigorating a national mandatory **renewable energy target** (RET) to provide investment certainty and increased uptake, including an explicit Renewable Energy Storage Capacity Target.
20. Restoring and strengthening feed in tariffs.
21. Providing subsidies for development and purchase of renewable energy storage capacity and smart grids.
22. Provide a clear pathway for assessment and approval of **ecologically sustainable renewable energy projects** and associated transmission infrastructure – by establishing national ecologically sustainable development standards for renewable energy projects. This includes, for example, frameworks to ensure that renewable energy projects are appropriately located, sited, designed and operated to ensure development avoids, minimises and mitigates adverse impacts on the natural environment (fauna and flora), water resources, First Nations heritage, cultures and access to Country, and associated ecological processes. This must include clear mandatory requirements for free prior informed consent and extensive consultation with impacted First Nations communities.
23. Extending the roles of the Clean Energy Finance Corporation (CEFC) and the Australian Renewable Energy Agency (ARENA) to support development of and renewable energy (which does not include fossil fuels in any form).
24. Establishing effective and best practice **national emissions and efficiency standards for electricity** - for example, the Council of Australian Governments could adopt greenhouse gas emissions standards and emission limits for power stations under federal and state mirror legislation.

Incentivise **transition in high emissions sectors and industries** by:

25. Embracing significant opportunities in **transport reform**, including removing the fuel tax credit scheme (rebate), and incentivising uptake of electric vehicles.
26. Establishing effective and best practice **national emissions and efficiency standards** for **transport** sectors, including mandatory vehicle emissions standards.
27. Instigate an **independent review** of government subsidies for high-emissions activities – including fossil fuel production (with or without carbon capture and storage (CCS) proposals), power generation and use. Examples to examine include the fuel tax credits scheme, royalty exemptions and accelerated depreciation of fossil fuel-producing assets. The independent review should be tasked to recommend how to reduce or phase-out subsidies and tax concessions that create incentives to pollute, or act as a barrier to emissions reduction.
28. **Redirect fossil fuel subsidies** – discontinue financial support (public funding), subsidies, investments and incentives that encourage fossil fuel or other activities that are contrary to genuine emissions reduction efforts (to be clear, this includes discontinuing financial support for proposals such as CCS, which is a distraction from, and delays, real climate action). Subsidies should be redirected to emissions reduction, environment protection, economic transition and community development.
29. Invest in **research and development** to support hard to transition industries to reduce their greenhouse gas emissions, for example, manufacturing and agriculture.

Direct regulation for emissions reduction

In terms of direct regulation of emissions, first and foremost this includes clear mechanisms to facilitate a **planned phasing out of fossil fuel** energy sources and fossil fuel production according to a legislated timeframe. This will also assist in avoiding financial and environmental risks of stranded assets in an increasingly carbon-constrained world. This involves economic and policy decisions, but there remains an important role for legal mechanisms to ensure decisions (both project and policy) are made consistent with appropriate GHG emissions reduction targets and carbon budgets.

Providing legal clarity on how emissions budgets and targets apply to any new or expanded fossil fuel proposals is critical. For existing emitters, we must ensure our primary emissions reduction mechanism – currently the Safeguard Mechanism under the National Greenhouse Energy and Reporting scheme[29] - is expanded in scope and coverage, includes scope 3 emissions, and ensures a progressive downward adjustment of emissions baselines. Although highly politicised, internalising environmental costs in decision making, including via a 'polluter pays' approach, by putting a price on greenhouse gas pollution, has been an effective tool in emissions management. We recommend a robust and comprehensive emissions trading scheme (ETS), but in the first instance amendments can be made to strengthen the Safeguard Mechanism.

There are tools and rules that need strengthening – including for example, clear requirements and parameters for using genuine carbon offsets;[30] effectively implementing nationally harmonised, binding limits on (or pricing of) fugitive emissions from all coal and gas extraction projects; and establishing effective and best practice national emissions and efficiency standards (for example, for electricity, building, agriculture and transport sectors). To level the playing field, a national standard for climate impact statements and full emissions disclosure should be developed and required for all energy and major projects. This must be a mandatory consideration for decision makers and linked to ensuring emissions targets and carbon budgets are met.

The planned transition for the Australian economy needs to encompass not just a plan for real net zero domestic emissions, but also a plan for our economy in a global economy of net zero emissions.

Every major country in the world has signed the Paris Agreement, including the aim of pursuing efforts to keep warming to 1.5°C. Globally approved fossil fuel projects and infrastructure is already sufficient to exceed this goal.[31] To achieve the aims of the Paris Agreement existing fossil fuel projects will need to wind down within their planned operational life[32] and no new fossil fuel projects can be approved. IPCC scenarios consistent with keeping warming to 1.5°C show primary energy from coal declining by 59-78% by 2030 and 73-97% by 2050 (relative to 2010).[33] Similarly under the 2020 International Energy Agency (**IEA**) Sustainable Development Scenario (**SDS**), consistent with limiting warming to 2°C, global thermal coal demand falls over 22% by 2025, over 40% by 2030 and over 65% by 2040, relative to 2019 levels.[34]

Accordingly, Australia can expect the purchasers of our fossil fuel exports, who are signatories to the Paris Agreement to rapidly reduce their demand for our fossil fuel exports, leaving our industries, workers and economy exposed if Australia does not have a plan to manage this transition. Already major purchasers of our fossil fuel exports including China, Japan and Korea have committed to net zero emissions by 2050 (or 2060 in the case of China). IEA has global thermal coal demand falling by over 60% from 2019 levels by 2030 under the net zero emissions scenario.[35]

"Beyond projects already committed as of 2021, there are no new oil and gas fields approved for development in our pathway [to net-zero], and no new coal mines or mine extensions are required."

International Energy Agency
"Net Zero by 2050; A Roadmap for the Global Energy Sector

Recommendations

Strengthen mechanisms for **direct regulation for emissions reduction** to meet targets including by:

30. Setting enforceable deadlines to **phase out domestic reliance on fossil fuels**, including prohibiting specified greenhouse gas emitting activities/projects that will drive exceedance of Australia's 'fair share' of a 1.5ºC carbon budget (ie, no new fossil fuel projects or non-renewable energy projects).

31. Providing legal clarity on how emissions budgets and targets apply to all projects and sectors. This will involve providing both project and sector-specific guidance.

32. Internalising environmental costs in decision-making, including via a 'polluter pays' approach, by putting a price on greenhouse gas pollution.

33. For existing emitters, we recommend a robust and comprehensive emissions trading scheme (ETS), but in the first instance amendments can be made to strengthen the Safeguard Mechanism.

34. Expand the scope of the primary emissions reduction mechanism/ETS to include scope 3 emissions.

35. Expand the coverage of the primary emissions reduction mechanism/ETS to include more emitters.

36. Ensure a progressive downward adjustment of baselines is built into the primary emissions reduction mechanism/ETS.

37. Ensure the primary emissions reduction mechanism/ETS implements nationally harmonised, binding limits on (or pricing of) **fugitive emissions** from current coal and gas extraction projects.

38. Requiring **Climate Impact Assessments** and emissions disclosure statements for energy and major projects - a national standard should be developed for this process, with guidance for mandatory consideration by decision-makers.

39. Setting a clear legislative definition of "low emissions technology" to explicitly exclude technology relying on fossil fuels, and exclude unproven technology that supports the continued use of fossil fuels (for example, fossil-fuel based hydrogen or carbon-capture and storage).

40. Reviewing and strengthening requirements and scrutiny of **carbon offsets**;

41. Establishing effective and best practice **national emissions and efficiency standards** for **building** - we recommend harmonised, mandatory building sustainability standards that: apply across residential, commercial, industrial and infrastructure sectors (new building developments and precincts, and existing building retrofits); maximise efficiency for energy, water, thermal comfort, carbon and appliances (taking account of regional differences in climate, hydrology, vegetation, and geography); minimise embodied energy and waste from construction and operation; move over time from low-carbon to zero-carbon to carbon-positive living; and ensure inclusive, liveable communities with public and active transport connections to workplaces, homes and nature.

42. Establishing effective and best practice **national emissions and efficiency standards** for **agriculture**.

43. Applying principles of 'continual improvement' and 'best available technology' to keep environmental and pollution standards up to date.

Related legislative reforms

A new and effective national approach to addressing the climate challenge will also require a range of reforms to other relevant laws if emissions reduction targets are to be met, and to ensure a resilient and sustainable future.

Under a national Climate Act and governance framework, the recommended Climate Division in the Department of Prime Minister & Cabinet should instigate a review of relevant legislation with the task of identifying the reforms necessary to ensure there is a whole of government approach to meeting emissions reduction targets. The recommended Climate Change Advisory Council and national EPA should have clear roles in advising on and developing national standards to ensure consistency across jurisdictions and relevant regulatory regimes.

Some key areas of related law reform are identified below.

National energy market (NEM): Australia's Energy and Environment Ministers should work closely to increase the integration of GHG emissions reduction into energy policy in order to limit the costs of a climate-changed world. We recommend that the National Energy Objective (**NEO**) – set out in the National Energy Law as mirrored across the Commonwealth, states and territories – be amended to include environmental and climate change considerations. This would enable decisions by energy market regulators and participants that better account for immediate and longer-term climate risks and solutions.

Carbon offsetting: The increasing use of carbon offsets undermines the urgent task of reducing fossil fuel emissions to limit global warming consistent with international agreement, particularly where carbon offsets are shown to be falling short of best practice. Carbon offsets frameworks need improved regulation. At a minimum, this requires high standards for offsets **integrity and transparent and robust accounting rules**. We recommend clear rules and safeguards relating to governance, additionality, leakage, biodiversity, robust carbon accounting for the land sector, and land rights and free prior informed consent of First Nations Peoples, to ensure integrity of carbon offsets in any accredited domestic or international schemes. The system must avoid perverse incentives and encourage and maximise opportunities for biodiversity co-benefits while recognising that land carbon is not an appropriate offset for fossil fuel carbon emissions. An urgent review of the integrity of offsets under the Carbon Credit (Carbon Farming Initiative) Act 2011 should be instigated.

"The ERF's [Emissions Reduction Fund] carbon offset crediting scheme is currently suffering from a distinct lack of integrity. People are getting ACCUs [Australian Carbon Credit Units] for not clearing forests that were never going to be cleared; they are getting credits for growing trees that are already there; they are getting credits for growing forests in places that will never sustain permanent forests; and they are getting credits for operating electricity generators at large landfills that would have operated anyway."

Professor Andrew MacIntosh, Former Chair of the Emissions Reduction Fund Integrity Committee[36]

Environmental law: Australian communities expect their national government to maintain strong environmental regulation and oversight of all major projects, including in relation to energy projects, be they power stations or coal and gas mines, or other projects that put increasing pressure on our national wildlife and landscapes, that are already facing the impacts of a changing climate. In addition to the establishment of a national EPA, Australia needs new and effective environment laws. The national environment law – currently the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) – should be rewritten or substantially strengthened, and provide for increased national oversight of emissions intensive projects (a **greenhouse gas trigger** for federal consideration and approvals) and for avoidance of carbon loss (a **land-clearing trigger** for projects with a significant impact). Other mitigation opportunities include:

- increasing protection of carbon-rich ecosystems (for example, forests, woodlands, native grasslands, savannahs, peatlands, coastal and marine ecosystems such as mangroves, tidal marshes, kelp forests and seagrass meadows) and areas of climate refugia on both public and private land;
- recognising the value of **forests as carbon sinks**, galvanising the transition from native forest logging to plantations (ie, end native forest logging); and
- ensuring there is a consistent nation-wide **ban on burning native forest biomass** – ie, ensure definitions of renewable energy do not include native forest biomass.

National standards should be established for land clearing including requiring assessment of carbon storage and emissions impacts arising from clearing. Establishing a national environment standard for **climate impact assessment** on threatened species and ecological communities could include mandatory climate impact statements for projects, submitted with environmental impact assessments.

In terms of adaptation, all jurisdictions should recognise the impacts of climate change as a key threatening process (KTP). This could be achieved by specific actions and policies that effectively respond to the existing climate change KTP listed under the EPBC Act[37] and by complimentary KTPs and Threat Abatement Plans (TAPs) that address specific impacts (for example, fire regimes - of which climate change is a key driver). Threat abatement plans (or equivalent) should require monitoring of impacts of climate change on ecosystems. **Recovery planning** must remain mandatory for climate impacted threatened species and communities; and recovery planning must include specific requirements to identify and address climate change impacts. Legislation should include **emergency listing provisions** and other responsive powers that provide for necessary intervention when threatened species and ecological communities and critical habitats are impacted by climate events such as bushfires.

One of the most magical things about Gimuy used to be watching the flying foxes cover the evening with a curtain of black. Now, we barely see any. Soon, we will probably see none. I expect that we are probably going to see another mass die-off of the species in the very near future. I suspect that there won't be any flying foxes in Gimuy within five years. This will mean another connection to Country gone. What else will then keep us connected to the land? One less animal means one less Goopi, one less spirit. When we are losing spirits, our storylines are changing. We have stories about the fish, the crabs, the prawns, the reefs and the flying foxes too. We will always tell stories, but as the animal's lives are changing, so must the stories.

Jiritju Fourmile, Yidinji Nation, Gimuy/Cairns. EDO report '*Flying-Fox Roost Management Reform for Queensland*, available at edo.org.au

Water management law is another area that requires amendment to ensure it is climate-ready. Reforms required include: an **adaptive water allocation** scheme where water allocation and extraction is based on climate change projections as well as the use of historic climate data; and a national standard that ensures climate considerations are addressed in **water sharing plans** at the sub-national level. This standard should provide that climate change is a relevant consideration in all Government decision making that relates to the extraction of water from the environment. Policy and guidelines should be developed in relation to climate change to ensure that Government decision making with respect to water resources is based on transparent and demonstrated best available scientific knowledge.

Consumer law: Reform is needed to establish guidelines and enforcement options in relation to 'greenwashing' and claims relating to 'clean' technologies, and eco-labelling in relation to emissions-intensive products or 'climate friendly' products. Reform proposals in the European Union include provisions that climate-related claims - for example, claims that relate to future climate performance targets by a certain date - should be prohibited unless supported by clear, objective and verifiable commitments supported by an independent monitoring system.[38] Australia needs clear standards regarding net zero claims. This is currently not covered by ACCC Green marketing and the Australian Consumer Law.[39] The ACCC and ASIC need dedicated budgets to investigate net zero claims/disclosures.

Directors duties: Reform is needed to amend corporations law to specify director's duties in relation to climate change impacts, risks and disclosure. Australian laws need to impose mandatory disclosure requirements regarding climate change risks on Australian companies. We recommend that this take place by way of amendment of the Corporations Act 2001 (Cth) (and regulations) and the ASX Listing Rules. We recommend that the mandatory disclosure rules require disclosure according to the Task-Force for Climate-related Disclosures (TCFD) framework.

A decade ago the Basin Plan failed to incorporate climate change into Australia's water policy and management. We've come a long way since 2012 and now recognise that these two issues are not independent of one another. To effectively manage our water resources, we need to account for the impact climate change will have on it.

Climate change will have devastating impacts on the Murray Darling Basin, from less rainfall and runoff, increased evaporation and sea level rise impacting the iconic Coorong. If we continue considering climate change and water management as two separate issues, we sign the death warrant for this already struggling ecosystem.

Kate McBride, Fifth-generation farmer from Western NSW

Transport: Emissions from the transport sector are significant and transport planning should be better linked to strategic planning and emissions reduction targets. As noted, policy reform is needed to embrace the significant opportunities in transport reform, including legislating mandatory vehicle emissions standards, removing the fuel tax credit scheme (rebate), and incentivising uptake of electric vehicles.

Waste: In relation to waste sector emissions, it has been recommended that the best way forward to ensure continued reductions in waste emissions is by enhancing and harmonising current state and territory regulatory approaches to reducing emissions from waste, especially landfill gas, and diverting organic waste from landfill.[40] National standards and guidelines should be developed to ensure the necessary harmonisation of regulatory approaches. A new national EPA could play a coordinating role in this reform process.

Agriculture: Agricultural sectors have been asking for Government support to be part of the transition and take advantage of trade opportunities that reward action on climate change. Adaptation and transition planning is essential as climate change impacts the agriculture sector, for example in relation to water availability and crop viability. A review of relevant legislation is needed to identify opportunities to: set baseline emissions and targets, including targets for methane, in different agricultural sectors; invest in technologies to help reduce emissions throughout the supply chain, including on-farm through decarbonising machinery and fertilisers, and off farm through transport, delivery, and processing systems; establish incentives for new verifiable carbon farming practices and strengthen the integrity of existing programs; develop improved methodologies for land sector carbon accounting; and incentivise carbon and biodiversity co-benefit schemes.

Human rights and environmental justice: There are a range of reforms that could be made to ensure Australian policy processes are consistent with Australia's human rights obligations and the UN Framework principles on Human Rights and The Environment.[41] These include: requiring that **Climate Impact Reporting** in Australia includes impacts on human rights and transboundary impacts; reviewing and improving transparency in relation to the role of Australian bodies in financing overseas projects – for example, reviewing Export Finance & Insurance Corporation Regulations; protecting the rights and freedoms of children and the public to express their views on climate change and undertake **peaceful protest**; protecting the rights of non-government organisations and charities to advocate for action on climate change.[42] In particular, Australia should adhere to its obligation to provide both procedural and substantive human rights in Australia which are directly related to climate change, such as the right to life with dignity, the right to a safe, clean, healthy and sustainable environment (which includes a right to a safe climate) and the right to culture and free, prior, informed consent.

Recommendations

Ensure a **whole of government approach to climate ready laws** by:

44. Instigating a review led by the recommended Climate Division in the Department of Prime Minister & Cabinet under a national Climate Act and governance framework, of relevant legislation with the task of identifying the reforms necessary to ensure there is a whole-of-government approach to meeting emissions reduction targets. The review should also identify investment needed for sectors where transition is challenging – for example, including agriculture and manufacturing.

45. Establishing clear roles for the recommended Climate Change Advisory Council and national EPA in advising on and developing consistent **national standards** to ensure across jurisdictions and relevant regulatory regimes.

46. In the first instance, reviewing and **reforming related legislation** to include climate considerations and establishing national standards to embed climate considerations and requirements in decision making, including in relation to:

- National Energy Market rule amendments;
- Carbon offsetting;
- Environment and biodiversity provisions to address impacts and adaptation;
- Water management;
- Directors duties and disclosure and reporting requirements in Corporations law;
- Regulation of climate-related claims and 'greenwashing' under consumer law;
- Transport;
- Waste; and
- Human rights and environmental justice.

Rapid and just transition

Transition policy must leave no sector or community behind – government must lead genuine transition planning for affected coal communities, workers in high emissions intensity industries and sectors, and highly impacted communities. A range of opportunities need to be consulted upon including: reskilling workers to emerging industries, incentivising carbon-biodiversity co-benefit schemes such as stewardship payments for rural landowners to manage land for carbon and biodiversity. In addition, there needs to be a review of existing infrastructure and adequacy of rehabilitation bonds to ensure communities aren't left with stranded assets and the impacts of the transition.

Survival and sovereignty of First Nations communities and Pacific States relies on limiting global temperature increase to 1.5°C. These communities are already suffering substantial climate harm at the current of 1.1°C warming. Australia's policy commitments and actions must ensure First Nations communities and our neighbours in the Pacific are included in the design and delivery of energy transition policies, as they see fit. This should include empowering First Nations communities to manage and protect Country.

These changes should occur within a climate justice framework, ensuring that the most affected communities (from both an economic and climate change perspective) are themselves invested in energy transition through equitable and genuine transition investments in these communities. A commitment to achieving our targets and staying within a carbon budget that will limit warming to 1.5°C requires commitment to establishing clear policy drivers, incentives and legal mechanisms which are just and equitable. On the ground this includes a range of measures, for example, exploring and implementing climate justice opportunities to provide renewable energy/energy justice to renters and social housing tenants and remote communities.[43] Natural disaster planning and adaptation planning should be on an environmental justice basis, not just an economic one. That is, ensuring that we identify at risk communities and target adaptation responses to those most at risk / disadvantaged by the climate change already locked in.

For further information on addressing environmental and climate justice issues for disproportionately impacted vulnerable communities, see EDO's report '*Implementing effective independent Environmental Protection Agencies in Australia*', available at edo.org.au'

Recommendations

Coordinate and implement a **rapid and just transition** by:

47. Establishing a statutory body to coordinate transition planning and implementation, with transition costs funded in part by the redirection of current fossil fuel subsidies.

48. Consulting on and establishing a plan for a rapid and just transition for effected communities and workers, leaving no sector or community behind and involving genuine transition planning for affected and highly impacted communities. This should be done in the context of an environmental justice framework.

49. Ensuring First Nations Peoples and our neighbours in the Pacific region are included in the design and delivery of energy transition policies, as they see fit, and First Nations communities are empowered to manage and protect Country.

Opportunity 5: Plan for and measure success

Once we have established a national climate legal framework with targets, duties and provisions to galvanise the transition from fossil fuels to renewable energy, we need mechanisms to assess and track progress to ensure that standards, emissions reduction targets and carbon budgets are met within legislated timeframes. This involves **monitoring and reporting**, frameworks for **risk assessment and adaptive planning**, and ensuring expert advice guides continual improvement.

The Australian Government should commit to expanding the Emissions and Energy Reporting System under the National Greenhouse and Energy Reporting Act 2007 **(**NGER Act) to provide a more comprehensive picture of Australia's GHG emissions. This needs to be expanded in terms of scope – who reports, but also in terms of the detail of what is monitored and reported. This is necessary to address gaps in current reporting and ensure that methodology is consistently updated to reflect the best available science. There are reporting gaps and discrepancies that need to be addressed to ensure we meet our targets. For example, the IEA estimates that global methane emissions from the energy sector are actually about 70% higher than reported in official data.[44] Reporting estimated emissions based on EIA documents is clearly inadequate.[45]

Australia needs to establish mechanisms by which emissions are tracked from the first stages of project development (for example, by requiring Climate Impact Statements and emissions disclosure statements for new proposals) through to disclosure and mandatory reporting of climate risk; and requirements for reporting on scope 3 emissions (for example, the emissions burnt by the wholesale consumer of fossil fuels). There should be clear legal requirements for: monitoring and reporting climate impacts on human rights, climate impacts statements for new laws and policies, and State of the Climate Reporting across jurisdictions and all sectors (electricity, transport, land sector etc).

A national Climate Act should establish a monitoring, reporting and verification framework to require the Australian Government to track, periodically review and publicly report on progress towards the Climate Act's goals, including the legislated targets. An independent audit and analysis of reporting would be an essential component, underpinned by public access to data and information. This framework would be a critical way to drive action, enhance ambition over time, and deliver public transparency and accountability around climate action, particularly the progress towards emission reductions targets.

Reporting must also include **mandatory financial reporting** of climate risks. As noted, Australian laws need to impose mandatory disclosure requirements regarding climate change risks on Australian companies. We recommend that this take place by way of amendment of the Corporations Act 2001 (Cth) (and regulations) and the ASX Listing Rules. We recommend that the mandatory disclosure rules require disclosure according to the Task-Force for Climate-related Disclosures (TCFD) framework. We note that New Zealand has recently announced plans for such mandatory disclosure for companies with assets of over $1 billion.[46] As noted by the NSW Bar Association in relation to proposed legislation in 2020:

> *The TCFD framework has been endorsed or supported by (amongst others) APRA, the Reserve Bank, ASIC and the ASX Corporate Governance Council. The Bar Council believes that a mandatory reporting requirement should be included in the Bill.*[47]

We need a high-level process for a national climate **risk assessment**, and specific policies and initiatives for sectors identified at high risk from climate change impacts (for example, housing, infrastructure, agriculture, energy, insurance, tourism, health). In relation to **national natural disaster arrangements**, there needs to be further investigation and recommendations for how Australia could achieve greater national coordination and accountability – through common national standards, rule-making, reporting and data sharing – with respect to key preparedness and resilience responsibilities for natural disasters and extreme events, explicitly including in

relation to mitigating and adapting to the impacts of climate change.[48] There is also the key question of how disaster responses are resourced, including consideration of polluter pays sources. As noted, natural disaster planning should have an environmental justice basis, identifying and prioritising highly impacted and overburdened communities.

We also need a national **Adaptation Plan** to be made, published, and periodically reviewed, with sectoral and regional adaptation plans also made consistent with the national adaptation plan. It is essential that we have a strengthened expert Climate Change Advisory Council and National EPA to assess and advise on progress towards targets, budgets, adaptation and continuous improvement based on best available science.

It is only through robust and comprehensive monitoring and reporting that we will be able to ensure that the new climate laws are working, that targets are being met, and progress is being made on building adaptation and resilience. The legal mechanisms recommended in this report should be designed so that they can be adjusted or strengthened in accordance with best available science on climate impacts. Legally backed adaptive management in fit for purpose climate laws will underpin our success at addressing the climate challenge.

The incoming Australian Government must urgently restore climate research funding and capabilities cut over the past nine years, immediately complete a national climate change risk assessment, create a national climate change mitigation and adaptation strategy to limit global warming, build community resilience, strengthen infrastructure, and increase response and recovery capabilities.

Emergency Leaders for Climate Action Statement[49]

Recommendations

Plan for and **measure success** by:

50. Requiring a **National Climate Risk Assessment** - adopt a high-level process for a national climate risk assessment, and require specific policies and initiatives for sectors identified as being at high risk from climate change impacts (e.g. housing, infrastructure, agriculture, energy, insurance, tourism, health).

51. Requiring a **National Climate Adaptation Plan** to be made, published, and periodically reviewed by the Minister on advice from the Climate Change Advisory Council. Sectoral and regional adaptation plans should also be made consistent with the national adaptation plan and ecologically sustainable development.

52. Building climate change considerations into coordinated natural disaster response and resilience planning.

53. Establishing mechanisms by which emissions and impacts are **monitored and reported** including from the first stages of project development (for example, by requiring Climate Impact Statements for new projects), through to emissions disclosure statements and mandatory reporting of climate risk, to ongoing monitoring of all emissions.

54. Expanding the Emissions and Energy Reporting System under the National Greenhouse and Energy Reporting Act 2007 (NGER Act) to provide a more comprehensive picture of Australia's GHG emissions. This includes expanding entities covered by the scheme and requiring comprehensive reporting on scope 3 emissions (i.e. the emissions burnt by the wholesale consumer of fossil fuels) and ensuring that emissions calculation methods are consistent with current best practice.

55. Improve the methodology for fugitive emissions accounting and reporting.

56. Requiring **Climate Impacts Statements** for new laws and policies, and requiring Climate Impact Statements to include impacts on human rights.

57. Requiring **State of the Climate Reporting** across jurisdictions and all sectors (electricity, transport, land sector etc).

58. Requiring **mandatory financial reporting of climate risks**. Australian laws need to impose mandatory disclosure requirements regarding climate change risks on Australian companies. We recommend that this take place by way of amendment of the Corporations Act 2001 (Cth) (and regulations) and the ASX Listing Rules. We recommend that the mandatory disclosure rules require disclosure according to the Task Force for Climate-related Disclosures (TCFD) framework.

Conclusion: It is time for a national Climate Act

It is clear that to effectively implement the necessary commitments, maximise transition opportunities and ensure we have the right mix of tools, rules and incentives to meet our targets, Australia needs an overarching Climate Act to coordinate our climate change response.

Australia currently has over 80 pieces of legislation relating to energy and various elements of climate policy, however the sum of these parts does not equal an effective legal framework to ensure the necessary action on climate change. It is time for a national framework Climate Act to set the path to real net zero, define responsibility, galvanise transition away from fossil fuels and incentivise innovation in meeting our targets to stay within a carbon budget that will limit global heating to 1.5°C.

This report has identified a range of key mechanisms that need to be enshrined in law to mandate a whole-of-government approach to both climate change mitigation and adaptation, in a clear and coordinated way.

We need a Climate Act to deliver a clear, strategic and accountable plan to achieve the required GHG emissions reductions; send a clear signal of a government's intention, commitment and level of ambition; drive low-carbon investment and innovation, and lower the cost of a just transition to a low-carbon economy; provide certainty and confidence for business and civil society, with positive influence on investor confidence; and deliver a range of positive economic and social benefits.

There is no more time to lose, but so many benefits to be gained by making climate-ready laws now.

References

[1] The IPCC Sixth Assessment Report is available at: https://www.ipcc.ch/assessment-report/ar6/

[2] In this report the term "Indigenous" is used in relation to Pasifika Peoples, and the term "First Nations" is used in relation to both Aboriginal and Torres Strait Islander Peoples in Australia and the Torres Straits.

[3] See: Australia's climate inaction is a human rights violation - UN submission - Environmental Defenders Office (edo.org.au) available at: https://www.edo.org.au/2020/07/10/australias-climate-inaction-human-rights-violation/

[4] See: Legal Letter Warns PM Over Failure to Protect Great Barrier Reef - Environmental Defenders Office (edo.org.au) available at: https://www.edo.org.au/2021/11/16/legal-letter-warns-pm-over-failure-to-protect-great-barrier-reef/

[5] For example, the Bramble Cays melomys (*Melomys rubicola*).

[6] Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/74/161, 15 July 2019.

[7] See ICCPR, Human Rights Committee, General Comment No. 36, 2019 at para 62. Available at: https://docstore.ohchr.org/SelfServices/FilesHandler.

[8] See: Compound Costs: How Climate Change is Damaging Australia's Economy | Climate Council available at: https://www.climatecouncil.org.au/resources/compound-costs-how-climate-change-damages-australias-economy/?atb=DSA01b&gclid=CjwKCAjwy7CKBhBMEiwA0Eb7ava_2RRL6Pv3raZeSQxUraUmoxc9pr9Z1cqwKJTdEtYEafkrDJkJKBoC_KsQAvD_BwE

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[11] A carbon budget calculates the amount of GHG that can be released into the atmosphere for any nominated temperature rise. The carbon budget changes over time as more GHG emissions are released. There are a number of ways to allocate the carbon budget amongst population or jurisdictions.

[12] See: The Registry of NDC communications at: Nationally Determined Contributions Registry | UNFCCC available at: https://unfccc.int/NDCREG

[13] See: Climate Change Authority (CCA) 2015, Final Report on Australia's Future Emissions Reduction Targets. Available at: https://www.climatechangeauthority.gov.au/sites/default/files/2020-07/Final-report-Australias-future-emissions-reduction-targets.pdf

[14] See: Legal Letter Warns PM Over Failure to Protect Great Barrier Reef - Environmental Defenders Office (edo.org.au) available at: https://www.edo.org.au/2021/11/16/legal-letter-warns-pm-over-failure-to-protect-great-barrier-reef/

[15] For example, Professor Will Steffen has calculated that a global reduction of emissions by 50% by 2030 and net-zero emissions by 2040 is needed to limit global warming to 1.8 degrees (well-below 2 degrees), from a 2018 emissions baseline – Prof Will Steffen, Expert Report to NSW Independent Planning Commission, Public Hearing – Vickery Extension Project, 30 June 2020 (at parr [9]-[11]) https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2020/03/vickery-extension-project/comments/200630-will-steffen.pdf

[16] See: Advisory report on the Climate Change (National Framework for Adaptation and Mitigation) Bill 2020 and Climate Change (National Framework for Adaptation and Mitigation) (Consequential and Transitional Provisions) Bill 2020 – Parliament of Australia (aph.gov.au) At 1.90 and 2.53. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/House/Environment_and_Energy/ClimateBills2020/Report

[17] We note the significant increase in the number of countries that committed to phasing out coal at COP 26 – see: End of Coal in Sight at COP26 | UNFCCC available at: https://unfccc.int/news/end-of-coal-in-sight-at-cop26

[18] See: Advisory report on the Climate Change (National Framework for Adaptation and Mitigation) Bill 2020 and Climate Change (National Framework for Adaptation and Mitigation) (Consequential and Transitional Provisions) Bill 2020 – Parliament of Australia (aph.gov.au) At 1.90. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/House/Environment_and_Energy/ClimateBills2020/Report

[19] Such legislated duties already exist in Victoria and in the laws of over 30 other countries including New Zealand, Canada and the UK.

[20] For example, the UK's Climate Change law phrases the duty as an absolute one ("It is the duty of the Secretary of State to ensure that the next UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline"); and the Climate Change (Scotland) Act 2009 places a legal duty on the Scottish Ministers to 'ensure that the net Scottish emissions account for the year 2050 is at least 80% lower than the [1990] baseline'.

[21] An example of this type of requirement can be found in section 137 of the Environment Protection & Biodiversity Conservation Act 1999 in relation to World Heritage decisions.

[22] We note that the 2020 Climate Change (National Framework for Adaptation and Mitigation) (Consequential and Transitional Provisions) Bill 2020 proposed an amendment to the Public Governance Performance and Accountability Act 2013 to insert in Part 3 – Duties to consider climate change impacts - a new subsection 19A that requires the accountable authority of a Commonwealth entity to consider the potential risks of climate change and report on material risks when performing their duties or exercising their powers.

[23] Ibid. 1.57 Part 3, Items 21 and 22.

[24] Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/74/161, 15 July 2019 At [62], [64](c) and [65].

[25] Formerly the Department of Industry, Science, Energy and Resources, and Department of Agriculture, Water and the Environment.

[26] See: Reducing emissions from the transport sector - Environmental Defenders Office (edo.org.au). Available at: https://www.edo.org.au/publication/reducing-emissions-from-the-transport-sector/

[27] See: Electricity storage: the critical electricity policy challenge for our new Government. A policy proposal, May 2022, available at: Victoria Energy Policy Centre (VEPC). Available at: https://www.vepc.org.au/

[28] The APEEL Technical Paper on Energy Regulation is available at: Australian Panel of Experts in Environmental Law Blueprint and Technical Reports - Environmental Defenders Office (edo.org.au) available at: https://www.edo.org.au/publication/australian-panel-of-experts-in-environmental-blueprint-and-technical-reports/

[29] See: The safeguard mechanism (cleanenergyregulator.gov.au) available at: http://www.cleanenergyregulator.gov.au/NGER/The-safeguard-mechanism

[30] EDO's view is that any use of 'carbon offsetting' must be strictly regulated via a robust, science-based scheme, developed with expert, scientific advice and that meets best practice, considering differences between the geological and active carbon cycle. Inadequately regulated offset schemes could significantly undermine achievement of emissions reduction targets and therefore must be strictly limited. Specific concerns have been raised about the integrity of the Australian Government's Emissions Reduction Fund (ERF), and carbon credits issued under specific ERF methods, including Human Induced Regeneration and Avoided Deforestation. See, The Australia Institute, An Environmental Fig Leaf? Restoring integrity to the Emissions Reduction Fund, 2022, available at https://australiainstitute.org.au/report/an-environmental-fig-leaf/; see also, for example, ABC News, Insider blows whistle on Australia's greenhouse gas reduction schemes, 24 March 2022, available at https://www.abc.net.au/news/2022-03-24/insider-blows-whistle-on-greenhouse-gas-reduction-schemes/100933186.

[31] Dan Tong et al, 'Committed emissions from existing energy infrastructure jeopardize 1.5 °C climate target' (2019) Nature available at: <https://doi.org/10.1038/s41586-019-1364-3 19> available at: https://www.nature.com/articles/s41586-019-1364-3

[32] Gregg Muttit, et al, The Sky's Limit: Why the Paris Climate Goals Require a Managed Decline of Fossil Fuel Production (Oil Change International, September 2016, Report) 5, available at: http://priceofoil.org/2016/09/22/the-skys-limit-report/

[33] Intergovernmental Panel on Climate Change (2018) IPCC Special Report: Global Warming of 1.5C, Summary for Policymakers, p16, Scenario 1 available at: <https://www.ipcc.ch/2018/10/08/summary-for-policymakers-of-ipcc-special-report-on-global-warming-of-1-5c-approved-by-governments/>.

[34] See: IEA, 2020 World Energy Outlook, Table A.1, p337 <https://www.iea.org/weo2020/>

[35] See: IEA, 2020 World Energy Outlook, Figure 1.1, p27 <https://www.iea.org/weo2020/>

[36] See: Australia's carbon market a "fraud on the environment" - ANU available at: https://www.anu.edu.au/news/all-news/australia%E2%80%99s-carbon-market-a-%E2%80%9Cfraud-on-the-environment%E2%80%9D

[37] Loss of terrestrial climatic habitat caused by anthropogenic emissions of greenhouse gases is listed as KTP under the EPBC Act, see https://www.awe.gov.au/environment/biodiversity/threatened/key-threatening-processes/loss-of-habitat-caused-by-greenhouse-gases

[38] See: Recital (4), page 18 "Environmental claims, in particular climate-related claims, increasingly relate to future performance in the form of a transition to carbon or climate neutrality, or a similar objective, by a certain date. Through such claims, traders create the impression that consumers contribute to a low-carbon economy by purchasing their products. To ensure the fairness and credibility of such claims, Article 6(2) of Directive 2005/29/EC should be amended to prohibit such claims, following a case-by-case assessment, when they are not supported by clear, objective and verifiable commitments and targets given by the trader. Such claims should also be supported by an independent monitoring system to monitor the progress of the trader with regard to the commitments and targets." Available at: 1_1_186774_prop_em_co_en.pdf (europa.eu)

[39] See: Green marketing and the Australian Consumer Law (accc.gov.au) available at: https://www.accc.gov.au/system/files/Green%20marketing%20and%20the%20ACL.pdf

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[43] For example, see: New HEATWATCH report for Western Sydney – Sweltering Cities available at: https://swelteringcities.org/2022/02/17/new-heatwatch-report-for-western-sydney/ and see: https://theconversation.com/how-climate-change-is-turning-remote-indigenous-houses-into-dangerous-hot-boxes-184328 available at: https://theconversation.com/how-climate-change-is-turning-remote-indigenous-houses-into-dangerous-hot-boxes-184328

[44] See: Methane emissions from the energy sector are 70% higher than official figures - News - IEA available at: https://www.iea.org/news/methane-emissions-from-the-energy-sector-are-70-higher-than-official-figures

[45] See: Emissions exposé: Australia's biggest polluters are emitting more than approved and getting away with it - Australian Conservation Foundation (acf.org.au) available at: https://www.acf.org.au/emissions_expose

[46] Media Release, 15 September 2020, The Hon James Shaw, New Zealand Minister for Climate Change. Available at: https://www.beehive.govt.nz/release/new-zealand-first-world-require-climate-risk-reporting

[47] See: Climate Change (National Framework for Adaptation and Mitigation) Bill 2020 | New South Wales Bar Association (nswbar.asn.au) available at: https://nswbar.asn.au/the-bar-association/publications/inbrief/view/08b347d11316f1372f3414b4c43a2705

[48] See: Bushfire Royal Commission - Environmental Defenders Office (edo.org.au) available at: https://www.edo.org.au/publication/bushfire-royal-commission/

[49] See: ELCA - Six-point plan for the incoming Federal Government. (emergencyleadersforclimateaction.org.au) available at: https://emergencyleadersforclimateaction.org.au/wp-content/uploads/2022/05/ELCA-Six-point-plan-for-the-incoming-Federal-Government..pdf

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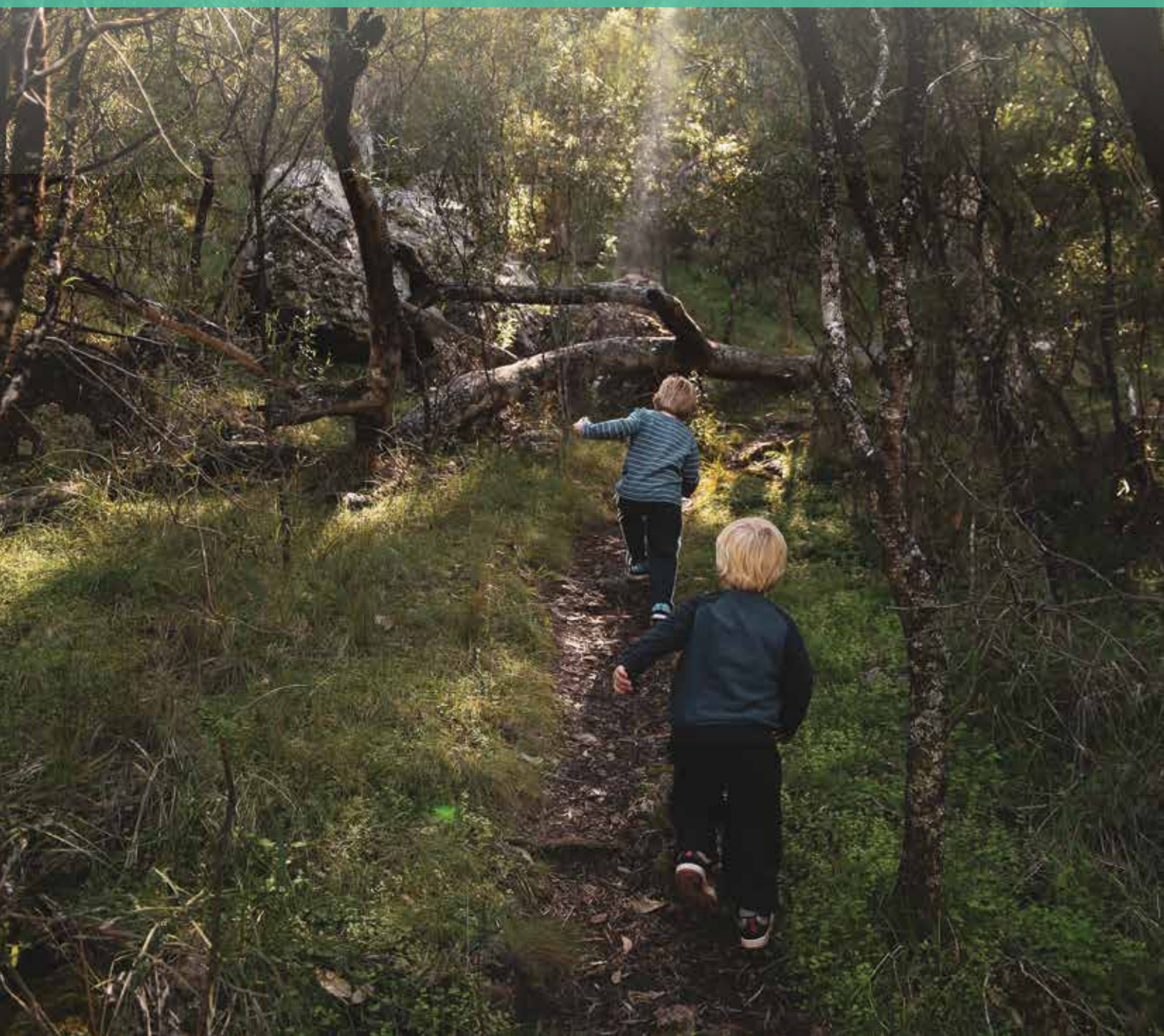
Environmental Defenders Office

A Healthy Environment is a Human Right:

Report on the Status of the Human Right to a Healthy Environment in Australia



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About EDO

Environmental Defenders Office Ltd (EDO) is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

www.edo.org.au

About Healthy Environment & Justice Program

EDO's Healthy Environment & Justice Program (HEJ Program) is underpinned by an environmental human rights framework. The goal of the HEJ Program is to empower overburdened people and communities to fight for environmental justice.

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Lead authors: Melanie Montalban and Frances Bradshaw

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Acknowledgment of Country

The Environmental Defenders Office recognises the Traditional Owners and Custodians of the land, seas and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present and emerging, and aspire to learn from traditional knowledges and customs so that, together, we can protect our environment and cultural heritage through Western law.

A note on Language concerning First Nations

We acknowledge that there is a legacy of writing about First Nations without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. In the domestic context, where possible, we have used specific references. Further, when referring to First Nations in the context of a particular Country we have used the term 'Traditional Owners'. More generally, we have chosen to use the term 'First Nations'. We acknowledge that not all Aboriginal and Torres Strait Island Peoples will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

Foreword

Time for Australia to Recognise the Right to a Healthy Environment

The 1972 Stockholm Declaration sparked dramatic changes not only in environmental law but also human rights law and constitutional law. The bold assertion, in Article 1, that people have *'the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being'* has been particularly influential.

Today, the right to a clean, healthy and sustainable environment is recognised in law by more than 80 per cent of nations. Unfortunately, Australia is among the shrinking minority of States that does not yet recognise this fundamental right in law. In 2022, this right was the subject of an historic UN resolution confirming that everyone, everywhere has the right to live in a clean, healthy and sustainable environment. Australia voted in favour of the resolution, opening the door to domestic action.

History proves that human rights can be a powerful catalyst for transformative change. Think about the role of equality rights in the abolition of slavery and the emancipation of women. Rights also played a central role in the end of apartheid, the civil rights movement and dramatic improvements in the status of Indigenous Peoples, persons with disabilities and LGBTQ+ persons.

In the face of today's unprecedented global environmental crisis, which has wrought devastation upon people and ecosystems in Australia, it is exciting to contemplate the potentially transformative impact of recognising and implementing the right to a healthy environment.

But what does the right to a healthy environment mean? Decades of experience have established that it means people have the right to clean air, safe and sufficient water, healthy and sustainably produced food, non-toxic environments where they can live, work, study and play, healthy ecosystems and biodiversity, and a safe climate. It also comes with a toolbox of access rights, including access to environmental information, public participation in environmental decision-making, and access to justice if the right to a healthy environment is being violated or threatened. And finally, the interpretation of this right is guided by key human rights principles including prevention, non-regression and non-discrimination.

The key strengths of taking a rights-based approach to the climate, biodiversity and pollution crises include: putting a human face on the problem; focusing on people and communities suffering the most severe impacts; and providing mechanisms that ensure accountability. Bringing human rights into the picture addresses the fundamental weakness of international environmental laws such as the Framework Convention on Climate Change, the Paris Agreement and the Convention on Biological Diversity, which is a glaring lack of enforcement or accountability mechanisms. By uniting international human rights law and international environmental law we create powerful synergies that integrate the best available science with strong tools for compelling governments and businesses to fulfill their commitments.

Because its core requirement is a healthy planet, the right to a healthy environment also reminds us that humans are neither superior to nor separate from the rest of the natural world. DNA analysis confirms that humans are not only related to each other but also related to all other forms of life on Earth. Perpetuating today's hierarchical relationship between humans and nature undermines our efforts to attain a sustainable future.

Implementation of the right to a healthy environment should also accelerate the transitions to renewable energy and a circular economy, two of the most challenging and vital paradigm shifts in all of human history.

Fifty years after the pioneering Stockholm Declaration, the right to a healthy environment has finally gained global recognition. It is time for Australia to recognise this fundamental human right. Every Australian should be able to breathe clean air, drink safe water and eat sustainably produced food. Australia should be free of pollution, with a safe climate and healthy biodiversity and ecosystems. The time is now!

Dr. David Boyd

UN Special Rapporteur on human rights and the environment

July 2022

Photo by Erico Marcelino on Unsplash

Contents

Executive Summary

All human rights ultimately depend on a healthy environment. Humans are part of nature and therefore, a healthy environment also contributes to human health.

In recognition of the interdependence between the environment and human health, the UN High Commissioner for Human Rights has described the triple planetary crises of climate change, biodiversity loss, and pollution as the *'single greatest challenge to human rights in our era'*.[1]

Fifty years ago, at the 1972 Stockholm Conference, governments declared that the environment is essential to our *'well-being and to the enjoyment of basic human rights'*[2] and that humanity has a *'fundamental right to... an environment of a quality that permits a life of dignity and well-being'*,[3] which must be safeguarded for present and future generations.[4]

In a landmark resolution on 28 July 2022, the UN General Assembly reaffirmed recognition of the human right to a clean, healthy and sustainable environment,[5] after this right was explicitly recognised by the UN Human Rights Council in October 2021.[6] The resolution passed with an overwhelming majority - with Australia voting in favour with another 160 UN Member States. The result is that the right to a healthy environment is now universally recognised as a human right that is important for the enjoyment of other human rights.

However, despite voting in favour of the General Assembly resolution, Australia is among the minority 20% of UN Member States that do not expressly recognise the right to a healthy environment in their laws.

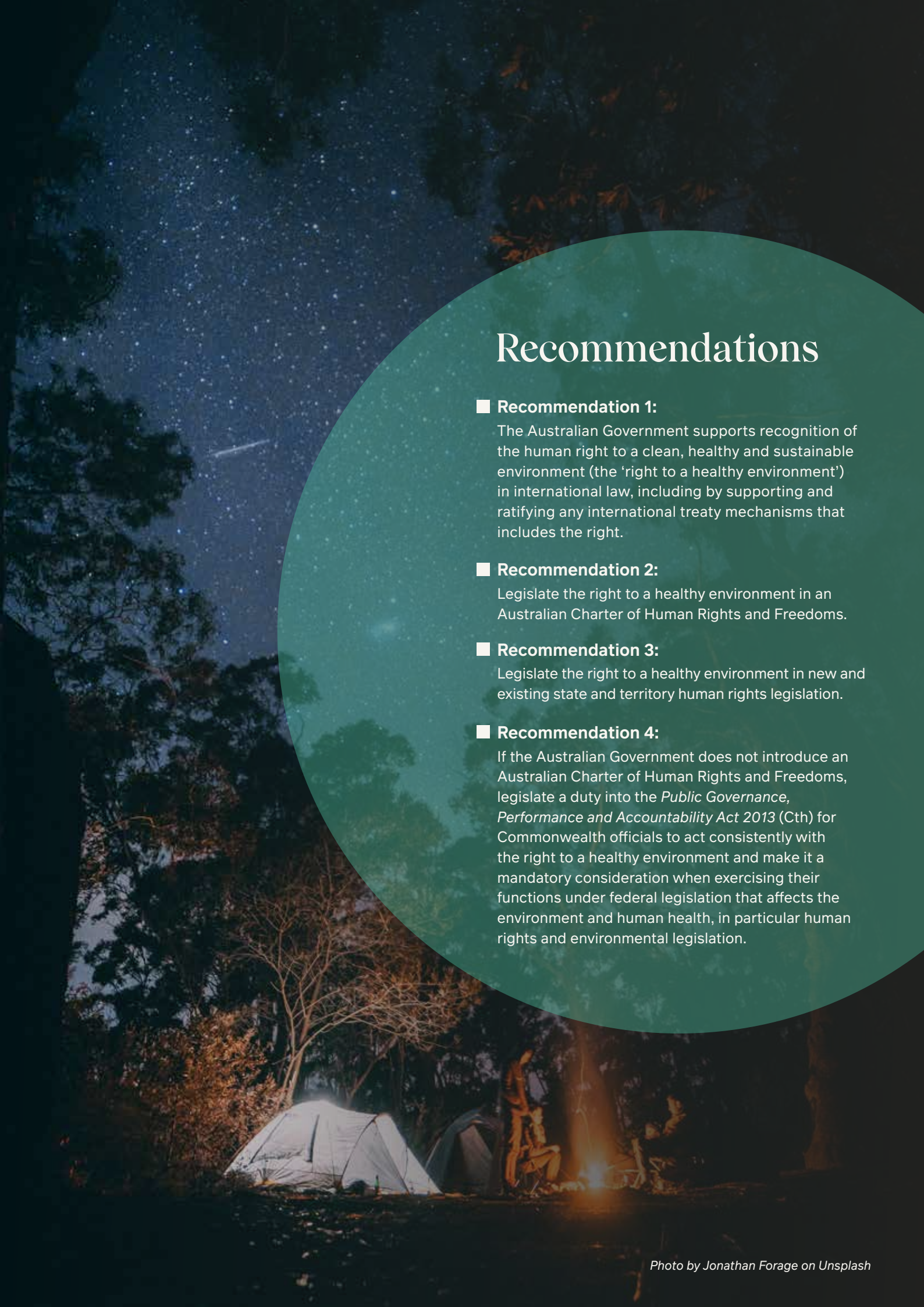
The Environmental Defenders Office (**EDO**) has advocated for the recognition of the human right to a clean, healthy and sustainable environment (the **'right to a healthy environment'**) in Australia for 20 years, since a Bill of Rights was first considered for the Australian Capital Territory (**ACT**) in 2002.

In Australia, we have a variety of laws, systems, and processes that protect components of our environment, and our human rights, to some extent. However, Australians are witnessing unacceptable levels of harm to our natural environment and human health from pollution, unsustainable development practices, destruction of significant First Nations' cultural heritage, and climate change. Environmental harm has a disproportionate impact on overburdened people and communities – such as First Nations, culturally and linguistically diverse communities, older people, young people, women, and people with a disability – who are at the most risk of environmental harm, but who are often least responsible for such harm.

It is clear that our existing laws – broad in subject matter though they may be – are not doing enough to fulfill our right to a healthy environment. The 2021 Australia State of the Environment Report and other independent reviews into Australian environmental law – such as Professor Graeme Samuel AC's review into the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) – have identified that stronger environmental laws are urgently needed to address future trajectories of environmental decline.

In this report, we address what the right to a healthy environment is and its legal status in Australia, why Australian governments should recognise the right to a healthy environment in our laws, the benefits of recognising the right to a healthy environment, and how the right can be supported on the international stage and recognised in Australian law. We make **four recommendations**, which are addressed to all levels of Australian government, to ensure that the right to a healthy environment is protected internationally, nationally, and within Australian states and territories.

It is time to enshrine the right of all Australians to live in a clean, healthy and sustainable environment in law.



Recommendations

Recommendation 1:

The Australian Government supports recognition of the human right to a clean, healthy and sustainable environment (the 'right to a healthy environment') in international law, including by supporting and ratifying any international treaty mechanisms that includes the right.

Recommendation 2:

Legislate the right to a healthy environment in an Australian Charter of Human Rights and Freedoms.

Recommendation 3:

Legislate the right to a healthy environment in new and existing state and territory human rights legislation.

Recommendation 4:

If the Australian Government does not introduce an Australian Charter of Human Rights and Freedoms, legislate a duty into the *Public Governance, Performance and Accountability Act 2013* (Cth) for Commonwealth officials to act consistently with the right to a healthy environment and make it a mandatory consideration when exercising their functions under federal legislation that affects the environment and human health, in particular human rights and environmental legislation.

Photo by Jonathan Forage on Unsplash

1 What is the Human Right to a Healthy Environment?

In this section, we explain:

- the definition of the human right to a clean, healthy, and sustainable environment;
- States' obligations under international human rights law as they relate to the enjoyment of a clean, healthy, and sustainable environment, including towards First Nations Peoples;
- examples of how the human right to a healthy environment is recognised in other countries.

It is important to acknowledge that the foundations of the human right to a healthy environment come from a number of cultural knowledges and traditions of Indigenous Peoples around the world, including First Nations Peoples cultural knowledges and traditions,[7] which have existed in Australia for over 60,000 years.

The human right to a healthy environment recognises that all humans have the right to live in a clean, healthy, and sustainable environment (the **'right to a healthy environment'**).

The Special Rapporteur on human rights and the environment (**Special Rapporteur**) defines the right to a healthy environment as being comprised of six **substantive elements**:[8]

- clean air,[9]
- a safe climate,[10]
- access to safe drinking water and sanitation,[11]
- healthy biodiversity and ecosystems,[12]
- toxic free environments in which to live, work and play,[13] and
- healthy and sustainably produced food.[14]

This list is not exhaustive and will evolve as our understanding of State obligations under international human rights law in relation to a healthy environment evolves.

For example, the right of First Nations Peoples to carry out cultural obligations to look after Country and be with Country is not captured in the Special Rapporteur's list of substantive elements. However, this right is critical to keeping Country not only healthy but also happy as a living entity, and is therefore intrinsic to the notion of a healthy environment from First Nations perspectives. This right should also be recognised as a substantive element of the right to a healthy environment.

The Special Rapporteur recognises that the substantive elements must be accompanied by corresponding **procedural elements**, without which it is not possible to achieve recognition of substantive rights.[15] These are:

- the right to information,
- the right to participate in decision-making, and
- access to justice.

The Special Rapporteur has also identified 16 Framework Principles on Human Rights and the Environment (**Framework Principles**), which are outlined in the textbox on the next page.[16] The Framework Principles are 16 basic obligations of States under international human rights law as they relate to the enjoyment of a clean, healthy and sustainable environment. The Framework Principles do not establish new legal obligations. Rather, they are derived from obligations that States already have under international human rights treaties and other sources of international law.[17] The Special Rapporteur has reiterated: '[t]*o be clear, all States have obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, including States that have not yet recognised the right to a healthy and sustainable environment*'.[18] Australian governments should utilise the Framework Principles as a guide when implementing their human rights obligations in relation to a healthy environment.

The 16 Framework Principles on Human Rights and the Environment

1. States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights.
2. States should respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment.
3. States should prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment.
4. States should provide a safe and enabling environment in which individuals, groups and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation and violence.
5. States should respect and protect the rights to freedom of expression, association and peaceful assembly in relation to environmental matters.
6. States should provide for education and public awareness on environmental matters.
7. States should provide public access to environmental information by collecting and disseminating information and by providing affordable, effective and timely access to information to any person upon request.
8. To avoid undertaking or authorising actions with environmental impacts that interfere with the full enjoyment of human rights, States should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights.
9. States should provide for and facilitate public participation in decision-making related to the environment, and take the views of the public into account in the decision-making process.
10. States should provide for access to effective remedies for violations of human rights and domestic laws relating to the environment.
11. States should establish and maintain substantive environmental standards that are non-discriminatory, non-retrogressive and otherwise respect, protect and fulfil human rights.
12. States should ensure the effective enforcement of their environmental standards against public and private actors.
13. States should cooperate with each other to establish, maintain and enforce effective international legal frameworks in order to prevent, reduce and remedy transboundary and global environmental harm that interferes with the full enjoyment of human rights.
14. States should take additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities.
15. States should ensure that they comply with their obligations to indigenous peoples and members of traditional communities, including by:
    (a) Recognising and protecting their rights to the lands, territories and resources that they have traditionally owned, occupied or used;
    (b) Consulting with them and obtaining their free, prior and informed consent before relocating them or taking or approving any other measures that may affect their lands, territories or resources;
    (c) Respecting and protecting their traditional knowledge and practices in relation to the conservation and sustainable use of their lands, territories and resources;
    (d) Ensuring that they fairly and equitably share the benefits from activities relating to their lands, territories or resources.
16. States should respect, protect and fulfil human rights in the actions they take to address environmental challenges and pursue sustainable development.

Framework Principles 3, 14 and 15 are particularly important with respect to First Nations in Australia. Because of the intimate spiritual and cultural connections that First Nations have to their lands, waters, territories and resources, they are particularly at risk of harm from destroyed, degraded and polluted environments. The right to a healthy environment must be applied based on the principle of non-discrimination and the recognition that First Nations are distinct peoples with collective rights, including the right to self-determination and the right to culture. This means recognising that there is an intimate and interdependent relationship between a right to a healthy environment and the right to culture for First Nations and that the right to a healthy environment includes respecting and protecting these spiritual and cultural connections to the environment. A healthy environment, and the wellbeing, health and cultural identities of First Nations, are bound together and this interdependence is protected by a right to a healthy environment.

The specific rights of First Nations Peoples in relation to a healthy environment are outlined in Framework Principle 15. In relation to 15(d), it is important to clarify that this recommendation is to be interpreted as requiring governments to ensure that any benefits from activities relating to the use of First Nations lands, territories or resources – including extraction activities and the agreed use of traditional knowledges, which remains the property of First Nations Peoples – are to be fairly and equitably shared with First Nations Peoples.[19]

The right to a healthy environment can be expressed in a variety of ways. Some examples of how the right to a healthy environment is phrased in other countries that recognise the right to a healthy environment – including in multilateral agreements and existing and proposed domestic legislation – are outlined in the textbox opposite.

Examples of how the right to a healthy environment is phrased in existing and proposed laws and agreements

- *Aarhus Convention* (European Commission): '[the Convention] affirms the right of every person of present and future generations to live in an environment adequate to his or her health and well-being' (Art 1).
- *Draft additional protocol to the European Convention on Human Rights:* 'Everyone has the right to a safe, clean, healthy and sustainable environment' (proposed Art 5, as recommended by the Parliamentary Assembly of the Council of Europe in Recommendation 2211 (2021), as at 29 September 2021).
- *Strengthening Environmental Protection for a Healthier Canada Bill:* 'In the administration of [the *Canadian Environmental Protection Act, 1999*] the Government of Canada shall… exercise its powers in a manner that protects the environment and human health, including the health of vulnerable populations… [and] protect the right of every individual in Canada to a healthy environment as provided under [the *Canadian Environmental Protection Act, 1999*], subject to any reasonable limits' (proposed amendment to s 2(1) as at Third Reading, passed by the Senate on 22 June 2022).
- *Environmental Justice for All Bill* (United States)*:* 'All people have the right to breathe clean air, drink clean water, live free of dangerous levels of toxic pollution, and share the benefits of a prosperous and vibrant pollution-free economy' (proposed s 9 as introduced on 18 March 2021).
- *New York State Constitution:* 'Each person shall have a right to clean air and water, and to a healthful environment' (s 19, which was introduced in November 2021).

- *Constitution of the Republic of South Africa 1996:* 'Everyone has the right—
  (a) to an environment that is not harmful to their health or wellbeing; and
  (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
    (i) prevent pollution and ecological degradation;
    (ii) promote conservation; and
    (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'
  (s 24, Chapter 2, Bill of Rights).
- *Constitution of Costa Rica 1949:* 'All persons have the right to a healthy and ecologically balanced environment. For that, they are legitimated to denounce the acts that infringe this right and to claim reparation for the damage caused. The State will guarantee, will defend and will preserve this right. The Law will determine the responsibilities and corresponding sanctions' (Art 50).
- *Constitution of the Fifth Republic 1958* (France)*:* 'Everyone has the right to live in a stable environment which respects health' (Art 1, *Charter for the Environment* (2005) grafted onto the *Constitution*).
- *Constitution of the Republic of Korea 1987* (South Korea): 'All citizens have the right to a healthy and pleasant environment. The State and all citizens shall endeavour to protect the environment' (Art 25(1)).
- *Constitution of the Republic of Fiji 2013*: 'Every person has the right to a clean and healthy environment, which includes the right to have the natural world protected for the benefit of present and future generations through legislative and other measures' (Art 40(1)).

2 Does Australia recognise the Right to a Healthy Environment

Australian laws do not expressly recognise the right to a healthy environment.

The first positive step towards recognition of the right in Australia was taken in February 2022 by the ACT Legislative Assembly, which passed a motion to investigate including the right to a healthy environment in the ACT's *Human Rights Act 2004*.[20] There has been other support at a subnational level. For instance, in 2007, the Tasmania Law Reform Institute recommended that the right to a safe environment and to the protection of the environment from pollution and ecological degradation be included in a Tasmanian charter of human rights.[21]

However, the right to a healthy environment is not a new human right. On 28 July 2022, the right was recognised by the UN General Assembly as a universal human right.[22] It is also recognised in international law, and today more than 80% of UN Member States (156 out of 193) recognise the right to a healthy environment either through regional human rights treaties, national constitutions or domestic legislation. Although Australia supported the General Assembly's resolution to recognise the right, it is among the minority 20% of UN Member States (37 out of 193) that do not yet expressly recognise the right in their laws.

In this section, we explain how the right to a healthy environment is recognised in international law, and the status of the right to a healthy environment in Australian law.

Status of the Right to a Healthy Environment in International Law

The right is recognised in international law in the following ways.

A standalone right to a healthy environment

The right to a healthy environment has been recognised as a standalone human right.

Fifty years ago, in 1972, the right was recognised in the Stockholm Declaration, the first principle of which states that humanity *'has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being'*.[22] Australia was one of the participants at the 1972 UN Conference on the Environment in Stockholm that adopted the Stockholm Declaration.[24]

The 1972 Stockholm Declaration was reaffirmed in the 1992 Rio Declaration,[25] and again in the outcome document of Rio+20 Summit in 2012, *The Future We Want*.[26]

In 1994, the final report of the Special Rapporteur for human rights and the environment, Fatma-Zohra Ksentini, outlined for the first time the legal foundations to a 'secure, healthy and ecologically sound environment', and recommended it as a standalone right in the annexed Draft Principles on Human Rights and the Environment.[27]

The 2016 IUCN World Declaration on the Environmental Rule of Law includes the 'right to a safe, clean, healthy and sustainable environment'.[28] Further, the 2017 Draft Pact for the Environment, which aims to be a new international environmental law constitution given there is no international instrument on environmental matters, includes the 'right to an ecologically sound environment'.[29]

On 8 October 2021, the UN Human Rights Council adopted Resolution 48/13 which recognises the standalone right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of other human rights (**Resolution 48/13**).[30] Resolution 48/13 called on States to build

capacity for the efforts to protect the environment and to adopt policies for the enjoyment of the right to a healthy environment. Resolution 48/13 also invited the UN General Assembly to consider and ultimately adopt the Council's resolution.

In a landmark resolution on 28 July 2022, the UN General Assembly reaffirmed recognition of the human right to a clean, healthy, and sustainable environment.[31] The resolution passed with an overwhelming majority - with Australia voting in favour with another 160 UN Member States.

Though these resolutions do not create binding obligations, they are an important statement that may be used to inform the Australian government's approach when considering introducing the right to a healthy environment. In addition, the movement towards recognising a standalone right to a healthy environment shows that there is a converging trend toward greater uniformity and certainty in human rights obligations relating to the environment. This trend is backed up by the practices of other UN Member States, the majority 80% of which have recognised the right to a healthy environment in constitutional or legislative texts.

A healthy environment as a precondition to the enjoyment of other human rights

The right to a healthy environment has also been recognised in a growing body of environmental human rights law as a precondition to the enjoyment of other human rights.

At international law, human rights are protected under several international human rights treaties including the *International Covenant on Civil and Political Rights* (**ICCPR**) and the *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**). These treaties protect rights such as the rights to life, health, water, food, housing, culture, and home and private life. There are currently no international human rights treaties that expressly include the right to a healthy environment.

Top: Photo by Milly Vueti on Unsplash.

However, international and regional courts and tribunals, UN treaty bodies and UN special rapporteurs have considered several matters where other human rights have been applied to environmental issues. These matters have successfully established that there is an explicit link between degradation of the environment, and its impact on people's enjoyment of a wide range of human rights. As a result, there are now numerous decisions, recommendations, and reports from international bodies that environmental harm interferes with the enjoyment of other human rights. This is referred to as the 'greening' of existing human rights.[32]

For example, the right to the highest attainable standard of physical and mental health is protected by Article 12 of the ICESCR. In 2000, the UN Committee on Economic, Social and Cultural Rights stated that Article 12 of ICESCR *'is not confined to the right to health care'*, but encompasses *'a wide range of socio-economic factors that promote conditions in which people can lead a healthy life'*, including a healthy environment.[34] The Committee further stated that Article 12 requires the *'prevention and reduction of the population's exposure to harmful substances... or other detrimental environmental conditions that directly or indirectly impact on human health'*.[35]

The right to life is protected under Article 6 of the ICCPR. In 2019, the UN Human Rights Committee acknowledged that *'environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life'*, and therefore 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.[36] The Committee further said that human rights obligations should be informed by international environmental law, and vice versa.[37]

The right to life has been interpreted broadly and can include a requirement to reduce infant mortality and increase life expectancy.[38] Taking an even broader approach, the right to life could extend to incorporate a right to health which itself has been interpreted to include determinants of health such as access to food, safe drinking water, adequate sanitation, and a healthy environment.[39] In this way, the right to life extends to a right to a healthy environment.

The International Court of Justice has recognised that the protection of the environment is a vital part of contemporary human rights doctrine because it is an essential condition for numerous human rights such as the right to life and the right to health.[40] Indeed, the Court has said *'environmental rights are human rights'*.[41]

Moreover, Indigenous Peoples around the world have successfully relied on the right to culture to protect the natural environment, relying on the right to culture as including a right to a healthy environment.[42]

State parties to international human rights treaties have obligations to implement the human rights protected under those treaties. As a result of the greening of human rights, States now have obligations to guarantee a healthy environment as a precondition of these rights.

As the Special Rapporteur has said, 'the human right to a healthy environment is not an empty vessel waiting to be filled; on the contrary, its content has already been exhaustively discussed, debated, defined, and clarified over [50] years'.[33]

Australian Human Rights Law

Australia has ratified seven out of nine main international human rights treaties, including the ICCPR and ICESCR. Australia also voted with the UN General Assembly to adopt the *United Nations Declaration on the Rights of Indigenous Peoples* of 2007 (**UNDRIP**), which Australia endorsed in 2009. Although UNDRIP is not legally binding, it contains existing human rights of Indigenous Peoples derived from a range of treaties.[43]

As a party to these international human rights treaties, Australia is bound under international law to respect, protect and fulfill its human rights obligations. Australia also has a duty to implement its obligations at home in Australia, and is accountable to international treaty bodies for its human rights implementation.[44]

However, although Australia has signed up to many international human rights treaties, Australia's obligations under those treaties do not automatically translate to legal rights in Australia. Australia has a dualist legal system, which means that international agreements must be effectively implemented into domestic law by Parliament before the obligations will have a legally binding effect.

National human rights laws

Unlike most similar liberal democratic nations, Australia does not have a national bill or charter of human rights.

The Australian Constitution protects some individual rights. These are the right to vote (section 41), protection against acquisition of property on unjust terms (section 51(xxxi)), the right to a trial by jury (section 80), freedom of religion (section 116) and prohibition of discrimination on the basis of state of residency (section 117). Other rights, such as the freedom of political communication, have been found by the High Court of Australia to be implied from the text of the Constitution.[45]

Although Australia does not have national human rights legislation, human rights are reflected in some national Australian laws. For example, under the *Australian Human Rights Commissioner Act 1986* (Cth) (**AHRC Act**), the Australian Human Rights Commission can inquire into any act or practice by an Australian government agency that may be inconsistent with, or contrary to, human rights, including human rights protected under the ICCPR and the Declaration on the Rights of the Child, among others.[46] After inquiring into a human rights complaint, the Commission will publish a report with its findings and any recommendations, which can include recommendations for the payment of compensation or other action to remedy or reduce loss or damage suffered by the victim.[47]

In addition, the *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)* requires members of Parliament who introduce new federal Bills and legislative instruments to prepare statements of compatibility against the seven international human rights treaties that Australia has ratified, which means that our federal legislation must be compatible with those human rights treaties.[48] The Parliamentary Joint Committee on Human Rights currently considers whether new legislation is compatible with the right to a healthy environment. However, this is confined to its consideration of the right to health under Art 12 of the ICESCR.[49] Australia has also enacted a wide range of anti-discrimination laws, which make it unlawful for anyone in Australia to engage in acts of discrimination.[50]

State and territory human rights laws

Three Australian states and territories – the ACT, Victoria, and Queensland – have enacted human rights legislation,[51] which is designed to protect civil and political rights, and some economic, social and cultural rights, of people who live in those jurisdictions.

Under human rights laws in the ACT, Victoria and Queensland, state/territory government agencies and their employees have a duty to act consistently with human rights, and to properly consider relevant human rights when making decisions.[52]

If a government agency contravenes this duty, people in the ACT, Victoria and Queensland have different options to enforce their human rights:

- **In the ACT**, a person may commence proceedings in the ACT Supreme Court.[53] The ACT Supreme Court may grant any relief that it considers appropriate, however it cannot grant damages (compensation) in human rights proceedings.[54]

At the time of writing, the ACT Government is also considering amendments to the *Human Rights Act 2004* (ACT) to introduce an informal complaints mechanism to resolve human rights matters.[55]

- **In Victoria**, a person can make a human rights complaint to the Victorian Ombudsman, who conducts an investigation into the complaint.[56] In conducting an investigation, the Ombudsman has broad investigative powers similar to a royal commission.[57] On completion of an investigation, the Ombudsman publishes a report, which includes their opinion about the administrative action and their recommendations.[58] The Ombudsman can also attempt to resolve the complaint by alternative dispute resolution.[59]
- **In Queensland**, a person can make a human rights complaint to the Queensland Human Rights Commission.[60] If the Commissioner accepts a complaint for resolution, the Commissioner may take any reasonable action that they consider appropriate to try to resolve the complaint,[61] including holding a confidential conciliation conference.[62] If the Commissioner considers that the complaint has not been resolved by conciliation or otherwise, the Commissioner must prepare a report about the complaint as soon as the Commission has finished dealing with the complaint, which may include the Commissioner's recommendations.[63]

In addition, new Bills and legislative instruments that are introduced into the ACT Legislative Assembly, the Parliament of Victoria, and Queensland Parliament are assessed for their compatibility against local human rights legislation.

The remaining five Australian states and territory – NSW, Tasmania, Western Australia, South Australia and the Northern Territory – do not currently have human rights legislation.

The right to a healthy environment in Australian law

The right to a healthy environment is not expressly recognised in any federal, state or territory legislation in Australia, including in Australian human rights law.

However, the right to a healthy environment can be implied as a precondition that is necessary for the enjoyment of other human rights that are protected in Australia.

For example, the right to life inherently recognises a right to a healthy environment. The basic requirements for life that are protected by the right to life – including clean air, clean water, sufficient food, and security of housing – are all under threat from harm from toxic pollution, climate change, and climate induced natural disasters. The link between the right to life and the right to a healthy environment is also supported by the international legal commentary described earlier in this section.

A healthy environment is also implied under laws that recognise the right to culture for First Nations Peoples based on their distinctive cultures. This link is evident in Australia's first climate change case based on human rights grounds, including the right to culture: **Waratah Coal v Youth Verdict, the Bimblebox Alliance** (see case study on the next page).

In Australia, laws that recognise the rights to life and culture include the AHRC Act, and legislation in ACT, Victoria and Queensland, all of which protect the right to life[64] and the right to culture.[65] These laws could be utilised by people in Australia seeking to rely on these rights. For example, it might be possible for the Australian Human Rights Commission to investigate a complaint about an act or practice that is inconsistent with the human right to a healthy environment, if the Commission was satisfied that a healthy environment can be interpreted as being part of the right to life or the right to culture. People living in the ACT, Victoria and Queensland may also be able to access remedies for a breach of the right under their local human rights laws.

Case Study: Waratah Coal v Youth Verdict, the Bimblebox Alliance (QLD)

Waratah Coal v Youth Verdict and the Bimblebox Alliance is the first matter ever launched in Australia to challenge a coal mine on human rights grounds, including the right to culture of First Nations Peoples.

First Nations-led organisation Youth Verdict, together with The Bimblebox Alliance, are opposing two applications by Waratah Coal (one application for environmental authority and one for a mining lease) on the basis that their human rights protected under the *Human Rights Act 2019* (QLD) will be impacted. Relevantly, Youth Verdict claims Waratah Coal's proposed mine will contribute to climate change in a way that will breach the cultural rights of First Nations Peoples to preserve, practice, and evolve culture due to shifting seasons, rising sea levels, and increasingly extreme weather events.[66]

Youth Verdict's case demonstrates the inherent link between the impact of Waratah Coal's proposed actions on the environment, and the impact these actions will have on the human rights of First Nations' Peoples right to culture.

3 Why Recognise the Right to a Healthy Environment?

In this section, we explain that the right to a healthy environment should be recognised in Australian law as a standalone human right because:

- Australia's current environmental laws do not adequately protect our environment and impacts on our health and wellbeing;
- Australia's current human rights law offers only piecemeal protection of the environment and our health and wellbeing;
- Australians are experiencing unacceptable levels of harm to our natural environment, and to our health and wellbeing;
- First Nations and other overburdened people and communities in Australia experience disproportionate impacts on their health and wellbeing.

In contrast, expressly recognising the right to a healthy environment as a standalone right in Australian law will:

- offer more comprehensive protection of the environment than is currently offered by existing environmental and human rights law;
- place people and communities at the heart of environmental protection;
- be consistent with, and build on, Australia's existing legal frameworks.

Gaps in Legal Protection of the Environment and Human Health

The state of Australia's environmental laws

Australia has a broad range of environmental, pollution and resource management laws that protect our environment to some extent.

For example, we have a range of federal laws in place that regulate air pollution,[67] greenhouse gas emissions,[68] the emission of toxic substances on land and in water,[69] access to safe drinking water and sanitation,[70] food safety and quality standards,[71] and laws that promote healthy biodiversity and ecosystems by regulating development and planning[72] including some farming activities,[73] and that promote sustainable fishing practices.[74] In practice these issues are largely dealt with by state and territory laws relating to air pollution,[75] climate change,[76] renewable energy,[77] the emission of toxic substances on land,[78] access to safe drinking water,[79] water pollution,[80] food,[81] and biodiversity.[82]

However, our national, state and territory laws do not satisfy all of Australia's obligations under international human rights law as they relate to the enjoyment of a healthy environment.

Recent reviews show that Australian environmental laws are not working. Professor Graeme Samuel AC conducted an independent review into the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**the EPBC Act**), Australia's central piece of environmental legislation. Professor Samuel presented his report to the Australian Government in October 2020, concluding that:

The EPBC Act is out dated and requires fundamental reform. It does not enable the Commonwealth to effectively fulfil its environmental management responsibilities to protect nationally important matters... The resounding message that I heard throughout the Review is that Australians do not trust that the EPBC Act is delivering for the environment, for business or for the community.[83]

The ineffectiveness of the EPBC Act is further demonstrated by the following case study.

Case Study: Sharma v Minister for the Environment

Anjali Sharma and seven other children, who claimed to represent all people in Australia under 18 years old, brought proceedings against the Minister for the Environment to seek an injunction to prevent the Minister from approving an extension to the Whitehaven Vickery coal mine in NSW under the EPBC Act. The applicants argued that the extension of the coal mine would exacerbate climate change, which would harm young people in the future. In a judgment in May 2021, the Federal Court concluded that the applicants had established that the Minister has a duty to take reasonable care to avoid causing personal injury to the applicants when deciding to approve or not approve the coal mine extension project.[84] In establishing the duty of care, the Court found that the foreseeable harm from the project, if the risks were to come true, would be 'catastrophic', and that children would be so directly affected that the Minister ought to consider their interests when making the approval decision. In a later judgment in July 2021, the Court declared that the Minister has a duty to take reasonable care to avoid causing personal injury or death to persons who were under 18 years of age and ordinarily resident in Australia at the time of the commencement of the proceedings arising from emissions of carbon dioxide into the Earth's atmosphere.[85] However, the Court ultimately declined to issue an injunction. Despite the Court's decision, in September 2021, the Minister approved the coal mine extension under the EPBC Act. The Minister later appealed the Court's decision to the Full Federal Court, which overturned the primary judge's decision to impose a duty of care on the Minister.[86]

Cases like Sharma demonstrate how the EPBC Act, Australia's primary environmental protection legislation, is currently ineffective at protecting the environment and our children's health from harm, including from climate change.

Reviews into Australian cultural heritage laws also show that these laws are not working to protect First Nations cultural heritage from destruction. In 2020, the Senate Joint Standing Committee on Northern Australia conducted an inquiry into the destruction of 46,000-year-old caves at Juukan Gorge in the Pilbara region of Western Australia. The inquiry report, presented to the Senate in October 2021, highlighted the serious deficiencies across Australia's Aboriginal and Torres Strait Islander cultural heritage legislative framework in all states and territories and nationally.[87]

Photo by Ondrej Machart on Unsplash.

Case Study: Juukan Gorge (WA)

The high-profile destruction of Juukan Gorge by Rio Tinto on 24 May 2020 in the Pilbara Region of WA is an example of the insufficient protections provided to cultural heritage and the rights of First Nations. Juukan Gorge was the site of two culturally and archaeologically significant rock shelters, including one which demonstrated evidence of 46,000 years of continuous occupation, and which contained artefacts that were integral to the culture of the Puutu Kunti Kurrama and Pinikura people of the Pilbara.[88] This destruction was widely condemned as demonstrating a lack of respect for First Nations and their cultures,[89] and as representing a violation of the right to culture and cultural practices[90] through federal and state governments failure to ensure adequate protection of the important site.

Rio Tinto's actions were, at the time, legal under the *Aboriginal Heritage Act 1972* (WA) (**AH Act**),[91] highlighting the clear inadequacy of existing protections for First Nations cultural heritage. WA is a mining state where the interests of miners have clearly been privileged over the interests of First Nations Peoples in protecting their cultural heritage. For example, from 1 July 2010 to 14 May 2020, on land covered by a mining lease there had been 463 applications for permission to destroy Aboriginal heritage under the AH Act and none of them were refused.[92] This is a highly pervasive form of systemic and structural racial discrimination, leading to widespread damage and destruction of First Nations People's cultural heritage.

A report from the Inquiry into the Juukan Gorge destruction recommended that the WA government legislate for stronger heritage protection, including to make space for greater involvement of First Nations in heritage decision-making.[93] The subsequent *Aboriginal Cultural Heritage Bill* 2020 (WA) was passed by the WA parliament in December 2021 despite significant concerns raised by First Nations within Western Australia and the UN Committee on the Elimination of Racial Discrimination.[94] Those concerns included its compatibility with Australia's international obligations such as the right to culture and the requirement for free, prior and informed consent.[95]

The destruction of Juukan Gorge and the new *Aboriginal Cultural Heritage Act 2021* (WA) is an example of the law failing to protect First Nations cultural heritage or address the structural racism that has underwritten past and contemporary destruction of cultural heritage in WA.

Australia's protection of procedural rights is also declining. In the last 2014 ranking of the World Resources Institutes' Environmental Democracy Index, which evaluated 70 countries' compliance with recognised standards for environmental democracy established by the Bali Guidelines of the UN Environment Programme, Australia received the lowest score of any OECD country recorded, scoring 1.42 out of 3.[96] This decline is further demonstrated by the following case study.

Case Study: Freedom of Information Laws (Tas)

Under Tasmania's freedom of information law, the *Right to Information Act 2009* (**RTI Act**), individuals have the right to access Tasmanian government information. However, Tasmanian public authorities are reported to make an excessive number of decisions refusing access to information. In 2019-20, Tasmania recorded the highest rates of refusal decisions in Australia.[97] Tasmanian public authorities frequently provide inadequate reasons for decisions and consistently misapply the RTI Act.[98] Recent analysis conducted by EDO shows that a high rate of Tasmanian government decisions are overturned on review by the Tasmanian Ombudsman.[99] The timeliness of decisions is also a major concern,[100] and in the event that information is ultimately released, access to information is delayed and may no longer be of any use. In one case in 2017, it took EDO's client 842 days (over two years) to access government information from the Environment Protection Authority, and only after the original refusal decision had been overturned by the Tasmanian Ombudsman on review.[101]

The lack of timely access to environmental information under the RTI Act presents a critical barrier for people in Tasmania to participate in environmental decision-making and to access remedies for environmental harms.

As can be seen from the case studies, Australian environmental laws are piecemeal and do not offer comprehensive protection of the environment. Stronger environmental laws are urgently needed to address trajectories of environmental decline.

In addition, our environmental laws tend to focus on facilitating development and managing our use of natural resources and not on increasing health and wellbeing. Without the right to a healthy environment, there are no laws in Australia that provide environmental benefits as a human right.

The state of Australia's human rights law

In 2009, a comprehensive review into Australian human rights law by the National Human Rights Consultation Committee, chaired by Father Frank Brennan, identified that human rights are not properly protected in our laws.[102] Australia's Constitution contains very few human rights protections, and we do not have national human rights legislation. As explained earlier in this report, Australia has a duty under the international human rights treaties it has signed to implement its human rights obligations at home in Australia. However, that duty is, to date, not meaningfully realised.

Human rights are better protected in the ACT, Victoria and Queensland, which have human rights legislation. However, these laws offer limited protection, as the laws protect people in the ACT, Victoria and Queensland from the actions of their territory or state governments, and tend to focus on civil and political rights rather than economic, social and cultural rights. They do not protect everyone in Australia, and do not protect people from the actions of our national government.

The result is that human rights are not fulsomely protected in Australia's current legal system.

The state of Australia's environment

Australians continue to witness unacceptable levels of harm to our physical and mental health and to our natural environment, including through toxic pollution, natural disasters driven by climate change, destruction of First Nations cultural heritage, and losses of our iconic and native species.

The *Australia State of the Environment Report* of 2021 released in June 2022 (**SoE Report**) reported that the general outlook of Australia's environment is poor and deteriorating. Some of the impacts on Australia's environment that were reported on include:[103]

- impacts on Australia's ecosystems from climate change and environmental extremes, including impacts on the Great Barrier Reef from marine heatwaves causing mass coral bleaching events, and impacts from bushfires leading to whole ecosystems burning;
- increased numbers of invasive non-native species, such that there are now more foreign terrestrial plant species in Australia than natives;
- significant impacts on Australia's agriculture from climate change, including damage to tree crops caused by more severe storms and cyclones, the effects of heat stress on domestic animals, and more insidious impacts that disrupt the lifecycles of pollinators and beneficial predatory insects;
- environmental damage to Country and First Nations Peoples' heritage, cultural connections and obligations to Country caused by clearing of land, climate change and expansion of mining; and
- significant and unacceptable impacts on our land from soil and water pollution and illegally dumped waste, which directly affects soils, waters, biota and habitats.

The SoE Report identifies that climate action failure and human environmental damage are key risks that increase the likelihood of having significant negative impacts within the next 10 years.[104]

The state of Australia's health and wellbeing

Environmental harm harms our health. As stated in the SoE Report, '[e]*nvironmental degradation is now considered a threat to humanity, that could bring about societal collapses with long-lasting and severe consequences'.*[105]

The indivisibility of the health of the environment and human health and wellbeing is increasingly being acknowledged globally. There is a growing consensus that ensuring human health and prosperity requires the safeguarding of the planet's rich biodiversity and ecological integrity,[106] and biocultural diversity.[107] The COVID-19 global pandemic has served as a prescient reminder of the interdependence of human health and the environment, with scientists warning of the clear link between environmental degradation and loss of biological diversity and the occurrence of dangerous zoonotic diseases which pose an existential threat to human health and rights more broadly.[108]

A recent report released by the UN Intergovernmental Panel on Climate Change (**IPCC**) in February 2022 reported that Australians are experiencing a number of impacts on our health and wellbeing caused by anthropogenic climate change, including extreme water shortages and water insecurity,[109] heat stress,[110] changing rainfall patterns including floods and drought,[111] climate-sensitive air pollution including that caused by wildfires,[112] and other natural disasters including bushfires. For example, the 2019-20 Black Summer bushfires are estimated to have caused 417 deaths and 3,151 hospital admissions for cardiovascular and respiratory conditions from exposure to bushfire smoke.[113] More specific impacts of these catastrophic fires on people are outlined in our case study on the next page. Natural disasters also have a detrimental and acknowledged impact on mental health outcomes. For example, in the aftermath of the 2019-20 bushfires, it has been estimated that more than half of Australian adults felt anxious or worried about the bushfires. There was also a 10-15% increase in calls to the Lifeline crisis support hotline, resulting in the introduction of a bushfire-specific telephone service.[114] More recently, demand in NSW for health support for anxiety, distress, and trauma has escalated markedly following the 2022 floods.[115]

The IPCC predicts that climate impacts will have tangible economic costs but also intangible costs to people. Tangible costs include from a loss of wealth from climate-induced reduction in productivity across the agriculture, manufacturing and service sectors,[116] a predicted reduction in Australia's Gross Domestic Product caused by global warming, and an increase in costs of damage caused by flooding, coastal inundation, forest fires, land subsidence and wind.[117] The predicted intangible costs from climate impacts include death and injury and impacts on health and wellbeing, the personal cost of which may be far higher than tangible costs.[118] For example, following the Victorian bushfires in 2009, the tangible costs were $3.1 billion while the intangible costs were $3.4billion.[119] Following the Queensland floods in 2010-11, the tangible costs were $6.7 billion while the intangible costs were $7.4 billion.[120]

The SoE Report also identifies that Australians are not immune to the impacts of environmental degradation on our health and wellbeing, and identified the following impacts;

- the competition for land area in Australia caused by urban sprawl, combined with the impacts of climate change, is putting increasing pressure on fresh food provision and security;
- water quality is declining in many areas due to increased salinity, algal blooms, bushfire ash run-off and pollutants;
- Australia's air quality is generally good but is deteriorating, and air quality is experienced differently by certain communities – for example, people living near power stations and industrial facilities, in urban centres and along transport corridors generally live with poorer air quality, which will be further exacerbated by climate change;
- there is no 'safe' level of air pollution, particularly for sensitive populations exposed to ozone or particulate matter, and studies have reported that in 2015, 2,566 deaths (1.6% of all deaths in Australia) were caused by air pollution; and
- climate change impacts – including from heatwaves, dust levels, and extreme weather events like cyclones, bushfires and floods – are increasingly affecting human wellbeing, particularly for overburdened people and communities who are at greater risk of harm from such impacts.[121]

Case Study: 2019-20 Black Summer Bushfires (ACT)

Between November 2019 and January 2020, Canberra, and the ACT more broadly, experienced significant air pollution caused by exposure to bushfire smoke from bushfires in neighbouring regions of NSW, and later from bushfires burning directly in the ACT. At times in January 2020, Canberra recorded the highest Air Quality Index (**AQI**) rating out of any capital city in the world.[122] On 1 January 2020, Canberra city's AQI peaked at 7,700.[123] With AQI levels above 200 considered hazardous, the air quality in Canberra city was more than 23 times the hazardous level.[124] Overall, people in Canberra spent more than one third of the 2019-2020 summer living with hazardous levels of air quality.[125] The bushfires were equally damaging to ecological health. The fire that swept through the Orroral Valley was one of the largest ecological disasters in the ACT's history, with 82,700 ha of Namadgi National Park (78% of the park's total area) and 1,444 ha (22%) of the Tidbinbilla Nature Reserve burnt.[126]

An ACT government risk assessment team deployed to assess the area identified 27 risks including direct impacts on cultural heritage, risks to public safety, threats to biodiversity, and impacts of threatened ecological communities.[127] On the public health front, the Australian Institute of Health and Welfare reported that there was a surge in presentations to hospital emergency departments for respiratory conditions, and that exposure to prolonged periods of dangerous air quality resulted in impacts on the financial, social, and physical wellbeing of residents.[128] However, the official statistics may grossly underestimate the prevalence of health problems associated with the Black Summer Bushfire's smoke. A survey conducted by ANU of more than 2,000 of Canberran residents found almost every respondent experienced at least one physical health symptom attributable to bushfire smoke and about half of the respondents reported mental health symptoms, but only 17% went to a medical practitioner for help and 1% went to hospital.[129] Exposure to bushfire smoke also has a significant toll on pregnant women, and has been associated with miscarriage, premature births, and impacts on babies' birth weight.[130] It is likely that pregnant women in Canberra who were exposed to bushfire smoke during the Black Summer Bushfires have experienced health impacts, however the full extent of these impacts is still unknown.

The devastating impact of the Black Summer Bushfires on health and air quality are a significant example of the fact that human health and the environment are inseparable.

The disproportionate impact on overburdened people and communities

Overburdened people and communities – including women, children, people who are financially disadvantaged, First Nations Peoples and communities, LGBTQIA communities, older people, people with disabilities, people from a racial or ethnic minority, and people displaced by natural disasters – are the most at risk of environmental harm, with subsequent impacts on their health and wellbeing.

First Nations Peoples

First Nations are particularly at risk of environmental harm from destroyed, degraded, and polluted environments because of the intimate spiritual and cultural connection they have to their lands, territories, and resources. Environmental burdens are disproportionately felt by First Nations, through impacts to their Country, cultural practices and the resources that they depend on. This burden is a direct consequence of colonisation, as historical and ongoing decisions around land management, ownership and environmental impacts have been highly destructive to First Nations and their culture, livelihoods and connection to Country and community.[131] The disproportionate impact of environmental injustices on First Nations is a clear example of environmental racism. Environmental racism can be seen to be perpetrated against First Nations communities through the ongoing impacts of colonisation, dispossession, and destruction of First Nations lands for settler purposes.

A recent IPCC report identified that changing climate conditions are expected to exacerbate many of the social, economic and health inequalities already faced by First Nations in Australia,[132] including from loss of bio-cultural diversity, nutritional changes through availability of traditional foods and forced diet change, water security, and loss of land and cultural resources through erosion and sea-level rise.[133]

As outlined in the following case studies, existing laws do not adequately protect First Nations cultural heritage and other human rights, including health, adequate housing, and access to water. As identified in the SoE Report, degradation to Country and destruction of First Nations heritage – including cultural landscapes and other intangible heritage – is particularly detrimental to First Nations Peoples' physical and mental health and wellbeing.[134]

Case Study: McArthur River Mine (NT)

The McArthur River Mine is located approximately 60km upstream from the predominantly Aboriginal town of Borroloola in the NT.[135] In 2013, as a result of a misclassification of potentially acid forming waste rock on the site, parts of a waste rock dump on the mine erupted in flames, emitting toxic smoke into the atmosphere over a prolonged period.[136] This event came after years of warnings from the four local clan groups (the Gudanji, Garawa, Mara and Yanyuwa) that the mine was a major environmental risk, especially when Glencore sought (and received) approval to divert the McArthur River for 5km to convert the mine to an open cut mine, cutting through a Rainbow Serpent dreaming site.[137] After Traditional Owners succeeded in challenging the NT approval in 2007, the NT Labor government passed legislation three days later that facilitated the mine's expansion, sidestepping the Court's ruling.[138] Traditional Owners also challenged Commonwealth approval for this expansion, and were successful in having it set aside,[139] however the Commonwealth government issued a new approval in 2009.[140]

Following the fire that resulted from mismanagement of the mine, Glencore admitted that the mine and its surrounds would need to be monitored for the next 1000 years,[141] especially because of the risk of ground water contamination. The NT government has since reduced the McArthur River Mine's environmental security bond by 23%.[142] This occurred after an environmental impact assessment report found that the original bond of $520 million was insufficient and based on water quality monitoring for only 25 years post closure, despite the mine site being likely to require a substantially longer period of monitoring and maintenance.[143] As Gudanji Traditional Owner Josephine Davey Green succinctly said: '*the government made a decision that could affect our people for thousands of years. If the mine walks away now, that river will be gone, and so will we*'.[144] Ms Davey Green, Garawa elder Jack Green and the Environment Centre NT have launched a legal action in the Supreme Court challenging the Minister's decisions with respect to the security bond.[145] As Mr Green says, *'the government doesn't realise how important this land is to our people. That land is Mother to all of us. That's the land that they're destroying'*.

This case study represents disregard for the rights of First Nations Peoples, with Australian governments focused on providing for the short-term economic interests and benefits of the mine rather than respecting First Nations Peoples' rights to culture and cultural flows.

'the government doesn't realise how important this land is to our people. That land is Mother to all of us. That's the land that they're destroying'.

Garawa elder Jack Green

Photo by Rebecca Parker.

Case Study: Endangered Spectacled Flying-Fox (QLD)

The Wet Tropics of Queensland World Heritage Site has been increasingly affected by the impacts of climate change, which has resulted in losses of biodiversity[146] and losses in culture for the Gimuy Walubara Yidinji Peoples, the traditional custodians of the region. The Spectacled Flying-fox is a local species that plays a crucial role in the local ecosystem, as a pollinator and propagator in eucalypt forests and rainforests.[147] Spectacled Flying-foxes traditionally serves as a source of food and medicine for the Gimuy Peoples, and also represent part of Gimuy Peoples' connection to the land through changing storylines.[148] However, the Spectacled Flying-fox population has declined by more than 80% in the last 15 years.[149] In 2018, a heatwave caused an extensive decline in Spectacled Flying-foxes, and is estimated to have reduced the total Australian population of Spectacled Flying-foxes by one third.[150] Studies have identified the Spectacled Flying-fox is nearing functional extinction. In addition to the negative implications this has on the ecosystem,[151] the Gimuy Peoples fear that destruction of the ecosystem and loss of biodiversity will curtail their ability to share traditional practices, resulting in significant losses in traditional culture and availability of food sources.[152]

Although there are laws in place for the management of Spectacled Flying-fox populations, existing laws have been contributing to the decline of the Flying-fox.[153] For example, under the *Nature Conservation Act 1992* (Qld), decision-makers are not required to consider cumulative impacts, which means that nationally significant Flying-fox roosts, such as the Cairns City Library Spectacled Flying-fox Camp, have been subject to clearing, undermining the roosts' viability.[154] The Gimuy Peoples possess knowledge and lore that could aid in stemming the decline of the Spectacled Flying-fox population. Some Gimuy are calling upon the Queensland government to recognise First Nations Lore through legislation and prioritise ecological values to aid in the recovery of the Spectacled Flying-fox, which help to maintain the ecological integrity of the World Heritage Site and to prevent loss of Gimuy culture.[155]

It is clear that Queensland's existing laws do not adequately prevent loss of biodiversity, or protect the Gimuy Peoples' human rights including cultural rights and health. Loss of biodiversity in the Wet Tropics of Queensland World Heritage Site, including from climate change, has a disproportionate impact on the Gimuy Peoples, who rely on biodiversity in their connection to the land.

Other overburdened people and communities

Other overburdened people and communities who are at the most risk of environmental harm and of impacts on their health and wellbeing include people who are financially disadvantaged, culturally and linguistically diverse communities, children, and young people.

For example, all humans can be exposed to environmental harm from pollution and contamination. However, the burden of such harms falls disproportionately upon overburdened people and communities that are already enduring poverty, discrimination and systemic marginalisation.[156] The disproportionate impact of pollution on such people and communities is a form of environmental injustice. Environmental injustices are rooted in racism, discrimination, colonialism, patriarchy impunity, and political systems that systematically ignore human rights.[157]

Some people and communities are exposed to levels of pollution and toxic substances that are so extreme in the areas in which they live that they are described as 'sacrifice zones'.[158] The most heavy polluting and hazardous facilities – including mines, coal-fired power stations, oil- and gas fields – are often located in close proximity to poor and marginalised communities.[159] It is also often the case that such communities are reliant on an industry for their economic stability, or where they cannot afford to live elsewhere.

The effects of environmental harm on overburdened communities in Australia is further explored in the following case studies.

Case Study: Urban Heat Islands (NSW)

'Urban heat islands' refers to the phenomenon where urban areas are generally hotter than surrounding rural areas. The replacement of native vegetation with heat-trapping construction materials in buildings and pavements, alongside the generation of heat from human activities like power generation and exacerbated by climate change, cause urban centres to absorb and retain heat at a greater rate than surrounding rural landscapes.[160] The impact of urban heat islands disproportionately affects groups who are at greater risk of environmental harm, such as culturally and linguistically diverse communities. For example, the suburb of Penrith in Western Sydney, which is one of the most diverse regions in Australia with large migrant communities,[161] was recorded as the hottest place on Earth on 4 January 2020 at 48.9°C.[162] Recent research by the Australia Institute has found that if emissions continue to accelerate, Western Sydney can expect to experience temperatures greater than 35°C on up to 46 days per year by 2090, and that places like Penrith could experience up to 58 days of extreme heat per year.[163] This is compared to more affluent and less diverse suburbs in Sydney's east, such as Mosman, which has moderately high vegetation cover compared to the western suburbs, lowering average temperatures and potential adverse health impacts.[164] Research has shown that more than 5 million people die each year globally because of excessively hot or cold conditions, with the incidence of deaths from high temperatures increasing.[165] Heart attacks, cardiac arrests, strokes, and other life-threatening diseases that particularly effect older individuals and people with underlying conditions increase with extreme heat.[166]

The heat island phenomenon in urban centres demonstrates the disproportionate impact of adverse environmental degradation and climate change on overburdened people and communities, such as culturally and linguistically diverse communities.

Lead Smelter in Port Pirie (SA)

Port Pirie, a regional town in South Australia, is home to one of the world's largest primary lead smelters that has operated since 1889.[167] Exposure to lead in dirt, dust and rainwater threatens the health of the community and exposes children to unacceptable levels of lead.[168] National guidelines identify safe lead levels in the blood to be less than five micrograms per decilitre,[169] while SA Health, the WHO and the US Environmental Protection Agency identify no safe threshold of exposure.[170] The 2021 SA Health report found that in the first half of the year the average blood lead levels of Port Pirie children under five was 5.7 micrograms, while children tested on their second birthday recorded 7.8 micrograms, the highest reading in a decade.[171] Children are most at risk of lead poisoning due to their small body size and hand-to-mouth activity.[172] Childhood exposure has been associated with significant negative health developmental outcomes including impaired cognitive development, reduced intelligence and poor mental health.[173] Meanwhile, Port Pirie residents have been advised to protect themselves by washing their hands, surfaces in the home and food.[174] Unfortunately, many Port Pirie residents are employed at the lead smelter or rely on the economic benefits of it to their town, meaning speaking out may threaten their livelihoods and positions in the community.

This case study demonstrates that environmental harm disproportionately impacts overburdened people and communities, such as children, regional communities and communities located near polluting industries that rely on that industry for their economic stability.

The Case for a Standalone Right to a Healthy Environment

As explained earlier in this report, the right to a healthy environment is not expressly recognised in any federal, state or territory legislation in Australia, including in Australian human rights law.

The right to a healthy environment should be expressly included as a standalone right in Australian laws for the following reasons:

- it provides comprehensive protection of all components of the environment, which are not adequately protected under current environmental or human rights laws;
- it places people and communities at the heart of environmental protection, empowering citizens to pursue environmental justice and achieve better outcomes for the environment;
- it is consistent with, and a logical extension of, partial protections that people in Australia already have under current laws; and
- it will not open the floodgates for vexatious litigation.

We explain these reasons in further detail below.

It provides comprehensive protection of all components of the environment

Australian environmental laws offer some protection of the various components of the environment. However, these laws are piecemeal and do not offer comprehensive protection of the environment.

The right to a healthy environment can be implied as a precondition that is necessary for the enjoyment of other human rights that are protected in Australia. However, this is not guaranteed because human rights are not fulsomely protected in Australia. To the extent that human rights are protected, the application of human rights to environmental issues in Australia could ensure that some discrete components of our environment are protected. However, this protection will be piecemeal, ad hoc, and dependent on case-by-case explanation of how environmental harm interferes with the enjoyment of specific rights.

In contrast, the right to a healthy environment protects all components of the environment, including air, water, soil, the atmosphere, biodiversity, ecosystems, cultural heritage, people and communities.

The protection it offers is more comprehensive in scope than the piecemeal protection of environmental issues offered by human rights law. It also provides stronger protection of aspects of our lives that are not currently adequately protected by other human rights, such as the right to life or the right to health.

It places people and communities at the heart of environmental protection

As a human right, the right to a healthy environment places individuals and communities at the heart of environmental protection. The right provides clear recourse for public participation in environmental decision-making and for pursuing remedies for environmental harms.

By putting humans at the centre of environmental protection, the right to a healthy environment can be used to empower citizens to pursue environmental justice.[175] In turn, the pursuit of environmental justice leads to better outcomes for both citizens and our environment.

In addition, introducing a human rights-based approach to environmental protection will clearly show that protecting the environment will positively benefit people and communities, rather than just protecting the environment for the sake of the

environment alone. This link may make it easier for people and governments in Australia to support recognition of the right to a healthy environment, and in turn could result in tangible positive environmental outcomes.[176]

It is consistent with Australia's existing legal frameworks

As outlined in this report, Australia has a broad range of environmental, pollution and resource management laws that protect our environment to some extent. By passing these laws, Australian parliaments have already taken steps to legislate protection of the environment. Express recognition of the right to a healthy environment builds on this existing legal framework and is a necessary and logical extension of the partial protections that people in Australia already have under current laws.

Some Australian laws already recognise that there is a clear link between environmental degradation and the impacts this has on human health.[177] The objects of environmental protection legislation in most Australian states and territories include protection of, or prevention of harm to, both the environment and human health. In other states and territories where protection of human health is not explicitly mentioned in the objects of the legislation, human health is a relevant factor for a number of matters under those laws.[178]

The three procedural elements of the right to a healthy environment – access to information,[179] participation in decision-making,[180] and access to judicial remedies[181] – are in most federal, state and territory environmental legislation (although these rights are not always available to third parties or members of the general public).[182] These procedural rights reflect developments in international environmental law, such as Principle 10 of the *Rio Declaration*, the *Aarhus Convention*,[183] and the *Escazú Agreement*.[184]

It will not open the floodgates for vexatious litigation

Finally, it is important to recognise that introducing the right to a healthy environment will not open the floodgates for individuals to bring vexatious litigation challenging government decisions and Australian laws. Previous governments have described the use of litigation to challenge government decision-making, particularly in the context of planning and development, as environmental 'lawfare'.[185] However, analysis conducted into legal challenges of decisions made under the EPBC Act found that only a negligible number of all EPBC Act decisions are challenged,[186] and that a high percentage of cases brought on public interest grounds were successful, which demonstrates that such claims raised genuine legal questions for the court to consider.[187] This research has concluded that there is no evidence of 'lawfare' under the EPBC Act.

In fact, court proceedings taken in the public interest have and continue to play an important role in upholding the rule of law, increasing government accountability, improving government decision-making, and making a positive contribution to Australian jurisprudence on a wide range of legal issues. If the right to a healthy environment was introduced, it would play a similarly important role. It is critical that Australians have access to remedies that permit incorrect or unlawful government decisions to be brought to the attention of independent tribunals and courts, and for government decision-makers to be held to account for correct implementation of the law.

4 What are the benefits of recognising the Right to a Healthy Environment

Evidence from decades of experience in other countries that already recognise the right to a healthy environment shows that express recognition of the right to a healthy environment will be a catalyst for a number of important benefits.

This evidence shows that if Australian laws were amended to recognise the right to a healthy environment, this would achieve better outcomes for our environment and our health in Australia.

There are four key benefits of recognising the right to a healthy environment in Australian laws:

- it will lead to better health outcomes for Australians and for our ecosystems;
- it will encourage stronger environmental laws and governance;
- it will improve access to justice for environmental harms; and
- it will reduce environmental injustices, which is particularly important for First Nations Peoples and other overburdened people and communities who are most at risk of environmental harm.

We explore these benefits in further detail below.

Improves Outcomes for Australians' Health and our Ecosystems

The most critical evidence in favour of recognising the right to a healthy environment is that countries that have formally recognised the right now have healthier people and ecosystems.

Studies from countries that recognise the right to a healthy environment show that recognition of the right has contributed to improved environmental performance, including cleaner air, enhanced access to safe drinking water, and reduced greenhouse gas emissions. This has resulted in millions of people, including overburdened people and communities, breathing cleaner air, gaining access to safe drinking water, and reducing their exposure to toxic substances, amongst other positive outcomes both for human health and the environment.[188]

For example, a global study undertaken by the current Special Rapporteur into the constitutions of 193 countries concluded that nations with the right to a healthy environment in their constitutions have smaller ecological footprints, rank higher on comprehensive indices of environmental indicators, are more likely to ratify international environmental agreements and have made faster progress in reducing greenhouse gas emissions than nations without such a provision.[189] A 2016 study into constitutional environmental rights found that such rights have a positive causal influence on environmental performance.[190] A further 2016 study conducted into 190 countries, 122 of which include environmental rights like the right to a healthy environment in their constitutions, concluded that constitutional environmental rights are positively related to increases in the proportion of populations with access to safe drinking water.[191] The World Health Organisation estimates that 23% of deaths globally could be prevented by ensuring that the right to a clean, healthy and sustainable environment is respected.[192]

This evidence shows that one of the strongest reasons for Australia to legally recognise the right is that it will result in improved health outcomes for Australians and our ecosystems.

As the right to a healthy environment has contributed to improvements in public health outcomes and reduction of deaths and illnesses, it is also likely that enshrining the right will have a positive impact on Australia's economy including by reducing the impacts of environmental harm on Australia's health care system.

Encourages Stronger Environmental Laws and Governance

Countries that have formally recognised the right to a healthy environment have since witnessed a number of positive developments in law reform and in better enforcement of environmental laws, regulations and policies.[193] This shows that recognition of the right to a healthy environment in Australia will result in stronger environmental laws, regulations and policies.

Framing environmental protection through the lens of human rights will shape law and policy-makers' understanding of the environment and its relationship with and to humanity.[194] In addition, introducing the right to a healthy environment would mean that scrutiny committees, parliamentary drafters and public entities will consider the need for laws that protect the environment and human health when considering all new Bills and legislative instruments.[195]

As a result, governments will be encouraged to uphold the right when considering making new laws or amending our existing laws.

Recognition of the right would also:

- require governments to consider and uphold the right in government decision-making;
- increase government accountability to its citizens;
- result in stronger implementation and enforcement of environmental laws; and
- encourage greater public participation in environmental decision-making.[196]

In particular, implementation of the procedural elements of the right – access to information, participation in decision-making, and access to judicial remedies – have proven to be crucial in ensuring individuals have access to mechanisms that promote accountability and safeguard the health of their environments and communities.[197]

Photo by Elia Pellegrini on Unsplash.

Case Study: Costa Rica and France

Costa Rica and France lead the High Ambition Coalition for Nature and People, are part of the Beyond Oil and Gas Coalition and have been leading voices in the campaign for universal recognition of the right to a healthy environment. Their own experiences illustrate the transformative potential of this right.

After adding the right to a healthy environment to its constitution in 1994, Costa Rica became a global environmental leader. Thirty percent of Costa Rica is national parks. Ninety-nine percent of electricity comes from renewable sources, including hydro, solar, wind and geothermal. Laws ban open pit mining and oil and gas development, while carbon taxes are used to pay Indigenous people and farmers to restore forests. Back in 1994, deforestation had reduced forest cover to 25 percent of all land, but today reforestation has driven that number above 50 percent.

France embraced the right to a healthy environment in 2004, sparking strong new laws to ban fracking, implement the right to breathe clean air, and prohibit the export of pesticides that are not authorized for use in the EU because of health and environmental concerns.

Improves Access to Justice

Formal recognition of the right to a healthy environment will improve access to justice by allowing individuals in Australia to rely on the right in order to better advocate for the environment and for our health. Access to justice is the right to seek justice for legal issues, and includes access to effective remedies. A 2018 study analysing empirical data from 198 countries found that countries that have the procedural elements of the right to a healthy environment entrenched in their constitutions have experienced positive environmental justice outcomes.[198] Access to justice is key to achieving the procedural aspects of environmental justice (procedural justice).

The remedies that are currently available through Australian human rights law are limited. At a national level, for example, when the Australian Human Rights Commission reports on human rights complaints under the AHRC Act, its recommendations are not binding, which means they are not legally enforceable. Similarly, in Victoria and Queensland, the recommendations of the Victorian Ombudsman and the Queensland Human Rights Commissioner are also not binding. In the ACT, although people have the right to commence proceedings in the Supreme Court and obtain a binding legal remedy for human rights contraventions, access to court can be prohibitive for most ACT residents due to financial barriers, and the Court cannot order damages (compensation).[199] In Australian states and territories without human rights legislation, the only avenue for redress is to make a human rights complaint to the Australian Human Rights Commission or, if that is not available, a complaint to an international human rights body. For example, the UN Human Rights Committee can consider complaints from individuals claiming to be victims of violations of rights in the ICCPR. However, the remedies that are available through international human rights complaints are also limited to non-binding recommendations only.

At a national level, including the right to a healthy environment as a standalone right in an Australian Charter of Rights, and introducing an obligation for government agencies to act in compliance with human rights, would provide a strong mechanism for individuals to access legal remedies for breaches of their human rights for causing environmental harms and impacting human health. In addition, the existence of the right to a healthy environment in Australian law would mean that subsequent laws (whether new or amended) would be scrutinised for compatibility with the right. This would lead to environmental human rights issues being identified and addressed in the early stages of developing laws and policies and making decisions, which in turn ensures that the right is effectively considered and implemented by decision-makers and improves the quality of decision-making. This in turn gives the public greater confidence in decision-making, ultimately reducing the risk of litigation.

In the ACT, Victoria and Queensland, which already have human rights legislation,[200] enshrining the right would ensure that the right could be captured by existing legal processes. This would mean that individuals living in those jurisdictions could access remedies and redress under their local legislation for breaches of the right. Redress for non-compliance with human rights under existing legislation includes complaint mechanisms (in Victoria and Queensland) and court proceedings (in the ACT). All three jurisdictions require parliamentary scrutiny of new legislation, whereby new legislation is examined for its compatibility with human rights.[201] Scrutiny of new laws against the right would facilitate proactive government action on legislation that has the potential to breach the obligations imposed by the right. There would also be similar benefits for other Australian jurisdictions that pass human rights legislation in the future.

Case Study: Philippines

Section 16 of the *Philippine Constitution of 1987* provides that the State 'shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature'. The Supreme Court of the Philippines has interpreted this provision to reflect a core constitutional right that is critical to the wellbeing of future generations.[202]

The constitutional right to a healthy environment has had a positive influence on access to justice for environmental matters in the Philippines. In 2008, the Philippines established additional specialised courts and tribunals to uphold environmental law.[203] In 2010, the Philippines' Supreme Court issued strong procedural rules for environmental cases, which enact open standing requirements, and limit costs for environmental litigants. For example, the rules provide that *'any Filipino citizen in representation of others, including minors or generations yet unborn'* acting in the public interest will have standing to bring an action under Filipino law for environmental harm.[204]

The Philippines' Supreme Court has also introduced two new civil action writs to remedy environmental harms. One writ provides a remedy for persons whose right under the Philippines' Constitution to a 'balanced and healthful ecology' is violated by an unlawful act or omission, and the other allows for the Court to engage post-judgment in ongoing monitoring of government compliance with a court order until satisfied.[205] The available relief under these writs includes directing the respondent to cease and desist from environmental destruction or damage, or to rectify the harm within a certain period,[206] although damages are not available for individual petitioners.[207]

Despite the implementation gap which has been identified in the Philippines,[208] **the strong constitutional basis for the right to a healthy environment has created a legal environment in which environmental and human rights defenders have the express right to challenge environmental abuses.**

Case Study: Uganda's National Environment Act 2019

In 2019, the Ugandan government passed the *National Environment Act 2019* (**NE Act**), Uganda's national environmental management law that recognises the right to a healthy environment. Section 3(1) of the NE Act provides that every person in Uganda has a 'right to a clean and healthy environment' in accordance with the Constitution and the principles of sustainable development, namely development that meets the needs of the present generation without compromising the ability of future generations to meet their own need.[209] Section 3 also allows people in Uganda to file a civil suit against a person whose act or omission has or is likely to cause harm to human health or the environment, even if there is no evidence that it has caused or is likely to cause personal harm or injury.[210] Section 146 of the NE Act enshrines the right of access to environmental information. Section 148 guarantees the integration of environmental education into educational curricula and programmes, ensuring that environmental literacy and awareness of sustainable development concerns are widely taught in the national education system.

While scholars recognise that implementation gaps still exist in the environmental assessment process in Uganda,[211] the creation of a strong legislative framework is a key step in improving access to environmental justice in the Global South. This is complemented by civil society efforts, such as the Sustainability School Programme, run by the National Association of professional Environmentalists in Uganda. This program builds capacity among disadvantaged groups, and seeks to enable them to participate in environmental decision-making through the provision of training courses for activists and community members, raising awareness around sharing experiences around environmental and development issues.[212]

Uganda's NE Act provides an exemplary model of legislative implementation of the right to a healthy environment, including both substantive and procedural elements.

Reduces Environmental Injustices

As described, express recognition of the right to a healthy environment is a catalyst that leads to improvements in human health and the health of our ecosystems, stronger environmental laws and governance, and improved access to justice. In this way, the right to a healthy environment ultimately reduces environmental injustices.

Environmental justice is a social movement that addresses the disproportionate impact of environmental harms – including harm from climate change, pollution, extractive industries, and natural disasters – on overburdened people and communities. EDO explores environmental justice, and the importance of applying an environmental justice framework to environmental protection, in our 2022 report *Implementing effective independent Environmental Protection Agencies in Australia*.[213]

Overburdened people and communities – including women, children, people who are financially disadvantaged, First Nations Peoples and communities, LGBTQIA communities, older people, people with disabilities, people from a racial or ethnic minority, and people displaced by natural disasters – are the most at risk of environmental harm, with subsequent impacts on their health and wellbeing. However, they are also often the least responsible for perpetuating such harms.

In this way, environmental justice also addresses environmental racism, which is the deliberate targeting of ethnic and minority communities for exposure to toxic and hazardous waste sites and facilities, coupled with the systematic exclusion of minorities in environmental policy making, enforcement, and remediation.[214] Any policy, practice or directive that differentially affects or disadvantages (whether intended or unintended) individuals, groups or communities based on race or colour is environmental racism.[215] In Australia, environmental racism can be seen to be perpetrated against First Nations communities through the ongoing impacts of colonisation and dispossession, as well as the destruction of First Nations lands including for planning and development purposes. It can also be seen to be perpetrated in Australia against culturally and linguistically diverse communities.

People and communities that experience environmental injustices have the right to live with their families in a healthy environment, and not to have environmental burdens placed on them simply by virtue of their postcode. People and communities can contribute to environmental solutions when empowered to do so.

As the benefits of recognising the right to a healthy environment include stronger environment protection through improved laws and systems, and healthier people and ecosystems, we would expect to experience less environmental degradation in Australia, which would reduce the presence and impact of environmental injustices on overburdened individuals and communities, and improve the distribution of environmental benefits in Australia.

Recognition of the right to a healthy environment is particularly important for First Nations justice because it will likely improve First Nations health and wellbeing and protect their spiritual and cultural connection to the environment.

Recognition of the right would also play an important role in facilitating greater awareness of the experiences of overburdened people and communities who are most at-risk of environmental injustice. This would serve to improve recognition in Australia of different societal groups and communities.[216]

Photo by Colin + Meg on Unsplash.

5 How to recognise the Right to a Healthy Environment

Australia must implement the human rights obligations that it has accepted and supported under international law. As emphasised by the Special Rapporteur, implementing the right to a healthy environment will optimally begin with legal recognition.[217]

We recommend that the Australian Government supports recognition of the right to a healthy environment at the international level, and that all levels of government in Australia enshrine the right to a healthy environment in Australian law.

Recommendation 1

Recommendation 1: The Australian Government supports recognition of the human right to a clean, healthy and sustainable environment (**the 'right to a healthy environment'**) in international law, including by supporting and ratifying any international treaty mechanisms that includes the right.

Support for the right to a healthy environment should start with support at the international level.

We commend the decision of the Australian Government to vote in favour of the UN General Assembly's resolution to recognise the right to a healthy environment. The Resolution clarifies that the right to a healthy environment should be universally recognised, protected, respected and fulfilled. This is an important first step towards ensuring that UN human rights institutions can better address the most pressing threats to the enjoyment of all human rights.

We recommend that the Australian Government continues to support recognition of the right to a healthy environment on the international stage, including by supporting any international treaty mechanisms that include the right. This could include, for example, ratifying an additional protocol to the ICCPR, ICESCR or other environmental or human rights treaties that explicitly recognises the right to a healthy environment.

It is important for the Australian Government to support the right to a healthy environment at the international level for the following reasons:

- in countries that already recognise the right to a healthy environment, international developments will be a catalyst for additional legislative and policy changes that ensure that these countries fulfil their obligations to respect, protect and fulfil the right;
- in countries that do not yet recognise the right to a healthy environment, international developments will be a catalyst for new environmental and human rights legislation, and policies that recognise and implement the right; and
- all countries would be driven to prioritise and accelerate actions to implement the right to a healthy environment, leading to improved health and environmental outcomes.

Recommendation 2

Recommendation 2: Legislate the right to a healthy environment in an Australian Charter of Human Rights and Freedoms.

The right to a healthy environment must be protected at the national level in Australia.

The best way to achieve this would be to enshrine the right in the Australian Constitution. However, due to Australia's unique constitutional history and the conservative culture of the High Court, inclusion of human rights in the Constitution either through implied or express recognition is extremely unlikely, and would also require a referendum.

In the absence of Constitutional amendment, the clearest way to achieve recognition of the right to a healthy environment at the national level is for the Australian Government to recognise the right in national human rights legislation.

The right to a healthy environment should be expressly recognised in national legislation. While the right can be implied through other rights, such as the rights to life, health or culture, express recognition of the right is the most comprehensive and secure option.[218]

Broadly speaking, introducing a Charter of Human Rights and Freedoms will benefit all Australians by preventing human rights violations, providing a powerful tool for challenging injustices and fostering a culture of understanding and respecting human rights.[219] In recognition that human rights are universal, indivisible, and interrelated,[220] we recommend that all human rights – whether civil and political or economic, social and cultural – are treated in an equal manner and recognised in an Australian Charter of Human Rights and Freedoms in accordance with Australia's international human rights obligations. Inclusion of the right to a healthy environment will strengthen the protection of other rights, which rely on a healthy environment as a precondition to their fulfilment.

It is important to acknowledge that the Australian Government can enact national legislation implementing the right to a healthy environment only if the right can be supported by the Australian Constitution. In our preliminary view, the right to a healthy environment can be supported by the external affairs power (section 51(xxix) of the Constitution) as giving domestic effect to, and/or being incidental to, Australia's obligations to ensure and respect the right to life under Article 6 of the ICCPR, or Australia's obligations to take steps to progressively realise the enjoyment of the highest attainable standard of physical and mental health under Article 12 of the ICESCR. However, at this stage, the constitutional basis for the right to a healthy environment is unknown as it has not yet been considered by the federal government or the courts.

Recommendation 3

Recommendation 3: Legislate the right to a healthy environment in new and existing state and territory human rights legislation.

State and territory governments should also recognise the right to a healthy environment in local human rights legislation.

Recognition of the right to healthy environment could occur in the various state and territory human rights legislative schemes, starting with the ACT, Victoria and Queensland, which already have human rights legislation.[221] The right to a healthy environment should be expressly recognised in such legislation, as this would provide the most comprehensive and secure protection of the right.

Enshrining the right in legislation would allow the right to be captured by existing legal processes, meaning that individuals living in those jurisdictions could access remedies and redress under their local legislation for breaches of the right. It would also ensure that new and amended legislation is scrutinised and assessed for its compatibility with the right to a healthy environment.[222]

Recognition of the right in state/territory human rights legislation can also improve the culture of human rights in government by increasing opportunities for dialogue between different arms of government, which helps to foster a culture of human rights.

Recommendation 4

Recommendation 4: If the Australian Government does not introduce an Australian Charter of Human Rights and Freedoms, legislate a duty into the *Public Governance, Performance and Accountability Act 2013* (Cth) for Commonwealth officials to act consistently with the right to a healthy environment and make it a mandatory consideration when exercising their functions under federal legislation that affects the environment and human health, in particular human rights and environmental legislation.

If it is not possible for the Australian Government to introduce an Australian Charter of Human Rights and Freedoms, another option to recognise the right to a healthy environment at the national level would be to legislate a duty for decision-makers to consider, and act consistently with, the right when exercising powers under federal legislation.[223]

6 Conclusion

It has been 50 years since the right to a healthy environment was recognised in the Stockholm Declaration. Following the General Assembly's resolution in July 2022, the right to a healthy environment is universally recognised as a human right. The decisions that Australia makes now will determine what the next 50 years will look like.

As the Minister for the Environment and Water, the Hon. Tanya Plibersek MP, acknowledged in July 2022, the SoE Report shows that if Australia continues on the trajectory that we are currently on, *'the precious places, landscapes, animals and plants that we think of when we think of home may not be here for our children and our grandchildren'.*[224]

It is time that all levels of Australian government enshrine the right of all Australians to live in a clean, healthy and sustainable environment in law.

For a digital copy of report and references please scan QR code:

We thank the following funding bodies for their support of this work

ACT Government

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JAMES N. KIRBY FOUNDATION

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Bottom: Photo by Wexor Tmg on Unsplash.
Opposite: Photo by Toomas Tartes on Unsplash.

“Let us take this step forward into a future we know is possible... to defend and improve the environment for present and future generations.”

Maritza Chan Valverde, Costa Rica’s representative to the United Nations, introducing the UN General Assembly resolution recognising the right to a healthy environment.

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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 Petition 32-21 (No Rights Without Remedy)

Submission Number: 22

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Environmental Defenders Office

Submission to Inquiry into Petition 32-21 (No Rights Without Remedy)

7 April 2022

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

www.edo.org.au

About Healthy Environment & Justice Program

EDO's ACT Practice falls within EDO's Healthy Environment & Justice Program (HEJ). The goal of the HEJ Program is to empower vulnerable communities to fight for environmental justice.

Acknowledgement of Contributions

EDO wishes to acknowledge with gratitude the assistance provided by many people in the researching, drafting and review of this submission, including EDO solicitors, particularly Frances Bradshaw, and our fantastic volunteer, Sarah Cocco.

Lead author: Melanie Montalban

Acknowledgment of funding from ACT Government

We acknowledge and are grateful to the ACT Government for its ongoing funding of the EDO's ACT Practice, without which it would not be possible for the ACT Practice to run.

Acknowledgment of Country

The EDO recognises the Traditional Owners and custodians of the land, seas and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander elders past, present and emerging, and aspire to learn from traditional knowledge and customs so that, together, we can protect our environment and cultural heritage through law.

A note on language

We acknowledge that there is a legacy of writing about First Nations without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. For the purposes of these submissions, we have chosen to use the term 'First Nations'. We acknowledge that not all Aboriginal and Torres Strait Island peoples will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

Submitted to:

Standing Committee on Justice and Community Safety
Legislative Assembly of the ACT
GPO Box 1020, Canberra ACT 2601
By email: LACommitteeJCS@parliament.act.gov.au

For further information on this submission, please contact:

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CLASS Ref. Y366

Inquiry into Petition 32-21 (No Rights Without Remedy):

Submission from Environmental Defenders Office

A Executive Summary

1. The Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on Petition 32-21 (No Rights Without Remedy).

2. Petition 32-21 proposes to amend the *Human Rights Act 2004* (ACT) (Human Rights Act) to:

    a. enable a complaint about any breach of the Human Rights Act to be made to the ACT Human Rights Commission (**the Commission**) for confidential conciliation; and

    b. 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 (**ACAT**) for resolution.

3. In EDO's ACT Practice, we are proud to live and work in a jurisdiction where we have the Human Rights Act, the first charter of human rights enacted in Australia. The ACT is one of only three Australian jurisdictions to have a bill of rights. Our Human Rights Act has many strengths and has delivered real-life benefits to many people in the ACT.

4. People in the ACT must be able to access effective remedies for human rights violations in order to protect and uphold their human rights. This is particularly important in an environmental context, given the enjoyment of many human rights – including the right to life, protection of family and children, and the right to culture – are infringed or threatened by environmental harm, including that caused by pollution, land clearing, climate change, natural disasters, and loss of biodiversity.

5. However, the remedies that are currently available under the Human Rights Act for human rights violations are not accessible by everybody in the ACT. In particular, the ACT is currently the only jurisdiction in Australia with human rights legislation that does not have an informal and non-judicial complaints mechanism. Victoria and Queensland both have free and accessible schemes, outside the court system, that allow people to make complaints about contraventions of their human rights. This means that people in the ACT – particularly our most vulnerable people and communities who experience disadvantage because of how society is structured and functions – currently experience a number of barriers to accessing justice for violations of their human rights.

6. **EDO strongly supports Petition 32-21** which, if accepted by the Assembly, would strengthen access to justice for human rights in the ACT. We also encourage the ACT Government to consider further amendments to the Human Rights Act in addition to the changes proposed in the Terms of Reference for this inquiry. We have made some additional recommendations in these submissions.

7. Reforming the Human Rights Act to provide access to effective remedies will ensure that the Act can realise its true potential to protect and promote our human rights.

8. Our submission is structured as follows:

    a. **Summary of Recommendations:** we have summarised the EDO's recommendations for the Committee's consideration;

    b. **Framework for Submission:** we have explained the lens from which the EDO has examined the Human Rights Act, particularly from an environmental context;

c. **Five Key Barriers to Access to Justice:** we have identified five current barriers to justice that people in the ACT may face due to the limitations of the Human Rights Act as currently drafted;

d. **The Case for a Human Rights Complaints Mechanism in the ACT:** in this section, we submit that an accessible human rights complaints mechanism should be introduced in the ACT, and have made a number of recommendations for how such a mechanism could function;

e. **Australia's International Human Rights Obligations:** we have identified a number of additional recommendations for the ACT Government to consider in implementing an accessible human rights complaints mechanism, based on Australia's international human rights obligations as they relate to a safe, clean, healthy and sustainable environment.

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B Summary of Recommendations

9. The EDO recommends that, in order for the Human Rights Act to better protect human rights in the ACT, ACT Legislation ought to be amended to implement the following:

- **Recommendation 1:** The Commission should be enabled to accept, and attempt to resolve, complaints about any breach of the Human Rights Act, including through confidential conciliation if appropriate.
- **Recommendation 2:** If a human rights complaint cannot be resolved through the Commission, proceedings regarding breaches of the Human Rights Act may be initiated in the ACAT as an alternative to the Supreme Court.
- **Recommendation 3:** Private entities should have the same obligations as public authorities under the Human Rights Act, and should be capable of being the subject of a human rights complaint.
- **Recommendation 4:** The one-year limitation period to bring a complaint about a breach of the Human Rights Act should be extended to allow people in the ACT sufficient time to apply for a remedy, and should allow people to make a complaint without first having to apply to a court for an extension of time.
- **Recommendation 5:** Damages should be available as a remedy for a complaint about a breach of the Human Rights Act.
- **Recommendation 6:** There should be no monetary limit on the jurisdiction of ACAT to hear complaints about breaches of the Human Rights Act.
- **Recommendation 7:** People who make complaints about breaches of the Human Rights Act should be protected against reprisal and vilification as a result of making a complaint.
- **Recommendation 8:** Procedures to hear and deal with complaints about breaches of the Human Rights Act should be impartial, independent, affordable, transparent, and fair. Such procedures should incorporate measures to overcome obstacles to access such as language, literacy, expense and distance. There should be additional procedures to ensure that First Nations and disadvantaged people and communities are able to access human rights complaint mechanisms.
- **Recommendation 9:** The Commission and ACAT should endeavour to review and deal with claims in a timely manner.
- **Recommendation 10:** The Commission and ACAT should have the necessary expertise and resources to deal with human rights complaints. To this end, the ACT Government should ensure that appropriate staff and resources are dedicated to implementing a new human rights complaints mechanism, and that appropriate training is provided to staff.
- **Recommendation 11:** Decisions should be made public and promptly and be effectively enforced. The ACT Government should ensure that outcomes from the Commission's complaints mechanism process (whether resolved or not) are made publicly available, de-identified where appropriate.
- **Recommendation 12:** The ACT Government should provide guidance to the public about how to seek access to remedies. This includes engaging with the community early and providing ongoing education about the new human rights complaints mechanism.

- **Recommendation 13:** There should be broad standing allowing any person to bring a complaint in relation to the Human Rights Act.

C Framework for Submission

10. We have examined the Human Rights Act against the following framework:

    a. EDO's goal of achieving **environmental justice** for vulnerable communities in the ACT;

    b. The human right to a healthy environment, and Australia's broader international human rights obligations as they relate to a **healthy environment**.

11. We have explained this framework further below.

Environmental justice

12. Access to justice in the ACT refers to the right of people in the ACT to access advice and assistance for legal wrongs, and includes the right to access effective remedies. In the environmental context, access to justice refers to the ability of people to access environmental justice.

13. **Environmental justice** recognises the disproportionate impact of environmental degradation on individuals and communities who face structural disadvantage, and who are often the least responsible for such harm.

14. Individuals and communities can face **structural disadvantage** on the basis of race or colour, ethnicity, nationality, age, gender identity, disability or income. In the environmental context, communities and individuals that may face structural disadvantage include, for example, persons with disability, the elderly and young people who may be at higher risk from the impacts of heat and other extreme weather exacerbated by climate change. Low-income communities that live in close proximity to polluting industries can be structurally disadvantaged where they are reliant on an industry for their economic stability which may also be impacting their health and environment, or where they cannot afford to live elsewhere. Environmental burdens are also disproportionately felt by First Nations, through impacts to their Country, cultural practices and the resources that they depend on.

15. Environmental justice is not defined in any piece of Australian legislation, however it is often underpinned by three theories: distributive justice, procedural justice, and justice as recognition.

    a. **Distributive justice** is concerned with the distribution of environmental goods (or benefits) and environmental 'bads' (or burdens).[1]

    b. **Procedural justice** is concerned with the ways in which decisions, including decisions regarding distribution of environmental benefits and burdens, are made, and who is involved and who has influence in those decisions.[2]

    c. **Justice as recognition** is concerned with who is given respect, and who is and is not valued. Justice as recognition requires the recognition of different social groups and communities, and of the natural environment and components of it.[3]

[1] Justice Brian Preston SC, 'The effectiveness of the law in providing access to environmental justice: an introduction' (Speech, 11th IUCN Academy of Environmental Law Colloquium, 28 June 2013) 1.
[2] Ibid, 2.
[3] Ibid.

Australia's international human rights obligations

16. Australia has ratified seven out of nine main international human rights treaties,[4] including the *International Covenant on Civil and Political Rights* (**ICCPR**) and the *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**). Under the ICCPR, Australia has obligations to provide for access for judicial and other procedures for effective remedies for violations of human rights.[5]

17. The UN Human Rights Committee has said that human rights obligations should be informed by international environmental law, and vice versa.[6] International environmental law includes the *Rio Declaration on Environment and Development*, adopted by the UN General Assembly in 1992,[7] and in particular Rio Principle 10 which provides that States shall provide '[e]*ffective access to judicial and administrative proceedings, including redress and remedy*'.[8]

18. Australia also has several other obligations resulting from being a party to international human rights treaties. The former Special Rapporteur on Human Rights and the Environment (**Special Rapporteur**) has proposed **16 Framework Principles** that States must comply with in order to satisfy their human rights obligations as they relate to the environment.[9] Each of the 16 Framework Principles are underpinned by existing obligations under international human rights treaties.[10] The Special Rapporteur has reiterated: '[t]*o be clear, all States have obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, including States that have not yet recognised the right to a healthy and sustainable environment*'.[11] As Australia is a party to a number of international treaties, the 16 Framework Principles represent Australia's current obligations with respect to human rights and the environment.

19. Relevantly for the purpose of this petition, Framework Principle 10 is that States should provide for access to effective remedies for violations of human rights and domestic laws relating to the environment.[12] The Special Rapporteur recommends that, in order to provide for effective remedies, States should ensure that individuals have access to

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[4] Law Council of Australia, 'Australia's International Human Rights Obligations' (Web page, 2022) <https://www.lawcouncil.asn.au/policy-agenda/human-rights/australias-international-human-rights-obligations>.
[5] *International Covenant on Civil and Political Rights*, art. 2(3).
[6] UN Human Rights Committee, *General Comment No. 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 (3 September 2019) at [62].
[7] UN General Assembly (**UNGA**), *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26/Rev.1 (Vol. I).
[8] Ibid.
[9] UN Human Rights Council (**HRC**), *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/HRC/37/59 (24 January 2018).
[10] For a list of international sources underpinning the Framework Principles, see: Office of the UN High Commissioner for Human Rights, *Selected Sources for Framework Principles on Human Rights and the Environment* (February 2018).
[11] HRC, *Right to a Healthy Environment: Good Practices,* UN DOC A/HRC/43/53 (30 December 2019) at [8].
[12] Framework Principle 10 is underpinned by the obligation of States to provide for access for judicial and other procedures for effective remedies for violations of human rights. The sources for this obligation include the *Universal Declaration of Human Rights*, art 8 and the *International Covenant on Civil and Political Rights*, art. 2(3). For a full list of sources for Principle 10, see Office of the UN High Commissioner for Human Rights, *Selected Sources for Framework Principles on Human Rights and the Environment* (February 2018) pp 18-19.

judicial and administrative procedures that meet basic requirements, including that the procedures:

a. are impartial, independent, affordable, transparent and fair;

b. ensure that claims are reviewed in a timely manner;

c. have the necessary expertise and resources;

d. incorporate a right of appeal to a higher body; and

e. issue binding decisions, including for interim measures, compensation, restitution and reparation, as necessary to provide effective remedies for violations.[13]

20. The Special Rapporteur also recommends:

a. individuals should have access to effective remedies against private actors, as well as government authorities;

b. remedies should be available for claims of imminent and foreseeable violations as well as past and current violations;

c. decisions should be made public and promptly and effectively enforced;

d. States should provide guidance to the public about how to seek access to remedies;

e. States should help to overcome obstacles to access remedies such as language, literacy, expense and distance;

f. standing should be construed broadly;

g. those pursuing remedies must be protected against reprisals, including threats and violence; and

h. States should protect against baseless lawsuits aimed at intimidating victims and discouraging them from pursuing remedies.[14]

21. In addition to the above, the EDO has long advocated for recognition of the **human right to a healthy environment** in Australia, and in particular since 2002 when a Bill of Rights was first considered for the ACT.[15] Although the ACT Government is currently investigating including the right to a healthy environment in the Human Rights Act, we acknowledge the Human Rights Act does not yet recognise the right. However, more than 80% of UN Member States legally recognise the right to a healthy environment either through constitutional recognition, ratification of regional treaties and/or national

[13] HRC, *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/HRC/37/59 (24 January 2018) at [29].
[14] Ibid at [28]-[30].
[15] Hanna Jaireth, Environmental Defenders Office ACT Inc., *Submission on the Need for an ACT Bill of Rights* (Submission #61, Bill of Rights Consultive Committee, 2002); Environmental Defenders Office ACT Inc., *Submission to the ACT Attorney General for Consideration under s 43 Review of Operation of the Human Rights Act 2004* (Submission, A-G Environment Related Human Rights, June 2005); Australian Network of Environmental Defender's Offices, *Submission to the National Human Rights Consultation* (Submission, National Human Rights Consultation, 15 June 2009); Environmental Defenders Office (Tasmania) Inc., *Proposed Charter of Human Rights for Tasmania*' (Submission, Tasmania Human Rights Consultation, 2011); Environmental Defenders Office (Victoria) Inc., *Inquiry into Charter of Human Rights and Responsibilities Act 2006* (Submission No 271, 1 July 2011).

legislation.[16] In October 2021, the UN Human Rights Council adopted a resolution that recognises the right to a clean, healthy and sustainable environment, and invited the UN General Assembly to consider this resolution.[17]

22. The right to a healthy environment is a standalone fundamental right. However, it is comprised of a number of elements, which are derived from existing State obligations under international human rights treaties and multilateral environmental agreements, and their elaboration in international and regional courts and tribunals, UN treaty bodies and inter-governmental bodies.[18] These sources enshrine rights that are protected under the Human Rights Act, such as the right to life[19] and the right to enjoy culture, practice religion and use language.[20]

23. The substantive elements of the right include people's right to:

    a. clean air;

    b. a safe climate;

    c. access to safe drinking water and sanitation;

    d. healthy biodiversity and ecosystems;

    e. toxic free environments; and

    f. healthy and sustainably produced food.[21]

24. Recognition of the substantive elements must be accompanied by the recognition of the right's corresponding procedural elements:

    a. the right to information;

    b. the right to participate in decision-making; and

    c. access to justice.[22]

25. Because the right to a healthy environment is implied in, or derived from, other human rights – including rights protected under the Human Rights Act – recognition of the right to a healthy environment is international best practice. It is therefore relevant to consider whether the Human Rights Act is consistent with the right.

26. Human rights are indivisible, interrelated and interdependent. A denial of one human right poses a direct threat not only to other existing human rights – such as the rights to life and culture – but also to the right to a healthy environment itself. It is therefore

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[16] HRC, *Right to a healthy environment: good practices*, UN Doc A/HRC/43/53 (30 December 2019) at [10]-[13].
[17] HRC, *The Human Right to a Safe, Clean, Healthy and Sustainable Environment*, GA Res 48/13, UN Doc A/HRC/48/L.23/Rev.1 (8 October 2021). The HRC also adopted Resolution 48/14, appointing a Special Rapporteur on the promotion and protection of human rights in the context of climate change.
[18] The international sources for the right to a healthy environment are listed under Framework Principles 1 and 2: Office of the UN High Commissioner for Human Rights, *Selected Sources for Framework Principles on Human Rights and the Environment* (February 2018) p 2.
[19] *Human Rights Act 2004* (ACT) s 9.
[20] Ibid, s 27.
[21] HRC, *Right to a Healthy Environment: good practices*, UN DOC A/HRC/43/53 (30 December 2019) at [2]. However, this list is not exhaustive and will evolve as our understanding of State obligations under international human rights law in relation to a healthy environment evolves.
[22] Ibid.

critical to ensure that all elements of the right – including access to justice – are protected at law.

D Five Key Barriers to Access to Justice under the Human Rights Act

27. The ACT is fortunate to be one of three jurisdictions in Australia with human rights legislation. Our Human Rights Act has resulted in real life benefits for people in the ACT including from better policy and legislation, better protections for vulnerable people, and increased transparency and accountability of executive action.[23] In this way, the Human Rights Act has already resulted in stronger protection of human rights in the ACT.

28. In our view, the strengths of the Human Rights Act include:

    a. **imposition of duties on public authorities:** The Human Rights Act imposes a positive duty on public authorities to act consistently with human rights, and to properly consider relevant human rights when making decisions;[24]

    b. **a direct cause of action to the Supreme Court:** People in the ACT whose human rights have been contravened have the right to bring an action in the Supreme Court of the ACT (**Supreme Court**) against a public authority for contravention of that right.[25] This is unique in Australia, as human rights legislation in Queensland and Victoria do not provide for a direct cause of legal action based solely on human rights violations to be initiated in courts or tribunals;

    c. **broad standing provisions:** Although only individuals have rights,[26] any person who claims that a public authority has acted incompatibly with human rights or has failed to consider relevant human rights in making a decision, and is a victim,[27] may start a proceeding in the Supreme Court.

29. However, despite these positive characteristics, people in the ACT have limited rights to access justice for human rights contraventions. Below, we have identified five key barriers that currently exist under the Human Rights Act to access justice for human rights contraventions.

Barrier 1 - There are limited avenues for seeking redress for contraventions of human rights in the ACT.

30. People in the ACT whose human rights have been contravened have the right to bring an action in the Supreme Court against a public authority for contravention of that right.[28] Apart from the Supreme Court, the alternative avenues for seeking redress are limited.

<u>People cannot bring direct human rights claims in the ACT Civil and Administrative Tribunal</u>

31. People in the ACT may rely on their rights under the Human Rights Act in other legal proceedings.[29] Raising human rights in the context of another legal claim is known as 'piggybacking'. People can piggyback human rights in legal proceedings in ACAT, an informal and accessible tribunal that hears and determines a wide range of cases and

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[23] Helen Watchirs, 'Towards an Accessible Human Rights Complaints Mechanism' (2021) *Ethos: Law Society of the ACT Journal* (Issue 260, Winter 2021) at 63.
[24] *Human Rights Act 2004* (ACT) s 40B(1). The ACT Government has previously recognised that section 40B imposes a positive duty on public authorities: ACT Justice and Community Safety Directorate, *Inclusive, Progressive, Equal: Discrimination Law Reform – Discussion Paper 1 – Extending the Protections of Discrimination Law* (October 2021) at 42.
[25] *Human Rights Act 2004* (ACT) s 40C(2)(a).
[26] Ibid, s 6.
[27] For example, in *Chaloner & Anor v Australian Capital Territory* [2013] ACTSC 269, it was held that the granddaughters of a person who had experienced a breach of their human rights did not have standing under s 40B of the *Human Rights Act 2004* (ACT) because only a person whose right is infringed can be a 'victim', and they were not victims themselves.
[28] *Human Rights Act 2004* (ACT) s 40C(2)(a).
[29] Ibid, s 40C(2)(b).

disputes in the ACT. ACAT can also hear and determine discrimination complaints under the *Discrimination Act 1991* (ACT),[30] complaints about conversion practices,[31] and certain complaints about services for older people[32] and occupancy disputes.[33]

32. However, people are not able to bring an action in the ACAT directly under the Human Rights Act. In cases where human rights are piggybacked on to other legal proceedings, remedies under the Human Rights Act are not available. Although the Human Rights Act has featured in other legal proceedings, the Human Rights Commissioner has herself noted that it has rarely substantively affected the outcome of cases.[34]

<u>People cannot make human rights complaints to the ACT Human Rights Commission</u>

33. The Commission has powers under the *Human Rights Commission Act 2005* (ACT) (**HRC Act**) to receive and deal with complaints about certain matters including complaints about health services,[35] services for people with disability,[36] services for children and young people,[37] services for older people,[38] occupancy disputes,[39] the treatment of vulnerable people, [40] victims rights complaints,[41] discrimination complaints under the *Discrimination Act 1991* (ACT),[42] and conversion practices.[43]

34. When the Commission deals with such complaints, the Commission must act in accordance with the human rights protected under the Human Rights Act.[44] In addition, a person can make a complaint about a disability service on the basis that the service provider acted inconsistently with the human rights principles in the *Disability Services Act 1991* (ACT).[45] However, apart from this, there is currently no ability for the Commission to receive and deal with a complaint about a contravention of the human rights protected under the Human Rights Act.

Barrier 2 - As the primary avenue for seeking relief under the Human Rights Act, the Supreme Court is not an accessible forum for everyone in the ACT.

35. Although people in the ACT whose human rights have been contravened have the right to bring an action in the Supreme Court, the Supreme Court is not a widely accessible forum due to the need for legal representation and the expenses of Court proceedings.

36. Proceedings before the Supreme Court are lengthy and complex. As a court, the Supreme Court is a formal venue with a large number of rules, practices and procedures that many people in the ACT – particularly those without legal training or experience – will not have an understanding of. It is nearly always necessary to have legal

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[30] *Human Rights Commission Act 2005* (ACT), Part 4, Division 4.2A.
[31] Ibid, Part 4, Division 4.2D.
[32] Ibid, Part 4, Division 4.2B.
[33] Ibid, Part 4, Division 4.2C.
[34] Helen Watchirs, 'Towards an Accessible Human Rights Complaints Mechanism' (2021) *Ethos: Law Society of the ACT Journal* (Issue 260, Winter 2021) at 64.
[35] *Human Rights Commission Act 2005* (ACT) ss 39 and 42(1)(d) and (f); *Health Records (Privacy and Access) Act 1997* (ACT) s 18.
[36] *Human Rights Commission Act 2005* (ACT) ss 40 and 42(1)(b).
[37] Ibid, ss 40A and 42(1)(a).
[38] Ibid, ss 41 and 42(1)(e).
[39] Ibid, ss 41A and 42(1)(g).
[40] Ibid, ss 41B and 42(1)(ea). A vulnerable person is person a who has a disability, or is at least 60 years old and has a disorder, illness, disease, impairment or is otherwise socially isolated or unable to participate in community life: s 41B(2).
[41] *Human Rights Commission Act 2005* (ACT) ss 41C and 42(1)(eb).
[42] Ibid, s 42(1)(c).
[43] Ibid, s 42(1)(ec).
[44] Ibid, s 15.
[45] Ibid, s 40(b)(ii).

representation to be able to bring an action in the Supreme Court. This itself presents a barrier due to the costs of obtaining legal representation, particularly for people who are not eligible for Legal Aid and are unable to find low cost or pro bono representation. It is also costly to commence and continue proceedings in the Supreme Court due to the fees that are payable unless waived by the Court. Applicants before the Supreme Court also bear a significant risk that the Court will grant a costs order if their application is unsuccessful. At the EDO, the risk of an adverse costs order is sometimes so significant for our clients that they are simply unable to proceed with litigation.

37. In practice, this means that in the ACT, relief for human rights contraventions is available only to individuals with the financial means to afford legal representation and other costs of proceedings.

38. Although individuals without financial means may apply for Legal Aid or seek the assistance of a community legal centre, community legal centres in the ACT are already significantly overworked and under-resourced, and do not have the capacity to represent everyone who seeks their assistance. The ACT Government should not have to rely on community legal centres to meet the gap in access to justice that is created by the unavailability under the Human Rights Act of less formal and less costly avenues for relief.

Barrier 3 - Proceedings may only be brought against public authorities and not private entities

39. In the ACT, it is unlawful for a public authority to act in a way that is incompatible with a human right, or fail to properly consider a relevant human right when making a decision.[46] Proceedings can be brought in the Supreme Court for a public authority's contravention of this duty.[47]

40. A public authority includes an administrative unit, a territory authority, ACT Ministers, and ACT public service employees.[48] Entities that are not public authorities may choose to be subject to the human rights obligations of a public authority.[49] However, there is no requirement for them to do so. This means that most private entities in the ACT do not have an obligation to act consistently with the human rights protected under the Human Rights Act. This leaves people in the ACT vulnerable to breaches of their human rights by private entities, but no recourse to an accessible remedy for such breaches.

41. In the environmental context, it is particularly vital for remedies to be available for violations of human rights. Private businesses are a major contributor to the destruction of ecosystems and the loss of biodiversity, through deforestation, land-grabbing, extracting, transporting and burning fossil fuels, industrial agriculture, intensive livestock operations, industrial fisheries, large-scale mining and the commodification of water and nature.[50]

Barrier 4 - The one-year limitation period for an action in the Supreme Court is prohibitive for those seeking relief for a contravention of human rights.

42. A legal proceeding relating to a contravention of human rights must be started in the Supreme Court within one year after the contravention occurs, unless the Court orders otherwise.[51]

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[46] *Human Rights Act 2004* (ACT) s 40B.
[47] Ibid, s 40C.
[48] Ibid, s 40.
[49] Ibid, s 40D.
[50] UNGA, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc. A/75/161 (15 July 2020) at [75].
[51] *Human Rights Act 2004* (ACT) s 40C(3).

43. Although human rights schemes in Victoria,[52] Queensland,[53] and the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**)[54] also impose a one-year time limit on human rights complaints, the legislation in those jurisdictions provides that a complaint may still be made outside the one-year period, although the human rights body *may* elect not to consider the complaint.[55] This language is more permissive. In comparison, in the ACT, section 40C of the Human Rights Act provides that proceedings *cannot* be brought outside the one-year period, unless the Court orders otherwise.[56] This language is less flexible. It also requires an application to be made to the Court for an exception to the rule, and there is no guarantee that the Court will grant the request. In addition, one year is a short amount of time to seek a judicial remedy, particularly considering the amount of time it would take to seek and secure legal representation and otherwise prepare legal proceedings. It is particularly prohibitive for vulnerable people, including people who do not speak English as a first language, people from low socio-economic backgrounds, and First Nations and Indigenous peoples.

44. In effect, the one-year limitation period may prohibit a person from accessing a remedy for a contravention of their human rights, and is therefore a barrier to access to justice for human rights in the ACT.

Barrier 5 - The unavailability of damages in the Supreme Court means that people in the ACT may be prohibited from accessing a suitable remedy for a contravention of their human rights.

45. Although the Supreme Court may grant any relief that it considers appropriate, it may not grant damages (compensation) in human rights proceedings.[57] However, in some circumstances, an award of damages may be the only remedy that achieves justice for the applicant. In addition, given the time and cost of litigation, and the personal stress that it can cause, people may be dissuaded from pursuing legal proceedings if damages are not available.

[52] In Victoria, the Victorian Ombudsman may choose not to look into a human rights complaint if it has been more than 12 months since the decision or action being complained about: *Ombudsman Act 1973* (Vic) s 15A(2).
[53] The Queensland Human Rights Commission may refuse to deal with or continue a human rights complaint if the complaint was not made or referred to the Commissioner within one year after the alleged contravention occurred: *Human Rights Act 2019* (Qld) s 70.
[54] The Australian Human Rights Commission may decide not to inquire into an act or practice, or, if the Commission has commenced to inquire into an act or practice, may decide not to continue to inquire into the act or practice if the complaint was made more than 12 months after the act was done or after the last occasion when an act was done pursuant to the practice: *Australian Human Rights Commission Act 1986* (Cth), s 20(2)(c).
[55] *Ombudsman Act 1973* (Vic) s 15A(2); *Human Rights Act 2019* (Qld) s 70; *Australian Human Rights Commission Act 1986* (Cth), s 20(2)(c).
[56] *Human Rights Act 2004* (ACT) s 40C(3).
[57] Ibid, s 40C(4).

E The Case for a Human Rights Complaints Mechanism in the ACT

46. EDO strongly supports Petition 32-21, which proposes to enable a complaint about any breach of the Human Rights Act to be made to the Commission for confidential conciliation, and if conciliation is unsuccessful, enable a complaint about the breach to be made to ACAT. If accepted by the Assembly, these amendments would strengthen access to justice for human rights in the ACT. We have also set out some additional issues and recommendations for the Committee's consideration.

Recommendation 1: The Commission should be enabled to accept, and attempt to resolve, complaints about any breach of the Human Rights Act, including through confidential conciliation if appropriate.

47. An accessible complaints mechanism that promotes a culture of human rights should be introduced into the ACT.

48. The ACT is currently the only jurisdiction in Australia with human rights legislation that does not have an informal and non-judicial complaints mechanism. Victoria and Queensland both have free and accessible schemes, outside the court system, that allow people to make complaints about contraventions of their human rights.

49. In Victoria, a person can make a complaint to the Victorian Ombudsman about an administrative action taken by a public authority on the basis that the relevant action is incompatible with a human right in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Victorian Charter**), or on the basis that the authority failed to properly consider a relevant human right under the Victorian Charter when making a decision.[58] The Victorian Ombudsman may decide to conduct an investigation into the complaint.[59] In conducting an investigation, the Ombudsman has broad investigative powers similar to a royal commission.[60] On completion of an investigation, the Ombudsman publishes a report stating its opinion about the administrative action and making any recommendations the Ombudsman sees fit.[61] The Ombudsman can also attempt to resolve the complaint by alternative dispute resolution.[62] Although the Ombudsman's recommendations are not binding, the vast majority (approximately 98%) of recommendations are accepted.[63]

50. In Queensland, a person can make a complaint to the Queensland Human Rights Commission (**QHRC**) alleging that a public entity has contravened human rights, either by acting or making a decision that is not compatible with human rights, or by failing to properly consider a relevant human right when making a decision.[64] The Queensland Human Rights Commissioner conducts preliminary inquiries and determines how to deal with the complaint,[65] including whether to accept the complaint for resolution by the Commissioner.[66] If the Commissioner accepts a complaint for resolution, the Commissioner may take the reasonable action that they consider appropriate to try to resolve the complaint.[67] In attempting to resolve a complaint, the Commissioner may

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[58] *Ombudsman Act 1973* (Vic) ss 13(2) and 14.
[59] Ibid, s 15B and Part IV.
[60] Victorian Ombudsman, 'Investigations' (Web Page, 2022) <https://www.ombudsman.vic.gov.au/investigations/>.
[61] *Ombudsman Act 1973* (Vic) s 23.
[62] Ibid, s 13G.
[63] Victorian Ombudsman, 'Investigations' (Web Page, 2022) <https://www.ombudsman.vic.gov.au/investigations/>.
[64] *Human Rights Act 2019* (Qld) ss 58(1) and 63.
[65] Ibid, s 68.
[66] Ibid, s 76.
[67] Ibid, s 77.

conduct a conciliation conference,[68] which is confidential.[69] If the Commissioner considers that the complaint has not been resolved by conciliation or otherwise, the Commissioner must prepare a report about the complaint as soon as the QHRC has finished dealing with the complaint, which may include the Commissioner's recommendations.[70] If the Commissioner considers that the complaint has been resolved, the Commissioner must give the parties a notice stating the outcome of the resolution of the complaint, and that the QHRC has finished dealing with the complaint.[71]

51. Since the Queensland complaints process has commenced, it has been utilised to achieve accessible, cost-effective, and meaningful outcomes for the people of that state. The QHRC's annual report from 2020-21 contains samples of feedback received about its conciliation process, with most feedback indicating that parties (both complainants and respondents) had a positive experience with the conciliation process.[72] We recommend introducing a similar model in the ACT, including for the following to occur:

    a. If a complaint cannot be resolved (whether through conciliation or otherwise), the ACT Human Rights Commission should be required to publish a report on the complaint including to make any non-binding recommendations regarding how the complaint may be resolved.

    b. If a complaint is resolved, the ACT Human Rights Commission should be enabled to issue a notice to the parties stating the outcome of the resolution of the complaint and that the Commission has finished dealing with the complaint.

52. We consider that such a scheme is not a significant departure from, and could be easily integrated into, the Commission's current process to resolve discrimination and other complaints under the HRC Act. However, unlike Queensland (and Victoria) where no further remedies are available other than piggybacking, we consider that the ACT's model should include the ability to seek a remedy in a higher tribunal or court if the parties do not agree with the Commission's findings or recommendations, which we have explained further below.

Recommendation 2: If a human rights complaint cannot be resolved through the Commission, proceedings regarding breaches of the Human Rights Act may be initiated in the ACAT as an alternative to the Supreme Court.

53. Unlike the ACT, people in Victoria and Queensland do not have the right to commence proceedings in relation to a contravention of human rights. Instead, they must piggyback human rights concerns in other legal proceedings. While the ACT Government ought to introduce a human rights complaint mechanism, and can be guided by the human rights complaint schemes in Victoria and Queensland, in our view the ACT Government must also do more to ensure that the Human Rights Act promotes access to justice.

54. In our view, ACAT should be granted jurisdiction to hear and resolve complaints about any breaches of the Human Rights Act, and make final determinations that are binding on the parties.

55. As we have explained earlier in these submissions, although the Human Rights Act provides a direct cause of action in the Supreme Court,[73] the Supreme Court is not an accessible forum for everybody in the ACT due to the need for legal representation and

[68] Ibid, s 79.
[69] Ibid, s 86.
[70] Ibid, s 88.
[71] Ibid, s 89.
[72] Queensland Human Rights Commission, *Annual Report 2020-21* (2021) at 53-54.
[73] *Human Rights Act 2004* (ACT) s 40C(2)(a).

the expenses of Court proceedings. In comparison, the ACAT is less far less formal and more accessible. Legal representation is not required in ACAT,[74] and ACAT fees are not as prohibitive as they are in the Supreme Court.[75] In addition, parties usually bear their own costs in ACAT proceedings,[76] which removes the risk of an adverse costs order for applicants.

56. In addition, Australia has obligations under international human rights law to ensure that individuals have access to judicial and administrative procedures that incorporate a right of appeal to a higher body, and issue binding decisions to provide effective remedies for violations.[77] We consider that giving ACAT jurisdiction to hear and determine human rights complaints would ensure that the ACT meets these standards.

Recommendation 3: Private entities should have the same obligations as public authorities under the Human Rights Act, and should be capable of being the subject of a human rights complaint.

57. As we set out earlier in these submissions, most private entities in the ACT do not have an obligation to act consistently with the human rights protected under the Human Rights Act, which leaves people in the ACT vulnerable to breaches of their human rights by private entities, but with no recourse to an accessible remedy for such breaches. International law requires individuals to be able to access effective remedies against private actors as well as government authorities.[78] In the environmental context, recognising that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life, the UN Human Rights Committee has declared that in order to fulfil their obligation to respect and ensure the right to life, States Parties must preserve the environment and protect it against harm, pollution and climate change caused by both public and private actors.[79]

58. For this reason, we recommend that private entities should have the same obligations as public authorities under the Human Rights Act, and should be capable of being the subject of a human rights complaint.

Recommendation 4: The one-year limitation period to bring a complaint about a breach of the Human Rights Act should be extended to allow people in the ACT sufficient time to apply for a remedy, and should allow people to make a complaint without first having to apply to a court for an extension of time.

59. In these submissions we have argued that the one-year limitation period for commencing proceedings in relation to a contravention of human rights is prohibitive. International law requires remedies to be available for claims of imminent and

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[74] ACAT, 'Do I need to be represented at ACAT?' (Web page, 2022) <https://www.acat.act.gov.au/what-to-expect/representation-and-advice#Do-I-need-to-be-represented-at-ACAT->.

[75] For example, the current filing fee for a civil dispute for an individual in ACAT is $593.00: *Court Procedures (Fees) Determination 2022* (ACT), Schedule, item 1000. In comparison, the current filing fee for an individual to commence a proceeding in the Supreme Court is $1,845: *Court Procedures (Fees) Determination 2022* (ACT), Schedule, item 1200.

[76] *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 48(1).

[77] HRC, *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/HRC/37/59 (24 January 2018) at [29].

[78] Ibid at [28].

[79] UN Human Rights Committee, *General Comment No. 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 (3 September 2019) 13 at [62].

foreseeable violations as well as past and current violations.[80] In our view, best practice in the ACT would mean that there is no limitation period for complaints about breaches of the Human Rights Act. However, at a minimum, the one-year limitation period ought to be extended, to ensure that people in the ACT – particularly people and communities who are structurally disadvantaged – have sufficient time to access a remedy under the Human Rights Act. The language in section 40C the Human Rights Act should also be amended to be more permissive, similar to the language adopted in Queensland, Victoria and the AHRC Act, allowing people to make a complaint without needing to first apply for an extension of time.

Recommendation 5: Damages should be available as a remedy for a complaint about a breach of the Human Rights Act.

Recommendation 6: There should be no monetary limit on the jurisdiction of ACAT to hear complaints about breaches of the Human Rights Act.

60. We have also argued that the unavailability of damages for a human rights complaint is prohibitive and may dissuade people from seeking a remedy for violation of their human rights. In some cases, damages will be the only appropriate remedy for a violation of human rights, and the unavailability of damages in these cases means that people cannot access an effective remedy for violation of their rights. We therefore recommend that damages are available as a remedy for a complaint about a breach of the Human Rights Act.

61. If damages are available, it is possible that a complaint about a breach of the Human Rights Act would be considered a civil dispute application, which cannot be made to the ACAT for an amount greater than $25,000, unless the excess is abandoned to come within ACAT's jurisdiction, or if the parties agree ACAT has jurisdiction.[81] There are also monetary limits imposed on ACAT's jurisdiction under the HRC Act to determine complaints about occupancy disputes,[82] although not for retirement village complaints or conversion practice complaints.[83] In some circumstances, $25,000 may not be sufficient compensation to provide effective redress for a person whose human rights have been violated. We therefore recommend that there is no monetary limit on ACAT's jurisdiction for complaints about breaches of the Human Rights Act, similar to retirement village complaints and conversation practice complaints.

62. Alternatively, it may be appropriate for the Supreme Court (and/or the Magistrates Court) to remain available to hear human rights complaints for amounts greater than $25,000.

Recommendation 7: People who make complaints about breaches of the Human Rights Act should be protected against reprisal and vilification as a result of making a complaint.

63. The Human Rights Act currently does not offer any protection for people who commence proceedings in the Supreme Court for contravention of their human rights. In contrast, for example, section 26 of the AHRC Act makes it an offence for a person to take reprisal action against another person as a result of making a complaint, including refusing to employ the other person, dismissing the other person from employment, or taking disciplinary action in relation to the other person.[84] International law requires

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[80] HRC, *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/HRC/37/59 (24 January 2018) at [29].
[81] *ACT Civil and Administrative Tribunal Act 2008* (ACT) ss 18(1), 20 and 21.
[82] *Human Rights Commission Act 2005* (ACT) s 53X
[83] Ibid, ss 53N and 53ZE respectively.
[84] *Australian Human Rights Commission Act 1986* (Cth) s 26(2).

people pursuing remedies to be protected against reprisals, including threats and violence, and that governments should protect people against baseless lawsuits aimed at intimidating victims and discouraging them from pursuing remedies.[85]

64. In our view, people who make complaints about breaches of the Human Rights Act ought to be protected from reprisal and vilification merely by reason of making a complaint. This could be done by incorporating a provision into the Human Rights Act similar to section 26 of the AHRC Act.

[85] HRC, *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/HRC/37/59 (24 January 2018) at [30].

F Australia's International Human Rights Obligations

65. If the ACT Government decides to proceed with introducing an accessible human rights complaint mechanism in the ACT, we also recommend that the ACT Government considers implementing the following recommendations to ensure that the complaint mechanism is consistent with Australia's obligations under international human rights law:

- **Recommendation 8: Procedures to hear and deal with complaints about breaches of the Human Rights Act should be impartial, independent, affordable, transparent, and fair.[86] Such procedures should incorporate measures to overcome obstacles to access such as language, literacy, expense and distance.[87] There should be additional procedures to ensure that First Nations and disadvantaged people and communities are able to access human rights complaint mechanisms.[88]**
- **Recommendation 9: The Commission and ACAT should endeavour to review and deal with claims in a timely manner.[89]**
- **Recommendation 10: The Commission and ACAT should have the necessary expertise and resources to deal with human rights complaints.[90] To this end, the ACT Government should ensure that appropriate staff and resources are dedicated to implementing a new human rights complaints mechanism, and that appropriate training is provided to staff.**
- **Recommendation 11: Decisions should be made public and promptly and be effectively enforced.[91] The ACT Government should ensure that outcomes from the Commission's complaints mechanism process (whether resolved or not) are made publicly available, de-identified where appropriate.**
- **Recommendation 12: The ACT Government should provide guidance to the public about how to seek access to remedies.[92] This includes engaging with the community early and providing ongoing education about the new human rights complaints mechanism.**
- **Recommendation 13: There should be broad standing provisions allowing any person to bring a complaint in relation to a breach of the Human Rights Act.[93]**

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[86] Ibid at [29].
[87] Ibid at [30].
[88] Framework Principle 14 discussed in HRC, *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/HRC/37/59 (24 January 2018) at [40]-[46].
[89] Ibid at [29].
[90] Ibid.
[91] Ibid.
[92] Ibid at [30].
[93] Ibid.

G Conclusion

66. EDO strongly supports Petition 32-21, and we urge the Committee to recommend that the ACT Government address the petition demands in full by amending our Human Rights Act to include an accessible complaints mechanism. We also ask the Committee to recommend that the ACT Government consider the additional recommendations that we have set out in this submission. We consider that making these suggested changes to the Human Rights Act will strengthen the Act by allowing the ACT community to access justice for their human rights, and better ensure their human rights are protected.

67. Melanie Montalban, Managing Lawyer of EDO's ACT Practice, and Frances Bradshaw, Senior Solicitor, are available to appear before the Committee to give evidence in person at its public hearing on 28 April 2022 if required.

Environmental Defenders Office

[redacted]

Melanie Montalban

Managing Lawyer, ACT

CLASS Ref. Y366

Submission on the *Planning Bill 2022*

17 June 2022

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

www.edo.org.au

About Healthy Environment & Justice Program

EDO's ACT Practice falls within EDO's Healthy Environment & Justice Program (**HEJ**). The goal of the HEJ Program is to empower overburdened communities to fight for environmental justice.

Acknowledgement of Contributions

EDO wishes to acknowledge with gratitude the assistance provided by many people in the researching, drafting and review of this submission, including EDO solicitors, particularly Rachel Walmsley and Cerin Loane, and our fantastic volunteers, Ayla Bower-Williams, Kimberley Slapp and Jadviga Kobryn-Coletti.

Lead authors: Melanie Montalban and Frances Bradshaw

Acknowledgment of funding from ACT Government

We acknowledge and are grateful to the ACT Government for its ongoing funding of the EDO's ACT Practice, without which it would not be possible for the ACT Practice to run.

Acknowledgment of Country

The EDO recognises the Traditional Owners and custodians of the land, seas and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander elders past, present and emerging, and aspire to learn from traditional knowledge and customs so that, together, we can protect our environment and cultural heritage through law.

A note on language on 'First Nations'

We acknowledge that there is a legacy of writing about First Nations without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. For the purposes of these submissions, we have chosen to use the term 'First Nations'. We acknowledge that not all Aboriginal and Torres Strait Island Peoples will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

Submitted to:

Environment, Planning and Sustainable Development Directorate
Email: EPSDDcomms@act.gov.au
Submitted online via Your Say Conversations on 17 June 2022

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CLASS Ref. P90; Y482

Contents

Executive Summary

The Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the ACT government's proposed draft *Planning Bill 2022* (**the Bill**).

The Bill is the most critical element of the ACT Planning System Review and Reform Project. The Bill, which is intended to replace the *Planning and Development Act 2007* (ACT), now in force for 15 years, is the centrepiece for how development will be planned, decided on, and regulated in the ACT in the future. It is important that the Bill establishes a planning system that provides for an appropriate balance between the need to achieve sustainable development with the need to protect and preserve our natural environment for future generations.

The EDO's ACT Practice is part of the EDO's Healthy Environment & Justice Program, which aims to empower overburdened communities to fight for environmental justice. Environmental justice means that all people are treated fairly under, and have the right to be meaningfully involved in, environmental laws, regulations and policies, regardless of their race, colour, national origin, or income. Environmental justice recognises that human rights and environmental rights are closely intertwined, and that promoting the rights of people in the community is central to protecting the environment from harm.

In these submissions, we have approached our analysis of the Bill by examining the extent to which the Bill promotes environmental justice. While we have considered the impacts of the Bill on the rights of all people in the ACT, our submissions have a particular focus on First Nations, children and young people, and people who are financially disadvantaged, as some people and communities who are often at greater risk of environmental harm, including harm caused by climate change, loss of biodiversity, and destruction of Aboriginal cultural heritage.

We have also considered the extent to which the Bill promotes the right to a healthy environment. Although the ACT Government has not yet enshrined the right to a healthy environment in the *Human Rights Act 2004* (ACT), we consider that international best practice requires Australian governments, including the ACT, to recognise this right.

In these submissions, we make 35 recommendations which, if accepted by the ACT Government, will better protect the ACT's environment from harm caused by development, and better protect the rights of people in the ACT to participate in the planning system and to live in a clean, healthy and sustainable environment.

Our submission is structured as follows:

A **Framework of Submission:** We explain the concepts of environmental justice and the right to a healthy environment, which we will use as the lens through which we have examined the Bill.

B **General Concepts:** We address central concepts that apply to the Bill in its entirety including the concept of outcomes-focussed planning systems, the objects of the Bill and the Territory Plan, the concept of ecologically sustainable development, and the hierarchy of planning strategies. We make a number of recommendations, including in particular that the object of the Bill can be strengthened, and that the primary object of the Bill should be to achieve ecologically sustainable development.

C **Justice as Recognition:** We address which social groups and communities are given respect, and who is and is not valued, within the ACT's planning system. We submit that the Bill should be designed to enable overburdened individuals and communities to enjoy

access to environmental benefits and access to procedural rights, including the ability to participate in the planning system and to have their voices heard.

D **Distributive Justice:** We address the extent to which the Bill protects the substantive rights of the ACT community to share in environmental benefits and the extent to which it protects the ACT community from environmental burdens, focusing on climate change and greenhouse gas emissions, biodiversity, and Aboriginal cultural heritage. We make a number of recommendations, including that the Bill should impose a duty on decision-makers to refuse an application for a development proposal that creates an unacceptable climate risk or has an unacceptable impact on the environment or Aboriginal cultural heritage. We also oppose provisions that enable decision-makers to approve development that is inconsistent with advice received from the Conservator of Flora and Fauna even in circumstances where the development is likely to have a significant adverse environmental impact on a protected matter. We also advocate for representative Aboriginal organisations to have the right to be consulted by decision-makers in planning matters under the Bill, and to give their free, prior and informed consent, as these rights do not currently exist.

E **Procedural Justice:** We address the extent to which the Bill protects the procedural rights of the ACT community, which are the right to access environmental information, the right to participate in decision-making, and the right to access justice. We make a number of recommendations, including that the Territory Planning Authority should be required to continuously disclose environmental risks of development to the public. We also submit that the Bill should include open standing provisions allowing any person to seek review of government decisions, and should enable third parties to seek review of all key planning decisions in the ACT Civil and Administrative Tribunal.

As a final note, it is important to acknowledge that our submission focuses on the Bill as it relates to what we consider to be central environmental justice issues. However, there are a number of other environmental issues that have been raised by stakeholders which we have not been able to address in our submissions, either because those issues do not directly relate to environmental justice, or because of resource and time restraints. If there are provisions of the Bill that we have not directly commented on in these submissions, this should not be taken as an endorsement of those provisions.

We are happy to be consulted about any additional environmental matters that are raised during the course of public submissions.

Summary of Recommendations

Outcomes-focussed

1. 'Desired future planning outcomes' and 'good planning outcomes' should be clearly defined in the Bill.
2. Outcomes-focussed provisions should be appropriately balanced with mandatory provisions and technical specifications.
3. The Bill must include strong compliance monitoring, reporting requirements and evaluation to ensure desired outcomes are being met.

Objects of the Bill

4. The objects of the Bill should be rewritten to provide that the overarching object of the Bill is the achievement of ecologically sustainable development, and should also include:
   - protection of the right to a clean, healthy and sustainable environment;
   - reduction of greenhouse gas emissions;
   - protection of the environment;
   - protection of natural, built and cultural heritage, including Aboriginal heritage; and
   - promotion of knowledge, traditions and customs of traditional custodians.
5. People and bodies involved in the administration of the Bill should be required to exercise powers and functions, and make decisions, consistently with the objects of the Bill.

Object of the Territory Plan

6. The object of the Territory Plan should be consistent with the objects of the Bill.
7. The object of the Territory Plan should be expanded to include a clean, healthy and sustainable environment.

Ecologically sustainable development

8. The definition of ecologically sustainable development should be updated to recognise that ecologically sustainable development requires the effective integration of environmental, economic, social and equitable considerations in decision-making processes, and that ecologically sustainable development can be achieved through the implementation of ecologically sustainable development principles.
9. All decisions, powers and functions under the Bill should be exercised to achieve ecologically sustainable development.

Planning strategies

10. The Bill should clearly state the hierarchy of planning strategies for each type of decision made under the Bill.
11. The Bill should clearly identify when district strategies and the statement of planning priorities are relevant to each type of decision under the Bill.
12. Following a decision to make the Planning Strategy and/or a district strategy, the Territory Plan should be reviewed for its consistency with the strategy.

Justice as recognition

13. The Bill should be designed to enable overburdened individuals and communities to enjoy access to environmental benefits and access to procedural rights, including the ability to participate in the planning system and to have their voices heard.

Climate change and greenhouse gas emissions

14. Climate change should be a mandatory consideration for all decisions made, and powers and functions exercised, under the Bill.

15. The Bill should include strong compliance and enforcement mechanisms available for development proposals that are likely to contribute to climate change through greenhouse gas emissions.

16. The Bill should include definitions for 'climate change', 'sustainable' and 'resilient'.

Biodiversity

17. Offsetting principles should be enshrined in the Bill. The Bill should clearly state that offsetting should only be allowed in limited circumstances and in line with the best practice science-based principles.

18. The definition of 'protected matters' should include matters protected under the *Nature Conservation Act 2014* (ACT).

19. Decision-makers should be required to consider the cumulative impacts of a proposed development.

20. The Bill must set clear and appropriate limits on the Chief Planner's power to override the Conservator of Flora and Fauna's advice on development applications.

21. The Bill should include strong compliance and enforcement mechanisms available for development proposals that are likely to have a significant adverse environmental impact.

Aboriginal cultural heritage

22. The Bill should include provisions requiring decision-makers to consult with representative Aboriginal organisations for key planning decisions including development applications, and should incorporate the principle of free, prior and informed consent.

23. The ACT Government should develop specific guidelines for consultation with First Nations, which should be culturally safe and developed through consultation with First Nations people and communities.

24. The Bill should introduce a duty on decision-makers to refuse development applications for proposals that will have a significant adverse impact on Aboriginal cultural heritage.

Access to information

25. Ensure the Territory Planning Authority's website is accessible.

26. Ensure information is available to people with no internet and at no additional cost.

27. The Territory Planning Authority should be required to continuously disclose environmental risks of development to the public.

Participation in decision-making

28. The Bill should require longer periods for public consultation on key planning decisions.
29. The principles of good consultation should be enshrined in the Bill.
30. The principles of good consultation should reflect best practice.

Access to justice

31. The Bill should include open standing provisions allowing any person to seek review of government decisions.
32. The Bill should enable third parties to seek review of all key planning decisions in the ACT Civil and Administrative Tribunal.
33. The Bill should not prohibit third parties from seeking an extension of time for making an application to the ACT Civil and Administrative Tribunal for review.
34. The Bill should enable any person to access administrative or judicial remedies to enforce a breach, or anticipated breach, of the Bill.
35. There should be no limits on the matters upon which a planning decision can be challenged.

ACT Planning System Review and Reform Project

Submission from EDO on the *Planning Bill 2022*

A Framework of Submission

The strategic goal of the EDO's ACT Practice is to empower overburdened communities to fight for **environmental justice**.

Environmental justice is a social movement that addresses the disproportionate impact of environmental harms – including harm from climate change, pollution, extractive industries, and natural disasters – on overburdened people and communities.

In the environmental context, overburdened communities and individuals include, for example, persons with disability, the elderly, and young people, who may be at higher risk from the impacts of heat and other extreme weather exacerbated by climate change. It may include low-income communities who live in close proximity to polluting industries and who may be reliant on an industry for their economic stability, which may also impact their health and environment, but who may not be able to afford living elsewhere. Environmental burdens are also disproportionately felt by First Nations, through impacts to their Country, cultural practices, and the resources that they depend on.

Environmental justice recognises that such individuals and communities are often most at risk of experiencing environmental harms. However, they are also often the least responsible for perpetuating such harms.

In this way, environmental justice also addresses environmental racism, which is the deliberate targeting of ethnic and minority communities for exposure to toxic and hazardous waste sites and facilities, coupled with the systematic exclusion of minorities in environmental policy making, enforcement, and remediation.[1] Any policy, practice or directive that differentially affects or disadvantages (where intended or unintended) individuals, groups or communities based on race or colour is environmental racism.[2] In Australia, environmental racism can be seen to be perpetrated against First Nations communities through the ongoing impacts of colonisation and dispossession, as well as the destruction of First Nations lands including for planning and development purposes. It can also be seen to be perpetrated in Australia against culturally and linguistically diverse communities.

By addressing the disproportionate impact of environmental harm on overburdened people and communities, environmental justice can be used as a framework to achieve protection of our environment. In January 2022, the EDO published a national report advocating for Australian environmental protection agencies to adopt an environmental justice framework to underpin environmental regulation in Australia.[3]

Environmental justice can also be used as a framework to underpin other laws that impact our environment, including planning legislation. For this reason, we have analysed the Bill and prepared these submissions by considering the extent to which the Bill achieves environmental justice for the ACT community, including overburdened people in our community.

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[1] Benjamin Chavis, *Confronting environmental racism: voices from the grassroots* (1993, South End Press) 31.
[2] Robert Bullard, 'Environment and Morality: Confronting Environmental Racism in the United States' (Programme Paper No 8, United Nations Research Institute for Social Development, October 2004) iii.
[3] EDO, *Implementing effective independent Environmental Protection Agencies in Australia: Best practice environmental governance for environmental justice* (Report, January 2022).

Defining environmental justice

Environmental justice is not defined in any piece of Australian legislation, and it is difficult to define. At the EDO, we have regard to the definition used by the United States Environmental Protection Agency (**US EPA**), which describes **environmental justice** as:

> '[T]*he fair treatment and meaningful involvement of all people, regardless of race, colour, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies'*.[4]

The US EPA further defines 'fair treatment' and 'meaningful involvement' as follows:[5]

- 'fair treatment' means that *'no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies'*; and
- 'meaningful involvement' means that people have an opportunity to participate in decisions about activities affecting their health or environment, that the public can influence regulatory decision-making, that community concerns will be considered in decision-making, and that decision-makers will seek out and facilitate the involvement of those potentially affected.

Environmental justice is often underpinned by three theories:

1. **Justice as recognition**, which is concerned with who is given respect, and who is and is not valued. Justice as recognition requires the recognition of different social groups and communities, and of the natural environment and components of it;[6]
2. **Distributive justice**, which is concerned with the distribution of environmental goods (or benefits) and environmental 'bads' (or burdens);[7] and
3. **Procedural justice**, which is concerned with the ways in which decisions, including decisions regarding distribution of environmental benefits and burdens, are made, and who is involved and who has influence in those decisions.[8]

In these submissions, we have explored the extent to which the Bill addresses each of the above theories of environmental justice.

The right to a healthy environment

In addition to the above, the EDO has long advocated for recognition of the **human right to a healthy environment** in Australia, and in particular since 2002 when a Bill of Rights was first considered for the ACT.[9] We acknowledge the *Human Rights Act 2004* (ACT) (**Human Rights Act**)

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[4] US EPA, *Learn About Environmental Justice* (Website, May 2022) <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice>.
[5] Ibid.
[6] Justice Brian Preston SC, 'The effectiveness of the law in providing access to environmental justice: an introduction' (Speech, 11th IUCN Academy of Environmental Law Colloquium, 28 June 2013), 2.
[7] Ibid, 1.
[8] Ibid, 2.
[9] Hanna Jaireth, Environmental Defenders Office ACT Inc., *Submission on the Need for an ACT Bill of Rights* (Submission #61, Bill of Rights Consultive Committee, 2002); Environmental Defenders Office ACT Inc., *Submission to the ACT Attorney General for Consideration under s 43 Review of Operation of the Human Rights*

does not yet recognise the right. However, the ACT Government is currently investigating including the right to a healthy environment in the Human Rights Act. In addition, more than 80% of UN Member States legally recognise the right to a healthy environment either through constitutional recognition, ratification of regional treaties and/or national legislation.[10] In October 2021, the UN Human Rights Council adopted a resolution that recognises the right to a clean, healthy and sustainable environment, and invited the UN General Assembly to consider this resolution.[11]

The right to a healthy environment is a standalone fundamental right. However, it is comprised of a number of elements, which are derived from Australia's existing obligations under international human rights treaties and multilateral environmental agreements, and their elaboration in international and regional courts and tribunals, UN treaty bodies and inter-governmental bodies.[12] These sources enshrine rights that are protected under the Human Rights Act, such as the right to life[13] and the right to enjoy culture, practice religion and use language.[14]

Because the right to a healthy environment is implied in, or derived from, other human rights – including rights protected under the Human Rights Act – recognition of the right to a healthy environment is international best practice. For this reason, in these submissions we have also considered whether the Bill is consistent with the right to a healthy environment.

This Bill will be examined for its compatibility with rights under the Human Rights Act. We note the following:

- the rights that are engaged by the Bill include the right to life,[15] the right to freedom of expression including access to information,[16] the right to participate in public affairs,[17] and the right to culture, and in particular how they relate to the environment;[18]
- the people whose rights are affected by the Bill are all people in the ACT, including First Nations people, children and young people, people who are financially disadvantaged, and other overburdened people;
- we anticipate that the Bill will have some negative impacts on substantive environmental human rights including those relating to climate change, biodiversity loss, and destruction

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Act 2004 (Submission, A-G Environment Related Human Rights, June 2005); Australian Network of Environmental Defender's Offices, *Submission to the National Human Rights Consultation* (Submission, National Human Rights Consultation, 15 June 2009); Environmental Defenders Office (Tasmania) Inc., *Proposed Charter of Human Rights for Tasmania*' (Submission, Tasmania Human Rights Consultation, 2011); Environmental Defenders Office (Victoria) Inc., *Inquiry into Charter of Human Rights and Responsibilities Act 2006* (Submission No 271, 1 July 2011).

[10] David Boyd, Special Rapporteur on Human Rights and the Environment, *Right to a healthy environment: good practices*, UN Doc A/HRC/43/53 (30 December 2019) at [10]-[13].

[11] Human Rights Council, *The Human Right to a Clean, Healthy and Sustainable Environment*, UN Doc A/HRC/RES/48/13 (18 October 2021). The HRC also adopted Resolution 48/14, appointing a Special Rapporteur on the promotion and protection of human rights in the context of climate change.

[12] The international sources for the right to a healthy environment are listed under Framework Principles 1 and 2: Office of the UN High Commissioner for Human Rights, *Selected Sources for Framework Principles on Human Rights and the Environment* (February 2018) p 2.

[13] *Human Rights Act 2004* (ACT) s 9.

[14] Ibid, s 27.

[15] Ibid, s 9.

[16] Ibid, s 16.

[17] Ibid, s 17.

[18] Ibid, s 27.

of Aboriginal cultural heritage, and on procedural environmental human rights including the right to information, the right to participate in decision-making, and access to justice.

We have addressed why we consider that the Bill will negatively impact the above human rights in the body of these submissions.

B General Concepts

In this section, we address EDO's views on the following five general concepts that apply to the Bill in its entirety:

1. outcomes-focussed planning systems;
2. objects of the Bill;
3. objects of the Territory Plan;
4. ecologically sustainable development (**ESD**); and
5. the role of planning strategies, policies and plans.

(1) Outcomes-focussed planning systems

In preparing the Bill and policy positions included in the Bill, the Environment, Planning and Sustainable Development Directorate (**EPSDD**) has sought to achieve five key principles, which include that the ACT's reformed planning system is **outcomes-focussed**.[19]

EDO has a number of concerns about the extent to which the ACT's reformed planning system is outcomes-focussed. We brought these concerns to EPSDD's attention during our participation in the ACT Planning System Review and Reform Project's Legislation Working Group (**LWG**) and are restating these concerns here for ease of reference.

We understand that the ACT Government considers outcomes-focussed planning systems to be best practice, and that the purpose of an outcomes-focussed planning system is to increase efficiency and ensure a flexible, discretionary approach to assessing developments according to results-based measurements, rather than prescriptive technical requirements.

However, critics of outcomes-focussed systems are of the view that such systems lower the standard of development, and result in a lack of public sector oversight of the private sector. Another critical issue is that it can be easier for applicants to successfully challenge planning decisions and obtain development approval or removal of conditions.

The following critiques provide examples of some of the dangers of an outcomes-focussed approach:

- in Colorado USA, performance-based zoning has led to unpredictable outcomes, and has led to a reactive system that has struggled to adjust to fast-changing community expectations, which made infrastructure planning problematic and created a complex and time-consuming review process;[20]
- similarly, the performance-based system in Idaho USA, which permitted any land use and did not include zoning requirements, encountered issues with the way development impact was measured, especially at a community level, with communities not being able to understand the system, as well as uncertainty around what development could take place.[21]

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[19] ACT Government, *Planning Bill – Policy Overview* (March 2022) p 9.
[20] L. Nellis and A. Richman, 'Performance Zoning: Requiem or Revolution?' (March 13, 1998) Videotape of a Presentation at the Rocky Mountain Land Institute, Seventh Annual Conference.
[21] D. R. Porter, 'Flexible Zoning: A Status Report on Performance Standard' (1998) *Zoning News* 1, which also identified similar issues in Colorado USA.

While the Bill describes the ACT's reformed planning system as outcomes-focussed, it is in fact a 'hybrid' system whereby many provisions will be written with an outcomes focus, while other provisions will specify mandatory technical requirements.[22] Hybridity is a common occurrence in overseas jurisdictions utilising outcomes-focussed planning schemes, including the US (described above) and New Zealand.[23]

Queensland's planning system is also a hybrid system in practice.[24] However, critiques of Queensland's planning system indicate that a hybrid system may not address the above criticisms of outcomes-focussed systems.

A review into Queensland's outcomes-focussed planning system identified that planners struggled to identify core desired outcomes, which led to vague and highly discretionary statements of preferred outcomes, that the system resulted in decisions to approve development even in circumstances where the proposal conflicted with clearly stated acceptable outcomes, and that the system had created uncertainty in decision-making, concluding that *'courts will be as powerless as the community to stop development that flies in the face of substantive planning scheme "requirements"'* .[25] Other critiques have also identified the following issues:

- there is too much ambiguity in outcome statements, leading to inconsistency in decision-making;
- flexibility in the planning system leads to greater potential for conflict between community expectations, politics and accountability in decision-making; and
- the lack of clarity around performance criteria intended to increase flexibility can actually fuel development speculation and problems with land valuation.[26]

For example, in 2016, Brisbane City Council approved an application to develop West Village, a major urban renewal project, in the heart of Brisbane. The total approved site cover was 15% more than the maximum site cover in the relevant neighbourhood plan code, however as compliance with the maximum site cover requirement was simply one possible acceptable solution, the developer was still able to demonstrate compliance with the relevant performance measure and the overall purpose of the code. After the decision was appealed in the Planning and Environment Court, the Planning Minister approved the development subject to conditions, which were intended to be a compromise (for example, reducing the site cover to the maximum amount permitted in the code, in exchange for increasing the number of permitted storeys from 15 to 22), however this was viewed by the community as an outcome that was more favourable to the developer, and caused disenchantment in the community with Queensland's planning system.[27]

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[22] ACT Government, *Planning Bill – Policy Overview* (March 2022) p 11.
[23] Philippa England and Amy McInerney, 'Anything goes? Performance-based planning and the slippery slope in Queensland planning law' (2017) 24 *Environmental and Planning Law Journal* 238, 240.
[24] Ibid.
[25] Ibid, 244 and 250.
[26] Jennifer Roughan, Buckley Vann Planning + Development, *Performance Based Planning in Queensland* (March 2016) pp 8-12; Travis G. Frew, *The Implementation of Performance Based Planning in Queensland under the Integrated Planning Act 1997: An Evaluation of Perceptions and Planning Schemes* (2011) (PhD Thesis, School of Urban Development, Queensland University of Technology) pp 282 and 315-316.
[27] Philippa England and Amy McInerney, 'Anything goes? Performance-based planning and the slippery slope in Queensland planning law' (2017) 24 *Environmental and Planning Law Journal* 238, 244-245.

We acknowledge that the performance of the ACT's planning system will depend greatly on how it is implemented. However, we are concerned that the ACT may experience similar issues as Queensland should it implement an outcomes-focussed system.

From our review of the Bill, it appears that the Bill contains proscriptive requirements for planning decisions that are to be followed by applicants and decision-makers. In general, EDO is supportive of such provisions because they ensure certainty, transparency and consistency in planning decisions, which also results in greater public confidence in decisions. However, we expect that most outcomes-focussed provisions will be included in the new Territory Plan. As the new Territory Plan is not yet publicly available, we are unable to comment on any outcomes-focussed provisions in the Plan. However, we are able to address the provisions in the Bill that relate to an outcomes-focussed system, which we have done below.

Recommendations for outcomes-focussed planning systems

Recommendation 1: 'Desired future planning outcomes' and 'good planning outcomes' should be clearly defined in the Bill.

The Bill refers to 'desired future planning outcomes', 'desired planning outcomes', 'desired outcomes' and 'good planning outcomes' throughout. We understand that the ACT Government considers good outcomes to be development that performs well and integrates effectively into its site context, and that a good outcome considers built form, public spaces, interactions with surrounding blocks and more. It considers community needs now and into the future. The ACT Government has also stated that in the ACT's reformed system, the Authority will be more descriptive of what good planning outcomes are and what the desired outcomes are for an area.[28]

However, these terms are not defined in the Bill. We consider that introducing an outcomes-focussed system that does not clearly state or define the desired outcomes creates a risk that the ACT will face similar issues to those faced in Queensland, described above.

It appears that desired planning outcomes are to be included in the Planning Strategy,[29] district strategies,[30] and the Territory Plan,[31] which are not currently publicly available.

Given the importance of desired planning outcomes in the ACT's reformed planning system, we do not consider that it is appropriate for such outcomes to be specified in the Planning Strategy or district strategies. Non-legislative policy documents should be used to provide further guidance on, or expand upon, the meaning of desired planning outcomes, but not define the outcomes.

We submit that desired outcomes ought to be defined and specified in the Bill. At the very least, outcomes ought to be specified in the Territory Plan, and not in the Planning Strategy or district strategies. It is also critical that desired outcomes, wherever they are stated, are clearly defined and are not ambiguous.

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[28] ACT Government, 'ACT Planning System Review and Reform Project, *YourSay Conversations* <https://yoursayconversations.act.gov.au/act-planning-system-review-and-reform> (website as at June 2022).
[29] Bill, ss 6(2)(a) and 34(1)(c).
[30] Bill, ss 6(2)(b) and 37(2)(a).
[31] Bill, ss 6(2)(c), 43 and 181(a).

Recommendation 2: Outcomes-focussed provisions should be appropriately balanced with mandatory provisions and technical specifications.

As noted above, we understand the approach taken by the ACT Government to date is to introduce some provisions that are written with an outcomes-focus, and other provisions that are mandatory and/or that contain technical specifications. Mandatory and technical provisions are critical to ensuring that there is also **certainty** and **transparency**, which are two other key principles for the ACT's reformed planning system.[32] We encourage the ACT Government to continue to apply this approach as it continues to implement the ACT Planning System Review and Reform Project.

Recommendation 3: The Bill must include strong compliance monitoring, reporting requirements and evaluation to ensure desired outcomes are being met.

In an outcomes-focussed system, it is critical that the ACT Government undertakes regular monitoring and evaluation of development across the ACT to ensure that desired outcomes are being met, and that the new system is working as intended. It is also critical that proponents are required to report to the ACT Government, to allow the ACT Government to gather sufficient information to be able to monitor or evaluate outcomes and take compliance action if required. This is particularly the case for the Bill, which allows third parties to seek merits review of decisions in very limited circumstances, meaning there will be little independent oversight of development by the ACT Civil and Administrative Tribunal (**ACAT**) (which we address later in these submissions in **Part E**, section 3). We submit that the Bill should include strong compliance monitoring, reporting requirements and evaluation to ensure desired outcomes are being met.

(2) Objects of the Bill

The objects of the Bill are set out in s 7(1). Subsection (2) sets out some additional matters that the planning system is 'intended' to achieve. Subsection (3) sets out matters that are 'important in achieving the object of the [Bill]'.

EDO supports the primary object of the Bill in s 7(1), which is *'to support and enhance the Territory's liveability and prosperity, and promote the well-being of residents by creating an effective, efficient, accessible and enabling planning system'*. We also support the inclusion of ESD (which we discuss later in **Part B**, section 4 of these submissions) and community participation in the objects of the Bill.[33]

EDO considers that the objects of the Bill are a good starting point. However, the objects are not as strong as they ought to be and ought to be reconsidered. We make the following recommendations to improve the objects of the Bill.

Recommendations for the objects of the Bill

Recommendation 4: The objects of the Bill should be rewritten to provide that the overarching object of the Bill is the achievement of ecologically sustainable development, and should also include:

- **protection of the right to a clean, healthy and sustainable environment;**
- **reduction of greenhouse gas emissions;**

[32] ACT Government, *Planning Bill – Policy Overview* (March 2022) p 9.
[33] Bill, s 7(1)(b) and (c).

- **protection of the environment;**
- **protection of natural, built and cultural heritage, including Aboriginal heritage; and**
- **promotion of knowledge, traditions and customs of traditional custodians.**

We submit that the overarching object of the Bill in s 7(1) should be to create a planning system that achieves ESD. As currently stated, the object of the Bill is to create a planning system that 'promotes and facilitates' ESD. This could be strengthened. We have further addressed ESD later in these submissions (**Part B**, section 4).

As noted in **Part A** of these submissions, we consider that international best practice requires the ACT Government to recognise the right of people in the ACT to a clean, healthy and sustainable environment. For this reason, we submit that the object of the Bill in s 7(1) should extend to creating a planning system that promotes a clean, healthy and sustainable environment.

In relation to climate change, s 7(3) of the Bill provides that a '*sustainable and resilient environment that is planned, designed and developed for a net-zero greenhouse gas future using integrated mitigation and adaptation best practices'* is a matter that is *'important to achieving the object'* of the Bill.[34] However, the use of this language in subsection (3), which describes these matters as important to achieving the object of the Bill rather than objects themselves, is weak. At a minimum, ensuring a sustainable and resilient environment developed for a net-zero greenhouse gas (**GHG**) future in s 7(3) should itself be recognised as an object of the Bill in s 7(1).

However, this object could be stated more clearly. A preferable approach would be for the objects of the Bill to explicitly include reducing GHG emissions, consistent with objectives, targets and responsibilities set out in the *Climate Change and Greenhouse Gas Reduction Act 2010* (ACT) (**Climate Change Act**) and related ACT legislation and policies. We submit that the objects of the Bill should include reducing GHG emissions in accordance with the targets set in the Climate Change Act. We have further addressed climate change later in these submissions (**Part D**, section 1).

In relation to protection of the environment, we note that in NSW, the objects of the *Environmental Planning and Assessment Act 1979* (NSW) include to *'protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats'*.[35] We recommend including a similar provision in s 7(1) of the Bill, and submit that including this would ensure that protection of the environment is considered at each level of the ACT's reformed planning system, and strengthen protection of the environment in planning matters. We have further addressed biodiversity later in these submissions (**Part D**, section 2).

In relation to Aboriginal cultural heritage, s 7(3) of the Bill provides that *the knowledge, culture and tradition of the traditional custodians of the land, the Ngunnawal people'* and '*the integration of natural, built, cultural and heritage elements'* are matters that are important to achieving the objects of the Bill.[36] As submitted in relation to climate change, the use of language in subsection (3) is weak. Protecting heritage, including Aboriginal heritage, and promoting and facilitating the knowledge, culture and tradition of traditional custodians in s 7(3) should itself be recognised as an object of the Bill in s 7(1). We have further addressed Aboriginal cultural heritage further later in these submissions (**Part D**, section 3).

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[34] Bill, s 7(3)(e).
[35] *Environmental Planning and Assessment Act 1979* (NSW) s 1.3(e).
[36] Bill, s 7(3)(e).

We further submit that the reference to creating a planning system that is 'outcomes-focussed' and 'provides a scheme for community participation' in the current objects of the Bill appear to us as being better suited as processes and procedures intended to help achieve the objects of the Bill, which are set out in s 7(2). However, we consider that the objects should include creating a planning system that protects the rights of the community to participate in decision-making.

If the ACT Government agrees with our view that some of the 'important matters' we have identified in s 7(3) should be recognised as objects of the Bill, s 7(3) will need to be amended to remove references to these matters.

We have set out below our suggested objects clause for the ACT Government's consideration.

> ***7 Object of Act***
>
> *(1) The primary object of this Act is to support and enhance the Territory's liveability and prosperity, and promote the well-being of residents by establishing an effective, efficient, accessible and enabling planning system that achieves ecologically sustainable development and that:*
>
> *(a) respects, protects and promotes the right of residents to a clean, healthy and sustainable environment;*
> *(b) reduces greenhouse gas emissions consistent with targets in the Climate Change and Greenhouse Gas Reduction Act 2010 (ACT);*
> *(c) protects the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats;*
> *(d) protects natural, built and cultural heritage, including Aboriginal cultural heritage;*
> *(e) promotes and facilitates the knowledge, culture and tradition of the Territory's traditional custodians; and*
> *(f) promotes the rights of the community to participate in decision-making.*
>
> *(2) As part of achieving the object mentioned in subsection (1), the planning system is intended to—*
>
> *(a) be outcomes focussed;*
> *(b)* [list remaining matters set out in s 7(2)].

Recommendation 5: People and bodies involved in the administration of the Bill should be required to exercise powers and functions, and make decisions, consistently with the objects of the Bill.

Decision-makers are required to have regard to the object of the Bill in some,[37] but not all, planning decisions. For example, there is no requirement to consider the objects when the Executive makes the new Territory Plan under section 49(2), when the Minister decides under s 72(2) whether or not to approve a major Territory Plan amendment, or when a decision-maker other than the Territory Planning Authority (**the Authority**) decides under s 180(1) whether to approve a development application.

Objects are written for the purpose of setting overarching goals for legislation. However, there is often a risk that objects will be passed over as aspirational statements unless further mechanisms are put in place to ensure the achievement of objects. In our view there ought to be a broad requirement for people involved in administration of the Bill to make decisions and act consistently with the objects of the Bill.

[37] For example, the Territory Planning Authority must exercise its functions in accordance with the object of the Bill: s 15(3)(a). See also ss 9(1), 34(1)(a), 87(2)(a) and 88(2)(b).

This could be achieved by including a provision that requires people and bodies involved in the administration of the Bill to act in accordance or consistently with the objects of the Bill.[38] We submit that including such a provision in the Bill would ensure that the objects of the Bill are considered at all stages of the ACT's reformed planning system.

(3) Objects of the Territory Plan

The object of the Territory Plan in s 42 is *'to ensure, in a manner not inconsistent with the national capital plan, that the planning and development of the ACT provides the people of the ACT with an attractive, safe and efficient environment in which to live, work and have their recreation'*.

While these objects are a good starting point, we submit that the object of the Territory Plan can be strengthened as follows.

Recommendations for the objects of the Territory Plan

Recommendation 6: The object of the Territory Plan should be consistent with the objects of the Bill.

Section 42 provides that the Territory Plan should be consistent with the provisions of the National Capital Plan. We submit that s 42 should be amended to also require the Territory Plan to be consistent with the objects of the Bill.

Recommendation 7: The object of the Territory Plan should be expanded to include a clean, healthy and sustainable environment.

As noted in **Part A** of these submissions, we consider that international best practice requires the ACT Government to recognise the right of people in the ACT to a clean, healthy and sustainable environment. For this reason, we submit that the object of the Territory Plan in s 42 should extend to providing the people of the ACT with a clean, healthy and sustainable environment.

(4) Ecologically sustainable development

The object of the Bill in s 7(1) is to create a planning system that, among other things, *'promotes and facilitates ecologically sustainable development that is consistent with planning strategies and policies'*.[39] ESD is defined in s 8(1) as development involving the effective integration of the following principles:

- the protection of ecological processes and natural systems at local, Territory and broader landscape levels;
- the achievement of economic development;
- the maintenance and enhancement of cultural, physical and social wellbeing of people and communities;
- the precautionary principle; and
- the inter-generational equity principle.

EDO is supportive of the inclusion of ESD in the overarching object of the Bill. However, we make the following recommendations, which we consider will ensure that the Bill effectively promotes

[38] *Planning, Development and Infrastructure Act 2016* (SA) s 13.
[39] Bill, s 7(1)(b).

and facilitates ESD. These recommendations are in addition to our recommendation that the overarching object of the Bill should be to achieve ESD (**Recommendation 4**).

Recommendations in relation to ESD

Recommendation 8: The definition of ecologically sustainable development should be updated to recognise that ecologically sustainable development requires the effective integration of environmental, economic, social and equitable considerations in decision-making processes, and that ecologically sustainable development can be achieved through the implementation of ESD principles.

The National Strategy for Ecologically Sustainable Development, endorsed by all Australian jurisdictions in 1992, defines the goal of ESD as development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends.[40]

ESD aims to provide for the needs of present generations without compromising the ability of future generations to meet their own needs. ESD seeks to integrate environmental, economic, social and equitable considerations in decision making. However, historically, an imbalance has led to environmental and social considerations being set aside for economic outcomes. Properly applied, ESD recognises that ecological integrity and environmental sustainability are fundamental to social and economic wellbeing, particularly when considering the needs of both present and future generations.

ESD should be achieved by the effective integration of short and long-term environmental, economic, social and equitable factors in decision-making. No one of these factors should be given priority. An effective ESD framework cannot be used simply as a 'balance' or 'trade off' exercise. Rather it recognises that long-term environmental health and socio-economic outcomes are deeply interconnected.[41]

ESD also requires recognition of the following principles in public and private sector decision-making (**ESD principles**):[42]

- **Prevention of harm:** taking preventative actions against likely harm to the environment and human health;
- **Precautionary principle:** taking precautionary actions against harm that would be serious or irreversible, but where scientific uncertainty remains about that harm; and engaging transparently with the risks of potential alternatives;
- **Inter-generational equity:** the present generation have an obligation to ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations;

[40] See Department of Environment and Energy (Cth), *National Strategy for Ecologically Sustainable Development* <http://www.environment.gov.au/about-us/esd/publications/national-esd-strategy>.
[41] APEEL, *Blueprint for the Next Generation of Australian Environmental Law* (2017) available on EDO's website at https://www.edo.org.au/wp-content/uploads/2022/06/APEELBlueprintforenvironmentallaws-Final-Blueprint.pdf.
[42] Developed from APEEL, *The Foundations of Environmental Law: Goals, Objects, Principles and Norms* (Technical Paper 1, April 2017). See also APEEL, *Blueprint for the Next Generation of Australian Environmental Law* (2017).

- **Intra-generational equity:** the present generation have an obligation to ensure that environmental costs, benefits and outcomes are borne equitably across society;
- **Biodiversity principle:** ensuring that biodiversity and ecological integrity are a fundamental consideration in decision-making, including by preventing, avoiding and minimising actions that contribute to the risk of extinction;
- **Environmental values principle:** ensuring that the true value of environmental assets is accounted for in decision-making – including intrinsic values, cultural values and the value of present and future ecosystem services provided to humans by nature; and
- **Polluter pays principle:** that those responsible for generating waste or causing environmental degradation bear the costs of safely removing or disposing of that waste, or repairing that degradation.

In addition to these principles, we submit that new and additional ESD principles should also be considered and adopted:

- **Achieving high levels of environmental protection**, including by requiring the use of best available scientific and commercial information, continuous improvement of environmental standards, and the use of best available techniques for environmental management;
- **Non-regression principle:** non-regression in environmental goals, standards, laws, policies and protections; and
- **Resilience principle:** strengthening the resilience of biodiversity and natural systems to climate change and other human-induced pressures on the environment.

As currently drafted, the definition of ESD in s 8(1) means development involving integration of environmental, economic and social considerations, in addition to their integration with some, but not all, of the ESD principles listed above.

In our view, environmental, economic and social considerations are better viewed as factors in decision-making. These factors can be achieved through the implementation of ESD principles, which should be described in the Bill separately. Guidance can be taken from the definition of ESD in s 6(2) of the *Protection of the Environment Administration Act 1991* (NSW), although s 6(2) does not incorporate all of our recommended ESD principles (which we recommend below are incorporated into the Bill). In addition to environmental, economic and social factors, it is also important to recognise 'equitable' factors, consistent with ESD principles of inter-generational and intra-generational equity. Equity is about making sure decisions produce fair outcomes. Equitable considerations are important as they consider the distribution of benefits, costs and impacts within and between generations, that arise from decisions made. Finally, while s 8(1) of the Bill identifies the precautionary principle and the inter-generational equity principle, it does not recognise the remainder of the ESD principles that we have outlined above.

In light of the above, we suggest that the definition the definition of ESD in s 8(1) of the Bill should be updated as follows:

> in this Act:
>
> ***ecologically sustainable development*** means the effective integration of environmental, economic, social and equitable considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs:

(a) the prevention of harm principle;

(b) the precautionary principle;

(c) inter-generational equity principle;

(d) the intra-generational equity principle;

(e) the biodiversity principle;

(f) the environmental values principle;

(g) the polluter pays principle;

(h) the principle of achieving high levels of environmental protection;

(i) the non-regression principle; and

(j) the resilience principle.

We recommend that the definition of ESD principles included in s 8(2) are amended to include definitions of the additional principles listed above. We also recommend that the definition of the precautionary principle is updated to include a broader definition like that adopted in NSW.[43]

Recommendation 9: All decisions, powers and functions under the Bill should be exercised to achieve ESD.

As noted above, the object of the Bill is currently to promote and facilitate ESD. However, if ESD is to be realised, it should be the outcome that decision-makers strive to achieve. It is not enough for ESD to be part of a process that simply requires ESD to be considered on the way through to making a decision. Decision-makers should be instructed to do more than simply have regard to it.[44]

As the Bill is currently drafted, there are no provisions that require consideration of ESD when making decisions or exercising powers or functions under the Bill.

Although ESD is incorporated into the objects of the Bill, as noted earlier in these submissions, decision-makers are required to consider the objects in some,[45] but not all, planning decisions. In particular, there is no requirement to consider the objects for other important planning decisions including, for example, when the Executive makes the new Territory Plan under section 49(2), when the Minister decides under s 72(2) whether or not to approve a major Territory Plan amendment, or when a decision-maker other than the Authority decides under s 180(1) whether to approve a development application. This means that achieving ESD is not a relevant consideration in these decisions.

As currently drafted, the Bill does not provide the necessary framework that would afford proper application of ESD and the ESD principles. Simply making ESD the objective of the ACT's reformed planning system is not enough. To give practical effect to the object of the Bill, there should be explicit requirements in the Bill that decisions be made in accordance, or consistently, with ESD.

We submit that all decisions, powers and functions under the Bill need to be exercised to achieve ESD.

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[43] *Protection of the Environment Administration Act 1991* (NSW) s 6(2)(a).

[44] Gerry Bates, *Environmental Law in Australia* (10th ed, Lexis Nexis Butterworths, 2020) at [4.22], p 184.

[45] For example, the Territory Planning Authority must exercise its functions in accordance with the object of the Bill: s 15(3)(a). See also ss 9(1), 34(1)(a), 87(2)(a) and 88(2)(b).

(5) Role of planning strategies

The strategies created under the Bill include the Planning Strategy,[46] district strategies,[47] and the statement of planning priorities.[48] In these submissions, we refer to these three types of documents as the '**planning strategies**'.

Recommendations for planning strategies

Recommendation 10: The Bill should clearly state the hierarchy of planning strategies for each type of decision made under the Bill.

The objects of the Bill include that the ACT's reformed planning system is intended to provide a clearly defined hierarchy of planning strategies that inform the content of the Territory Plan.[49] The object of the Bill is also to create an accessible and enabling planning system.[50]

We assume that the reference to 'planning strategies' in the object of the Bill is a reference to the Planning Strategy, district strategies and the statement of planning priorities, although this is not abundantly clear. In addition, as currently drafted, the Bill does not clearly state the hierarchy of planning strategies for each type of planning decision under the Bill.

We submit that the Bill should be amended:

- to clarify the meaning of 'planning strategies' in the Bill, including in the object in s 7(1)(b);[51] and
- to make the hierarchy of planning strategies abundantly clear to the reader, including the hierarchy of planning strategies in relation to the Bill, the Territory Plan, and policies and guidelines made under the Bill, and their hierarchy in relation to each other.

We submit that amending the Bill this way will assist the ACT community to better understand the hierarchy of various documents in the ACT's reformed planning system, including in the event that there is inconsistency between two or more planning strategies, which will make the planning system more accessible and promote public participation.

Recommendation 11: The Bill should clearly identify when district strategies and the statement of planning priorities are relevant to each type of decision under the Bill.

Section 35 of the Bill clearly states matters where the Planning Strategy is a relevant consideration, however there is not an equivalent provision for district strategies or the statement of planning priorities. As the Bill is currently drafted, it will be difficult for an everyday user without a legal background to understand when district strategies and the statement of planning priorities are relevant.

We submit that the Bill should be amended to address the matters where the district strategies and statement of planning priorities are and are not relevant. We submit that amending the Bill this way will assist the ACT community better understand the extent to which each planning

[46] Bill, s 34.
[47] Bill, s 37.
[48] Bill, s 38.
[49] Bill, s 7(2)(b).
[50] Bill, s 7(1).
[51] Section 9(1) also uses the term 'planning strategies'.

strategy will be considered and applied in planning decisions, and the extent to which the public can expect to rely on matters set out in those strategies.

Recommendation 12: Following a decision to make the Planning Strategy and/or a district strategy, the Territory Plan should be reviewed for its consistency with the strategy.

The Planning Strategy and district strategies are made after the Executive has engaged in mandatory public consultation. After the Planning Strategy and district strategies are finalised and made public, the ACT community will expect the ACT Government to make decisions – for example, in relation to development applications – that are consistent with those strategies. The Territory Plan is required to give effect to the Planning Strategy and district strategies.[52] However, there are currently no provisions that ensure that the Territory Plan is reviewed after the Planning Strategy and district strategies are made. To the contrary, the Bill currently provides that an amendment to the Territory Plan cannot be invalidated merely because it is inconsistent with the Planning Strategy or district strategies.[53]

We submit that after a decision to make the Planning Strategy and/or a district strategy, the Territory Plan should be reviewed for its consistency with the Planning strategy. This will ensure that any outcomes in the strategies are reflected in the Territory Plan and will therefore be reflected in other decisions such as development approvals.

[52] Bill, s 43(b).
[53] Bill, s 80(2).

C Justice as Recognition

Justice as recognition is concerned with who is given respect, and who is and is not valued. Justice as recognition requires the recognition of different social groups and communities, and of the natural environment and components of it.[54]

In considering whether the Bill promotes justice as recognition, in this section we have considered the extent to which the Bill allows for the views of people and communities who are most at risk of environmental harm to be incorporated into planning issues in the ACT, whether the mechanisms allowing for this to take place are accessible, and whether the views of these people and communities are afforded sufficient weight in planning decisions.

As we outlined earlier in these submissions, there are a number of overburdened individuals and communities. However, for the purpose of these submissions we have focussed on

1. First Nations;
2. children and young people; and
3. people who are financially disadvantaged.

(1) First Nations

According to the 2016 Census, around 6,500 people, or 1.6% of the ACT population, identify as Aboriginal or Torres Strait Islander.[55]

The Special Rapporteur on Human Rights and the Environment (**Special Rapporteur**) identifies First Nations as people who are often at greater risk of environmental harm. In particular, First Nations rely on their country for their material and cultural existence, but face increasing pressure from government and businesses seeking to exploit their resources and are often marginalised from decision-making processes and their rights are often ignored or violated.[56]

We have addressed the particular obligations that the Australian and ACT Governments owe to First Nations under human rights law in **Part D**, section 3 of these submissions.

(2) Young people and children

The EDO considers children to be people who are 18 years old or younger, while young people are 24 years old or younger. A significant proportion of the ACT's population are young people and children, with the 2016 Census reporting that around 130,000 people, being over 30% of the ACT population, are 24 years old or younger.[57]

The Special Rapporteur identifies children as people who are at greater risk of environmental harm for a number of reasons, including that they are developing physically and are less resistant to many types of environmental harm.[58] In 2018, the Special Rapporteur released a special report

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[54] Justice Brian Preston SC, 'The effectiveness of the law in providing access to environmental justice: an introduction' (Speech, 11th IUCN Academy of Environmental Law Colloquium, 28 June 2013) 2.
[55] Australian Bureau of Statistics, *2016 Census: Australian Capital Territory* <https://www.abs.gov.au/census/find-census-data/quickstats/2016/8ACTE>.
[56] Special Rapporteur on Human Rights and the Environment, *Annex: Framework principles on human rights and the environment*, UN Doc A/HRC/37/59 (24 January 2018) at [41](d), p 17.
[57] Australian Bureau of Statistics, *2016 Census: Australian Capital Territory* <https://www.abs.gov.au/census/find-census-data/quickstats/2016/8ACTE>.
[58] Special Rapporteur on Human Rights and the Environment, *Annex: Framework principles on human rights and the environment*, UN Doc A/HRC/37/59 (24 January 2018) at [41](b), p 17.

focusing on the rights of children in relation to the environment.[59] This report identified that of the approximately 6 million deaths of children under the age of 5 in 2015, more than 1.5 million could have been prevented through the reduction of environmental risks.[60] Exposure to pollution and other environmental harms in childhood can have lifelong consequences, including by increasing the likelihood of cancer and other diseases.

In addition, children and young people are of a generation that will live to experience the effects of climate change. The UN Human Rights Council has also recognised that children are among the most at risk to the effects of climate change, which may have a serious impact on their human rights including the right to life, health, food, adequate housing, safe drinking water and sanitation.[61]

(3) People who are financially disadvantaged

According to data collected by the ACT Council of Social Services Inc (**ACTCOSS**), in 2020 the number of people in the ACT who are living in poverty increased to around 38,000 people.[62]

In relation to children, ACTCOSS identified that almost 8,000 (or 12%) of children live in low-income households in the ACT, that children are more likely to live in poverty (18%) when compared with the whole population (14%), and that the risk of poverty for children in sole parent families is much higher, at 44%.[63] ACTCOSS also identified that First Nations face an elevated risk of experiencing poverty and/or socioeconomic disadvantage in the ACT.[64]

The Special Rapporteur identifies people living in poverty as people who are particularly at risk of environmental harm. This is because they may lack adequate access to safe water and sanitation, and they are more likely to burn wood, coal and other solid fuels for heating and cooking, causing household air pollution.[65] We further note that people living in poverty may not have access to other fundamental services such as heating or cooling or access to public green space, and may not have guaranteed access to shelter, which means that they are more at risk to the effects of climate change including extreme temperatures and climate-related natural disasters. In addition, people experiencing poverty or socioeconomic disadvantage may be less likely to participate in decision-making if they do not have sufficient time and energy or the resources to do so.

People who are financially disadvantaged are therefore likely to experience serious impacts of environmental degradation on their substantive human rights, including the right to life, health, food, adequate housing, safe drinking water and sanitation, and on their procedural rights including the right to participate in decision-making.

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[59] John Knox, 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*, UN Doc A/HRC/37/58 (24 January 2018).
[60] Ibid, [15], p 5.
[61] UN Human Rights Council, *Resolution adopted by the Human Rights Council on 1 July 2016: Human rights and climate change*, UN Doc A/HRC/RES/32/33 (18 July 2016) p 2.
[62] ACTCOSS, *Poverty and Covid-19 in the ACT* (Factsheet, October 2020) p 1.
[63] Ibid, 1 and 5.
[64] Ibid, 1.
[65] Special Rapporteur on Human Rights and the Environment, *Annex: Framework principles on human rights and the environment*, UN Doc A/HRC/37/59 (24 January 2018) at [41](c), p 17.

Recommendation in relation to justice as recognition

Recommendation 13: The Bill should be designed to enable overburdened individuals and communities to enjoy access to environmental benefits and access to procedural rights, including the ability to participate in the planning system and to have their voices heard.

The Bill – and the ACT's planning system more generally – appears to be designed to be accessible by certain types of people in the ACT, to the exclusion of other overburdened people. In particular, our planning system appears to assume that people accessing the system are people who have the following characteristics, or are part of a community that has access to such characteristics:

- people who are native English speakers;
- people who have good literacy;
- people who have access to the internet;
- people who have sufficient time and resources to review and comment on long and sometimes technically complex documents;
- people who have knowledge and understanding of where and how to access planning information; and
- people who have knowledge and understanding of legal processes and/or where and how to access legal advice or assistance.

We consider that the ACT Government can do more to ensure that there are provisions in the Bill that protect the rights of people who do not meet the above criteria, who may include First Nations, children and young people, and people who are financially disadvantaged.

We submit that the Bill should be designed to enable overburdened individuals and communities to enjoy access to environmental benefits and access to procedural rights, including the ability to participate in the planning system and to have their voices heard.

In general, the Bill should include provisions that ensure that:

- public participation processes are designed to enable First Nations, children and young people, and people who are financially disadvantaged to participate;
- people and bodies that make decisions, or exercise powers and functions, under the Bill consider the rights and interests of First Nations, children and young people, and people who are financially disadvantaged, and consider the impact of key planning decisions on such people.

D Distributive Justice

Distributive justice is concerned with the distribution of environmental goods (or benefits) and environmental 'bads' (or burdens).[66] Environmental benefits can include access to clean air, water and land, green space and a healthful ecology. In contrast, environmental burdens can include air pollution and loss of green space, biological diversity or ecological integrity.

Distributive justice – and environmental justice more broadly – focuses largely on the benefits of the environment for people, rather than benefits for the environment's sake. However, distributive justice is promoted by giving substantive rights to members of the community to share in environmental benefits, and to prevent, mitigate and remediate environmental burdens.[67]

In this section of our submissions, we address the extent to which the Bill promotes distributive justice by giving substantive rights to the ACT community to share in environmental benefits. While there are a range of environmental issues that are relevant to planning matters, for the purpose of these submissions we have focussed on three key areas:

1. climate change and GHG emissions,
2. biodiversity; and
3. Aboriginal cultural heritage.

(1) Climate change and greenhouse gas emissions

In order to promote distributive justice, the Bill must promote the right of people in the ACT to a safe climate.

The Special Rapporteur has identified that access to a safe climate is one of the substantive elements of the right to a clean, healthy and sustainable environment.[68] States, including Australia, have obligations under international human rights law to protect human rights from environmental harm, and to fulfil their commitments under international human rights treaties.[69] Climate change imposes a number of foreseeable and potentially catastrophic adverse effects on the enjoyment of a wide range of human rights including the right to life and the right to culture, which are both protected in the Human Rights Act.[70] The threat of climate change gives rise to extensive State duties to take immediate actions to prevent those harms.[71]

These duties include substantive obligations: States must not violate the right to a safe climate through their own actions; must protect that right from being violated by third parties, especially

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[66] Justice Brian Preston, 'The effectiveness of the law in providing access to environmental justice: an introduction' (Speech, 11th IUCN Academy of Environmental Law Colloquium, 28 June 2013) 1.
[67] Justice Brian Preston, 'The adequacy of the law in satisfying society's expectations for major projects' (2015) 32 *Environmental and Planning Law Journal* 182 at 185.
[68] David Boyd, Special Rapporteur on Human Rights and the Environment, *Right to a Healthy Environment: good practices*, UN DOC A/HRC/43/53 (30 December 2019) pp 9-12; UN General Assembly, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* (Report of the Special Rapporteur on a safe climate), UN Doc A/74/161 (15 July 2019).
[69] John Knox, Independent Expert on Human Rights and the Environment, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox: Mapping report*, UN Doc A/HRC/25/53 (30 December 2013).
[70] *Human Rights Act 2004* (ACT), ss 9 and 27.
[71] David Boyd, Special Rapporteur on Human Rights and the Environment, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* (Report of the Special Rapporteur on a safe climate), UN Doc A/74/161 (15 July 2019) at [62].

businesses; and must establish, implement and enforce laws, policies and programmes to fulfil that right.[72] States must also avoid discrimination and retrogressive measures. These principles govern all climate actions, including obligations related to mitigation, adaptation, finance, and loss and damage.[73] Rights relating to the environment are derived from international human rights treaties, including the *International Covenant on Civil and Political Rights* (**ICCPR**) and *International Covenant on Economic and Social Rights* (**ICESCR**).[74] As many obligations under the ICCPR and some of the obligations under the ICESCR are incorporated into the Human Rights Act, obligations in relation to climate change extend to the ACT Government to the extent the provisions in the Human Rights Act reflect those in the ICCPR and ICESCR. These obligations otherwise reflect best practice.

The Bill provides that a *'sustainable and resilient environment that is planned, designed and developed for a net-zero greenhouse gas future using integrated mitigation and adaptation best practices'* is a matter that is *'important in achieving the object of the* [Bill]'.[75]

The principles of good planning include sustainability and resilience principles, which is defined to mean that:

- places should be planned, designed and developed to be sustainable and resilient;
- effort should be focussed on adapting to the effects of climate change, including through mitigating the effects of urban heat, managing water supplies and achieving energy efficient urban environments;
- policies and practices should promote the use, reuse and renewal of sustainable resources, and minimise use of resources.[76]

Under the Bill, development applications for development proposals that are expected to produce more than 250T of GHG emissions annually are required to be accompanied by an expected GHG statement.[77] In addition, such development proposals are required to be accompanied by an EIS,[78] and are considered 'significant development'.[79]

However, the ACT Government can do more to ensure the Bill is drafted to fulfil the ACT's obligations under human rights law to mitigate against climate change impacts from development. Our recommendations in relation to climate change are additional to our recommendation that the objects of the Bill should include reducing GHG emissions (**Recommendation 4**).

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[72] Committee on Economic, Social and Cultural Rights, *General comment No. 3 on the nature of States parties' obligations*, UN Doc E/1991/23 (14 December 1990)
[73] UN General Assembly, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* (Report of the Special Rapporteur on a safe climate), UN Doc A/74/161 (15 July 2019) at [65].
[74] See Special Rapporteur on Human Rights and the Environment, *Annex: Framework principles on human rights and the environment*, UN Doc A/HRC/37/59 (24 January 2018)
[75] Bill, s 7(3)(e).
[76] Bill, s 9(2).
[77] Bill, s 162(2)(d) and Schedule 2, Part 2.2, item 12; draft *Planning (General) Regulation 2022*, s 26. This trigger is also in the current legislation: *Planning and Development Act 2007* (ACT), s 139(2)(u); *Planning and Development Regulation 2008* (ACT), r 25AA.
[78] Bill, s 102(a); draft *Planning (General) Regulation 2022*, r 8 and Schedule 1, Part 1.2, item 24.
[79] Bill, s 91(c).

Recommendations in relation to climate change and greenhouse gas emissions

Recommendation 14: Climate change should be a mandatory consideration for all decisions made, and powers and functions exercised, under the Bill.

As noted above, climate change and GHG emissions are recognised as matters that are important to achieving the objects of the Bill and in the principles of good planning.[80]

As the Bill is currently drafted, climate change considerations will be taken into account by people and bodies for some,[81] but not all, planning decisions under the Bill. For example, climate change is not a relevant consideration when the Executive makes the new Territory Plan under section 49(2), when the Minister decides under s 72(2) whether or not to approve a major Territory Plan amendment, or when a decision-maker other than the Authority decides under s 180(1) whether to approve a development application.

However, simply recognising climate change and GHG emissions as matters that are important to achieving the object of the Bill is not enough. Climate change objects of the Bill should be clearly prioritised and operationalised in decision-making. Without this, the object of ensuring a sustainable and resilient environment developed for a net-zero GHG future has limited practical effect.

We submit that the Bill should include an overarching obligation for people and bodies who make decisions or exercise decision-makers exercising functions under the Bill to consider the negative impacts of climate change, including cumulative impacts. For example, the Victorian *Climate Change Act 2017* includes a duty for decision-makers to have regard to the potential impacts of climate change and the potential contribution to the state's GHG emissions relevant to the decision or action when exercising their functions under other environmental legislation.[82]

We further submit that climate change should be explicitly identified as a mandatory consideration for all decisions made, and powers and functions exercised, under the Bill.

Recommendation 15: The Bill should include strong compliance and enforcement mechanisms available for development proposals that are likely to contribute to climate change through greenhouse gas emissions.

We submit that the Bill should include strong compliance and enforcement mechanisms available for development proposals that are likely to contribute to climate change through GHG emissions, including by:

- introducing a duty on decision-makers to refuse development applications for development proposals that will have unacceptable climate risks; and
- introducing a clear power for decision-makers to set conditions in relation to climate change or GHG emissions, including adaptive conditions.

The Bill currently prevents decision-makers from approving development applications for development proposals that are inconsistent with the matters prescribed in s 184(1).[83] Section 184

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[80] Bill, ss 7(3)(e) and 9(1)

[81] For example, the Territory Planning Authority must exercise its functions in accordance with the object of the Bill and with the principles of good planning: s 15(3). See also ss 9(1), 34(1)(a), 15(3)(a), 87(2)(a) and 88(2)(b).

[82] *Climate Change Act 2017* (Vic), s 17 and Schedule 1.

[83] Although, s 184(1)(c) and (d) are subject to s 185: Bill, s 184(2).

does not currently restrict decision-makers from approving development applications for proposals that will have an unacceptable climate change impact.

We submit that the Bill should impose a duty on decision-makers to refuse development applications for development proposals that will have unacceptable climate risks. This could include where climate change poses a likely threat to the lives or safety of present or future residents, would impose prohibitive public costs by way of emergency management, infrastructure reparation or future adaptation costs and would increase threats to biodiversity. A precautionary approach should apply where there is a lack of full scientific certainty as to the scale or nature of the threat, so that the proponent must demonstrate to the decision maker that a serious or irreversible threat is negligible.

We further submit that the Bill should require decision-makers to assess and respond to climate change impacts during the lifecycle of the development, including by imposing conditions to ameliorate those impacts. Section 182 of the Bill sets out provisions in relation to condition-setting for development applications that are conditionally approved. We submit that s 182 should be amended to provide that decision-makers can set conditions in relation to climate change or GHG emissions, including adaptive conditions.

In practice, adaptive conditions might include, for example, that any conditions relating to GHG emissions are to be reviewed after a certain period of time to examine whether there have been any unexpected climate risks, whether the climate impacts of the development have exceeded the terms of its approval, or whether the development has exceeded its annual expected GHG emissions. If the conditions are no longer appropriate, they can be modified. Modification might be appropriate in other circumstances including, for example, if the ACT's GHG emissions targets change.

However, any offsetting conditions that relate to GHG emissions (for example, conditions to achieve 'carbon neutrality', where there are no net emissions from a project) must be strictly regulated via a robust science-based scheme, developed with advice from the ACT Climate Change Council and that meets best practice, and should be used sparingly.

It is particularly necessary for the Bill to include strong provisions for regulation of development proposals that contribute to climate change in circumstances where the *Environment Protection Act 1997* (ACT) (**EP Act**) does not include any provisions that regulate climate change or GHG emissions.

Recommendation 16: The Bill should include definitions for 'climate change', 'sustainable' and 'resilient'.

As currently drafted, the Bill refers to 'climate change' and a 'sustainable' and 'resilient' environment throughout. However, none of these important terms are defined in the Bill. We submit that the Bill should include a definition for these terms.

There is also currently no definition of these terms in the Climate Change Act or in similar legislation enacted in South Australia and Tasmania.[84] However, the Victorian *Climate Change Act 2017* includes a definition of climate change, which is taken from the United Nations Framework Convention on Climate Change and defined as *'a change of climate which is attributed directly or*

[84] *Climate Change and Greenhouse Emissions Reduction Act 2007* (SA); *Climate Change (State Action) Act 2008* (Tas).

indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods'.[85]

(2) Biodiversity

In order to promote distributive justice, the Bill must also promote the right of people in the ACT to healthy ecosystems and biodiversity.

The Special Rapporteur has identified that access to healthy ecosystems and biodiversity is one of the substantive elements of the right to a clean, healthy and sustainable environment.[86] The Special Rapporteur argues that, in order for people to have full enjoyment of their human rights, including the rights to life, health, food and water, depends on the services provided by ecosystems, which in turn depends on the health and sustainability of ecosystems, which depends on biodiversity. The full enjoyment of human rights thus depends on biodiversity, and the degradation and loss of biodiversity undermine the ability of human beings to enjoy their human rights.[87]

Human rights law does not require that ecosystems remain untouched. However, in order to support the continued enjoyment of human rights, development cannot overexploit natural ecosystems and destroy the services on which we depend. Development must be sustainable, and sustainable development requires healthy ecosystems.[88]

As the loss of ecosystem services and biodiversity threatens a broad spectrum of rights, States have a general obligation to safeguard biodiversity in order to protect those rights from infringement. That obligation includes a duty to protect against environmental harm from private actors.[89] Rights relating to the environment are derived from international human rights treaties, including the ICCPR and ICESCR.[90] As many obligations under the ICCPR and some of the obligations under the ICESCR are incorporated into the Human Rights Act, obligations in relation to biodiversity also extend to the ACT Government to the extent the provisions in the Human Rights Act reflect those in the ICCPR and ICESCR. These obligations otherwise reflect best practice.

The Bill provides that *'the ACT's biodiversity and landscape setting'* is a matter that is *'important in achieving the object of the* [Bill]'.[91]

In addition, the principles of good planning include natural environment conservation principles,[92] which is defined to mean that:

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[85] *Climate Change Act 2017* (Vic), s 3.
[86] David Boyd, Special Rapporteur on Human Rights and the Environment, *Right to a Healthy Environment: good practices*, UN DOC A/HRC/43/53 (30 December 2019) pp 17-18; John Knox, 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* (Report on Biodiversity), UN Doc. A/HRC/34/49 (19 January 2017).
[87] John Knox, 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* (Report on Biodiversity), UN Doc. A/HRC/34/49 (19 January 2017) at [5].
[88] Ibid, [8].
[89] Ibid, [33].
[90] See Special Rapporteur on Human Rights and the Environment, *Annex: Framework principles on human rights and the environment*, UN Doc A/HRC/37/59 (24 January 2018).
[91] Bill, s 7(3)(c).
[92] Bill, s 9(1)(h).

- planning and design should promote healthy and resilient ecosystems, by avoiding or minimising loss of habitat and other key threatening processes for biodiversity;
- policies, planning and design should integrate and promote nature-based solutions to climate change and water security, and the valuation and maintenance of the ecosystem services and amenity provided by a healthy natural environment;
- biodiversity connectivity and habitat values should be integrated across urban areas, including through appropriate planning for, and landscaping of, urban open space and travel corridors.[93]

The Bill also removes the contentious EIS exemption provisions that currently exist in the *Planning and Development Act 2007* (ACT) (**P&D Act**).[94] There are no longer provisions that allow a proponent to apply to be exempted from producing an EIS, however proponents may still rely on recent studies when addressing the matters in the scoping document in its draft EIS, whether or not the study relates to the particular development proposal.[95]

While EDO is generally supportive of these provisions, the ACT Government can do more to ensure the Bill is drafted to fulfil the ACT's obligations under human rights law to achieve sustainable development in the ACT. Our recommendations in relation to biodiversity are in addition to our recommendation that the objects of the Bill should be expanded to include protection of the environment (**Recommendation 4**).

Recommendations in relation to biodiversity

Recommendation 17: Offsetting principles should be enshrined in the Bill. The Bill should clearly state that offsetting should only be allowed in limited circumstances and in line with the best practice science-based principles.

Provisions on offsetting are set out in Chapter 9 of the Bill. The provisions are procedural rather than substantive. They include, for example, procedures detailing how the offset policy will be made,[96] how offset policy guidelines will be made,[97] the form of offsets and how the value of offsets are to be calculated,[98] and how offset management plans are created.[99]

Biodiversity offsetting is an attractive option for governments and policy makers seeking to ensure development can proceed despite environmental impacts. However, questions remain about the effectiveness of biodiversity offsetting and its ability to deliver the anticipated environmental outcomes. Critics of biodiversity offsetting point to difficulties in quantifying biodiversity values for market purposes, and in establishing offset markets (i.e. supply and demand requirements), challenges in re-creating nature, time lags in restoring areas, failure to account for declining base lines, failures to effectively manage offsets sites and protect offset sites in perpetuity, and perverse outcomes, as reasons to adopt the use of biodiversity offsets with caution.[100]

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[93] Bill, s 9(2).
[94] *Planning and Development Act 2007* (ACT), s 211H.
[95] Bill, s 110.
[96] Bill, ss 219, 223, 224 and 225.
[97] Bill, s 227.
[98] Bill, ss 233 and 234.
[99] Bill, s 241.
[100] See, for example: Bull, J.W. et al, 'Biodiversity offsets in theory and practice' (2013) 47(3) *Fauna and Flora International* 369-380; Curren, M. et al., 'Is there empirical support for biodiversity offset policy?' (2014) 24(4)

Given the significant challenges in achieving genuine biodiversity outcomes through offsetting, it should only be allowed in limited circumstances, in line with best practice science-based principles. There are a number of fundamental principles that must underpin any ecologically sound biodiversity offsetting scheme. The fundamental principles are as follows:

- **Biodiversity offsets must only be used as a last resort, after consideration of alternatives to avoid, minimise or mitigate impacts:** The mitigation hierarchy should be clearly set out in relevant planning legislation as a mandatory pre-condition before any offsetting option is considered. Appropriate guidance and emphasis should be provided to proponents on how they can demonstrate their endeavours to genuinely 'avoid' and 'mitigate' aspects of the proposed development.
- **Offsets must be based on the 'like for like' principle:** Any ecologically credible offset scheme must enshrine the requirement of 'like for like' offsets, to ensure that the environmental values of the site being used as an offset are equivalent to the environmental values impacted by the proposed action. Otherwise the resulting action is not an offset. A 'like for like' requirement is absolutely fundamental to the ecological integrity and credibility of any offset scheme. Any concerted policy action and long-term strategic planning to contextualise offsetting within a broader strategy of environmental conservation, must be based on sound landscape conservation principles, without eroding the like for like principle.
- **Legislation and policy should set clear limits on the use of offsets:** Offset schemes must have clear parameters. The use of 'red flag' or 'no go' areas is essential to make it clear that there are certain matters in relation to which offsetting cannot be an appropriate strategy. This is particularly relevant to critical habitat and threatened species or communities that cannot withstand further loss. (This principle must not be undermined by relaxing the 'like for like' rule).
- **Indirect offsets must be strictly limited:** There should be extremely minimal use of indirect offsets under any offset scheme, including, for example, payment of money in lieu of a direct offset. This is due to significant uncertainty of regarding any link between an indirect offset and relevant environmental outcomes, and higher risk that biodiversity outcomes may not be achieved at all. Expanded use of indirect offsets results in net loss of impacted biodiversity.
- **Offsetting must achieve benefits in perpetuity:** An offset area must be legally protected and managed in perpetuity, as the impact of the development is permanent. Offset areas should not be available to be offset again in the future.
- **Offsets must be designed to improve biodiversity outcomes:** Simply requiring 'no net loss' does not acknowledge current trajectories of biodiversity loss, and that positive action is required to halt and reverse this trend. Offset schemes should be designed to improve biodiversity values (e.g. 'no net less or better', 'net gain', 'maintain and improve').

Ecological Applications 617-632; Fallding, M, 'Biodiversity Offsets: Practice and Promise' (2014) 31 *Environmental Planning & Law Journal* 33; Gordon, A. et al, 'Perverse incentives risk undermining biodiversity offset policies' (2015) 52 *Journal of Applied Ecology* 532–537; Gibbons, P. et al, 'Outcomes from 10 years of biodiversity offsetting' (2018) 24(2) *Global Change Biology* 643-654; Pope, J. et al, 'When is an Offset Not an Offset? A Framework of Necessary Conditions for Biodiversity Offsets' (2021) 67 *Environmental Management* 424–435.

- **Offsets must be additional:** Any offset action must be additional to what is already required by law. The requirement of 'additionality' must be based on clear criteria to ensure that offsets are not approved unless they provide a conservation benefit additional to what would otherwise occur.
- **Offset arrangements must be legally enforceable:** Any offset scheme must be underpinned by strong enforcement and compliance mechanisms in legislation, with adequate resourcing, established from the outset.
- **Offset frameworks should build in mechanisms to respond to climate change and stochastic events:** Climate change and associated impacts (such as more frequent and intense weather events) have a significant impact on biodiversity. Any biodiversity offsets scheme must build in mechanisms for responding to climate change and stochastic events (for example, a mechanism to ensure credit charge estimates can be reviewed following significant events, such as bushfires).

In the ACT's current planning system, offsetting principles are set out in the *ACT Environmental Offsets Policy*, which is a non-legislative policy document. Similarly, under the Bill, we expect that offsetting principles will be included in the offsetting policy,[101] which is a notifiable instrument made by the Minister.[102]

We submit that the offsetting principles should be enshrined in the Bill, rather than in a policy document. In addition, the Bill should clearly state that offsetting should only be allowed in limited circumstances, in line with the best practice science-based principles that we have set out above.

In addition, in 2021, the Office of the Commissioner for Sustainability and the Environment (**OCSE**) published a report on environmental offsets in the ACT, which identified a number of opportunities for improving offsets in the ACT.[103] These are summarised in a submission from the Commissioner for Sustainability and the Environment, who has recommended that the draft Bill is revised to reflect and address the issues OCSE identified with the ACT's current offset policies and their implementation.[104] We endorse this recommendation.

Recommendation 18: The definition of 'protected matters' should include matters protected under the *Nature Conservation Act 2014* (ACT).

The Bill includes provisions in relation to protected matters. The Authority must refer a development application to the Conservator of Flora and Fauna (**Conservator**) if satisfied that a proposed development is likely to have a significant impact on a protected matter.[105] In addition, offsets are intended to address development that is likely to have a significant adverse environmental impact on a protected matter.[106]

'Protected matter' is defined in s 214 as a matter that is protected by the Commonwealth or is declared by the Minister to be a protected matter.[107] Matters protected by the Commonwealth

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[101] Bill, s 217.
[102] Bill, ss 219(2) and 224(2).
[103] Commissioner for Sustainability and the Environment, *Environmental offsets in the ACT* (2021) <https://envcomm.act.gov.au/latest-from-us/environmental-offsets-in-the-act/>.
[104] Dr Sophie Lewis, Commissioner for Sustainability and the Environment, *ACT Planning System Review and Reform Project,* Submission Number 3 (1 June 2022), recommendation 5.
[105] Bill, s 166(1)(c).
[106] Bill, ss 216 and 237(1).
[107] Bill, s 214(1).

means matters of national environmental significance that are protected by the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**),[108] which extends to matters such as world and national heritage properties, Ramsar wetlands, and nationally listed threatened species and ecological communities.

'Protected matter' does not include species or ecological communities that are protected under the *Nature Conservation Act 2014* (ACT) (**NC Act**). It would be open to the Minister to make a declaration under s 214(2) to include species and ecological communities listed under the NC Act as 'protected matters'. Under the P&D Act, the Minister has declared certain ACT-listed species as protected matters under s 111A of the P&D Act.[109] However, this declaration does not include all ACT-listed species and ecological communities as protected matters.

We submit that the definition of 'protected matters' in s 214 should extend to matters protected under the NC Act. This is preferable to relying on the Minister to exercise power under s 214(2) to include those matters because it ensures that that all matters protected under the NC Act will be automatically protected under the Bill, and it is also a more administratively efficient solution.

Recommendation 19: Decision-makers should be required to consider the cumulative impacts of a proposed development.

When deciding a development application under s 180(1), a decision-maker must consider the probable impact of the proposed development, including the nature, extent and significance of probable environmental impacts,[110] and the interaction of the proposed development with any adjoining or adjacent development proposals.[111]

However, it is unclear whether decision-makers are required to consider the cumulative impacts of the proposed development on the ACT more broadly. From our review of the Bill, it appears that a decision-maker will consider the cumulative impacts of a proposed development when considering whether an adverse environmental impact is significant and therefore that the development is a significant development.[112] It is also possible that the cumulative impacts of a proposed development could be considered by decision-makers if such impacts are addressed in an EIS prepared for the development application.[113] However, there is no requirement in the Bill for EISs to address cumulative impacts. In addition, although an EIS scoping document may require consideration of cumulative impacts, there is no requirement in the Bill or the Regulation for the contents of a scoping document to require this.[114] In the absence of a provision requiring decision-makers to consider the cumulative impacts of development, it is not clear that cumulative impacts will be considered.

We submit that decision-makers should be required to consider the cumulative impacts of a proposed development. This could be achieved by amending s 181(e) to specify that consideration of the probable impact of a proposed development includes consideration of cumulative impacts.

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[108] Bill, s 215.
[109] *Planning and Development (Protected Matters) Declaration 2015* (ACT).
[110] Bill, s 181(e).
[111] Bill, s 181(f).
[112] Bill, ss 91(c) and 102. Decision-makers are also required to consider the 'cumulative impact' of changes to a development application when deciding whether to re-notify an application that has changed: s 174(4)(b). However, this focuses on the cumulative impacts of one particular development, rather than the cumulative impacts of the development within the context of the ACT.
[113] Bill, s 181(l)
[114] See Bill s 107; draft *Planning (General) Regulation 2022*, r 13.

Recommendation 20: The Bill must set clear and appropriate limits on the Chief Planner's power to override the Conservator of Flora and Fauna's advice on development applications.

Under s 185 of the Bill, decision-makers have the power to approve a development application even if the approval is contrary to advice it has received from other entities. For applications for significant development that is likely to have a significant adverse environmental impact on a declared protected matter, and that are inconsistent with the advice of the Conservator received under s 168 in relation to the protected matter, the Chief Planner may approve the application if:

- the proposal is consistent with the offsets policy; and
- the proposal would provide a 'substantial public benefit'.[115]

It is not appropriate for the Chief Planner to have the power to approve a development that is likely to have a significant adverse environmental impact on a declared protected matter, even if it would provide a substantial public benefit. As explained later in these submissions, we recommend that the Bill imposes a duty on decision-makers not to approve development that has an unacceptable impact on the environment (**Recommendation 21**).

However, if the ACT Government does not agree with this submission, we are concerned that, without clear and appropriate limits on the Chief Planner's power, there is a significant risk that the Chief Planner will be empowered to approve most significant development proposals in the ACT even if they have an unacceptable impact on the environment. The Bill must therefore set clear and appropriate limits on the Chief Planner's power to override the Conservator's advice on development applications.

We are supportive of the word 'substantial' in the public benefit test, as this appears to set a high threshold for the exercise of the Chief Planner's power.

However, we submit that a public benefit test is not appropriate. We are concerned that, in practice, application of this test may be skewed towards favouring the economic benefits of a project, rather than a more even-handed consideration of whether the proposal promotes ESD. If there is to be any limit on the Chief Planner's power, a 'substantial public interest' test should be adopted. Guidance can be taken from NSW, which has adopted a public interest test,[116] although we submit that the ACT should retain the word 'substantial'.

If, despite our recommendation, the ACT Government maintains the 'substantial public benefit' test, we recommend that the Bill should include a definition for 'substantial public benefit' in s 185(2). This term is currently not defined in the Bill.

We understand from a public information session held by EPSDD on 4 May 2022 that this term can be interpreted using case law from other jurisdictions including from NSW.

As noted above, NSW adopts the term 'public interest',[117] rather than public benefit. We have identified two decisions from the NSW Land and Environment Court that include a cursory mention of the term 'public benefit'.[118] We note that in 2013, the NSW Government considered

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[115] Bill, s 185(2).
[116] *Environmental Planning and Assessment Act 1979* (NSW) s 4.15(1)(e).
[117] *Environmental Planning and Assessment Act 1979* (NSW) s 4.15(1)(e).
[118] See for example *Mecone Pty Ltd v Waverley Council* [2015] NSWLEC 1312; *Marchese & Partners Architects Pty Ltd v North Sydney Council* [2000].

including a 'public benefit' consideration within its public interest test.[119] However, this proposed amendment was ultimately not adopted. In Queensland, the *Planning Act 2016* (Qld) adopts the term 'public benefit'.[120] There is some case law from the Planning and Environment Court of Queensland in which the Court has considered whether a proposed development has a 'public benefit'.[121]

However, even if there is some case law that has considered the meaning of 'public benefit', it is not appropriate to assume that, in the absence of a definition in the Bill, the meaning of 'substantial public benefit' in the Bill can be interpreted by decision-makers, courts and tribunals by relying on jurisprudence from other jurisdictions in the context of completely different legislative schemes.

In addition, for everyday people in the ACT who do not have legal backgrounds, the absence of a definition in the Bill does not provide sufficient certainty for the threshold that will apply in decisions like these.

Recommendation 21: The Bill should include strong compliance and enforcement mechanisms available for development proposals that are likely to have a significant adverse environmental impact.

We submit that the Bill should include strong compliance and enforcement mechanisms for development proposals that are likely to have a significant adverse environmental impact, including by:

- introducing a duty on decision-makers to refuse development applications for development proposals that will have unacceptable impact on the environment; and
- introducing a clear power for decision-makers to set adaptive conditions, to ensure that conditions can be regularly reviewed and modified if appropriate.

The provisions of the Bill imply that a development application that has unacceptable environmental impacts will not be approved. For example, under s 184(1) a decision-maker may approve a development application only if it is consistent with advice from the Conservator. If the Conservator recommends that the application is not approved because of its impact on protected matters, then the decision-maker must refuse the application (unless the circumstances in s 185(2) apply, allowing a decision contrary to advice, which we oppose as recommended above in **Recommendation 20**).

However, this intention should be stated more clearly. We therefore submit that the Bill should impose a duty on decision-makers to refuse development applications for development proposals that will have an unacceptable impact on the environment.

We further submit that s 182 of the Bill, sets out provisions in relation to condition-setting for development applications that are conditionally approved, should be amended to provide that decision-makers can set adaptive conditions. Adaptive conditions may permit conditions that protect or mitigate against environmental impacts to be reviewed and modified if appropriate,

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[119] Proposed amendment to s 4.19(2)(d), discussed in NSW Government, *A New Planning System for NSW: White paper* (April 2013).
[120] *Planning Act 2016* (Qld), s 5(2)(i).
[121] See for example *Sandstrom v Sunshine Coast Regional Council* [2021] QPELR 1107; *Navara Back Right Wheel Pty Ltd v Logan City Council; Wilhelm v Logan City Council* [2020] QPELR 899; *K&K (GC) Pty Ltd v Gold Coast City Council* [2020] QPEC 040; *Beerwah Land Pty Ltd v Sunshine Coast Regional Council* [2018] QPEC 010.

including for example if the development has an unacceptable impact on the environment or a greater impact on the environment than was anticipated in the development approval.

(3) Aboriginal cultural heritage

Finally, in order to promote distributive justice, the Bill must promote the right of First Nations in the ACT to speak on behalf of their country and to protect culturally significant places and objects, both tangible and intangible, from the impacts of development.

The ACT Government owes particular obligations to First Nations under the Human Rights Act. Under s 40B of the Human Rights Act, public entities are required to act consistently with human rights and to give proper consideration to relevant human rights when making decisions.[122] Human rights that are protected in the ACT include the cultural and other rights of Aboriginal and Torres Strait Islander Peoples to:[123]

- enjoy their culture, to declare and practice their religion, and to use their language;
- maintain, control, protect and develop their cultural heritage and distinctive spiritual practices, observances, beliefs and teachings, languages and knowledge, and kinship ties; and
- have 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.

The primary source of the rights in s 27(2) of the Human Rights Act is the *United Nations Declaration of the Rights of Indigenous Peoples* (**UNDRIP**), art 25 and 31. UNDRIP was endorsed by Australia in 2009. Although it is non-binding, Australia has accepted it as a framework for better recognising and protecting the rights of First Nations in Australia. Section 27 of the Human Rights Act is also derived from art 27 of the ICCPR, which Australia has also ratified.[124]

Section 27 should also be read together with s 8 of the Human Rights Act, which recognises that everyone has the right to recognition as a person before the law and the right to enjoy their rights without distinction or discrimination, and that everyone is equal before the law and is entitled to equal protection of the law without discrimination. Section 8 is derived from art 2(1) of the ICCPR.[125]

As noted in **Part C** of these submissions (Justice as Recognition), the Special Rapporteur identifies First Nations as people who are often at greater risk of environmental harm. As a result, States owe particular obligations under international human rights law to protect First Nations' right to enjoy a healthy environment. These obligations are derived from a number of international human rights treaties including the ICCPR, and are as follows:

- to prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a healthy environment, which includes an obligation to protect against environmental harm that results from or contributes to

[122] *Human Rights Act 2004* (ACT), s 40B(1).
[123] *Human Rights Act 2004* (ACT), s 27.
[124] Article 27 provides that ethnic, religious or linguistic minorities should not be denied the right to enjoy their own culture, to profess and practice their own religion, or to use their own language.
[125] Article 2(1) provides that each State party must respect and ensure the rights of all individuals within its territory and subject to its jurisdiction, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

discrimination, to provide for equal access to environmental benefits and to ensure that their actions relating to the environment do not themselves discriminate;[126]

- to take additional measures to protect the rights of those who are most vulnerable to, or at a particular risk from, environmental harm, taking into account their needs, risks and capacities, which includes an obligation to ensure that laws and policies take into account the ways that some parts of the population are more susceptible to environmental harm, and the barriers some face to exercising their human rights related to the environment;[127]
- to ensure that they comply with their obligations to Indigenous Peoples and members of traditional communities, including by recognising and protecting their rights to the lands, territories and resources that they have traditionally owned, occupied or used, consulting with them and obtaining their free, prior and informed consent before relocating them or taking or approving any other measures that may affect their lands, territories or resources, respecting and protecting their traditional knowledge and practices in relation to the conservation and sustainable use of their lands, territories and resources, and ensuring that they fairly and equitably share the benefits from activities relating to their lands, territories or resources.[128]

As the Human Rights Act incorporates rights enshrined in the ICCPR, these obligations extend to the ACT Government.

The Bill protects Aboriginal cultural heritage to some extent during some, but not all, planning matters, which we address further below. We consider that the ACT Government can do more to ensure the Bill is drafted to fulfil the ACT's obligations under human rights law to First Nations in the ACT. Our recommendations in relation to Aboriginal cultural heritage are additional to our recommendation that the object of the Bill should include protection of heritage, including Aboriginal heritage, and promotion and facilitation of the knowledge, culture and tradition of the traditional custodians of the land (**Recommendation 4**).

Recommendations in relation to Aboriginal cultural heritage

Recommendation 22: The Bill should include provisions requiring decision-makers to consult with representative Aboriginal organisations for key planning decisions including development applications, and should incorporate the principle of free, prior and informed consent.

There are no provisions in the Bill that require consultation with First Nations at any stage of the reformed planning system. We acknowledge that First Nations will have an opportunity to participate in the public consultation period for various planning decisions. However, as noted above, the ACT Government has obligations to take additional measures to protect the rights of those who are most risk of environmental harm, and to consult with First Nations before approving measures that may affect their country. We submit that consultation with First Nations

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[126] Special Rapporteur on Human Rights and the Environment, *Annex: Framework principles on human rights and the environment*, UN Doc A/HRC/37/59 (24 January 2018) at [7], p 7 (Framework Principle 3). The sources for Principle 3 include ICCPR art 2(1) and 26, ICESCR art 2(2), and ICERD, art 2 and 5: UN Office of the High Commissioner for Human Rights, *Selected Sources for Framework Principles on Human Rights and the Environment* (February 2018) p 3.
[127] Ibid, [40]-[42], pp 16-18 (Framework Principle 14). The sources for Principle 14 include ICCPR art 27, ICESCR art 15, ICERD, and UNDRIP art 20(2) and 32(3).
[128] Ibid, p 18 (Framework Principle 15). The sources for Principle 15 include UNDRIP, ICCPR art 27, and ICESCR art 15.

through a public consultation period is the bare minimum and is not enough to discharge the ACT Government's obligations. A more proactive approach is required.

The Authority must consult with the ACT Heritage Council (**Heritage Council**) during some (but not all) key planning decisions under the Bill, including in relation to the new draft Territory Plan,[129] draft major amendments to the Territory Plan,[130] and development applications for proposals that require an EIS and are therefore significant development.[131]

The Authority is also required to consult with the Heritage Council in relation to development applications for proposals that are significant development, but only if it relates to a place that is registered or provisionally registered under the Heritage Act, or if the Authority is *'aware that the proposed development may impact an Aboriginal object or place'.*[132] In the absence of provisions requiring consultation with First Nations, it is not clear to us how the Authority could become aware that the proposed development may impact an Aboriginal object or place.

Under the ACT's current planning system, when the Heritage Council receives a development application that has been referred by the ACT Planning and Land Authority under s 148 of the P&D Act,[133] the Council is required to provide advice to the Authority about the effect of the development on the heritage significance of a registered place or object or a nominated place or object that is likely to have heritage significance.[134] There is no requirement for the Heritage Council to advise on the effect of the development on places or objects that are not registered or nominated to be registered. There is also no requirement in the Heritage Act for the Heritage Council to engage with representative Aboriginal organisations (**RAOs**) when providing this advice to the Authority.[135]

We understand that, in practice, proponents engage cultural heritage consultants in relation to their development proposal before submitting a development application, and that heritage consultants will engage with RAOs and provide a heritage survey to the proponent to accompany its development application. However, there are no provisions in the Bill that require development applications to be accompanied by a heritage survey.[136] Instead, any such consultation with RAOs will occur outside the planning system and therefore outside the oversight of the ACT Government.

In short, the Bill does not require the ACT Government to engage in effective consultation with First Nations before it makes decisions that may have an impact on their country.

We submit that the Bill should include provisions requiring ACT Government consultation with RAOs for key planning decisions including development applications.

In making this submission, we acknowledge that First Nations may experience consultation fatigue from being frequently consulted to provide input on a variety of government programs and

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[129] Bill, s 48(2)(b)(v).
[130] Bill, s 59(d) and 64(3)(b)(v).
[131] Bill, s 166(1)(a); draft *Planning (General) Regulation 2022*, r 28(1)(f).
[132] Bill, s 166(1)(a); draft *Planning (General) Regulation 2022*, r 27(d).
[133] *Planning and Development Act 2007* (ACT) s 148(1); *Planning and Development Regulation 2008* (ACT) r 26(1)(f) (for the impact track).
[134] *Planning and Development Act 2007* (ACT) s 149(2); *Heritage Act 2004* (ACT) s 60.
[135] *Heritage Act 2004* (ACT) ss 60 and 61.
[136] See Bill, s 162(2)(d); Schedule 2, Part 2.2.

policies.[137] Consultation takes up time and resources, which may already be limited, and is often done without financial incentive or support. However, in our view, the Bill should at least facilitate an option to consult with RAOs on key planning decisions.

In addition to the above, the ACT Government's obligation to consult with First Nations before taking or approving any measures that may affect their country includes an obligation to obtain their free, prior and informed consent.

Free, prior and informed consent has been recognised in UNDRIP, which provides that *'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent'* prior to *'adopting and implementing legislative or administrative measures that may affect them'* or approving *'any project affecting their lands or territories or other resources'*.[138]

The *Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent*, endorsed by the UN Permanent Forum on Indigenous Issues, made findings and recommendations on the defining qualities of free, prior and informed consent. These include:

- **Free:** decision-making should not be undermined by coercion, intimidation or manipulation;
- **Prior:** consent should be sought sufficiently in advance of any authorisation or commencement of activities and that respect is shown for time requirements of Indigenous consultation consensus processes;
- **Informed:** information should be provided, in a form that is accessible and understandable, regarding the nature, size, pace, reversibility and scope of the project; the reasons for or purpose of the project; the duration of the project; the locality affected; the preliminary assessment of the likely economic, social, cultural and environmental impacts, including potential risks and equitable benefit sharing in a context that respects the precautionary principle, the personnel likely to be involved in the execution of the project; and
- **Consent:** the consent process should involve consultation and participation. Indigenous Peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The process may include the option of withholding consent.[139]

The Bill does not implement the principle of free, prior and informed consent relating to First Nations. We submit that the ACT Government must obtain the free, prior and informed consent of traditional custodians prior to making decisions in relation to development.

Recommendation 23: The ACT Government should develop specific guidelines for consultation with First Nations, which should be culturally safe and developed through consultation with First Nations people and communities.

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[137] See, for example, Department of Agriculture Water and the Environment, *Northern Rivers Regional Biodiversity Management Plan*: *Appendix 7*, p 1.
[138] UNDRIP, art 19 and 32(2).
[139] Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, UN Doc E/C.19/2005/3 (17-19 January 2005, adopted 17 February 2005) pp 12-13, summarised in Justice Brian Preston, 'The adequacy of the law in satisfying society's expectations for major projects' (2015) 32 *Environment and Planning Law Journal* 182 at 190.

Consultation with First Nations should be culturally safe and should occur in accordance with consultation guidelines that are developed through consultation with First Nations people and communities to ensure that the guidelines conform with Cultural Protocols based on First Nations Lore, including the principle of free, prior and informed consent. Such guidelines could be prepared with consultation fatigue in mind if First Nations consultants consider it to be a relevant issue.

Recommendation 24: The Bill should introduce a duty on decision-makers to refuse development applications for proposals that will have a significant adverse impact on Aboriginal cultural heritage.

As with climate change and biodiversity, we submit that the Bill should introduce a duty on decision-makers to refuse development applications for development proposals that will have a significant adverse impact on Aboriginal cultural heritage.

The provisions of the Bill imply that a development application that has unacceptable impacts on Aboriginal cultural heritage not be approved. For example, under s 184(1) a decision-maker may approve a development application only if it is consistent with advice from the Heritage Council. If the Heritage Council recommends that the application is not approved because of its impact on a registered place or object or a nominated place or object that is likely to have heritage significance, then the decision-maker must refuse the application (unless the circumstances in s 185(1) apply, allowing a decision contrary to advice). However, this intention should be stated more clearly.

In addition, under the ACT's current planning system, the Heritage Council provides advice to the Authority about the effect of the development on the heritage significance of a registered place or object or a nominated place or object that is likely to have heritage significance,[140] but there is no requirement for the Heritage Council to advise on the effect of the development on places or objects that are not registered or nominated to be registered.

We therefore submit that the Bill should impose a duty on decision-makers to refuse development applications for development proposals that will have a significant adverse impact on Aboriginal cultural heritage, whether or not the place or object is protected under the Heritage Act.

We note that this submission is consistent with submissions from the Heritage Council, which has recommended that where the Heritage Council advises that a proposed development is likely to have a significant adverse heritage impact, the development must not be approved.[141]

[140] *Planning and Development Act 2007* (ACT) s 149(2); *Heritage Act 2004* (ACT) s 60.
[141] ACT Heritage Council, *Submission from the ACT Heritage Council,* Submission Number 70 (June 2022), pp 8-9.

E Procedural Justice

Procedural justice is concerned with the ways in which decisions, including decisions regarding distribution of environmental benefits and burdens, are made, and who is involved and who has influence in those decisions.[142] Broad, inclusive and democratic decision-making procedures are a precondition for distributive justice.[143]

In this section of our submissions, we address the following key elements of procedural justice:

1. access to environmental information;
2. entitlement to participate in decision-making; and
3. access to review procedures before a court or tribunal to challenge decision-making or impairment of substantive or procedural rights – or, more simply, access to justice.[144]

In addressing these elements, we have considered the provisions of the Bill against the requirements of the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (**Aarhus Convention**). Although Australia has not ratified the Aarhus Convention, we consider that the Convention represents best practice principles for promoting and protecting procedural rights and therefore the ACT Government should have regard to the Aarhus Convention when considering the Bill.

The Special Rapporteur identifies access to information, participation in decision-making and access to justice as procedural elements of the right to a healthy environment.[145] The Special Rapporteur has also identified that States have obligations under international human rights law to provide access to environmental information,[146] to provide for and facilitate public participation in decision-making related to the environment and take the views of the public into account in the decision-making process,[147] and to provide for access to effective remedies for violations of human rights and domestic laws relating to the environment.[148] These obligations are derived from a number of international human rights treaties, including the ICCPR. As the Human Rights Act incorporates rights enshrined in the ICCPR, these obligations also extend to the ACT Government.

(1) Access to information

Access to information is concerned with the right of people in the ACT to receive environmental information that is held by public authorities. The right to access information is derived from art

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[142] Justice Brian Preston SC, 'The effectiveness of the law in providing access to environmental justice: an introduction' (Speech, 11th IUCN Academy of Environmental Law Colloquium, 28 June 2013) 2.
[143] Ibid.
[144] Justice Brian Preston, 'The adequacy of the law in satisfying society's expectations for major projects' (2015) 32 *Environment and Planning Law Journal* 182 at 185.
[145] David Boyd, Special Rapporteur on Human Rights and the Environment, *Right to a healthy environment: good practices*, UN Doc A/HRC/43/53 (30 December 2019).
[146] Special Rapporteur on Human Rights and the Environment, *Annex: Framework principles on human rights and the environment*, UN Doc A/HRC/37/59 (24 January 2018) Framework principle 7, p 11. The sources for Principle 7 include the ICCPR, art 19: UN Office of the High Commissioner for Human Rights, *Selected Sources for Framework Principles on Human Rights and the Environment* (February 2018) p 12.
[147] Ibid, Framework principle 9, pp 12-13. The sources for Principle 9 include the ICCPR, art 25: UN Office of the High Commissioner for Human Rights, *Selected Sources for Framework Principles on Human Rights and the Environment* (February 2018) p 16.
[148] Ibid, Framework principle 10, p 13. The sources for Principle 10 include the ICCPR, art 2(3): UN Office of the High Commissioner for Human Rights, *Selected Sources for Framework Principles on Human Rights and the Environment* (February 2018) p 18.

19 of the ICCPR,[149] which is reflected in s 16 of the Human Rights Act. In order to ensure enjoyment of this right, the Aarhus Convention requires the following:[150]

- **Presumption in favour of access to information:** Any environmental information held by a public authority must be provided when requested by any member of the public, unless it can be shown to fall within a finite list of exempt categories. Public authorities may withhold information where disclosure would adversely affect various interests (e.g. national defence, public security, the course of justice, commercial confidentiality, intellectual property rights, personal privacy). To prevent abuse of the exemptions by over-secretive public authorities, any exemptions are to be interpreted in a restrictive way, and in all cases may only be applied when the public interest served by disclosure has been taken into account.
- **'Any person':** The right of access to information extends to any person, without them having to prove or state an interest or a reason for requesting the information.
- **Time limits:** The information (or decision to refuse access) must be provided as soon as possible, and at the latest within one month after submission of a request for information. This period may be extended by a further month where the volume and complexity of the information justifies this, however the requester must be notified of any such extension and the reasons for it.
- **Refusals:** Refusals, and the reasons for them, are to be issued in writing where requested.
- **Continuous disclosure of risks:** Authorities must publicly disclose relevant information regarding environmental risks arising from activities it is responsible for managing and approving. This includes provisions to require authorities to immediately provide the public with all information in their possession which could enable the public to take measures to prevent or mitigate harm arising from an imminent threat to human health or the environment.
- **Transparency:** There is a requirement for regular preparation, publication and dissemination of a report on the state of the environment, including information on the quality of the environment and information on pressures on the environment.

In general, we consider that the extent to which the Bill promotes access to information is an improvement from the P&D Act. However, we make the following recommendations to ensure that the Bill effectively promotes access to information.

Recommendations in relation to access to information

Recommendation 25: Ensure the Territory Planning Authority's website is accessible.

The Bill provides for the creation of a website for the Authority.[151] Several provisions throughout the Bill provide that certain information must be made available on the Authority's website,

[149] Article 19 protects the right of everyone to hold opinions without interference, and to freedom of expression including the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, whether orally, or in writing or in print, in the form of art, or through any other media.
[150] Aarhus Convention, art 4.
[151] Bill, s 511.

including the Planning Strategy,[152] district strategies,[153] the statement of planning priorities,[154] decisions to make and amend the new Territory Plan,[155] applications for EIS scoping documents,[156] draft and final EISs,[157] and decision notices for decisions on development applications.[158] These provisions mean that such information will be readily available to the majority of the public, which is a significant improvement to the P&D Act.

However, we submit that more can be done to ensure that information on the Authority's website is accessible. We recommend the following:

- include more information online about what the Authority is, its membership, the legislation and policies that govern its decisions, and its decision-making process;
- make information accessible to people who may have a limited understanding of the ACT's planning system, including children and young people;
- make information available in other languages than English, noting that at least 22% of households in the ACT speak a language other than English at home;[159]
- include a subscription service so that interested people can be notified of new applications or updates on existing applications, to avoid the need for people to constantly review the Authority's website for information. Although it is possible to subscribe to notifications using the DA Finder App, this application is only available on mobile phone and should be made available online using an internet browser.

Recommendation 26: Ensure information is available to people with no internet and at no additional cost.

The Bill also provides for the Authority to keep a public register in any form it considers appropriate, which must include certain information specified in s 500.[160] However, the public register must not contain certain information (associated documents) specified in s 503.[161] The Authority must publish certain documents included in the public register on its website.[162]

In the current planning system, the public register is available for inspection at the Access Canberra Environment, Planning, and Land Services Shopfront in Dickson ACT or by emailing EPSDD.[163] There is no charge for inspecting the register, although fees are payable for accessing copies of associated documents.

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[152] Bill, s 34(5).
[153] Bill, s 37(5).
[154] Bill, s 38(5).
[155] Bill, ss 49(4), 55(6), 72(6), s 83(5)
[156] Bill, s 106(2)(c).
[157] Bill, ss 111(c) and 127.
[158] Bill, s 191(5).
[159] Australian Bureau of Statistics, *2016 Census: Australian Capital Territory* <https://www.abs.gov.au/census/find-census-data/quickstats/2016/8ACTE>.
[160] Bill, s 499.
[161] Bill, s 500(3).
[162] Bill, s 502.
[163] EPSDD – Planning, *The public register – development applications, approvals and compliance orders* <https://www.planning.act.gov.au/talk-with-us/public-register>.

The 2016 Census identified that in the ACT, 14.1% of our population reported that they do not access the internet from their dwelling, and 10.1% of households reported that they did not have any access to the internet at all.[164]

We submit that the Authority should ensure that information in the ACT's reformed planning system continues to be made available to people without access to the internet, and at no additional cost. In particular, we recommend that:

- the Bill should include provisions ensuring that information included on the Authority's website is also available to be inspected in person; and
- there should be no fee for inspecting associated documents.

Recommendation 27: The Territory Planning Authority should be required to continuously disclose environmental risks of development to the public.

There are no provisions in the Bill that require the Authority or the Minister to disclose environmental risks associated with an approved development application to the public.

For significant development that requires an EIS, the public has the right to make representations on the draft EIS,[165] through which the public can become aware of environmental risks associated with the development proposal. There are also provisions that allow the Minister to conduct an inquiry about one or more aspects of an EIS,[166] including in relation to the effects on public health.[167] However, apart from the availability of inquiries into an EIS, there are no provisions under the Bill that require the Authority or the Minister to disclose environmental risks associated with an approved development if the environmental risks identified in an EIS eventuate. In addition, EISs are not required for all development applications.

We submit that the Bill should include provisions that require the Authority to continuously disclose to the public any environmental risks associated with an approved development.

(2) Participation in decision-making

Participation in decision-making is concerned with the right of people in the ACT to participate in environmental decision-making. The right to participate in decision-making derived from art 25 of the ICCPR,[168] which is reflected in s 17 of the Human Rights Act. In order to ensure enjoyment of this right, the Aarhus Convention requires the following:[169]

- **Prior information:** The community should be informed early in an environmental decision-making process, and in an adequate, timely and effective manner throughout that process. Authorities must publicly disclose all documents on which environmental decisions will be based, allowing sufficient exposure time for the public to prepare and participate effectively during environmental decision-making.

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[164] Australian Bureau of Statistics, *2016 Census: Australian Capital Territory* <https://www.abs.gov.au/census/find-census-data/quickstats/2016/8ACTE>.
[165] Bill, s 112(1).
[166] Bill, s 129.
[167] Bill, s 129(3); *Public Health Act 1997* (ACT), s 134.
[168] Article 25 protects the right of all citizens to have the opportunity to take part in the conduct of public affairs directly or through freely chosen representatives, to vote and to be elected at genuine periodic elections, and to have access on general terms of equality to public service.
[169] Aarhus Convention, art 5 to 8.

- **Timeframes for decision-making:** Public participation procedures should include reasonable timeframes to allow the public to access relevant information, prepare and participate effectively during environmental decision-making.
- **Open standing to participate:** Any person should have the right to participate in government decision-making, regardless of locality or organisational affiliation (or lack thereof).
- **How community views are taken into account:** The community's views should have meaningful weight in the decision-making process and the decision-making authority must demonstrate how community views have been considered and taken into account during that decision-making process, including via a publicly available statement of reasons. Statements of reasons for decisions should also be disclosed as a matter of course within no less than 30 days of a decision being taken.

The object of the Bill is to create a planning system that *'provides a scheme for community participation'.*[170] In addition, as part of achieving this object, the planning system is intended to *'provide for community participation in relation to the development of planning strategies and policies, and development assessment'.*[171]

The Bill provides for mandatory public consultation on a wide range of planning matters including in relation to the Planning Strategy,[172] district strategies,[173] draft major amendments to the Territory Plan,[174] draft EISs,[175] development applications,[176] and proposed declarations of Territory Priority Projects.[177] The Bill also provides for discretionary public consultation in other key decisions including in relation to a draft EIS scoping document,[178] a revised EIS if it is significantly different from the draft EIS,[179] an amended development application (if the application is changed, either following receipt of further information from the proponent or after amendment by the Authority, and if the adverse environmental impact of the development has increased),[180] and applications to amend development applications.[181] Anyone may participate in these public consultation processes.

We consider that these provisions are key strengths of the Bill. However, we make the following recommendations to ensure that the Bill effectively promotes effective participation in planning decisions in accordance with the object of the Bill.

Recommendations in relation to public participation

Recommendation 28: The Bill should require longer periods for public consultation on key planning decisions.

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[170] Bill, s 7(1)(c).
[171] Bill, s 7(2)(f).
[172] Bill, s 34(3).
[173] Bill, s 37(3).
[174] Bill, s 60(1)(c).
[175] Bill, s 112(1).
[176] Bill, ss 171 and 175(1).
[177] Bill, s 212(4).
[178] Bill, s 106(3); draft *Planning (General) Regulation 2022*, r 10(2).
[179] Bill, s 116.
[180] Bill, s 174.
[181] Bill, ss 201(1)(b) and 203.

The Office of Best Practice Regulation within the Commonwealth Department of Prime Minister and Cabinet recommends that, in general, and depending on the significance of the proposal, a public consultation period of between 30 to 60 calendar days is usually appropriate for effective consultation, and that 30 days is considered the minimum appropriate period.[182] 30 calendar dates equates to roughly 20 working days,[183] while 60 calendar days equates to roughly 40 working days.[184]

We submit that the public consultation period for key planning decisions should be extended as follows, consistent with the Office of Best Practice Regulation's recommendations:

- development applications should be extended from 15 working days[185] to **20 working days**;
- development applications for proposals that are significant development should be extended from 25 working days[186] to **40 working days**;
- draft EISs should be extended from 30 working days[187] to **40 working days**;
- draft major amendments to the Territory Plan should be extended from 30 working days[188] to **40 working days**.

In addition, the term 'working day' is not defined in the Bill. 'Working day' is defined in the *Legislation Act 2001*, which excludes weekends and public holidays in the ACT from being counted, but does not exclude the December to January summer period. Section 15 of the *Planning Legislation Amendment Act 2020* (ACT), which has not yet commenced, will amend the public notification period for development applications under s 157 of the P&D Act to exclude the period between 20 December and 10 January.

We submit that the Bill should include a definition of 'working day' that excludes the period between 20 December and 10 January from being counted. This definition should apply to all key planning decisions, not just development applications.

Recommendation 29: The principles of good consultation should be enshrined in the Bill.

The principles of good consultation are not included in the Bill. They are instead set in guidelines that may be made by the Minister under the Bill.[189] However, best practice for consultation in planning matters recommends legislating or creating legally enforceable policies that outline the standards and principles that are to be followed for consultation processes.[190]

Given the importance of the principles of good consultation in a wide range of key planning decisions under the Bill, and the need to provide certainty to the public on decision-making, we

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[182] Office of Best Practice Regulation, 'Best Practice Consultation' (Online, March 2020) <https://www.pmc.gov.au/sites/default/files/publications/best-practice-consultation_0.pdf> 5.
[183] From our calculations, 20 working days is 28 calendar days, although it would be more if there were public holidays included in that time period. This equates to roughly 30 calendar days.
[184] From our calculations, 40 working days is 56 calendar days, although it would be more if there were public holidays included in that time period. This equates to roughly 60 calendar days.
[185] Bill, s 171(2)(a); draft *Planning (General) Regulation 2022*, r 30(b).
[186] Bill, s 171(2)(a); draft *Planning (General) Regulation 2022*, r 30(a).
[187] Bill, s 111(a)(iii).
[188] Bill, s 52.
[189] Bill, s 10(1).
[190] See Leslie Stein, 'Community Participation: Best Practice' in *Comparative Urban Land Use Planning* (Sydney University Press, 2017).

submit that the principles of good consultation should be enshrined in the Bill. If the Minister then makes guidelines on good consultation, these guidelines could expand on the principles enshrined in the Bill.

Recommendation 30: The principles of good consultation should reflect best practice.

Good consultation means recognising that the right of the public to participate is not confined to the opportunity to be heard in respect of the content of a proposal. It also includes other critical factors such as the need for the community to understand the planning process and obtain access to the stream of relevant planning information and explanations.[191]

The International Association for Public Participation has developed core values for public participation for use in the development and implementation of public participation processes.[192] These are as follows:

- Public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process.
- Public participation includes the promise that the public's contribution will influence the decision.
- Public participation promotes sustainable decisions by recognising and communicating the needs and interests of all participants, including decision makers.
- Public participation seeks out and facilitates the involvement of those potentially affected by or interested in a decision.
- Public participation seeks input from participants in designing how they participate.
- Public participation provides participants with the information they need to participate in a meaningful way.
- Public participation communicates to participants how their input affected the decision.

Planning Aid England makes the following practical recommendations for good consultation:

- **In the pre-application stage:** Build relationships with community groups and individuals; communicate widely to raise awareness about the plan, what is fixed, and what is up for debate; engage early and set a clear timeline for consultation; and monitor involvement and direct resources to under-represented and marginalised communities.
- **In the submission and decision stage:** Be clear about timelines and how comments will be considered; communicate widely and explain why consultation is taking place; ensure consultation is conducted widely, aiming resources and communication to a variety of groups; and monitor involvement and inform communities of the decision that is made.
- **In the construction and operation stage:** Continue relationships with existing community groups; communicate widely and keep the community informed of when, where and what is happening for the development; and respond to comments and continue to engage with the community.[193]

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[191] Ibid.
[192] International Association for Public Participation, *IAP2 Core Values* <https://www.iap2.org/page/corevalues>.
[193] Planning Aid England, *Good Practice Guide to Public Engagement in Development Schemes* (2010).

Chief Justice Preston further recommends that proper consultation should:[194]

- be undertaken at a time when proposals are at a formative stage, and at a stage when the public has the potential to influence the nature, extent and other features of the use of land and its resources;
- include sufficient information on a particular proposal to allow those consulted to give intelligent consideration and an intelligent response;
- give adequate time for this purpose; and
- conscientiously take the product of consultation into account when the ultimate decision is made.

We submit that the ACT Government should have regard to best practice, including the sources discussed above, when developing the principles of good consultation.

We further submit that the ACT Government should maintain mandatory public consultation in relation to pre-development applications, as is currently protected under the P&D Act. This would be consistent with best practice, which recommends consulting the public as early as possible at a stage when the public has the potential to influence the outcome of the decision.

(3) Access to justice

Access to justice is concerned with the right of people in the ACT to challenge or seek review of public decisions and ensure that breaches are enforced. The right to access to justice is derived from art 2(3) of the ICCPR.[195] In EDO's submission on the Inquiry into Petition 32-21 (No Rights Without Remedy), we have recommended that the Human Rights Act is amended to better protect the rights of people in the ACT to access justice.[196]

In order to ensure enjoyment of this right, the Aarhus Convention requires the following:[197]

- **Open standing:** There is open standing to seek a review of government decisions, or enforce a breach, or anticipated breach, of environment law through third party enforcement provisions.
- **Third-party enforcement rights:** Any person has access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which breach laws relating to the environment.
- **Access to information appeals:** A person whose request for information has not been dealt with to their satisfaction must be provided with access to a review procedure before a court of law or another independent and impartial body established by law (such as an

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[194] Justice Brian Preston, 'The adequacy of the law in satisfying society's expectations for major projects' (2015) 32 *Environment and Planning Law Journal* 182 at 187-188, citing *R v Brent London Borough Council; Ex parte Gunning* (1985) 84 LGR 168 at 189; *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213 at 258 [107].

[195] Article 2(3) of the ICCPR provides that State parties must ensure that any person whose rights or freedoms are violated shall have an affected remedy, to ensure that any person claiming a remedy shall have their rights determined by competent authorities and to develop the possibilities of judicial remedy, and to ensure that competent authorities will enforce such remedies when granted.

[196] EDO, *Submission to Inquiry into Petition 32-21 (No Rights Without Remedy)*, Submission Number 22 to the ACT Legislative Assembly Standing Committee on Justice and Community Safety (7 April 2022).

[197] Aarhus Convention, art 9.

Ombudsperson). These appeals should be free of charge or inexpensive in relation to the average wage in Australia.

- **Access to justice:** The procedures referred to above must be 'fair, equitable, timely and not prohibitively expensive', including limitations on upfront costs for community members exercising legal rights and the use of public interest cost orders in those cases.

Recommendations in relation to access to justice

Recommendation 31: The Bill should include open standing provisions allowing any person to seek review of government decisions.

Under the Bill, third parties can seek review in the ACAT of certain decisions on development applications (discussed below). However, they may only do so if:

- they made a representation during the public notification period about the application, or had a reasonable excuse for not making a representation; and
- the approval of the application may cause them to suffer material detriment, which means that the decision has, or is likely to have, an adverse impact on their use or enjoyment of land or, for organisations, the decision relates to a matter included in the organisation's objects or purposes.[198]

We consider that best practice, as reflected in the Aarhus Convention, is for governments to enshrine open standing provisions in legislation. We also consider that the material detriment test is prohibitive and is not easily understood by some members of the ACT community.

For these reasons, we submit that the test for third party standing should be amended to allow any person to seek review in the ACAT, whether or not the approval of the application may cause the entity to suffer material detriment.

However, if there is to be some limit on the entities who may seek review of a development application decision, the ACT Government should consider adopting a broader test for standing, for example an entity whose 'interests are affected by the decision'. This would be consistent with other environmental legislation in the ACT including, for example, the EP Act,[199] and would be interpreted consistently with the *ACT Civil and Administrative Tribunal Act 2008* (ACT) (**ACAT Act**).[200]

Recommendation 32: The Bill should enable third parties to seek review of all key planning decisions in the ACT Civil and Administrative Tribunal.

The Bill allows third parties to apply to the ACAT to seek review of only a limited number of decisions. These are:

- decisions to approve, with or without conditions, a development application that was publicly notified,[201] including decisions made on reconsideration under s 194;[202]
- decisions to amend, with or without conditions, a development application that was publicly notified.[203]

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[198] Bill, Schedule 6, Part 6.1, s 6.1.
[199] *Environment Protection Act 1997* (ACT) s 136D(b).
[200] ACT Civil and Administrative Tribunal Act 2008 (ACT) s 22Q.
[201] Bill, Schedule 6, Part 6.2, item 2.
[202] Bill, Schedule 6, Part 6.2, item 6.
[203] Bill, Schedule 6, Part 6.2, item 7.

However, the Bill also explicitly exempts a number of matters from third-party ACAT review, which are listed in Schedule 7 and include Territory Priority Projects.[204]

Where third-party merits review is not available, judicial review by the Supreme Court of the ACT may be available. However, judicial review is not a feasible option for many people in the ACT for the following reasons.

Proceedings before the Supreme Court are lengthy and complex. As a court, the Supreme Court is a formal venue with a large number of rules, practices and procedures that many people in the ACT – particularly those without legal training or experience – will not have an understanding of. In addition, judicial review proceedings are legally technical. It is nearly always necessary to have legal representation to be able to bring an action for judicial review in the Supreme Court.

This presents a barrier to justice due to the costs of obtaining legal representation, particularly for people who are not eligible for Legal Aid and are unable to find low cost or pro bono representation. It is also costly to commence and continue proceedings in the Supreme Court due to the fees that are payable unless waived by the Court. Applicants before the Supreme Court also bear a significant risk that the Court will grant a costs order if their application is unsuccessful. At the EDO, the risk of an adverse costs order is sometimes so significant for our clients that they are simply unable to proceed with litigation. In practice, relief through judicial review is available only to individuals or organisations with the financial means to afford legal representation and other costs of proceedings.

Although individuals without financial means may apply for Legal Aid or seek the assistance of a community legal centre, community legal centres in the ACT are already significantly overworked and under-resourced, and do not have the capacity to represent everyone who seeks their assistance. The ACT Government should not have to rely on community legal centres to meet the gap in access to justice that is created by the unavailability under the Bill of less formal and less costly avenues for relief.

Even successful applications for judicial review do not always achieve the desired outcome. In a successful application, the usual remedy is for the Court to set aside the challenged decision and order the decision-maker to remake the decision according to law. More often than not, the decision-maker will proceed to make the same substantive decision, as only errors in the decision-making process can be addressed.

In comparison to judicial review in the Supreme Court, it is not necessary to be legally represented in merits review proceedings in the ACAT, which is designed for people to represent themselves.[205] ACAT fees are not as prohibitive as they are in the Supreme Court,[206] and parties usually bear their own costs in ACAT proceedings[207] which removes the risk of an adverse costs order for applicants. The ACAT stands in the shoes of the decision-maker and has the power to remake the substantive decision itself. In the context of planning decisions, the remedies available in merits review before the ACAT are far more effective than judicial review proceedings before the Supreme Court.

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[204] Bill, Schedule 7, item 1.

[205] ACAT, 'Do I need to be represented at ACAT?' (Web page, 2022) <https://www.acat.act.gov.au/what-to-expect/representation-and-advice#Do-I-need-to-be-represented-at-ACAT->.

[206] For example, the current filing fee for a civil dispute for an individual in ACAT is $593.00. In comparison, the current filing fee for an individual to commence a proceeding in the Supreme Court is $1,845: *Court Procedures (Fees) Determination 2022* (ACT), Schedule, items 1000 and 1200.

[207] *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 48(1).

In addition to the above, most members of the community who do not have any legal training do not know about the existence or availability of judicial review. In our experience, when we advise members of the community that merits review in ACAT is not available, but that judicial review in the Supreme Court may be available, they are surprised to learn about the availability of this avenue of relief. Unless more can be done to educate the public about the availability of judicial review (for example, by including notes in the Bill that judicial review may be available), and to make judicial review more accessible, merits review will likely be the only avenue that most members of the community will pursue. When merits review is not available, the likely outcome – whether due to the significant barriers in commencing judicial review proceedings, or lack of knowledge of the availability of such relief – is that the community merely will not participate.

Furthermore, in circumstances where the ACT Government is intending to introduce an outcomes-focussed system, which may increase the ease at which developers can obtain development approval by removing prescriptive mandatory requirements, but potentially decrease the ability of the community to challenge approval decisions and development conditions, it is critical that the Bill provides sufficient protection of third party review rights.

For the above reasons, we submit that the Bill should enable third parties to seek review of all key planning decisions in the ACAT. At a minimum, the decisions that are currently capable of third party merits review should be expanded to include development applications for Territory priority projects and decisions to amend the Territory Plan.

Recommendation 33: The Bill should not prohibit third parties from seeking an extension of time for making an application to the ACT Civil and Administrative Tribunal for review.

Subsection 509(4) prohibits third parties from obtaining an extension of time for making an application for review to the ACAT. This provision is identical to s 409(3) of the P&D Act.

This provision, which is extremely prohibitive, should be removed. In our view, an applicant who wishes to seek review by ACAT of a decision made under the Bill should be able to request an extension of time if they have a legitimate reason to do so, just as most applicants in the ACAT are entitled to do. There may be a number of legitimate reasons for requesting an extension of time, including for example if the applicant was not aware of the development due to an error in the public notification process.

We submit that the Bill should not prohibit third parties from seeking an extension of time for making an application to ACAT for review. It should be possible to request additional time to seek review in the ACAT of a reviewable decision made under the Bill if the decision is incorrect, provided there is a legitimate reason for requiring additional time and the request is made consistently with the *ACT Civil and Administrative Tribunal Procedures Rules 2020*.[208]

Recommendation 34: The Bill should enable any person to access administrative or judicial remedies to enforce a breach, or anticipated breach, of the Bill.

The Bill includes some citizen enforcement provisions. However, the actions that are available to citizens the ACT are limited to making a complaint and seeking an injunction. In particular, any person who believes that a person is carrying out, or has carried out, a controlled activity may

[208] *ACT Civil and Administrative Tribunal Procedures Rules 2020*, r 38. We note that r 38(5) provides it is subject to any express provision about the extension of time in any other law, such as s 409(3) of the P&D Act. We similarly disagree with the prohibition under s 409(3) and are therefore suggesting this rule be read without reference to that provision. If our recommendation is accepted by the ACT Government, r 38 would need to be amended to remove this restriction.

submit a complaint to the Authority,[209] which then decides whether to investigate the complaint. In addition, if a person has engaged, is engaging, or proposes to engage in conduct contravening a controlled activity order or prohibition notice, any person may apply to the Supreme Court for an injunction to restrain that contravention.[210] In addition, the actions that are available to citizens are only available in relation to controlled activities. Controlled activities are listed in Schedule 5 and include matters such as undertaking a development for which development approval is required without obtaining that approval or other than in accordance with the development approval,[211] or failing to take steps to implement an offset management plan as required under s 243.[212] However, the list of controlled activities is not that extensive.

In comparison, in NSW, citizen enforcement provisions are broader. Section 9.45 of the *Environmental Planning and Assessment Act 1979* (NSW) provides that any person may bring proceedings in the Land and Environment Court of NSW for an order to remedy or restrain a breach of the Act, *'whether or not any right of that person has been or may be infringed by or as a consequence of that breach'.*

We submit that the Bill should enable any person to access administrative or judicial remedies to enforce a breach, or anticipated breach, of the Bill. This could be done by including a provision like s 9.45 of the *Environmental Planning and Assessment Act 1979* (NSW) in the Bill.

Recommendation 35: There should be no limits on the matters upon which a planning decision can be challenged.

One of the strengths of the Bill compared to the current P&D Act is that the Bill removes the restrictions that are currently imposed under s 121(2) in merits review of decisions to approve development proposals in the merit track. We strongly support the ACT Government's decision to remove this provision, which was confusing to all users of the planning system and also presented a significant barrier to access to justice for such decisions.

However, as noted earlier, one of the issues that has been identified with outcomes-focussed planning systems is that it can be easier for applicants to successfully challenge planning decisions and obtain development approval or removal of conditions. This is clearly not a desirable outcome for environmental justice in the ACT.

In addition, the Bill currently purports to restrict the availability of challenges to the Territory Plan on certain grounds. Subsection 80(2) provides that the validity of a provision of the Territory Plan must not be questioned in any legal proceeding only on the basis that the major plan amendment that inserted or amended the provision was inconsistent with the Planning Strategy or a district strategy.

In our view, there should not be any limits to the matters that can be challenged in relation to the Territory Plan. It is not appropriate to prevent a legitimate challenge to a provision of the Territory Plan if the sole reason for the challenge is that the provision is inconsistent with the Planning Strategy or a district strategy. Under the Bill, the Territory Plan is required to give effect to the Planning Strategy and district strategies.[213] It is also likely that the ACT community will consider the Planning Strategy and district strategies to have equal importance in planning decisions as the Bill and the Territory Plan. If the Planning Strategy or a district strategy has been made by the

[209] Bill, s 413(1).
[210] Bill, s 457(2).
[211] Bill, Schedule 5, item 3.
[212] Bill, Schedule 5, item 5.
[213] Bill, s 43.

Executive, and legislation is later developed that is inconsistent with that strategy, a member of the ACT community who is affected by the inconsistency should have every right to raise their concerns in legal proceedings.

We submit that there should be no limits on the matters upon which a planning decision can be challenged, whether through merits review or otherwise.

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