



# Environmental Defenders Office

## **EDO submission to the Special Rapporteur on human rights and the environment: Procedural elements of the human right to a clean, healthy and sustainable environment**

### **Question 1:**

As a party to international human rights treaties – including the ICCPR, ICESCR and UNDRIP – Australia is bound under international law to respect, protect and fulfill its human rights obligations.<sup>1</sup> Australia has not ratified the Aarhus Convention or the Escazú Agreement.

#### State obligations under human rights law

A major barrier is that Australia does not have a national Act or Charter of human rights and freedoms. The Parliament of Australia is actively considering whether Australia ought to have a national Act or Charter of human rights and is conducting an inquiry into Australia's human rights framework.<sup>2</sup> At present, however, as Australia's human rights obligations have not been incorporated into domestic law, its obligations are not legally binding. EDO's [submission to the Inquiry \(Inquiry submission\)](#) advocates for Australia to enact such legislation, to ratify the Aarhus Convention and to enshrine the rights protected under it in legislation.<sup>3</sup>

Another barrier is that Australia remains among the minority 20% of UN Member States that do not expressly recognise the right to a clean, healthy and sustainable environment in their laws, despite voting in favour of recognising the right before the United Nations General Assembly (**UNGA**). EDO's 2022 report [A Healthy Environment is a Human Right \(right to a healthy environment report\)](#) provides further analysis of the status of the right to healthy environment in Australia.<sup>4</sup> In this report and our [submission to the Inquiry](#), we advocate for the right to a healthy environment to be enshrined in Australian national and sub-national human rights legislation.<sup>5</sup>

A further barrier is that Australian legislation does not provide effective remedies for breaches of human rights. The Australian Human Rights Commission (**AHRC**), Australia's national human rights body, can receive and investigate complaints about acts or practices that are inconsistent or contrary to human rights.<sup>6</sup> However, the AHRC's recommendations are not legally binding. As a further example, the Human Rights Committee recently found that there were no effective domestic remedies available to Daniel Billy and other petitioners in the *Torres Strait Islanders Petition*, who were therefore not precluded from complaining directly to the Committee.<sup>7</sup> In EDO's [Inquiry submission](#), we submitted that national human rights legislation (when enacted) should impose a positive duty on public and private actors to act consistently with human rights and for decision-makers to consider human rights, and should provide access to effective remedies including an informal complaints mechanism, judicial remedies and adequate protections for individuals against adverse costs orders.<sup>8</sup>

#### State and territory human rights law

At the sub-national level, three (out of eight) Australian jurisdictions – the Australian Capital Territory (**ACT**), Queensland and Victoria – have enacted human rights legislation, which impose a duty on public authorities to act consistently with human rights, and to consider human rights

**T** +61 2 6230 6627      **W** [edo.org.au](http://edo.org.au)  
**E** [canberra@edo.org.au](mailto:canberra@edo.org.au)

PO Box 1616, Canberra ACT 2601  
ABN: 72002 880 864

when making decisions.<sup>9</sup> None of these laws currently enshrine the right to a healthy environment, although the ACT Government has committed to including the right in ACT human rights legislation.<sup>10</sup> In Victoria, a version of the right to a healthy environment – expressed as the ‘principle of equity’ – is included in environmental legislation as one of the principles of environmental protection, which must be considered by the Victorian Environment Protection Authority when exercising certain powers under this legislation.<sup>11</sup>

In the ACT, access to information and participation in decision-making are recognised as human rights to some extent.<sup>12</sup> However, access to justice is not included. We have not yet reviewed Queensland or Victoria legislation but can do so if that would assist the Special Rapporteur.

We discuss the extent to which legislation in the ACT, Victoria and Queensland provides remedies for breaches of human rights in our report on the right to a healthy environment.<sup>13</sup> We have also outlined our views on barriers to access to justice in the *Human Rights Act 2004* (ACT), and our recommendations to overcome these barriers, in a recent [submission to the ACT Legislative Assembly](#).<sup>14</sup>

### State obligations under environmental law

Environmental legislation in Australia – which exists at the national and sub-national level – imposes procedural obligations on governments, such as obligations to conduct public consultation. The requirements differ between jurisdictions. While this protects procedural rights to some extent, the protection is piecemeal and rights are not always available to third parties or members of the general public.<sup>15</sup> Further, as noted in our [right to a healthy environment report](#), Australia’s protection of procedural rights is declining.<sup>16</sup> In partnership with the Wilderness Society, EDO recently analysed environmental, planning and freedom of information laws, including the *Environment Protection and Biodiversity Act 1999* (Cth) (**EPBC Act**) (Australia’s primary national environmental legislation), to examine the extent to which those laws protect procedural rights. We found that procedural rights are not comprehensively or consistently enshrined in Australian laws, and that there is inadequate transparency and accountability in environmental decision-making in Australia.<sup>17</sup> EDO is also involved in ongoing advocacy for improvements to the EPBC Act, including improvements to procedural rights.<sup>18</sup> This work is available on our website.<sup>19</sup>

### Businesses’ responsibilities

Australia has supported the *United Nations Guiding Principles on Businesses and Human Rights* (**UNGP**) since its inception in 2011, and during the 2016 Universal Periodic Review, pledged to implement the UNGP.<sup>20</sup> Despite this, Australia’s regime for enforcing human rights obligations on businesses is very limited. Currently, the only mechanism that expressly addresses human rights violations by businesses in Australia is the mediation mechanism in the ‘National Contact Point’, established under the *OECD Guidelines for Multinational Enterprises*.<sup>21</sup> The mechanism’s record for providing relief to human rights violations has received significant criticism from Australia-based human rights organisations.<sup>22</sup> As noted above, EDO’s [Inquiry submission](#) advocates for national human rights legislation (when enacted) to impose a positive duty on private actors to act consistently with human rights and for access to effective remedies for breach of this duty.<sup>23</sup>

## Question 2:

As noted above, as Australia's obligations with respect to access to environmental education, freedom of expression and freedom of association have not been incorporated into national law, its obligations are not legally binding.

The High Court of Australia has held that an implied freedom of political communication exists as an indispensable part of the system of representative and responsible government created by the Constitution.<sup>24</sup> However, the scope of this protection is narrow; it operates as a freedom from government restraint, rather than a right conferred directly on individuals.

Australia has been witnessing increasing repression of climate protesters. Some Australian jurisdictions have passed legislation that directly targets climate protestors. For example, in New South Wales and South Australia, amendments that impose terms of imprisonment as a maximum penalty have been introduced.<sup>25</sup> Similar legislative amendments have also been introduced in Queensland and Tasmania.

EDO's 2021 [Global Warning Report \(Defenders report\)](#) maps the systemic repression faced by climate activists in Australia and examines the unregulated political influence of the fossil fuel industry driving that repression. Some of the key barriers identified include:

- access to courts, including limitation periods and lack of informal and independent complaints mechanisms;
- misunderstanding about application and scope of legislative schemes,<sup>26</sup> which leads to an incorrect perception that protest is 'unauthorised' or 'unlawful';
- proactive or over-policing of environmental defenders. Common examples include the use of bail conditions as a mechanism to restrict association and monitor the movement of people, and the use of coercive police powers (such as search warrants and data access orders) to obtain and access people's electronic devices;
- the media narrative of environmental defenders portrays them as extremists.

We address how these barriers may be overcome in our response to Question 3 below.

## Question 3:

Our [Defenders report](#) provides several recommendations for ensuring the safety of environmental human rights defenders. For example, we recommend that Australian states and territories build stronger defences for activism in the law, impose greater oversight for police practices including bail conditions, and provide education for police regarding protest rights.<sup>27</sup>

Safety of defenders could also be better ensured by adopting the recommendations in our [Inquiry submission](#), which advocates for national human rights legislation that (when enacted) imposes duties on both public and private actors, that includes rights to protect environmental human rights defenders, in particular the right to a safe and enabling environment so that they are able to act free from threat, restriction and insecurity, that gives access to effective remedies for breaches of human rights, and introduces a rapid response mechanism for human rights defenders.<sup>28</sup>

## Question 4:

EDO's [Inquiry submission](#) recommends including a participation duty in national human rights legislation, which would impose a duty on public authorities to ensure the effective participation

of all overburdened<sup>29</sup> people and communities who are most at risk of experiencing environmental harm.<sup>30</sup> All overburdened communities must be appropriately represented in the creation, application and delivery of decision-making processes that impact them. This allows for a deeper understanding of the nuanced needs of overburdened communities.

Public authorities should also be required to create culturally safe spaces to enable safer engagement for overburdened communities in decision-making processes that impact them. Members of overburdened communities should be adequately compensated for their time and effort in participating in decision-making processes to avoid creating additional financial burdens.

Finally, environmental law organisations – such as EDO – and First Nations justice organisations should be adequately funded and supported to service their communities.

#### First Nations peoples

EDO's [Inquiry submission](#) recommends that national human rights legislation should incorporate the cultural rights of First Nations peoples and enshrine all rights protected under UNDRIP.<sup>31</sup>

It is important to acknowledge that environmental education in Australia is currently understood from a Western science lens. It is critical that First Nations understandings of their Countries and waters are centred in the preparation of environmental education, allowing for better engagement with First Nations communities. First Nations knowledges and those who hold that knowledge must be respected, and Indigenous Cultural Intellectual Property rights, whether upheld by the Western legal system or founded in ethical workings, must be upheld in creating cross-cultural environmental education resources. Sharing of knowledge must also be adequately compensated. Environmental resources should also be published in multiple languages, including First Nations languages, and accessible outside of online sources.

#### **Question 5:**

As noted above, Australia has not signed or ratified the Aarhus Convention or the Escazú Agreement, so we cannot comment on their effectiveness in an Australian context. As noted in response to Question 2 above, Australia has seen a backsliding in protection of human rights for climate activists. We reiterate our recommendations in response to Questions 2 and 3 above.

#### **Question 6:**

EDO has been involved in recent litigation where the procedural rights of First Nations applicants and witnesses have been protected and enhanced.

In the *Tipakalippa* decision,<sup>32</sup> the Federal Court of Australia held that the National Offshore Petroleum Safety and Environmental Management Authority's approval of Santos Limited's plans to drill the Barossa gas fields in northern Australian waters was unlawful because the Authority had not satisfied its consultation obligations with respect to the applicant, Munupi Senior Lawman and Tiwi Traditional Owner Dennis Tipakalippa. The Court held that the regulations required the Authority to consult with the Munupi clan and other First Nations clans of the Tiwi Islands prior to approving Santos's plans. Importantly, the Court sat at Melville Island and accepted evidence from several witnesses in words, song and dance. Although Santos appealed this decision, the appeal was dismissed, with the Full Court upholding the requirement to consult with the applicant. The Court also held that such consultation must be adapted to the interests of the affected persons including providing sufficient information to allow communities to make an informed assessment of the possible consequences of the proposed activity on their interests.

The rights to public participation and access to justice were also upheld by the Queensland Land Court in *Waratah Coal (No 5)*,<sup>33</sup> where the Court found that to confine the evidence of First Nations witnesses to their written statements, rather than allow them to speak on Country, would unjustifiably limit their cultural rights under the *Human Rights Act 2019* (Qld).

---

<sup>1</sup> Australia is party to seven core international human rights treaties and also supports UNDRIP: see <https://humanrights.gov.au/our-work/education/human-rights-explained-fact-sheet-7australia-and-human-rights-treaties> for a further explanation.

<sup>2</sup> Inquiry into Australia's human rights framework:

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/HumanRightsFramework](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework).

<sup>3</sup> EDO, [Submission to the Australia Parliamentary Joint Committee's Inquiry into Australia's Human Rights Framework](#) (2023) recommendations #1, #2 and #5.

<sup>4</sup> EDO, [A Healthy Environment is a Human Right](#) (Report, 2022) 8.

<sup>5</sup> EDO, [A Healthy Environment is a Human Right](#) (Report, 2022) recommendations #2 and #3; EDO, [Submission to the Australia Parliamentary Joint Committee's Inquiry into Australia's Human Rights Framework](#) (2023) recommendation #3.

<sup>6</sup> [Australian Human Rights Commission Act 1986 \(Cth\)](#) Part II, Division 3.

<sup>7</sup> *Daniel Billy and others v Australia (Torres Strait Islanders Petition)* (CCPR/C/135/D/3624/2019).

<sup>8</sup> EDO, [Submission to the Australia Parliamentary Joint Committee's Inquiry into Australia's Human Rights Framework](#) (2023) recommendations #9, #10 and #12.

<sup>9</sup> *Human Rights Act 2004* (ACT), *Charter of Human Rights and Responsibilities Act 2006* (Vic), *Human Rights Act 2019* (Qld).

<sup>10</sup> ACT Government, 'Right to a Healthy Environment', online: <https://www.justice.act.gov.au/safer-communities/right-to-a-healthy-environment>.

<sup>11</sup> *Environment Protection Act 2007* (Vic) s 21.

<sup>12</sup> The right to access information is derived from art 19(2) of the ICCPR, which is reflected in s 16(2) of the *Human Rights Act 2004* (ACT). The right to participate in decision-making is derived from art 25(a) of the ICCPR, which is reflected in s 17(a).

<sup>13</sup> EDO, [A Healthy Environment is a Human Right](#) (Report, 2022) 17-18.

<sup>14</sup> EDO, [Submission to Inquiry into Petition 32-21 \(No Rights Without Remedy\)](#) (April 2022).

<sup>15</sup> Lee Godden, Jacqueline Peel and Jan McDonald, *Environmental Law* (Oxford University Press, 2nd ed, 2018) 70, 88, citing Australian Panel of Experts on Environmental Law, *Democracy and the Environment* (2017) Technical Paper 8; Guy Dwyer and Judith Preston, 'Striving for Best Practice in Environmental Governance and Justice: Reporting on the Inaugural Environmental Democracy Index for Australia' (2015) 32 *Environmental and Planning Law Journal* 202.

<sup>16</sup> EDO, [A Healthy Environment is a Human Right](#) (Report, 2022) p 23.

<sup>17</sup> The Wilderness Society, [Who holds the power? Community rights in environmental decision-making](#) (2022) p 5; EDO's [Background analysis](#). See also, [EDO submission on Tasmania Freedom of Information laws](#).

<sup>18</sup> See e.g. EDO, [Submission to the EPBC Act Review Discussion Paper](#) (2020).

<sup>19</sup> EDO, EPBC Hub: <https://www.edo.org.au/the-epbc-act-review-2020/>.

<sup>20</sup> Attorney-General's Department, 'Annex2: Australia's Voluntary Commitments-Second Cycle UPR 2015 – Status of Implementation', *National Report of Australia -Universal Periodic Review 2021* (2021) item 10.

<sup>21</sup> Organisation for Economic Co-operation & Development, 'OECD Guidelines for Multinational Enterprises National Contact Point Peer Reviews: Australia' (2022).

<sup>22</sup> Australian Human Rights Institute and Australian Human Rights Commission, *At the Crossroads: 10 years of Implementing the UN Guiding Principles on Business and Human Rights in Australia* (Full Report, 2021) 13.

<sup>23</sup> EDO, [Submission to the Australia Parliamentary Joint Committee's Inquiry into Australia's Human Rights Framework](#) (2023) recommendations #10 and #12.

<sup>24</sup> See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106.

<sup>25</sup> These amendments are to the *Roads Act 1993* and the *Crimes Act 1900* (in NSW), and amendments to the *Summary Offences Act 1953* (in South Australia).

---

<sup>26</sup> For example, Part 4 of *Summary Offences Act 1988* in NSW.

<sup>27</sup> EDO, *Global Warning Report* (2021), recommendations A and B.

<sup>28</sup> EDO, [Submission to the Australia Parliamentary Joint Committee's Inquiry into Australia's Human Rights Framework](#) (2023) recommendations #8, #9, #10, #12 and #13.

<sup>29</sup> EDO prefers the term 'overburdened communities' over 'vulnerable communities', as it recognises the immense strength within communities who are disproportionately and unjustly impacted by climate and environmental harms. This may include First Nations peoples, children, people with disability, women, people who are financially disadvantaged, older people, people from a racially or ethnically minority background, people displaced by natural disasters, culturally and racially marginalised communities and those from the LGBTIQ+ communities.

<sup>30</sup> EDO, [Submission to the Australia Parliamentary Joint Committee's Inquiry into Australia's Human Rights Framework](#) (2023) recommendation #11.

<sup>31</sup> *Ibid*, recommendation #7.

<sup>32</sup> *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority* (No 2) [2022] FCA 1121.

<sup>33</sup> *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* (No 5) [2022] QLC 4.