



Environmental
Defenders Office

**Submission to the Inquiry into the Potential for a Human Rights
Act for South Australia**

23 February 2024

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

Submitted to:

The Secretary

Social Development Committee

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Acknowledgement of Country

The EDO recognises and pays respect to the First Nations peoples of the lands, seas and rivers of Australia. We pay our respects to the First Nations Elders past, present and emerging, and aspire to learn from traditional knowledges and customs that exist from and within First Laws so that together, we can protect our environment and First Nations cultural heritage through both First and Western laws. We recognise that First Nations Countries were never ceded and express our remorse for the injustices and inequities that have been and continue to be endured by the First Nations of Australia and the Torres Strait Islands since the beginning of colonisation.

EDO recognises self-determination as a person's right to freely determine their own political status and freely pursue their economic, social and cultural development. EDO respects all First Nations' right to be self-determined, which extends to recognising the many different First Nations within Australia and the Torres Strait Islands, as well as the multitude of languages, cultures, protocols and First Laws.

First Laws are the laws that existed prior to colonisation and continue to exist today within all First Nations. It refers to the learning and transmission of customs, traditions, kinship and heritage. First Laws are a way of living and interacting with Country that balances human needs and environmental needs to ensure the environment and ecosystems that nurture, support, and sustain human life are also nurtured, supported, and sustained. Country is sacred and spiritual, with culture, First Laws, spirituality, social obligations and kinship all stemming from relationships to and with the Land.

A Note on Language

We acknowledge there is a legacy of writing about First Nations peoples without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. For the purpose of this submission, we have chosen to use the term 'First Nations peoples.' We acknowledge that not all First Nations peoples will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

The role of EDO

EDO is a non-Indigenous community legal centre that works alongside First Nations peoples around Australia and the Torres Strait Islands in their efforts to protect their Countries and cultural heritage from damage and destruction.

EDO has and continues to work with First Nations clients who have interacted with Western laws, including litigation and engaging in Western law reform processes.

Out of respect for First Nations self-determination, EDO has provided high-level key recommendations for Western law reform to empower First Nations to protect their Countries and cultural heritage. These high-level recommendations comply with Australia's obligations under international law and provide respectful and effective protection of First Nations' Countries and cultural heritage.

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EXECUTIVE SUMMARY

The Environmental Defenders Office Ltd (**EDO**) welcomes the opportunity to contribute to the South Australian Parliament Social Development Committee's *Inquiry into the Potential for a Human Rights Act for South Australia (Inquiry)*. EDO strongly recommends the South Australian Government introduce a Charter or Act of Human Rights and Freedoms (**Charter**).

EDO notes that the timing of the Inquiry is particularly pertinent given human rights developments in the four years in Australia and internationally, including:

1. Resolutions in the United Nations General Assembly (**UNGA**) and United Nations Human Rights Council (**HRC**) that recognised access to a clean, healthy and sustainable environment (**right to a healthy environment**) as an universal human right.¹ As Australia voted in favour of the UNGA resolution, EDO considers the Inquiry is a significant opportunity for South Australia to implement Australia's commitment to the international community by enacting a Charter that enshrines the right to a healthy environment in law.
2. The Commonwealth Parliamentary Joint Committee's Inquiry into Australia's Human Rights Framework, which commenced on 15 March 2023 and with its report due by 31 March 2024.²
3. The Australian Capital Territory (**ACT**)'s Government's decision to incorporate the right to a healthy environment in the *Human Rights Act 2004* (ACT).³ This is an important development in human rights protection in Australia. EDO notes that this commitment follows a significant period of advocacy by the EDO in the ACT for the inclusion of the right in the *Human Rights Act 2004*. Should the ACT Government fulfil this commitment, this would mark the first jurisdiction in Australia to expressly incorporate the standalone right in human rights legislation. As we explain in this submission, the right to a healthy environment is increasingly recognised under international law,⁴ and we advocate for the right to be included in South Australia.
4. The New South Wales (**NSW**) Parliament's recent passage of the *Climate Change (Net Zero Future) Act 2023* (NSW) that includes the right to a clean, healthy and sustainable environment as one of its guiding principles.⁵

¹ United Nations Human Rights Council, *The Human Right to a Clean, Healthy and Sustainable Environment*, GA Res 48/13, UN Doc A/HRC/48/13 (18 October 2021); United Nations General Assembly, *The Human Right to a Clean, Healthy, and Sustainable Environment*, UN Doc. A/RES/76/300 (28 July 2022).

² Parliament of Australia, Parliamentary Joint Committee on Human Rights, 'Inquiry into Australia's Human Rights Framework' <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework>.

³ *The Human Rights (Healthy Environment) Amendment Bill 2023* (ACT).

⁴ See UN Human Rights Council, *The Human Right to a Clean, Healthy and Sustainable Environment*, GA Res 48/13, UN Doc A/HRC/48/13 (18 October 2021) and UN General Assembly, *The Human Right to a Clean, Healthy, and Sustainable Environment*, UN Doc. A/RES/76/300 (28 July 2022); see also *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).

⁵ *Climate Change (Net Zero Future) Act 2023* (NSW), s 8(5).

The EDO is the largest environmental legal centre in the Australia-Pacific. EDO is dedicated to protecting the climate, communities, and environment by providing access to justice, running litigation, and leading law reform advocacy. As an accredited community legal service and non-government, not-for-profit organisation, EDO uses the law to protect and defend Australia's wildlife, people, and places.

Our work is underpinned by an environmental justice and human rights framework. EDO recognises that the human rights of certain people and communities are disproportionately impacted by environmental harm, including the impacts of climate change. This guides EDO to focus on empowering overburdened people and communities to fight for environmental justice.

In this submission, EDO responds to the following terms of reference for the Inquiry:

- The effectiveness of current laws and mechanisms for protecting human rights in South Australia and any possible improvements to these mechanisms;
- The operation and effectiveness of human rights legislation in other jurisdictions;
- The strengths and weaknesses of adopting a Human Rights Act in South Australia;
- The potential human rights protections in any act; and
- The potential implications of any act for making laws, courts and tribunals, public authorities and other entities.

In this submission, we make **11 recommendations** in response to the terms of reference, which are summarised in the following section.

In support of our recommendations, we **attach** the following:

- **Attachment 1 – [A Healthy Environment is a Human Right: Report on the Status of the Human Right to a Healthy Environment in Australia](#)** (August 2022) which describes the importance of the human right to a clean, healthy and sustainable environment (the 'right to a healthy environment') and calls on all levels of Australian government to enshrine the right to a healthy environment in Australian law.
- **Attachment 2 – [Submission from EDO to the ACT Legislative Assembly in the Inquiry into Petition 32-21 \(No Rights Without Remedy\)](#)** (April 2022) which supports the proposal to amend the ACT's *Human Rights Act 2004* to introduce an informal and accessible human rights complaint mechanism, and which makes 13 recommendations to improve access to justice for human rights matters in the ACT.
- **Attachment 3 – [Submission from EDO to the ACT Government on its investigation into including the right to a healthy environment in the ACT's Human Rights Act 2004](#)** (August 2022), which strongly recommends that the ACT Government includes the right to a healthy environment in the ACT's *Human Rights Act 2004*, and which makes 17 recommendations to ensure that, if the right to a healthy environment is included in the Act, it is appropriately defined and can be effectively implemented in the ACT.
- **Attachment 4 – EDO, Human Rights Law Centre and Greenpeace, [Global Warning Report: The Threat to Climate Defenders in Australia](#)** (December 2021), which documents the importance of climate activism in Australia, maps the systemic repression faced by

climate activists across the country, and examines the unregulated political influence of the fossil fuel industry driving that repression. It makes recommendations for Australian law to protect these rights.

- **Attachment 5 – [Submission from EDO to the UN Special Rapporteur on toxics and human rights](#)** (May 2023) which investigates the implications for human rights of environmentally sound management and disposal of hazardous substances and wastes, highlights how Australian law does not protect human rights to be free of toxic pollutants, and identifies changes that must be made at a national and subnational level to protect these rights.
- **Attachment 6 – Wilderness Society, [Who holds the power? Community rights in environmental decision-making](#)** (2022), which includes EDO’s analysis of federal, state and territory environmental protection and planning legislation to assess how well these provide for the three core environmental community rights established by the Rio Declaration, and the Aarhus Convention and reveals that environmental community rights are not adequately protected across the country.
- **Attachment 7 – [Submission from EDO to the Joint Parliamentary Committee on Inquiry into Australia’s Human Rights Framework](#)** (July 2023), which recommended the Australian Government enact a national human rights charter and incorporate the right to a healthy environment in that charter (among other rights).
- **Attachment 8 – [Toxic Transport : How Our Pollution Laws Are Failing to Protect Our Health](#)** (November 2023), which investigates the failures of Australia’s national air pollution laws to protect Australian residents from the impacts of road transport pollution.
- **Attachment 9 – [Submission from EDO to the ACT Inquiry into Human Rights \(Healthy Environment\) Amendment Bill 2023](#)** (December 2023), which recommends the right to the healthy environment in the *Human Rights Act 2004* (ACT) be consistent with international law and be fully and immediately enforceable and justiciable for people whose right to a healthy environment has been contravened.

SUMMARY OF RECOMMENDATIONS

EDO recommends the following:

1. The South Australian Government should enact a Charter or Act of Human Rights and Freedoms (**Charter**).
2. A South Australian Charter should include the right to a clean, healthy and sustainable environment (the **right to a healthy environment**), which should be defined broadly, consistent with international law.
3. A South Australian Charter should enshrine all rights protected under the international human rights treaties ratified by Australia.
4. A South Australia Charter should include all rights of First Nations peoples protected under the *Universal Declaration of the Rights of Indigenous Peoples* (**UNDRIP**). Alternatively, the South Australian Government should enact legislation to give effect to UNDRIP in South Australia. Any provision relating to the rights of First Nations peoples should be developed by or co-designed with First Nations peoples. At a bare minimum and consistent with Articles 18 and 19 of UNDRIP, those provisions must be developed in culturally appropriate consultation with First Nations peoples.
5. A South Australian Charter should enshrine the environmental procedural rights that are protected under *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (**Aarhus Convention**).
6. A South Australian Charter should include 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 in Article 9(1) of the *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean* (**Escazú Agreement**), and other relevant protest rights in Article 9(2) of the Escazú Agreement.
7. A South Australian Charter should include a participation duty on public authorities to ensure the effective participation of all people who are most at risk of experiencing environmental harm to the extent that such people wish to participate in decision-making, such as First Nations peoples, women, children, people with disability, people who are financially disadvantaged, older people, people from a racial, ethnic or other minorities, people displaced by natural disasters, culturally and racially marginalised communities, and LGBTIQ+ communities.
8. A South Australian Charter should include a positive duty on public authorities to consider and protect human rights.
9. A South Australian Charter should explicitly state that, consistent with international law, the positive duty on public authorities extends to a duty to ensure that private actors act consistently with the human rights contained in the Charter. The Charter should also impose a duty on businesses and other private actors to act consistently with human rights and should include accessible remedies for harmful interference on human rights by private actors.

10. The South Australian Equal Opportunity Commission's functions should be expanded to promote, monitor, report, and advise the South Australian government on the rights contained in a South Australian Charter, and to investigate and conciliate any complaints made under the Charter.
11. The Charter should ensure access to effective remedies for breaches of human rights including an informal complaints mechanism, access to judicial remedies, and adequate protections for individuals against adverse costs orders.

1 – THE EFFECTIVENESS OF CURRENT LAWS AND MECHANISMS FOR PROTECTING HUMAN RIGHTS IN SOUTH AUSTRALIA AND ANY POSSIBLE IMPROVEMENTS TO THESE MECHANISMS

In this section, we address the effectiveness of current laws and mechanisms for protecting human rights in South Australia and possible improvements to these mechanisms.

(a) Current Effectiveness of Human Rights Protections in South Australia

There is no human rights legislation or constitutionally entrenched Bill of Rights at the Commonwealth level in Australia. Rather, human rights protection in Australia is dependent upon several constitutional and common law limitations on legislative power, and anti-discrimination legislation that provides some limited protection and promotion of individual human rights. For discussion of human rights protections in Australia at a Commonwealth level please see page 17 of our report: *A Healthy Environment is a Human Right: Report on the Status of the Human Right to a Healthy Environment in Australia* (**Attachment 1**).

At the state level, South Australia does not have specific human rights legislation and stands apart from other state and territory jurisdictions where specific human rights legislation has been enacted in the ACT, Queensland, and Victoria (discussed at **section 2** below). Accordingly, in South Australia there is no human rights legislation or parliamentary oversight, such as via a parliamentary committee, in which proposed laws and their impact on the enjoyment of human rights can be scrutinised. Nor is there recourse to South Australian courts (with some limited exceptions) if South Australian state legislation or the actions of South Australian public authorities or private actors are likely to infringe upon, or have infringed on, the human rights of a person in South Australia.

EDO does note that South Australia's current laws and mechanisms do provide some limited means of human rights protection, including:

- Independent statutory commissions of state office holders with mandates to review government action and respond to complaints, including: the South Australia Guardian for Children and Young People, South Australian Ombudsman, Mental Health Commissioner, and the Equal Opportunity Commission;⁶
- Specific legislative provisions designed to protect or promote certain individual rights, most prominently, *the Equal Opportunity Act 1984* (SA) (**SA EO Act**), which provides some individual rights protection by prohibiting certain kinds of discrimination based on sex, race, disability, age, or various other grounds and to facilitate participation of these groups in the economic and social life of the South Australian community;⁷ and
- Relating to the protection of human rights from environmental harm, South Australia has several environmental laws and regulations which provide some limited protections, including via the prohibition of certain acts or activities that may harm the environment from air, water and other toxic pollutants and biodiversity loss, the administration and

⁶ For discussion of these roles and their relationship to human rights see: [Rights Resource Network SA, *Designing a Human Rights Framework for South Australia* \(Final Report, February 2022\)](#) 10-14.

⁷ *Equal Opportunity Act 1984* (SA).

regulation of South Australia's water resources, and the setting of greenhouse gas emission targets intended to contribute to the mitigation of climate change.⁸

Notwithstanding these protections, the current effectiveness of South Australia's legislation to protect environmental human rights is limited and needs to be urgently improved. These issues are examined in greater detail below.

Lack of Protection of Rights Relating to the Environment and Human Health

Despite the plethora of environmental legislation in South Australia, environmental harm and degradation continues to impact South Australian residents. As South Australia's 2018 *State of the Environment Report* highlighted, South Australia's environment and communities are experiencing serious biodiversity loss with many species heading towards extinction, reduced streamflow that has consequences for water availability and water quality, and ongoing exposure to incidents of poor air quality and pollution caused by transport and heavy industry.⁹ Each of these issues can be expected to worsen as a result of the impacts of climate change, with South Australia identified as being especially vulnerable to its effects, particularly as a result of South Australia's high aridity.¹⁰ Each of these impacts has potential consequences for the enjoyment and protection of South Australian's rights, which South Australia's current environmental legislation is failing to adequately protect.

Case Study: Lead Smelter in Port Pirie

Set out at page 31 of our report *A Healthy Environment is a Human Right: Report on the Status of the Human Right to a Healthy Environment in Australia (Attachment 1)*, EDO examined the impacts of pollution from lead smelters on communities living in Port Pirie. As set out in this case study, residents of Port Pirie, particularly children under five were exposed to dangerous levels of lead, with blood lead levels for under-five's testing on average at 5.7 micrograms and children on their second birthday on average recording 7.8 micrograms, the highest reading in a decade.¹¹ As noted in the case study, childhood exposure has been associated with significant negative health developmental outcomes including impaired cognitive development, reduced intelligence, and poor mental health. This case study demonstrated an acute failure of South Australia's environmental legislation, particularly, the inadequacy of the *National Environment (Ambient Air Quality) Measure*, as implemented in South Australia, to protect the rights to life, health, healthy environment, and rights of children living in Port Pirie. For a detailed discussion of the

⁸ See, e.g., for air quality and toxic pollutants the *National Environment Protection (Ambient Air Quality) Measure* and *National Environment Protection (National Pollutant Inventory) Measure* established under the *National Environment Protection Council Act 1994* (Cth) and corresponding *National Environment Protection (South Australia) Act 1995* (SA) and *Environment Protection (Air Quality) Policy 2016* (SA); see, e.g., for general environment protection and pollution control legislation, , *Environment Protection Act 1993* (SA); *Environment Protection Regulations 2009* (SA); in addition to general environmental legislation for water administration and quality see *Water Industry Act 2012* (SA); *Environment Protection (Water Quality) Policy 2015* (SA); for biodiversity legislation, see *Native Vegetation Act 1992* (SA); *National Parks and Wildlife Act 1972* (SA); *Landscape South Australia Act 2019* (SA). For greenhouse gas emission target legislation, see *Climate Change and Greenhouse Emissions Reduction Act 2007* (SA).

⁹ See [Environment Protection Authority South Australia, South Australia State of the Environment Report \(Report 2018\)](#).

¹⁰ Ibid 6 & 14-17.

¹¹ EDO, *A Healthy Environment is a Human Right: Report on the Status of the Human Right to a Healthy Environment in Australia* (Report, 2022) 31.

inadequacies of the *National Environment (Ambient Air Quality) Measure* and its implementation see page 6 of the Submission from EDO to the UN Special Rapporteur on toxics and human rights (May 2023) (**Attachment 5**) and pages 27 to 31 of our report: *Toxic Transport : How Our Pollution Laws Are Failing to Protect Our Health* (November 2023) (**Attachment 8**).

Environmental Procedural and Community Rights and South Australia's Anti-Protest Legislation

South Australia has only limited community and environmental procedural rights protections for its residents. These rights, including the right to know, the right to participate and the right to challenge, were first recognised internationally in Principle 10 of the Rio Declaration for Environment and Development and subsequently recognised as crucial procedural elements for the protection of the right to a healthy environment. Notwithstanding the importance of these rights for the enjoyment and protection of other human rights impacted by the environment, including the right to a healthy environment, health, and the rights of children, South Australia has inadequate protection of these environmental and community procedural rights within its environmental legislation.

In partnership with the Wilderness Society, EDO conducted an analysis of federal, state and territory environmental and planning laws to examine the extent to which those laws protect the three core environmental community rights established by Principle 10 of the 1992 Rio Declaration on Environment and Development and further elaborated in the Aarhus Convention (Wilderness Society, *Who holds the power? Community rights in environmental decision-making* (2022) (**Attachment 6**)). As set out at page 19 of this report, EDO's analysis found that South Australia was found to be 'weak' on 9 out of 15 indicators used to analyse the strengths of protection of the three core rights. South Australia scored as having 'limited' protections for another 6 indicators, with no indicators found to have strong protections. At Page 25, EDO noted South Australia performed especially poorly due to extreme restrictions placed on merits review rights for third parties (where they existed at all), the lack of legal requirements to disclose environmental risk either while a development is being considered or post development if a risk eventuates and finally, the lack of any explicit requirement that community views be considered in planning decision-making, with no requirement for statement of reasons for any environmental decisions being required to be given.

The weak community and environmental procedural rights have been further impacted by the recent passage of legislation which may infringe of the rights of freedom of association and to peaceful assembly of environmental human rights defenders. In circumstances where community views are not required to be considered in planning and decision making, community protest is a crucial means for communities to exercise and protect their rights and has been expressly enshrined in regional human rights treaties, such as the at Article 9 of the *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean* (**Escazú Agreement**), or has been found to be impliedly protected by Article 3(8) of the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (**Aarhus Convention**).¹²

¹² For discussion, see: [Teresa Weber, 'Are Climate Activists Protected by the Aarhus Convention? A note on Article 3\(8\) Aarhus Convention and the New Rapid Response Mechanism for Environmental Defenders'](#)

Case Study: Systemic Repression of Environmental Human Rights Defenders

Our report *Global Warning Report: The Threat to Climate Defenders in Australia (Attachment 4)*, in collaboration with the Human Rights Law Centre and Greenpeace, documents the importance of climate activism in Australia, maps the ongoing and worsening systemic repression faced by climate defenders across the country, and examines the unregulated political influence of the fossil fuel industry driving that repression. This report makes recommendations for Australian law to protect the rights of climate defenders, including recommending the introduction of federal human rights legislation and enshrinement of the rights to freedom of association and freedom of peaceful assembly. EDO has also witnessed an increase in proactive policing of climate defenders across all Australian states and territories including, for example, police raids, seizure of devices, pre-emptive checks, and onerous bail conditions, which are increasingly utilised as mechanisms for disrupting and isolating the environmental movement.¹³

EDO is concerned that this worsening systemic oppression is also occurring in South Australia, with the passing of the amendments to the *Summary Offences Act 1953 (SA)*,¹⁴ which may infringe on the internationally recognised rights to freedom of association and freedom of peaceful assembly under the *International Covenant on Civil and Political Rights (ICCPR)*.¹⁵ In addition to potentially infringing on internationally recognised human rights, the amendments to this act are potentially unconstitutional, best demonstrated by the partly successful challenge to similarly enacted legislation in NSW to the *Roads Act 1993 (NSW)* and the *Crimes Act 1900 (NSW)* (collectively, the **NSW Protest Laws**).¹⁶ In that challenge EDO represented ‘Knitting Nannas’ Dominique Jacobs and Helen Kvelde in a constitutional challenge to aspects of the NSW Protest Laws, with the Court ruling that amendments to the *Crimes Act 1900 (NSW)* were unconstitutional on the basis it impermissibly burdened the implied freedom of political communication.¹⁷

A South Australian Charter would incorporate important legislative tools, most prominently the ‘proportionality test’¹⁸ which aids public authorities in better balancing rights, such as the rights of

[\(2022\) 32\(1\) Review of European Comparative & International Environmental Law 67](#), 70-72 citing Aarhus Convention Compliance Committee (ACCC) ‘Findings and Recommendations of the Compliance Committee with Regard to Communication ACCC/C/2009/44 Concerning Compliance by Belarus’ UN Doc ECE/MP.PP/C.1/2011/6/Add.1 (28 June 2011) (ACCC/C/2009/44 Belarus); ACCC ‘Findings and Recommendations with Regard to Communication ACCC/C/2014/102 Concerning Compliance by Belarus’ UN Doc ECE/MP.PP/C.1/2017/19 (18 June 2017) (ACCC/C/2014/102 Belarus).

¹³ See for example ‘Extinction Rebellion protesters have ‘onerous’ bail conditions revoked by Sydney court’, *SBS News* (online, 25 October 2019) available at <<https://www.sbs.com.au/news/article/extinction-rebellion-protesters-have-onerous-bail-conditions-revoked-by-sydney-court/8na7evqe8>>; Paul Gregoire, ‘Bail and Remand Are Being Weaponised to Stamp Out Climate Activism’, *Sydney Criminal Lawyers* (online 20 July 2022) available at <<https://www.sydneycriminallawyers.com.au/blog/bail-and-remand-are-being-weaponised-to-stamp-out-climate-activism/>>; Jesse Noakes, ‘WA police raid journalists’, *The Saturday Paper* (online, 13 May 2023) available at

<<https://www.thesaturdaypaper.com.au/news/environment/2023/05/13/wa-police-raid-journalists#hrd>>;

¹⁴ *Summary Offences (Obstruction of Public Places) Bill 2023 (SA)*.

¹⁵ See *International Covenant on Civil and Political Rights*, opened for signature on 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (**ICCPR**) arts 21 & 22.

¹⁶ *Road Amendment (Major Bridges and Tunnels) Regulation 2022 (NSW)*, *Roads and Crimes Legislation Amendment Act 2022 (NSW)* and *Crimes Act 1900 (NSW)*.

¹⁷ [Kvelde v State of New South Wales \[2023\] NSWSC 1560](#).

¹⁸ See for example, s 7 of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, s 28 of the *Human Rights Act 2004 (ACT)* and s 13 of the *Human Rights Act 2019 (Qld)*.

peaceful assembly against other concerns such as public safety, when exercising their functions and making decisions. Applied before legislation is enacted, public authorities can use this test to ensure that legislation they are enacting is both consistent with international human rights but also less likely to attract judicial challenges, as was the case in NSW.

(b) Improvements to Human Rights Protections in South Australia

The key improvement to the protection of human rights in South Australia's legislation is through legislating a Charter. As discussed above, human rights protection is not expressly provided for in South Australia, with the Australian Constitution and the common law only providing a few limited rights for South Australian residents. For this reason, it is essential that South Australia implement a Charter. Most modern democracies have considered the protection of human rights too important to be left as moral norms and have thus entrenched human rights in their constitutions, such that Australia is now the only Western democratic country that does not have explicitly protect human rights in a federal Charter. As a federation of state and territories, Australian state and territory governments are a key level of government with legislative responsibility for many areas of government and services that can and do affect the enjoyment of human rights, including decisions relating to policing, health, education, environmental protection, and planning and development that have an important role in ensuring human rights protection via the enactment of state human rights legislation.

Positively state and territory governments in Australia are filling this gap, with the ACT, Queensland and Victoria having enacted legislation to protect and promote the human rights of their residents. By enacting a South Australia Charter, South Australia has an important opportunity to legislate a much broader suite of human rights protections that expand the limited rights protected under South Australia's anti-discrimination legislation, the common law and the Australian Constitution. Without enacting a Charter, South Australian's human rights will remain without adequate or express protection.

The operation and effectiveness of a Charter in other jurisdictions and the strengths and weaknesses of incorporating a Charter in South Australia are discussed at sections 2 and 3 below.

2 – OPERATION AND EFFECTIVENESS OF HUMAN RIGHTS LEGISLATION IN OTHER JURISDICTIONS

As noted above, ACT, Queensland, and Victoria each have enacted human rights legislation in their jurisdictions. In our report *A Healthy Environment is a Human Right* (**Attachment 1**), we address the effectiveness of existing human rights legislation in these jurisdictions (see pages 17-18, 24 and 37). Despite limitations to the existing human rights legislation, the Human Rights Law Centre has collated 101 examples of how human rights legislation in the ACT, Queensland and Victoria has benefited people’s lives in those jurisdictions.¹⁹ These case studies highlight the need for human rights legislation in other jurisdictions, including South Australia.

In relation to the ACT, EDO prepared three submissions to the ACT Government that address the effectiveness of the ACT *Human Rights Act 2004* and made recommendations for improvement. The first submission advocates for the inclusion of an accessible complaints mechanism, and for other amendments to improve access to justice for human rights matters in the ACT (**Attachment 2**). The second submission advocates for the inclusion of the right to a healthy environment in the *Human Rights Act 2004* (**Attachment 3**). The third submission is in relation to the proposed bill (**Attachment 9**), which has some significant issues discussed in our submission and the dissenting report of Mr Peter Cain MLA appended to the ACT Government Parliamentary Committee’s report, which recommended recognition of the right.²⁰

In response to these inquiries, the ACT Government committed to introducing both an accessible complaints mechanism to the ACT Human Rights Commission and the substantive right to a healthy environment in the *Human Rights Act 2004* (ACT). The bill is expected to commence in 2024, following debate and passage by the ACT Legislative Assembly.²¹ This important legislation provides a great precedent for other states like South Australia. The right to a healthy environment is discussed in further detail at **section 4** below.

¹⁹ See ‘101 Cases’, *Human Rights Law Centre* (online) available at <<https://charterofrights.org.au/101-cases>>.’

²⁰ ACT Legislative Assembly Standing Committee on Justice and Community Safety, , *Inquiry into Human Rights (Healthy Environment) Amendment Bill 2023* (Report 22, January 2024).

²¹ Right to a Healthy Environment, *Justice and Community Safety Directorate* (online) available at <[https://www.justice.act.gov.au/safer-communities/right-to-a-healthy-environment#:~:text=The%20Human%20Rights%20\(Healthy%20Environment,the%20ACT%27s%20human%20rights%20framework.>](https://www.justice.act.gov.au/safer-communities/right-to-a-healthy-environment#:~:text=The%20Human%20Rights%20(Healthy%20Environment,the%20ACT%27s%20human%20rights%20framework.>)>.

3 – THE STRENGTHS AND WEAKNESSES OF ADOPTING A HUMAN RIGHTS ACT IN SOUTH AUSTRALIA

A Charter enacted in South Australia would position human rights at the centre of South Australia's laws. A Charter establishes a framework wherein individuals and communities can legally assert their rights in circumstances where the protection of these rights is threatened or has been violated by the actions or decisions of public officials and actions of private actors, such as corporations, and is not reasonably justified.

This is particularly important for people and communities that suffer the impacts of systemic disadvantage and are particularly vulnerable to human rights violations. In relation to environmental harm, the Special Rapporteur on human rights and the environment has identified women, people who are financially disadvantaged, older people, people from a racial, ethnic, or other minority, and people displaced by natural disasters as people who may be particularly vulnerable to environmental harm.²² By enacting a Charter, South Australia can ensure these communities are better able to assert and enforce their rights, and access remedies in situations where their rights have been breached.

Importantly, a Charter would also ensure that South Australia's legislative and regulatory responses to systemic issues faced by these communities are more likely to be proactive, with lawmakers in South Australia being able to rely on the Charter's human rights framework to guide the creation and drafting of legislation that is compliant with human rights norms. In circumstances where it may be necessary for South Australia's parliament to pass laws or take regulatory action to abrogate human rights, a Charter will ensure that there is careful scrutiny of the effects and proportionality of the proposed legislation. Positively, this means laws are less likely to be subject to judicial challenge at a later stage.

The importance of enhanced human rights deliberation is not only reflected in the enactment of human rights legislation in the ACT, Queensland, and Victoria, but has also been incorporated at the federal level by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth),²³ though there are some notable limitations with this dialogue model.²⁴ Crucially, the impacts of enhanced lawmaking in jurisdictions with human rights legislation has seen tangible and practical improvements to how individuals rights are protected within legislation and by decision makers.

In identifying the strengths of a Charter, EDO considers it important to address the most common criticism of introducing human rights legislation in a jurisdiction: the potential for a 'flood of vexatious litigation' that inundates Courts and stymies effective government and legislating. As has been observed by multiple legal and judicial advocacy organisations, no such 'flood' has eventuated in response to the introduction of human rights legislation in Australia. The Law Council of Australia makes this clear by stating it has not seen a 'flood' of litigation in these jurisdictions' Courts.²⁵

²² 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) [41] p 17.

²³ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

²⁴ See [Law Council of Australia, 'Submission to Australian Human Rights Commission's Free and Equal: An Australian Conversation on a Human Rights Inquiry' \(November 2019\)](#) 35.

²⁵ *Ibid* 6.

Specifically in relation to the right to a healthy environment, we refer to our analysis contained at page 15 of our submission to the ACT government on a right to a healthy environment (**Attachment 3**) which states unequivocally, the recognition of a justiciable right to a healthy environment would not lead to a flood of litigation and rely on that analysis in this submission.

4 – THE POTENTIAL HUMAN RIGHTS PROTECTIONS IN ANY ACT

EDO strongly recommends that the South Australian Parliament enact a Charter or human rights Act (**Recommendation #1**). We further recommend that any such Charter should include the following human rights.

(a) The Right to a Healthy Environment

EDO strongly recommends that any South Australian Charter include the right to a healthy environment (**Recommendation #2**), for the reasons set out in our report *A Healthy Environment is a Human Right* (**Attachment 1**).

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,²⁶ after this right was explicitly recognised by the UN Human Rights Council in October 2021.²⁷ 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. Noting that Australia voted in favour of recognising the right to a healthy environment, EDO considers that South Australia should reflect the Commonwealth Government’s commitment to the international community within its jurisdiction by legislating a Charter and including the right to a healthy environment in such a Charter. This would also ensure that South Australia at a minimum provides recognition of the right in line with other jurisdictions in Australia that recognise or will soon recognise the right in legislation.

As already discussed, the ACT has introduced a bill recognising the right to a healthy environment in its *Human Rights Act 2004* (ACT). Notably, the right has also been incorporated into the guiding principles of NSW’s recently enacted *Climate Change (Net Zero Future) Act 2023* (NSW) and as an objective in Victoria’s *Environment Protection Act 2017* (Vic) under the ‘Principle of Equity’.²⁸ EDO notes that for each of these examples, the right to a healthy environment is not justiciable in the way civil and political rights are under the *Human Rights Act 2004* (ACT) and believes South Australia has an opportunity to take a step further than these jurisdictions and offer comprehensive protection of the right to a healthy environment, consistent with its international development and recognition.

Our report *A Healthy Environment is a Human Right* (**Attachment 1**) discusses the meaning of the right to a healthy environment in international law (Section 1), its status in Australian law (Section 2), and presents arguments in favour of recognising the right to a healthy environment in Australian law in all levels of government, including state law (Sections 3 and 4).

Definition of the right to a healthy environment

Consistent with our recommendations to the ACT Government (**Attachment 3**), the right to a healthy environment should be defined broadly. The right to a healthy environment should not be limited to an exhaustive list of substantive elements (such as the right to clean air, clean water, or

²⁶ UN General Assembly, *The human right to a clean, healthy and sustainable environment*, UN Doc. A/RES/76/300 (28 July 2022).

²⁷ 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).

²⁸ *Climate Change (Net Zero Future) Act 2023* (NSW), s 8(5); *Environment Protection Act 2017* (Vic), s 21(1).

safe food) and/or procedural elements. That is because interpretation of the right 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.²⁹

Our submission to the ACT Government includes further suggestions on how the right to a healthy environment could be defined (see recommendations 3 and 4, pages 16-21). In particular, 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 UN General Assembly’s resolution. Our submission contains further guidance on how these terms are interpreted in practice by UN Member States. Our submission to the ACT Government also addresses how the right to a healthy environment could be implemented in practice.

As noted above, problematically, the ACT government’s proposal to enact a right to a healthy environment is not justiciable. This significantly undermines the right’s protection, particularly its enforceability for affected individuals and communities. EDO strongly recommends that a South Australian Charter or human rights legislation include a right a healthy environment that is judiciable and enforceable by affected parties.

(b) All Rights Protected Under the International Human Rights Treaties Ratified by Australia

EDO recommends that a South Australian Charter should enshrine all rights protected under the international human rights treaties ratified by Australia (**Recommendation #3**).

All human rights are interconnected and are therefore indivisible. It will not be possible for South Australia to realise human rights unless all human rights are recognised and protected under South Australian law. This includes all political, civil, economic, cultural, and social rights contained in the ICCPR and *International Covenant on Economic, Social and Cultural Rights (ICESCR)*,³⁰ as well as other rights including the rights of women, children, and people living with disability, enshrined in the seven international human rights treaties ratified by Australia.

In recognising all rights protected under international treaties ratified by Australia, EDO strongly recommends that no distinction be made between the civil and political rights enshrined in the ICCPR, economic, cultural, and social rights enshrined in ICESCR and other international human rights treaties, and the right to a healthy environment. As set out at pages 16 to 18 of our submission at **Attachment 3**, we note that any delineation between these sets of rights is artificial and unnecessary in determining whether and/or what aspects of a right are ‘immediately realisable’ by governments. EDO repeats this view in relation to a South Australian Charter.

Instead, as was similarly noted in our submission at **Attachment 3**, a South Australian Charter can contain a provision similar to section 28 of the *Human Rights Act 2004* (ACT) in which all human

²⁹ 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).

³⁰ *International Covenant on Civil and Political Rights*, opened for signature on 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR) and *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS (entered into force 3 January 1976) (ICESCR).

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’, 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.³¹

(c) Rights of First Nations Peoples

A South Australia Charter should include all rights of First Nations peoples protected under the *Universal Declaration of the Rights of Indigenous Peoples (UNDRIP)*, including the principle of ‘free, prior and informed consent’. Alternatively, the South Australian Government should enact legislation to give effect to UNDRIP within South Australia. Any provision relating to the rights of First Nations peoples should be developed by or co-designed with First Nations peoples. At a bare minimum and consistent with Articles 18 and 19 of UNDRIP, those provisions must be developed in culturally appropriate consultation with First Nations peoples (**Recommendation #4**).

The rights of First Nations peoples are recognised under UNDRIP,³² in addition to other human rights treaties such as the ICCPR. The Special Rapporteur on human rights and the environment has identified 16 Framework Principles on Human Rights and the Environment (**Framework Principles**),³³ which are outlined on page 11 of our report at **Attachment 1**. 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.³⁴

Framework Principles 3, 14 and 15 are particularly important with respect to First Nations in Australia. The specific rights of First Nations peoples in relation to a healthy environment are outlined in Framework Principle 15. 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:³⁵

- 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;

³¹ *Human Rights Act 2004 (ACT)*, ss28(1) & 28(2).

³² *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49 (2 October 2007, adopted 13 September 2007).

³³ 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).

³⁴ *Ibid*, 3 [8]; 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>>.

³⁵ *Ibid*, Principle 15, pp 18-20.

- respect and protect their traditional knowledges and practices in relation to the conservation and sustainable use of their lands, territories, and resources; and
- ensure that they fairly and equitably share the benefits from activities relating to their lands, territories, or resources.

The obligations in Framework Principle 15 arise out of international human rights sources including UNDRIP and Article 27 of the ICCPR.³⁶ Reflecting these obligations, it is EDO's position that a South Australian Charter must include substantive cultural rights for First Nations peoples. EDO notes that similar rights have been enshrined at section 28 of Queensland's *Human Rights Act 2019* and recommends these rights be similarly enshrined in a South Australian Charter. EDO considers that the cultural rights of First Nations peoples must also be expressly included in any South Australia Charter.

In giving effect to the rights of First Nations peoples, a South Australian Charter must incorporate a corresponding participation duty to ensure the participation of First Nations peoples in relation to decisions that directly or disproportionately affect their rights. Such a participation duty draws on international human rights law standards and common law procedural fairness principles and the positive requirements to enable participation of First Nations peoples based on articles 18 and 19 of UNDRIP.³⁷ These rights protect the right of Indigenous peoples to participate in decisions that affect them and the right of Indigenous peoples to free, prior and informed consent, respectively. This is discussed at **section 5** in greater detail below along with a broader participation duty.

In making this recommendation, it is important to note that the EDO is not a First Nations organisation and therefore cannot speak on behalf of First Nations peoples. Further, due to capacity and funding constraints, we have not consulted with any external First Nations peoples in relation to our recommendations. We instead make this recommendation based on our interpretation of human rights law and international best practice.

(d) All Procedural Rights Protected Under the Aarhus Convention

EDO has previously recommended the Commonwealth Government ratify the Aarhus Convention in its submission to the Joint Parliamentary Committee on Human Rights' Inquiry into an Australian Human Rights Framework (**Attachment 7**). The Aarhus Convention protects rights that are essential to achieving the three procedural elements of the right to a healthy environment: the right to access information, right to participate in decision-making, and access to justice. If the South Australian Parliament enacts a Charter that includes the right to a healthy environment, it will be essential to also include rights protected under the Aarhus Convention to ensure the right to a healthy environment can be implemented in practice.

As discussed above, in partnership with the Wilderness Society, EDO recently conducted an analysis of federal, state and territory environmental and planning laws to examine the extent to which those laws protect the three core environmental community rights established by Principle 10 of the 1992 Rio Declaration on Environment and Development and further elaborated in the Aarhus Convention. EDO recommends that a South Australia Charter should protect the broader participatory rights of all people.

³⁶ *Selected Sources for Framework Principles on Human Rights and the Environment*, Principle 15, pp 30-32.

³⁷ *Ibid*, p 183.

EDO consider that this should be achieved by legislating each of the procedural rights contained in the Aarhus Convention as separate and distinct rights in the South Australia Charter (in addition to the ‘participation duty’ which is discussed at **section 5** below) (**Recommendation #5**).

(e) Rights to Protect Environmental Human Rights Defenders

EDO strongly recommends that a South Australian Charter include rights to protect environmental human rights defenders (**Recommendation #6**). It is essential for such protections to be enshrined in law, particularly in light of recent developments in some parts of Australia, including NSW and South Australia, to enact legislation that restricts the ability of Australians to engage in peaceful protest, and the increase in proactive policing of climate defenders.

This could be achieved by adopting our recommendation that a South Australian Charter includes the rights enshrined in Article 9 of the Escazú Agreement, which provides the following (emphasis added):

1. *Each Party shall **guarantee a safe and enabling environment** for persons, groups and organisations that promote and defend human rights in environmental matters, so that they are able **to act free from threat, restriction and insecurity**.*
2. *Each Party shall take adequate and effective measures to recognize, protect and promote all the rights of human rights defenders in environmental matters, including their **right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement, as well as their ability to exercise their access rights**, taking into account its international obligations in the field of human rights, its constitutional principles and the basic concepts of its legal system.*
3. *Each Party shall also take appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidations that human rights defenders in environmental matters may suffer while exercising the rights set out in the present Agreement.*

We recommend that a South Australian Charter should include 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 in Article 9(1) of the Escazú Agreement and other relevant protest rights in Article 9(2). In relation to Article 9(2), we note that these rights appear to reflect the ICCPR rights to freedom of expression (Article 19), the right of peaceful assembly (Article 21), and the right to freedom of association (Article 22), however Article 9(2) protects a broader range of participatory rights which we consider is necessary to adequately protect environmental human rights defenders.

5 – THE POTENTIAL IMPLICATIONS OF ANY ACT FOR MAKING OF LAWS, COURTS AND TRIBUNALS, PUBLIC AUTHORITIES AND OTHER ENTITIES

(a) Enhanced Oversight of Legislation, Regulatory and Policy Making

As discussed in sections 2 and 3 of the submission, a Charter will have impacts on the South Australian legislature and policy makers and require them to consider the impacts of legislation, regulation, and policy on South Australian’s human rights, and in circumstances where human rights must be abrogated, give careful consideration to the proportionality of such abrogation. The requirement of scrutinising bills can be found in each of the ACT, Queensland and Victoria’s state human rights legislation,³⁸ and at a Commonwealth level, pursuant to the requirements set out in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).³⁹

(b) Participation Duties

Under a South Australian Charter, a ‘participation duty’ should be enshrined to ensure the participation of all people, including First Nations peoples, if they decide decisions directly or disproportionately affect their rights (**Recommendation #7**), similar to the duty recommended by the Australian Human Rights Commission in the Commonwealth inquiry. The Commission described the duty as a duty that would “primarily operate as a duty on public authorities (being the Executive) and would apply to proponents of legislation.”⁴⁰ The Commission describes the duty as having two elements, one binding, the other non-binding. These are extracted below for ease of reference:⁴¹

- This duty would be binding on public authorities with obligations under the Human Rights Act. It would require public authorities to ensure the participation of First Nations peoples, children and persons with disability in relation to decisions that directly or disproportionately affect their rights. It would operate as a cross-cutting duty, meaning it would be relevant to the fulfilment of all the rights in the Human Rights Act. If a public authority has failed to comply with this duty in relation to a decision affecting a particular right, this would point to a breach of the positive duty to ‘properly consider’ human rights in decision-making.
- This duty would also include a non-binding requirement for proponents of legislation to facilitate participation during the law-making process and to reflect what participation measures were undertaken in statements of compatibility. This would also be subject to scrutiny by the Parliamentary Joint Committee on Human Rights. Failure to engage in or report on participation to Parliament would not affect the validity of the instrument in question.

While we agree public authorities should offer to engage and accommodate the participation of First Nations peoples in decision-making, the decision on whether to engage in public

³⁸ *Human Rights Act 2004* (ACT), ss 37 & 38; *Human Rights Act 2019* (Qld), ss 38-41; *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 28-30.

³⁹ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s 8.

⁴⁰ Australian Human Rights Commission ‘Free and Equal. A Human Right Act for Australia 2022’ (Position Paper, 2022) 161

⁴¹ *Ibid.*

consultation, including whether decisions of public authorities are ‘direct’ or ‘disproportionate’ on them, should ultimately be at the discretion of First Nations people.

Moreover, we recommend the duty must extend to ensure the participation of people in society who require special protection under human rights legislation, namely children and persons with disability, and people who are most at risk of experiencing environmental harm. The Special Rapporteur on human rights and the environment has identified women, people who are financially disadvantaged, older people, people from a racial, ethnic or other minority, and people displaced by natural disasters as people who may be particularly vulnerable to environmental harm.⁴² EDO also considers that culturally and racially marginalised communities and LGBTIQ+ communities may require additional protections from environmental harm. However, similar to First Nations peoples, each of these groups should have the discretion to decide whether to participate in decision-making.

Finally, we recommend that both requirements be binding, so that failure to engage in or report on participation to Parliament would affect the validity of the instrument in question.

We note that EDO similarly advocated for this duty in its submission to Joint Parliamentary Committee on Human Rights’ Inquiry into an Australian Human Rights Framework (**Attachment 7**) and consider our reasons set out in that submission are relevant to South Australia. The ‘participation duty’ draws on international human rights law standards and common law procedural fairness principles.⁴³

First Nations Peoples & Free, Prior and Informed Consent

In relation to First Nations peoples, the participation duty must include the positive requirements to enable participation of First Nations peoples based on Articles 18 and 19 of UNDRIP.⁴⁴ These rights protect the right of Indigenous peoples to participate in decisions that affect them and the right of Indigenous peoples to free, prior and informed consent, respectively.

(c) A Duty to Act Compatibly with Human Rights

EDO recommends that a South Australian Charter should impose a positive duty on public authorities to act compatibly with the human rights expressed in a South Australian Charter and to consider human rights when making decisions. In accordance with this public duty, there would be a specific ‘positive duty’ on the South Australian executive to act compatibly with human rights and give ‘proper consideration’ to human rights when making decisions. Pursuant to this duty, South Australian Government entities, known as ‘public authorities’ would be bound by this duty (**Recommendation #8**).

The positive duty to act compatibly with human rights has procedural and substantive obligations. The requirement to give ‘proper consideration’ to human rights applies to making decisions and implementing legislation and policy – it is a procedural obligation. The requirement to ‘act compatibly’ with human rights is a substantive obligation on public authorities. Public authorities would also be required to engage in participation processes where the ‘participation duty’ is

⁴² 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) [41] p 17.

⁴³ *Ibid*, p 182.

⁴⁴ *Ibid*, p 183.

relevant, as part of the ‘proper consideration’ limb.⁴⁵ Compliance with the positive duty would be reviewable by courts (and possibly by tribunals as discussed below in relation to administrative law remedies). The positive duty would require decision makers to consider human rights at an early stage, helping to prevent breaches from occurring.

(d) Application to Private Actors

Under international law, States’ obligations to protect human rights includes an obligation to protect against harmful interference on human rights by businesses and other private actors.⁴⁶ Similarly, individuals must be able to access effective remedies against private actors as well as government authorities.⁴⁷ 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 must preserve the environment and protect it against harm, pollution and climate change caused by both public and private actors.⁴⁸

EDO therefore recommends that a South Australian Charter should explicitly state that, consistent with international law, the positive duty on public authorities extends to a duty to ensure that private actors act consistently with the human rights contained in a South Australian Charter. A South Australian Charter should also impose a duty on businesses and other private actors to act consistently with human rights and should include accessible remedies for harmful interference on human rights by private actors (**Recommendation #9**).

This recommendation is consistent with Pillars I-III of the United Nations Guiding Principles on Business and Human Rights.⁴⁹ The Australian Government states that it has supported the UN Guiding Principles on Business and Human Rights since their inception in 2011 and made a pledge to implement the Guidelines in the 2016 Universal Periodic Review.⁵⁰ EDO considers that South Australia has an important role in ensuring that Australia’s broader obligations under these principles are upheld in its jurisdiction, and therefore must ensure that a South Australian Charter applies to private actors and that possible breaches of the South Australian Charter are capable of being remediated effectively in accordance with **Recommendation #11** of this submission.

(e) South Australian Equal Opportunity Commission

⁴⁵ Australian Human Rights Commission, *Free and Equal: A Human Rights Act for Australia* (Summary Report, December 2022) 17.

⁴⁶ John Knox, *Framework Principles on Human Rights and the Environment*, UN Doc A/HRC/37/59 (24 January 2018) [5], 7-8.

⁴⁷ *Ibid*, [28] p 13.

⁴⁸ 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) [62] p 13.

⁴⁹ John Ruggie, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises – Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, 17th sess, Agenda Item 3, UN Doc A/HRC/17/31 (21 March 2011) annex (United Nations Guiding Principles on Business and Human Rights) (**UNGPs**).

⁵⁰ Attorney-General’s Department, ‘Annex 2: Australia’s Voluntary Commitments – Second cycle UPR 2015 - Status of Implementation’, *National Report of Australia - Universal Periodic Review 2021* (2021) item 10, available at <https://www.ag.gov.au/sites/default/files/2020-12/annex-2-upr-2021.pdf>, p 6.

EDO believes that the South Australian Equal Opportunity Commission can play an important role in the protection and promotion of human rights, particularly in relation to ensuring environmental and climate justice in South Australia. EDO strongly recommends that the South Australian Equal Opportunity Commission's functions should be expanded to promote, monitor, report, and advise the South Australian government on the rights contained in a South Australian Charter, and to investigate and conciliate any complaints made under the Charter (**Recommendation #10**).

As noted in a UN Human Rights Council's 2022 resolution on the role of national human rights institutions welcomed the critical contributions of such institutions in monitoring, reporting and advising governments and other stakeholders on climate action that is based on human rights.⁵¹ The resolution highlights the important role that national human rights institutions play in assisting states to adopt effective frameworks to protect the human rights of all individuals without discrimination, and the particularly vulnerable situations of Indigenous peoples to the impacts of climate change. EDO considers that this resolution is equally applicable to state and territory human rights institutions, particularly within the Australian context where under its federal system state jurisdictions (**as discussed at section 1 above**) are a crucial level of government.

The South Australian Equal Opportunity Commission should have a significant role to play in seeking to mitigate the effects of the triple planetary crisis of climate change, biodiversity loss and toxic environments, on the enjoyment of human rights in South Australia. As set out in EDO's submission to the Joint Parliamentary Committee on Human Rights' Inquiry into an Australian Human Rights Framework (**Attachment 7**) EDO recommended the role of the Australian Human Rights Commission should be expanded to include consideration of environmental human rights: see recommendation 14 of **Attachment 7**. In making **Recommendation #10**, EDO considers it essential that the South Australian Equal Opportunity Commission similarly adopt the five functions recommended in that submission to the extent that they are relevant to South Australia's jurisdiction.

(f) A Role for Courts: Ensuring Access to Effective Remedies

To ensure that a South Australian Charter promotes access to justice, it must ensure that all people have access to effective remedies, including an informal complaints mechanism and access to judicial remedies in circumstances where their rights may be or have been infringed (**Recommendation #11**).

EDO advocates for the inclusion of an independent cause of action for a breach of human rights committed by a public authority or private actor, and that people must have access to a range of remedies for a breach. EDO recommends including an accessible complaints process whereby a person can make a complaint to the South Australian Equal Opportunity Commission (discussed above).

If conciliation via the South Australian Equal Opportunity Commission fails or is inappropriate, or if the matter is urgent, individuals with standing should have the right to initiate proceedings in the South Australian Civil and Administration Tribunal (**SACAT**). As set out at pages of EDO's

⁵¹ UN Human Rights Council, *National human rights institutions*, 51st Session, UN Doc. A/HRC/51/L.16/Rev.1 (5 October 2022).

submission to the ACT Legislative Assembly's *Inquiry into Petition 32-21 (No Rights Without Remedy)* (April 2022) (**Attachment 2**), EDO argues access to a tribunal like SACAT (or in the case of that submission ACAT), while not replacing access to a Supreme Court, provides for a less formal and expensive option to claimants than the Supreme Court, thereby increasing access to justice.

Notwithstanding access to a complaints mechanism to the South Australian Equal Opportunity Commission and SACAT, EDO strongly recommends that an individual with standing should be able to pursue a direct cause of action under a South Australian Charter, and that ordinary judicial review could be pursued as an alternative, or in addition to, this direct cause of action in the South Australian Supreme Court. The available remedies should replicate the remedies available under discrimination laws which include monetary damages, amongst other remedies. People could also rely on the rights under the Charter in other legal proceedings. Further, a Charter should include an additional means of enhancing access to justice by including protections against adverse cost orders. Finally, for clarity and as recommended earlier, EDO considers that each of these complaints mechanisms must be applicable against private actors (**Recommendation #9**).

For further information about anything raised in this submission or in relation to our recommendations, please contact melanie.montalban@edo.org.au or (02) 6230 6627.