



ACT
Government

Right to a Healthy Environment

Discussion Paper

Public consultation to inform consideration of the introduction of a right to a healthy environment in the *Human Rights Act 2004*

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Summary of consultation aims

In the Parliamentary and Governing Agreement for the 10th Assembly, the ACT Government committed to considering the inclusion of a ‘right to a healthy environment’ in the *Human Rights Act 2004* (Human Rights Act).¹

This discussion paper seeks community views on how the right to a healthy environment could be included in the Human Rights Act and what the content of the right could be.

In particular, the community is being asked to provide feedback on the following:

- *How could we define the right to a healthy environment?*
- *What duties could be included for the Government and private entities to ensure respect for individuals’ right to healthy environment?*
- *What additional measures could be considered to ensure protection of the right to healthy environment for vulnerable groups?*
- *How could the right to a healthy environment recognise the importance of ‘country’ for Aboriginal and Torres Strait Islander people?*
- *How could the Government go about fulfilling the right to a healthy environment?*

Context

Human Rights Act 2004

The Human Rights Act provides statutory protection of human rights in the ACT. The ACT was the first jurisdiction in Australia to enact a legislative charter of human rights. Similar legislation was subsequently introduced, first in Victoria (*Charter of Human Rights 2006* (Vic)) and then in Queensland (*Human Rights Act 2019* (Qld)). Australia does not have a national charter of human rights.

The Human Rights Act protects a number of civil and political rights as well as some economic, social and cultural rights (ESC rights). These rights are primarily drawn from the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Public authorities are required to act consistently with human rights recognised in the Act and individuals have a right of action in the Supreme Court for failure to act consistently with human rights.²

The Human Rights Act recognises that human rights may be subject to reasonable limitations that can be demonstrably justified in a free and democratic society.³ In addition, economic social and cultural rights

¹ Parliamentary and Governing Agreement of the 10th Assembly, Appendix 2.

² *Human Rights Act 2004*, sections 40B and 40C.

³ *Human Rights Act 2004* Preamble.

have aspects that are immediately realisable, and aspects that must be progressively realised by the Government over time, and subject to available resources.

If introduced into the Human Rights Act, a right to a healthy environment would give rise to certain general obligations that would require immediate action by the Government. In addition, there would be an obligation on the Government to take further positive measures to improve the enjoyment of the right via appropriate means and within available resources. It would also require the Government not to take backwards steps that would reduce protection of the right. These aspects of the right would also be subject to reasonable limitations.

Human rights vs rights of nature

The Human Rights Act provides that only individuals have human rights (section 6). This aligns with the international human rights law principle that human rights are held by all people by virtue of being human.

Commentary on environmental rights suggests that nature and natural phenomena such as rivers, lakes and trees share the right to exist and that the rights of nature should be protected in the same way as the rights of humans.⁴

However, the present exploration of whether to include a right to a healthy environment in the Human Rights Act excludes consideration of the rights of nature and non-human species in their own right.

Climate Change

In May 2019, the ACT joined many other cities, states and territories around the world in declaring a state of climate emergency, acknowledging the need for urgent action across all levels of government.⁵

The ACT Climate Change Strategy sets out measures the Government intends to take to address the challenge of climate change including reducing greenhouse emissions and building resilience to climate change impacts. Alongside these commitments the Government has set in place blueprints for the future of Territory planning and transport and enhancing living infrastructure and biodiversity.⁶ Central to these commitments is the objective of 'securing a liveable and healthy future for our community, for all species and for future generations'.⁷

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

⁵ ACT Government, ACT Climate Change Strategy (*Climate Change Strategy*) 2019-2025, 1.

⁶ Ibid 96.

⁷ Ibid 1.

In the context of the climate emergency, environment-related human rights are gaining prominence as a means of ensuring accountability of governments and companies for protecting the environment and preventing further degradation that would impact on human health and wellbeing.⁸

Environment and Health

The natural environment and ecosystems sustain humans and all other living creatures, which rely on the environment for food, clean air and water as well as raw materials and medicines.⁹ The environment and ecosystems also deliver essential services (such as pollination, soil fertility, pest control and erosion control) which may be irreplaceable if lost.

The environment is a major underlying determinant of health and how we live.¹⁰ According to the World Health Organisation, environmental factors are responsible for almost a quarter of global burden of disease.¹¹ Australia's national preventive health strategies acknowledge the integral role of the environment – both the natural and built environments – in shaping the health and wellbeing of Australians.¹² In the ACT, key actions in the Territory preventive health strategy focus on the promotion of active living and rely to a large extent on broader environmental factors such as safe and accessible urban spaces, nature and other amenities.¹³

It is within this context that the discussions on introducing a new right to a healthy environment in the ACT are taking place.

QUESTION for discussion

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

The next sections will look in detail at defining the content of the right to a healthy environment and obligations on the Government and other parties to protect and fulfil the right.

8 Examples of recent litigation include: *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560); [Dutch court found Royal Dutch Shell liable for damage](#) caused by oil spills in the Niger delta; In May 2021, a Dutch court in the Hague ordered Royal Dutch Shell to reduce its CO2 emissions.

<https://www.euronews.com/green/2021/05/26/shell-ordered-to-cut-co2-emissions-by-45-in-landmark-climate-case> .

⁹ Department of Environment, Water, Heritage and the Arts, *Ecosystem Services: Key Concepts and Applications* Occasional Paper Series No. 1 (2010) 2.

¹⁰ Australian Institute of Health and Welfare, *Health and the Environment: A Compilation of Evidence* (AIHW, 2011) vii.

¹¹ World Health Organisation, *Preventing disease through healthy environments: a global assessment of the burden of disease from environmental risks* (WHO 2018) vii.

¹² Australian Government Department of Health, *National Preventive Health Strategy 2021-2030* ('National Preventive Health Strategy') (2021) 15.

¹³ ACT Health, *Healthy Canberra ACT Preventive Health Plan 2020-2025* (2019) ('Healthy Canberra') 6-7.

Right to a healthy environment

There is a growing body of national, regional and international law that recognises the close relationship between human rights and the environment. This is coupled with a trend across different countries towards adoption of laws with an express right for individuals' right to a healthy, safe and sustainable environment (see below).

In 2012, the UN Human Rights Council appointed an independent expert to examine human rights and the enjoyment of a safe, clean, healthy and sustainable environment. The mandate included an initial mapping study of international human rights and environmental law obligations relating to the right to a healthy environment. The report concluded that there is a converging trend toward greater uniformity and certainty in the human rights obligations relating to the environment. This trend is backed up by UN member State practices in relation to international environmental instruments and the universal periodic review process.¹⁴ Today around 80% of UN member States recognise the right to a healthy environment in constitutional or legislative texts.¹⁵

In October 2021, the UN Human Rights Council made a resolution recognising the right to a safe, clean, healthy, and sustainable environment as a human right that is important for the enjoyment of other human rights. The resolution calls on States (governments of each country) to build capacity for the efforts to protect the environment, and to adopt policies for the enjoyment of the right to a safe, clean, healthy and sustainable environment, including biodiversity and ecosystems.¹⁶

Though the resolution does not create binding obligations, it is an important statement which may be used to inform the Territory's approach when considering introducing a right to a healthy environment in the Human Rights Act.

International sources of right to a healthy environment

There is no standalone right to a healthy environment included in the international human rights treaties to which Australia is a party (such as the International Covenant on Civil and Political Rights (ICCPR) or the International Covenant on Economic, Social and Cultural Rights (ICESCR)), nor is there a global treaty explicitly including a human right to a healthy environment.

However, the right to a healthy environment may be seen as an aspect of several rights already recognised in the Human Rights Act and relevant international treaties. These include the right to life (section 9 Human Rights Act) and the right to privacy, family and home (section 12 Human Rights Act), which derive from the ICCPR Articles 6 and 17, and the cultural rights of Aboriginal and Torres Strait Islander people (s 27 Human Rights Act) which is derived from the UN Declaration on the Rights

¹⁴ *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, John H. Knox Mapping Report [UN Doc A/HRC/25/53](#) (30 December 2013) [27].

¹⁵ UN Special Rapporteur on Human Rights and the Environment, *Good Practices in Implementing the Right to a Healthy Environment – 2020* (Web Page) <http://www.srenvironment.org/report/good-practices-in-implementing-the-right-to-a-healthy-environment-2020>.

¹⁶ Human Rights Council *The human right to a safe, clean, healthy and sustainable environment* UN Doc [A/HRC/48/L.23/Rev.1](#) (5 October 2021) [1]-[3].

of Indigenous Peoples.¹⁷ The right to a healthy environment is also considered part of the right to health under ICESCR (Art 12). See further discussion below.

Right to life

The right to life has been interpreted by the UN Human Rights Committee as meaning that States must take appropriate measures to address the general conditions in society that may give rise to threats to the right to life or prevent individuals from enjoying their right to life with dignity and that environmental degradation and climate change are a threat to present and future generations' enjoyment of the right to life. Thus, it has stated that '[i]mplementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors.'¹⁸

Right to privacy

The UN Human Rights Committee has found that a failure to enforce environmental standards amounts to an arbitrary interference with a person's privacy, family and home, as the degradation of the environment may adversely affect the well-being of individuals and have direct repercussions on a person's private and family life and the home.¹⁹

Right to health

The right to the highest standard of physical and mental health is regarded as a fundamental human right and indispensable for the exercise of other human rights.²⁰ The obligation to respect, protect and fulfil the right to health incorporates the obligation to address the environmental determinants of health such as clean air and water, adequate food and shelter.²¹

Scope and definition

Defining 'environment'

Both natural and built environments are factors in determining people's health.²² Existing Territory legislation sets out a broad definition of 'environment' that incorporates both natural and built environments. The *Environment Protection Act 1997* defines 'environment' as follows:

environment means each of the following:

- (a) the components of the earth, including soil, the atmosphere and water;
- (b) any organic or inorganic matter and any living organism;

¹⁷ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/925 UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).

¹⁸ Human Rights Committee, [General comment no. 36, Article 6 \(Right to Life\)](#), UN Doc CCPR/C/GC/35 (3 September 2019).

¹⁹ UN Human Rights Committee, [Views adopted by the Committee under article 5\(4\) of the Optional Protocol, concerning communication no.2751/2016](#) (20 September 2019), [7.8].

²⁰ Committee on Economic, Social and Cultural Rights, [General Comment No. 14: The Right to the Highest Attainable Standard of Health \(Art. 12 of the Covenant\)](#), UN Doc E/C.12/2000/4 (11 August 2000) [1].

²¹ *Ibid* [11].

²² National Preventive Health Strategy (n 12) 15.

- (c) human made or modified structures and areas;
- (d) ecosystems and their constituent parts, including people and communities;
- (e) the qualities and characteristics of places and areas that contribute to their biological diversity and ecological integrity, scientific value, and amenity;
- (f) the interactions and interdependencies within and between the things mentioned in paragraphs (a) to (e);
- (g) the social, aesthetic, cultural and economic conditions that affect, or are affected by, the things mentioned in paragraphs (a) to (e).²³

For the purposes of this Discussion Paper, it will be assumed that in adopting a right to a healthy environment in the Human Rights Act, ‘environment’ will be defined consistently with the definition in existing Territory laws.

Understanding ‘procedural’ and ‘substantive’ obligations

Where the right to a healthy environment has been recognised by countries in national legislation, the content of that right has been expressed in different ways, and may impose a **procedural obligation** a **substantive obligation**, or a combination of **both**.²⁴

The table below shows examples of where procedural and substantive obligations have been adopted by countries as part of defining the right to a healthy environment in national laws.

Table 1 – Right to a healthy environment – Examples of country definitions²⁵

State instrument	Procedural	Substantive
	The law will guarantee the community’s participation in the decisions that may affect it	
Colombia Constitution	It is the duty of the state to protect the diversity and integrity of the environment, to conserve the areas of special ecological importance, and to foster education for the achievement of these ends. (<i>Participation in decision-making</i>)	Every individual has the right to enjoy a healthy environment.
Fiji Constitution		Every person has the right to a clean and healthy environment, which includes the right to have the natural world protected for the benefit of present and future generations through legislative and other measures.

²³ *Environmental Protection Act 1997 (ACT) Dictionary*. Environment protection is also governed with reference to the Intergovernmental Agreement on the Environment that sets out certain responsibilities of Commonwealth, States and Territories in relation to the environment.

²⁴ John H. Knox, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: Compilation of Good Practices*, UN Doc A/HRC/28/61 (3 February 2015).

²⁵ Source <https://enviroightsmap.org/>.

France Constitution	Everyone has the right, subject to the conditions and within the limits defined by the law, to have access to the information relating to the environment held by the public authorities. (<i>Access to information</i>)	
Hawaii Constitution	Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law. (<i>Remedy</i>)	Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources.
Netherlands Constitution		It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.
Norway Constitution	In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to be informed of the state of the natural environment and of the effects of any encroachments on nature that are planned or commenced. The State authorities shall issue further provisions for the implementation of these principles. (<i>Access to information</i>)	Every person has a right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved. Natural resources should be made use of on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well.
South Africa Constitution		Every person shall have the right to an environment which is not detrimental to his or her health or well-being.
Spain Constitution		Everyone has the right to enjoy an environment suitable for the development of the person, as well as the duty to preserve it. The State shall protect, preserve and improve the environment for the benefit of the community.

As the examples in the Table show, procedural obligations may include

- Assessing environmental impacts and making environmental information public;
- Facilitating public participation in decision making regarding the environment including by protecting freedom of expression and association; and
- Providing access to remedies for harm.

It is important to note that a range of procedural protections relevant to human rights and the environment are already given effect through the Human Rights Act and other Territory and

Commonwealth legislation. Examples include requirements for public notification of environmental assessments and impacts,²⁶ and public participation in decisions affecting the environment.²⁷

The Human Rights Act contains procedural obligations on public authorities aimed at safeguarding human rights.²⁸ This includes the obligation on public authorities to give proper consideration to human rights when making decisions,²⁹ and the requirement for the Attorney-General to inform the public about human rights impacts through compatibility statements presented with new legislation to the Legislative Assembly.³⁰ It may be complicated to include additional procedural rights specific to the right to a healthy environment in the Human Rights Act. This might lead to inconsistencies with specific obligations and remedies within existing Territory and Commonwealth environment laws. This would also be inconsistent with the way that other human rights are protected in the Human Rights Act.

Human Rights Act procedures for ‘enforcing’ human rights

The Human Rights Act in section 40C provides a cause of action in the Supreme Court against a public authority where the public authority has failed to act consistently with human rights or has failed to properly consider human rights in accordance with the duty in Section 40B.

Decision makers are also required to interpret laws consistently with human rights as far as possible to do so consistent with the purpose of the law. The Supreme Court may issue a declaration of incompatibility where a law cannot be interpreted to be compatible with human rights. Where such a declaration is issued it does not invalidate the law but allows it to be considered further by the Legislative Assembly.³¹

Recognition of a right to a healthy environment would ensure the right is considered as part of government decision-making and given effect through human rights compatible legislation, policy and practice.

Importantly, inclusion of a right to a healthy environment would not require public authorities to provide all Canberrans with a healthy environment in all circumstances. Rather public authorities would have to demonstrate that they have properly considered the right and that any limitations on the right to a healthy environment are authorised by law and are justifiable as necessary, proportionate and reasonable in accordance with section 28 of the Human Rights Act.

When it comes to substantive aspects that form part of the right to a healthy environment, according to the UN Special Rapporteur, these would include:

- clean air;
- a safe climate;
- access to safe water and adequate sanitation;

²⁶ *Environmental Protection Act 1997* s41.

²⁷ *Environmental Protection Act 1997* s 48.

²⁸ *Human Rights Act 2004* (ACT) section 40 defines ‘public authority’ and an administrative unit (e.g., Directorate, Territory government service provider) Ministers, and entities exercising functions of a public nature.

²⁹ Human Rights Act section 40B.

³⁰ ACT Government, *Cabinet Handbook*, 18.

³¹ Human Rights Act, sections 30 and 32.

- healthy and sustainably produced food;
- non-toxic environments in which to live, work, study and play; and
- healthy biodiversity and ecosystems.³²

Within each of the substantive areas there is a body of existing international environmental law, which is given effect nationally through inter-governmental agreements between the Commonwealth, states and territories. For example, actions taken by ACT Government agencies relating to ensuring non-toxic environments are based on the extensive body of international law that addresses pollution and toxic substances including the Basel, Rotterdam and Stockholm Conventions.³³

Such international environmental standards provide an existing baseline for determining the necessary actions for protecting the right to a healthy environment and enable further action to be taken in line with international good practices.³⁴

In determining the scope and definition of right to a healthy environment an important consideration is how **specific** or **broad** the definition of the right could be.

An example of a **broad definition** is as follows:

‘Everyone has the right to a safe, clean, healthy and sustainable environment.’

A **specific definition** could specify duties relating to a healthy environment as follows:

*‘Everyone has the right to a safe, clean, healthy and sustainable environment, including:
clean air;
a safe climate;
access to safe water and adequate sanitation;
healthy and sustainably produced food;
non-toxic environments in which to live, work, study and play; and
healthy biodiversity and ecosystems.’*

One benefit of a broad definition is that it would allow for the evolution of international human rights and environmental law and the development of additional norms and obligations that form part of national and international environmental and human rights law frameworks. Furthermore, regard must be had to the division of responsibility between the Commonwealth and states and territories for legislating aspects of environment and health protection. A broad definition of the right to a healthy environment would allow flexibility for the Territory to prioritise those aspects of a healthy environment that are within the jurisdiction and control of the ACT Government and its available resources, and at the same time allow the Territory to continue to implement programs and standards that are set at a national and international level.

On the other hand, a broad definition may potentially impose a substantial resource impact or may be unachievable or difficult to realise. For example, while obligations to ensure a right to a healthy

³² United Nations Office of the High Commissioner of Human Rights, *Special Rapporteur on Human Rights and the Environment* (Web page) < <https://www.ohchr.org/en/special-procedures/sr-environment>>

³³ John Knox, *Human rights depend on a non-toxic environment: Executive Summary of A/HRC/49/53* (Report) < <https://www.ohchr.org/sites/default/files/2022-03/ToxicsSummary.pdf>> .

³⁴ Knox (n 24) [38]-[112].

environment extend to the built environment the Government may consider it would not be appropriate or feasible to safeguard all aspects of internal environments of private facilities and private residences.

QUESTION for discussion

Could the right to a healthy environment be defined broadly with the right expressed general terms?
Alternatively, could the definition of right to a healthy environment be more specific and incorporate substantive aspects?

Immediate obligations

The right to a healthy environment is understood to fall within the category of ESC rights.³⁵

International law distinguishes between immediate obligations in relation to implementation of human rights, and obligations that are subject to progressive realisation.³⁶

ESC rights have aspects that are immediately realisable, which means they have immediate effect and must be respected by public authorities. ESC rights also have aspects that are required to be progressively realised over time, and subject to available resources. That is, obligations that would require ongoing implementation rather than requiring full compliance immediately, which are assessed relative to available resources.

Introducing ESC rights to the Human Rights Act

When enacted in 2004, the Human Rights Act contained only civil and political rights drawn from the ICCPR and did not incorporate ESC rights drawn from the ICESCR. The ACT has taken an incremental approach to adopting ESC rights beginning with the right to education (2012) and followed by Aboriginal and Torres Strait Islander cultural rights (2016) and the right to work (2020).

What are immediate obligations in relation to right to a healthy environment?

If enacted, a right to a healthy environment means that certain general obligations would require immediate action by the Government such as:

- ensure no discrimination in the way that the right to a healthy environment is enjoyed; and
- avoid any unjustified measures that may deprive people of rights as currently enjoyed.

The general obligations could be specifically spelled out in the legislation. For example, both ESC rights currently in the Human Rights Act – the right to education and the right to work provided in sections 27A and 27B – provide that everyone is entitled to enjoy these rights without discrimination (s27A(3)(a) and s27B(5)). Under s 27B there is also a note that refers to aspects of the right to work are considered at

³⁵ Though the distinction between civil and political rights and economic, social and cultural rights is largely seen as artificial. Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on Economic, Social and Cultural Rights*, Fact Sheet no. 33 (UN OHCHR 2008) 8.

³⁶ ICESCR Art 2.1. See also Office of the United Nations High Commissioner for Human Rights, International Human Rights Law (Web page) <https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law#:~:text=By%20becoming%20parties%20to%20international,the%20enjoyment%20of%20human%20rights>

international law to be subject to an obligation of progressive realisation. As noted previously, the obligation of progressive realisation entails a corresponding obligation not to take unjustifiable retrogressive measures.

In addition, some definitions of a right to a healthy environment emphasise the importance of protecting the environment for current and future generations (see for example Norway in Table 1). Current ACT environmental protection legislation captures this idea in the principle of *inter-generational equity*, which means that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.³⁷

The ACT Government is already taking positive steps to protect and promote a healthy environment for the enjoyment of the community throughout the Territory.³⁸ As mentioned in the introduction of this Discussion Paper, strategies, programs and legislation are in place to address impacts of climate change, secure sustainable energy and transport and protect biodiversity. Further, the Government has measures aimed at addressing underlying environmental risks to human health including bushfire smoke and air quality, toxic and poisonous substances in the environment, water quality and disease vectors.

The law provides certain existing obligations on both the Government and private entities in relation to the protection of the environment. For example, the *Environment Protection Act 1997* provides for each person in the ACT to take all practicable and reasonable steps to prevent or minimise environmental harm or environmental nuisance that their actions might cause.³⁹ The Act also details the 'objects' and 'principles' that must be considered by the administering authority to protection of human health and the environment.⁴⁰

The Government is interested in hearing views on specific additional obligations that could be included for the right to a healthy environment.

QUESTION for discussion

What additional obligations or duties could be included for the Government to ensure the protection of individuals' right to a healthy environment?

Additional considerations for vulnerable groups

There is a close relationship between people's health and the circumstances in which people grow, live, work, play and age, and differential environmental and other wider determinants of health contribute to inequity and inequality in society.⁴¹ Environmental damage is felt most acutely by vulnerable populations and while our healthy environment means Canberrans enjoy one of the highest average standards of health

³⁷ Environment Protection Act 1997 (ACT) s 3D.

³⁸ Refer to [Appendix](#).

³⁹ *Environment Protection Act 1997* (ACT) General environmental duty section 22.

⁴⁰ *Environment Protection Act 1997* (ACT 'Objects' of the Act are outlined in Part 1 3C and 'Principles' are outlined in Part 1 3D.

⁴¹ National Preventive Health Strategy (n 12) 6.

and wellbeing in the world⁴² the burden of disease is higher for lower socioeconomic and marginalised groups.⁴³ Differential environmental and other wider determinants of health can contribute to inequity and inequality in society. Groups that are more susceptible to environmental damage include people with a disability, women and children, Aboriginal and Torres Strait Islander people, culturally and linguistically diverse people and people experiencing poverty. Such groups may experience increased vulnerability to negative health impacts associated with climate change and other environmental damage as a result of higher exposure to risks, biological sensitivities, and limited capacity to adapt.

It is for these reasons that consideration be given to whether the Government obligations attaching to the right to a healthy environment specifically address vulnerable populations.

It may be argued that the human rights contained in the Human Rights Act are interdependent and interrelated and together provide indirect protection for vulnerable groups. For example, the right to equality before the law and protection against discrimination ‘requires laws to be non-discriminatory both in terms of their substantive content, and to be enforced or implemented without discrimination’.⁴⁴

Notwithstanding, there is merit in making express provision in the Human Rights Act for additional duties, similar to the existing ESC rights, such as non-discrimination and progressive realisation, and to refrain from retrogressive steps.

The Government is interested in hearing the public’s views on how the right to a healthy environment could recognise the heightened vulnerability of specific groups.

QUESTION for discussion

What additional measures could be considered to ensure protection of the right to a healthy environment for vulnerable groups?

Specific considerations for Aboriginal and Torres Strait Islander people

Aboriginal and Torres Strait Islander people are at particular risk of impacts from environmental damage because of their cultural and economic dependence on environmental resources.⁴⁵ As a corollary to environmental determinants of health, cultural determinants are of particular importance to the health and wellbeing of Aboriginal and Torres Strait Islander people.⁴⁶ *Mayi Kuwayu, the National Study of Aboriginal and Torres Strait Islander Wellbeing*, refers to the importance of ‘Country’ to wellbeing:

‘Connection to Country links an Aboriginal and/or Torres Strait Islander person to their land or island and community in a deeply cultural and spiritual way. Culturally

⁴² Healthy Canberra (n 13) 3.

⁴³ Healthy Canberra (n 13) 8; National Preventive Health Strategy (n 12) 6.

⁴⁴ Hilary Charlesworth et al, *ACT Economic, Social and Cultural Rights Project Report* (September 2010), 86.

⁴⁵ John Knox *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Preliminary Report* UN Doc A/HRC/22/43 (24 December 2012) [45]; Environmental Defenders Office *Implementing effective independent Environmental Protection Agencies in Australia: Best practice environmental governance for environmental justice*, (EDO, March 2022) (Report) <<https://www.edo.org.au/publication/implementing-effective-independent-environmental-protection-agencies-in-australia/>>

⁴⁶ National Preventive Health Strategy (n 12) 17.

Aboriginal and Torres Strait Islander people describe themselves as being ‘of Country’ with identity, cultural practices, systems of authority and social rules, traditions and spirituality all tied to Country. Loss of Country, or loss of connection to Country, may have negative impacts on health. Some reports have also highlighted the negative impacts on health and wellbeing when Country has changed.⁴⁷

Section 27 of the Human Rights Act recognises the cultural and other rights of Aboriginal and Torres Strait Islander people, and includes an obligation not to deny the right:

‘... to have their material and economic relationships with the land and waters and other resources with which they have a connection under traditional laws and customs recognised and valued.’ s27(2)(b).⁴⁸

The right in section 27 points to the importance of land and resources for Aboriginal and Torres Strait Islander people and the value of knowledge, culture and tradition in decision making about the environment.

The Government is interested in hearing from the community on how the right to a healthy environment could recognise the specific importance of a healthy environment to Aboriginal and Torres Strait Islander people.

QUESTION for discussion

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

Progressive realisation - fulfilling the right to a healthy environment

As part of the progressive realisation of the right to a healthy environment, there would be an obligation on the Government to take further positive measures to improve the enjoyment of the right via appropriate means and within available resources.

This positive obligation exists alongside the duty not to take unjustified retrogressive, or backwards steps that would undo protections that are already in place.

There is a degree of flexibility about the timeframe for fully realising ESC rights. There is also a wide margin in the types of initiatives that could be pursued, having regard to available resources.

Striking a balance between human rights and other legitimate objectives

The right to a healthy environment may be subject to reasonable limitations, where such limitations are in pursuit of other legitimate objectives (see section 28 Human Rights Act). For example, the right

⁴⁷ Mayi Kuwayu *Links between Aboriginal and Torres Strait Islander culture and wellbeing: what the evidence says* (Report) <https://mkstudy.com.au/wp-content/uploads/2019/06/MAK001_Links-between-culture_Brochure_A4-Online_FINAL_V6.pdf> 5.

⁴⁸ This right is closely modelled on the UN Declaration of the Rights of Indigenous People Articles 25 and 31.

to clean air could interact with an everyday lawful activity, such as the delivery of food by emitting vehicles that comply with pollution laws.

'The obligation to protect human rights from environmental harm does not require States to prohibit all activities that may cause any environmental degradation; States have discretion to strike a balance between environmental protection and other legitimate societal interests. But the balance cannot be unreasonable, or result in unjustified, foreseeable infringements of human rights.'⁴⁹

Progressive steps could include measures such as improving policies and services which support people's enjoyment of their rights; promoting the right via awareness raising; or providing additional measures for individuals or groups unable to realise the right.

In the context of determining where and how the Government directs specific attention to progressive realisation of the right to a healthy environment, one challenge is that the environment is not static. With the emphasis in the Government's current climate change strategy being on climate resilience, both the Government and scientists anticipate more change ahead, and with such change will be challenges to find strategies to adapt.⁵⁰

The Government is interested to hear of suggestions for progressive steps that could be taken to fulfill the right to a healthy environment.

QUESTION for discussion

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

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

Making a submission

Submissions on any of the issues raised in this paper are invited by **31 July 2022**. Further information about the consultation is available on the Your Say website <https://www.yoursay.act.gov.au/>.

Submissions or questions about the public consultation can be sent to civilconsultation@act.gov.au.

If you require this document in an alternative, accessible format, or if you require assistance in making a submission, please contact us so we can help.

Submissions will be published on the ACT Government's Justice and Community Safety Directorate website unless you tell us that you would like your submission to be confidential. The options discussed here are intended to promote informed public debate. They are not the Government's final proposals. All submissions received will inform the Government's decision.

⁴⁹ Knox (n 14) [80].

⁵⁰ Climate Change Strategy (n 5) 30-31.

APPENDIX: Current ACT Government Laws, Policies and Initiatives Supporting Environmental Protection

- ACT Climate Change Strategy
- Canberra’s Living Infrastructure Plan: Cooling the City (note: there are multiple initiatives under this plan, including but not limited to the following):
 - Urban Forest Strategy
 - Climate-wise Landscape Guide
- ACT’s Transition to Zero Emissions Vehicles Action Plan
- Gas Transition
- Actsmart Schools program
- Big Canberra Battery
- Business Energy and Water Program
- Business Fleet Advisory Service
- Community Zero Emissions Grant
- Energy Efficiency Improvement Scheme
- Home Energy Support Program
- Nature in the City Grants
- Solar for Business Program
- Sustainable Household Scheme
- Sustainable Home Advice Program
- Wood Heater Replacement Program
- Bushfire smoke and air quality strategy
- ACT Planning Strategy
- ACT Environmental Offsets Policy

Select ACT environment laws

- National Environment Protection Council Act 1994 (which includes the Inter-Governmental Agreement on the Environment),
- Environment Protection Act 1997 and Environment Protection Regulation 2005 (see below, examples of substantive environment protection polices made under this legislation)
- Nature Conservation Act 2014
- Heritage Act 2004
- Commissioner for Sustainability and the Environment Act 1993
- Planning and Development Act 2007
- Waste Management and Resource Recovery Act 2016
- Plastic Reduction Act 2021.

Environment protection policies

- General Environment Protection Policy (EPP), Hazardous Materials EPP, Contaminated Sites EPP, Noise EPP, Water EPP, Air EPP, Motorsport EPP, Outdoor Concerts EPP, Separation Distance Guidelines for Air Emissions, Environmental Standards for the Classification of Liquid and Non-Liquid Waste, Waste Stockpile Guidelines, Environment Protection Guidelines for Land Development and Construction.



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Justice and Community Safety Directorate

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