

**2023**

**THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**HUMAN RIGHTS (HEALTHY ENVIRONMENT) AMENDMENT BILL 2023**

**EXPLANATORY STATEMENT  
and  
HUMAN RIGHTS COMPATIBILITY STATEMENT  
(*Human Rights Act 2004, s 37*)**

**Presented by  
Tara Cheyne MLA**

# HUMAN RIGHTS (HEALTHY ENVIRONMENT) AMENDMENT BILL 2023

The Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

## OVERVIEW OF THE BILL

The Human Rights (Healthy Environment) Amendment Bill 2023 (the Bill) amends the *Human Rights Act 2004* (the Human Rights Act) to include the right to a healthy environment in the ACT's human rights framework. The amendment inserts a new section (section 27C) into Part 3A 'Economic, social and cultural rights' of the Human Rights Act providing explicit statutory recognition that everyone has the right to a clean, healthy and sustainable environment.

The ACT will be the first Australian jurisdiction to enshrine the right to a healthy environment. This reflects the Government's recognition of the triple planetary threat of climate change, environmental pollution and biodiversity loss and the increasingly urgent need for action. Introducing the right is part of the Government's long-term commitment to protecting human rights and recognising the importance of the environment in determining outcomes for human health and wellbeing.

Recognition of the right to a healthy environment has been linked to a range of potential benefits including:

- better health outcomes for Canberrans and ecosystems for both present and future generations,
- encouraging stronger environmental laws and governance,
- improving access to justice for environmental harms in time, and
- reducing environmental injustices, which is particularly important for Aboriginal and Torres Strait Islander people and other vulnerable groups who are most at risk of environmental harm.<sup>1</sup>

Incorporating the right to a healthy environment will ensure that environmental and climate impacts are given proper consideration in the exercise of all public authority functions, including in the development of legislation, policy and decision making. This will institutionalise greater understanding of human rights and environmental considerations across Government, building and strengthening the ACT's human rights culture.

Enshrining the right is consistent with growing international consensus and practice around the role and importance of environmental protections, and understanding of a healthy environment as a human right. The emerging new right to a healthy

---

<sup>1</sup> Environmental Defenders Officer, *A Healthy Environment is a Human Right: Report on the Status of the Human Right to a Healthy Environment*.

environment has been recognised by the United Nations (UN) Human Rights Council<sup>2</sup> and the UN General Assembly.<sup>3</sup> On 22 July 2022, the UN General Assembly adopted a resolution to declare access to a clean, healthy and sustainable environment, to be a universal human right. There were 161 votes in favour, including Australia, and eight abstentions. The resolution was based on similar text adopted on 8 October 2021 by the UN Human Rights Council, which was the first formal recognition of the right to a healthy environment at the global level. Many UN member states recognise the right to a healthy environment in constitutional, legislative texts and/or accession to regional treaties incorporating the right.<sup>4</sup>

The right to a clean, healthy, and sustainable environment has not yet been established as a matter of customary international law. General Assembly resolutions do not, in themselves, create binding obligations. At this point in time, international treaty law does not provide for such a right and it is not yet been considered by a UN complaints body as a stand-alone right.

The preamble to the UN General Assembly Resolution notes the work of the Special Rapporteur on Human Rights and the Environment (the Special Rapporteur). The mandate of the Special Rapporteur, to study the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment and to identify and promote best practices relating to the use of human rights obligations and commitments to inform, support and strengthen environmental policymaking, was established in 2012 by the Human Rights Council.<sup>5</sup>

The right to a healthy environment recognises that a clean, healthy and sustainable environment is necessary for the full enjoyment of a vast range of fundamental human rights, including the rights to life, health, food, water and development. At the same time, the exercise of human rights, including the rights to information, participation and remedy, is vital to the protection of the environment.

To facilitate implementation of the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, the Special Rapporteur was urged to develop and disseminate guidance that clearly describes the relevant norms.<sup>6</sup> On the basis of previous work and extensive consultation with representatives of governments, international organisations, civil society organisations and academics, the Special Rapporteur presented framework principles on human rights and the environment to the Human Rights Council in March 2018.<sup>7</sup>

---

<sup>2</sup> Human Rights Council resolution A/HRC/RES/48/13, 8 October 2021.

<sup>3</sup> General Assembly resolution A/RES/76/300, 28 July 2022.

<sup>4</sup> Human Rights Council A/HRC/43/53, Report of the Special Rapporteur on the issue of human rights, obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, *Right to a healthy environment: good practices*, 30 December 2019.

<sup>5</sup> Human Rights Council resolution A/HRC/RES/19/10, 19 April 2012.

<sup>6</sup> Human Rights Council A/HRC/31/53, Report of the Special Rapporteur on the issue of human rights, obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 28 December 2015.

<sup>7</sup> Human Rights Council A/HRC/37/59, Special Rapporteur on Human Rights and the Environment, *Framework*

The 16 framework principles set out basic obligations of States under human rights law as they relate to the enjoyment of a safe, clean, healthy and sustainable environment. Each framework principle has commentary that elaborates on it and further clarifies its meaning. The principles provide integrated and detailed guidance for practical implementation of the obligations, and a basis for their further development as the understanding of the relationship between human rights and the environment continues to evolve. The framework principles and commentary do not create new obligations. Rather, they are intended to reflect the application of existing human rights obligations in the environmental context.

The 16 framework principles are:

1. States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights.
2. States should respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment.
3. States should prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment.
4. States should provide a safe and enabling environment in which individuals, groups and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation and violence.
5. States should respect and protect the rights to freedom of expression, association and peaceful assembly in relation to environmental matters.
6. States should provide for education and public awareness on environmental matters.
7. States should provide public access to environmental information by collecting and disseminating information and by providing affordable, effective and timely access to information to any person upon request.
8. To avoid undertaking or authorising actions with environmental impacts that interfere with the full enjoyment of human rights, States should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights.
9. States should provide for and facilitate public participation in decision-making related to the environment, and take the views of the public into account in the decision-making process.
10. States should provide for access to effective remedies for violations of human rights and domestic laws relating to the environment.

11. States should establish and maintain substantive environmental standards that are non-discriminatory, non-retrogressive and otherwise respect, protect and fulfil human rights.
12. States should ensure the effective enforcement of their environmental standards against public and private actors.
13. States should cooperate with each other to establish, maintain and enforce effective international legal frameworks in order to prevent, reduce and remedy transboundary and global environmental harm that interferes with the full enjoyment of human rights.
14. States should take additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities.
15. States should ensure that they comply with their obligations to indigenous peoples and members of traditional communities, including by:
  - a. recognising and protecting their rights to the lands, territories and resources that they have traditionally owned, occupied or used,
  - b. consulting with them and obtaining their free, prior and informed consent before relocating them or taking or approving any other measures that may affect their lands, territories or resources,
  - c. respecting and protecting their traditional knowledge and practices in relation to the conservation and sustainable use of their lands, territories and resources, and
  - d. ensuring that they fairly and equitably share the benefits from activities relating to their lands, territories or resources.
16. States should respect, protect and fulfil human rights in the actions they take to address environmental challenges and pursue sustainable development.

The new section 27C adopts the language of the UN General Assembly Resolution that everyone has the right to a clean, healthy and sustainable environment. This broad, principled statement will allow the right to evolve and develop consistently with international law. The interpretation of the scope and content the right will be informed by international human rights case law and commentary of the UN treaty bodies.

The right to a healthy environment contains both substantive and procedural elements derived from a number of human rights, including civil and political rights (for example, the right to life and the right to privacy) and economic, social and cultural rights (e.g. the right to health). Substantive components provide a guarantee of a baseline, material outcome, whereas procedural components are outcome-neutral, guaranteeing the use of, and access to, certain processes.

The right to a healthy environment has been defined by the Special Rapporteur to comprise the following six substantive elements:<sup>8</sup>

- clean air,<sup>9</sup>
- a safe climate,<sup>10</sup>
- access to safe water and adequate sanitation,<sup>11</sup>
- healthy and sustainably produced food,<sup>12</sup>
- non-toxic environments in which to live, work, study and play,<sup>13</sup> and
- healthy biodiversity and eco-systems.<sup>14</sup>

This list is not exhaustive and will evolve as the understanding of State obligations under international human rights law in relation to a healthy environment evolves.

Within each of the substantive components there is a body of existing international environmental law, providing a baseline for determining the necessary actions for protecting the right to a healthy environment and enabling further action to be taken in line with international good practices.<sup>15</sup>

The Special Rapporteur recognises that the substantive elements must be accompanied by corresponding procedural elements. The procedural elements that will be protected by the introduction of the right include:

- access to information on environmental risks and harms,
- participation in environmental-decision-making,
- requiring the prior assessment of possible environmental impacts of proposed projects and policies, including their potential effects on human rights, and

---

<sup>8</sup> 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> >

<sup>9</sup> Human Rights Council A/HRC/40/55, Special Rapporteur on Human Rights and the Environment, *Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, 8 January 2019.

<sup>10</sup> Human Rights Council A/74/161, Special Rapporteur on Human Rights and the Environment, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, 15 July 2019.

<sup>11</sup> Human Rights Council A/HRC/46/28, Special Rapporteur on Human Rights and the Environment, *Human rights and the global water crisis: water pollution, water scarcity and water-related disasters*, 19 January 2021.

<sup>12</sup> Human Rights Council A/76/179, Special Rapporteur on Human Rights and the Environment, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, 19 July 2021.

<sup>13</sup> Human Rights Council A/HRC/49/53, Special Rapporteur on Human Rights and the Environment, *The right to a clean, healthy and sustainable environment: non-toxic environment*, 12 January 2022.

<sup>14</sup> Human Rights Council A/75/161, Special Rapporteur on Human Rights and the Environment, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, 15 July 2020.

<sup>15</sup> Human Rights Council A/HRC/28/61, *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*, 3 February 2015.

- access to justice.

The new right in the Bill will be included in Part 3A of the Human Rights Act. At international law, economic, social and cultural rights have aspects that are immediately realisable and aspects that are required to be progressively realised over time. To the extent that certain aspects of the right to a healthy environment are derived from economic, social and cultural rights, such aspects may be subject to progressive realisation. Such aspects will require governments to take reasonable steps within available resources to achieve these rights, and not to take retrogressive steps. This is reflected in the *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*.<sup>16</sup> Progressively realisable aspects are generally those obligations that require ongoing investment to fulfil and can continue to be improved. As noted by the Special Rapporteur, limited resources may prevent the immediate realisation of the rights to health, food, water and other economic, social and cultural rights.<sup>17</sup> The obligation of States to achieve progressively the full realisation of these rights by all appropriate means requires States to take deliberate, concrete and targeted measures towards that goal, but States have some discretion in deciding which means are appropriate in light of available resources.<sup>18</sup>

The discretion is not unlimited and is constrained by two general obligations that require immediate action by the Government:

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

By way of example, the Special Rapporteur notes that the right to breathe clean air is subject to progressive realisation, recognising that in some low- and middle-income States it cannot be immediately fulfilled. States have discretion to determine which air quality policies and programs are best suited to their particular circumstances. However, they have obligations, to the maximum of their available resources, to implement concrete and effective measures to prevent increases in air pollution, improve air quality and fulfil the right to breathe clean air. Some obligations, such as non-discrimination and non-regression, are of immediate effect. The principle of non-regression means States must not weaken air quality regulations, standards or policies.<sup>19</sup>

---

<sup>16</sup> Human Rights Council A/HRC/37/59, Special Rapporteur on Human Rights and the Environment, *Framework principles on human rights and the environment*, 24 January 2018, refer Framework Principle 11.

<sup>17</sup> Human Rights Council A/HRC/37/59, Special Rapporteur on Human Rights and the Environment, *Framework principles on human rights and the environment*, 24 January 2018, refer Framework Principle 11.

<sup>18</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 3, Nature of State Parties' Obligations, Article 2, Para 1 (14 December 1990).

<sup>19</sup> Human Rights Council A/HRC/40/55, Special Rapporteur on Human Rights and the Environment, *Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, 8 January 2019.

Although progressive realisation requires States to take reasonable steps to the maximum of available resources, this concept recognises that States are required to determine the optimum use of their resources and to adopt policies and prioritise certain resource demands over others.<sup>20</sup>

In reflecting on the sound management and disposal of hazardous substances and wastes, the Special Rapporteur considers that the obligation of non-discrimination requires States to avoid exacerbating, and actively improve, existing situations of environmental injustice. It also requires States to prioritise clean-up and restoration measures for disadvantaged communities that bear a disproportionate burden of exposure to pervasive pollution and toxic contamination.<sup>21</sup>

The Special Rapporteur argues that States must adopt science-based standards for pollution and toxic substances, based on international guidance from organisations including the World Health Organisation, the Food and Agriculture Organization of the United Nations (FAO) and the United Nations Environment Programme (UNEP). Once these standards are in place, the Special Rapporteur notes that the principle of non-regression means the State cannot ignore them or establish levels that are less protective without adequate justification, which would compromise its obligation to ensure the progressive development of the rights to health and the environment.<sup>22</sup>

The Special Rapporteur lists the other factors that should be taken into account in assessing whether environmental standards otherwise respect, promote and fulfill human rights including:

- the standard should take into account and, to the extent possible, be consistent with all relevant international environmental, health and safety standards, such as those set by the WHO,
- the standard should take into account the best available science,
- the standard must comply with all relevant human rights obligations. For example, in all actions concerning children, the best interests of the child must be a primary consideration, and
- the standard must not strike an unjustifiable or unreasonable balance between environmental protection and other social goals.<sup>23</sup>

The concept of progressive realisation recognises that governments have discretion to make difficult decisions about the allocation of finite resources across a range of priority areas, but seeks to ensure that progress towards fulfilling rights is ongoing and that backwards steps are not taken unless these can be reasonably justified.

---

<sup>20</sup> See the Committee on Economic, Social and Cultural Rights Statement (2007) *An evaluation of the obligation to take steps to the 'maximum available resources' under an optional protocol to the Covenant*.

<sup>21</sup> Human Rights Council A/HRC/49/53, Special Rapporteur on Human Rights and the Environment, *The right to a clean, healthy and sustainable environment: non-toxic environment*, 12 January 2022.

<sup>22</sup> Human Rights Council A/HRC/49/53, Special Rapporteur on Human Rights and the Environment, *The right to a clean, healthy and sustainable environment: non-toxic environment*, 12 January 2022.

<sup>23</sup> Human Rights Council A/HRC/37/59, Special Rapporteur on Human Rights and the Environment, *Framework principles on human rights and the environment*, 24 January 2018, refer Framework Principle 11.



There is a degree of flexibility about the timeframe for fully realising economic, social and cultural rights. The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights notes, however, that the obligation "to achieve progressively the full realization of the rights" requires States parties to move as expeditiously and effectively as possible towards the realisation of the rights.<sup>24</sup>

As with other rights in the Human Rights Act, the right to a healthy environment is not absolute and can be subject to such limitations as are demonstrably justifiable in a free and democratic society.

The specific obligation for public authorities to act consistently with human rights and to give proper consideration to relevant rights in decision making in section 40B of the Human Rights Act will apply to the new right.

While public authorities will have obligations to comply with this right, to allow public authorities time to fully understand, implement and institutionalise the right to a healthy environment in decision-making, policies and legislation, the direct right of action to the ACT Supreme Court for a breach of public authority obligations, and the ability to raise public authority breaches as part of other litigation, set out in section 40C of the HR Act, will not initially apply to this right.

This limitation will be subject to a mandatory statutory review. The review will be required to be tabled as soon as practicable after five years from commencement of the new right. The review will also assess the impact of the right and any refinement needed based on further development and crystallisation of the right at the international level. This period will provide greater clarity on the obligations owed before this right becomes justiciable.

While the direct right of action in the Supreme Court will not apply to this right, all other enforcement mechanisms in the Human Rights Act will apply, including:

- the requirement for the Attorney-General to certify compatibility of new Government Bills (section 37),
- scrutiny by the Legislative Assembly Scrutiny of Bills Committee (section 38),
- the requirement for Courts and decision makers to interpret laws to be consistent with human rights, as far as possible and consistent with the purpose of the law (section 30),
- the ability for the Supreme Court to issue a declarations of incompatibility where a law cannot be interpreted to be compatible with the right to a healthy environment (section 32), and
- the ability to bring complaints about breaches of this right by public authorities to the Human Rights Commission pursuant to amendments to be introduced in

---

<sup>24</sup> Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. See also, Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1990).

the Human Rights (Complaints) Legislation Amendment Bill 2023.

## CONSULTATION ON THE PROPOSED APPROACH

In the 10th Parliamentary and Governing Agreement, the Government agreed to consider introducing the right to a healthy environment into the Human Rights Act.

In November 2022, the Government committed to introduce an amendment to the Human Rights Act to include a right to a healthy environment in the Human Rights Act in this term of the Assembly. This followed strong public support for introducing the right to a healthy environment expressed through a public consultation process undertaken in 2022. The YourSay public consultation was launched via release of a Discussion Paper in June 2022.<sup>25</sup> The Listening Report published in November 2022 provides a summary of the responses received and views expressed.<sup>26</sup>

In 2023, the Justice and Community Safety Directorate has been engaging with key stakeholders, including primarily Government directorates and agencies to inform the development of the Bill and key implementation measures.

## CONSISTENCY WITH HUMAN RIGHTS

### Rights engaged

The UN General Assembly Resolution affirms ‘the importance of a clean, healthy and sustainable environment for the enjoyment of all human rights’. The right to a healthy environment has been recognised as a precondition to the enjoyment of all other human rights. Treaty bodies, regional tribunals, special rapporteurs and other international human rights bodies have described how environmental degradation interferes with specific rights, including the rights to life, health, food, water, housing, culture, development, property and home and private life, in effect “greening” existing human rights.<sup>27</sup>

The Human Rights (Healthy Environment) Amendment Bill 2023 promotes all of the rights in the Human Rights Act by providing for the protection of the environment, including ecosystems, to contribute and promote human wellbeing for both present and future generations.

The Bill specifically engages and complements the following rights:

---

<sup>25</sup> ACT Government, *Right to a Healthy Environment*, Discussion Paper, [https://www.justice.act.gov.au/\\_data/assets/pdf\\_file/0007/2072383/Discussion\\_Paper\\_-\\_Right\\_to\\_a\\_Healthy\\_Environment.pdf](https://www.justice.act.gov.au/_data/assets/pdf_file/0007/2072383/Discussion_Paper_-_Right_to_a_Healthy_Environment.pdf).

<sup>26</sup> ACT Legislative Assembly, *Your Say Report – Right to a Healthy Environment – Report on What We Heard*, November 2022, [https://hdp-au-prod-app-act-yoursay-files.s3.ap-southeast-2.amazonaws.com/8716/6967/9172/Your\\_Say\\_Report\\_-\\_Right\\_To\\_A\\_Healthy\\_Environment\\_-\\_Report\\_On\\_What\\_We\\_Heard.pdf](https://hdp-au-prod-app-act-yoursay-files.s3.ap-southeast-2.amazonaws.com/8716/6967/9172/Your_Say_Report_-_Right_To_A_Healthy_Environment_-_Report_On_What_We_Heard.pdf).

<sup>27</sup> Human Rights Council A/73/188, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, 19 July 2018.

- Right to equality (promoted)
- Right to life (promoted)
- Protection of the family and children (promoted)
- Right to privacy, family and home (promoted)
- Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities (promoted)

### ***Rights Promoted***

The Human Rights (Healthy Environment) Amendment Bill 2023 promotes the rights in the *Human Rights Act 2004* by recognising the right to a healthy environment which has both substantive and procedural components. 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, including the right to life (section 9) and the right to privacy, family and home (section 12), and the right to health recognised under the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The new section 40C(5B) clarifies that the limitation on Court remedies will not have any effect on the ability to take action and make a claim in relation to breaches of other rights in the Human Rights Act that include aspects of the right to a healthy environment, such as the right to life (section 9) and the cultural rights of Aboriginal and Torres Strait Islander peoples (section 27(2)).

The Bill promotes:

- The right to equality – the human rights implications of environmental damage are felt most acutely by segments of the population that are already in vulnerable situations, including Indigenous peoples, children, older persons and persons with disabilities. The new section 27C(2) states that everyone is entitled to enjoy the rights in section 27C without discrimination, reflecting the UN General Assembly Resolution. This includes the concept of taking ‘special measures’ to ensure substantive equality in the enjoyment of the right to a healthy environment. There may be areas where the right might require a greater focus on the needs of individuals with particular vulnerabilities who may be more affected by environmental issues than the broader community.
- The right to life – this right is threatened by environmental degradation, including climate change, pollution and biodiversity loss. 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.<sup>28</sup> The right to life could also extend to incorporate a right to health which has been interpreted to include determinants of health such as access to food, safe drinking water, adequate sanitation, and a healthy environment.<sup>29</sup>

- Protection of the family and children – the Committee on the Rights of the Child has said that the triple planetary crisis is an urgent and systemic threat to children’s rights globally.<sup>30</sup> The Committee noted the immediate risks that children face from poor air and water quality, a lack of food safety and exposure to toxic pollutants such as lead, especially children with disabilities, belonging to minority or Indigenous groups, and living in areas vulnerable to climate breakdown and disasters. Statutory recognition of the right to a healthy environment will provide a safeguard for present and future generations.
- The right to privacy and reputation – 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.<sup>31</sup>
- Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities – the Bill includes explicit recognition of the distinct cultural rights of Aboriginal and Torres Strait Islander peoples in note 2 to the new section 27C. Aspects of the right to a healthy environment set out in Framework Principle 15 are drawn from the UN Declaration on the Rights of Indigenous Peoples and reflect that Aboriginal and Torres Strait Islander people have material spiritual and cultural connections and economic relationships with the land, waters and other resources under traditional laws and customs recognised and valued.

---

<sup>28</sup> Human Rights Committee, General Comment No. 36, Article 6 (Right to Life) (3 September 2019).

<sup>29</sup> Committee on Economic, Social and Cultural Rights, General Comment No 14, Article 12 (Right to Highest Attainable Standard of Health) (11 August 2000).

<sup>30</sup> Convention on the Rights of the Child, General Comment No. 26, Children’s rights and the environment, with a special focus on climate change (22 August 2023).

<sup>31</sup> Human Rights Committee, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication (20 September 2019).

# HUMAN RIGHTS (HEALTHY ENVIRONMENT) AMENDMENT BILL 2023

## *Human Rights Act 2004 - Compatibility Statement*

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Human Rights (Healthy Environment) Amendment Bill 2023**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly **is** consistent with the *Human Rights Act 2004*.

.....

Shane Rattenbury MLA  
Attorney-General

## CLAUSE NOTES

### Clause 1 Name of Act

This clause provides that the name of the Act is the *Human Rights (Healthy Environment) Amendment Act 2023*.

### Clause 2 Commencement

This clause provides for the commencement of the Act on a date fixed by the Minister by written notice. Note 3 to this clause confirms that if a date is not fixed by the Minister by written notice within 6 months beginning on the notification day, the Act will automatically commence on the first day after 6 months, as per section 79 of the *Legislation Act 2001*

### Clause 3 Legislation amended

This clause provides that the Bill amends the *Human Rights Act 2004*.

### Clause 4 Part 3A, new notes

This clause inserts three new notes to Part 3A which relates to economic, social and cultural rights. The right to a clean, healthy, and sustainable environment has not yet been established as a matter of customary international law, and is an emerging right which will continue to develop in its scope and nature at the international level. It has also been said to fit within a third generation of ‘solidarity’ rights, alongside rights to peace and development, as responses to changing circumstances and needs.<sup>32</sup>

The new note 1 lists the primary sources for the rights set out in Part 3A.

The new note 2 is inserted to provide that some aspects of the rights in Part 3A are considered at international law to be subject to an obligation of progressive realisation. This reflects that international law distinguishes between immediate obligations in relation to implementation of human rights, and obligations that are subject to progressive realisation. The two other rights in Part 3A, the right to education and the right to work and other work-related rights, specify some of the general obligations that apply to the rights. The right to education in section 27A(3) specifically lists aspects of the right that constitute the immediately realisable obligation. The new note 2 does not affect the operation of the right to education.

The new note 3 recognises that some of these rights have been expressed in a core human right treaty, namely Article 8(4) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR). This source is relevant for the purpose of

---

<sup>32</sup> VP Nada and G Pring, *International Environmental Law and Policy for the 21<sup>st</sup> Century*, (Transnational Publishers, New York, 2003), 455.

interpreting the scope and application of some of the Part 3A rights, including the obligation of progressive realisation.

**Clause 5 Right to work and other work-related rights  
Section 27B, notes 2 and 3**

This clause omits notes 2 and 3 from section 27B (right to work and other work-related rights). These notes will now be contained in the notes to Part 3A.

**Clause 6 New section 27C**

This clause inserts new section 27C, the right to a healthy environment, giving express recognition that everyone has the right to a clean, healthy and sustainable environment.

The right a healthy environment in section 27C(1) is expressed in the same terms as the UN General Assembly Resolution. This broad, principled statement will allow the right to evolve and develop consistently with international law.

Section 27C(2) states that everyone is entitled to enjoy the right contained in section 27C(1) without discrimination. This provides a general obligation that will require immediate action by the ACT Government on commencement of the Bill. This reflects the Special Rapporteur's Framework Principle 3 which involves obligations to:

- protect against environmental harm that results from or contributes to discrimination,
- provide equal access to environmental benefits,
- avoid decisions that indirectly discriminate, for example, authorising toxic or hazardous facilities near particular disadvantaged communities, and
- take additional measures to protect those who are most vulnerable to, or at risk from, environmental harm.

It also reflects other ACT laws such as the *Discrimination Act 1991* which protects discrimination on the ground of a number of attributes, including race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.

Expressly including the non-discrimination obligation in the new section 27C(2) is not intended to have any interpretative impact on other rights. Section 8(2) of the Human Rights Act, which provides that everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind, applies to all rights.

Note 1 refers to section 28 of the Human Rights Act. Section 28 applies to all rights in the Human Rights Act and this note is not intended to affect the application of section 28 to all other rights. This note is provided to make plainly clear that the right to a healthy environment is not absolute and can be subject to such limitations as are demonstrably justifiable in a free and democratic society. This clarifies that when the Government is

introducing legislation, and when public authorities are making decisions and exercising their functions, the right to a healthy environment would not prohibit actions that have adverse environmental effects, but would require that any interferences with the right be reasonable and demonstrably justified. Whether a limit is reasonable depends upon whether it is proportionate to achieve a legitimate aim. The test in section 28 provides a principled approach to allow human rights considerations to be factored into policy and decision making, and would permit the Government to balance the right to a healthy environment against a number of legitimate, public interest objectives.

Note 2 cross-references section 27(2) of the Human Rights Act which enshrines Aboriginal and Torres Strait Islander peoples' cultural rights in relation to the land and waters and other resources. The note intends to recognise the intimate and interdependent relationship between the right to a healthy environment and the right to culture for Aboriginal and Torres Strait Islander people and their connections to their lands, waters, territories and resources, which are particularly at risk of harm from destroyed, degraded and polluted environments.

#### **Clause 7      Legal proceedings in relation to public authority actions New section 40C (5A) and (5B)**

This clause inserts new subsections (5A) and (5B) into section 40C. Subsection (5A) provides that the remedies in section 40C, being the right of individuals affected by a breach of a human rights obligation by a public authority to take action in the Supreme Court, and the ability to raise a breach of human rights in other proceedings, will not initially apply.

Public authority obligations under section 40B will apply to the right on commencement. All public authorities, including public employees, have an obligation under section 40B to act consistently with human rights, including the new right to a healthy environment, and to give proper consideration to relevant rights in decision-making.

Individuals will also be able to bring complaints to the Human Rights Commission for conciliation once amendments introduced by the Human Rights (Complaints) Legislation Amendment Bill 2023 commence operation. This will provide an accessible mechanism for individuals to raise and resolve concerns.

Subsection (5B) clarifies that the restriction on litigation would not have any effect on the ability to take action in relation to breaches of other rights in the Human Rights Act that include aspects of the right to a healthy environment to the extent of any overlap. International legal commentary supports the links between the right to a healthy environment and other existing rights, such as the right to life and the cultural rights of Aboriginal and Torres Strait Islander peoples. This means a person would not be precluded from bringing a matter to the ACT Supreme Court or relying on the person's other rights protected in the Human Rights Act in other legal proceedings involving an environmental issue.



The example in subsection (5B) demonstrates potential intersections between the right to life and the right to a healthy environment. The UN Human Rights Committee 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.'<sup>33</sup>

#### **Clause 8      New section 43**

This clause inserts section 43 which imposes a review obligation on the Minister to conduct a review and present a report to the Legislative Assembly as soon as practicable after five years of the Bill commencing operation. This would enable the review itself to start earlier if appropriate. It is a requirement that the review consider the operation of section 27C and section 40C(5A) and (5B).

#### **Clause 9      ICESCR source of human rights Schedule 2, new note**

This clause inserts a new note 2 reflecting the source of the right to a healthy environment.

---

<sup>33</sup> Human Rights Committee, General Comment No. 36, Article 6 (Right to Life) (3 September 2019).