

Submission in response to

Parliamentary Joint Committee on Human Rights: Inquiry into Australia's Human Rights Framework

prepared by

Environmental Justice Australia

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1 About Environmental Justice Australia

1. Environmental Justice Australia (**EJA**), formerly the Environment Defenders Office (Victoria) is a public interest environmental law practice, based in Melbourne and undertaking work across our areas of expertise throughout Australia. We provide legal advice and support to the community on public interest environmental justice issues, advocate for better environmental laws, and provide legal education to the community on environment matters.
2. Our work involves witnessing the human rights implications of environmental degradation and climate change on a daily basis. We represent clients experiencing environmental injustice for whom various fundamental human rights are threatened by the unsustainable environmental practices and decisions imposed by government and corporations.
3. Particularly relevant to this inquiry, we facilitate community participation in environmental decision-making processes to empower individuals and communities to protect the environment. We also defend the protest rights of environment and climate activists.
4. EJA is not a First Nations led organisation. We bring a depth of knowledge in the ways that existing environment legislation perpetuates settler colonial relationships to natural resources and denies the distinct human rights of Aboriginal and Torres Strait Islander peoples in relation to land, waters, and the protection of significant cultural landscapes. The recommendations we make in relation to First Nations human rights are informed by international best practice in human rights governance. However, we strongly recommend that legislation and policy impacting First Nations peoples be developed with and informed by First Nations advocates.

2 Executive Summary

5. We support the enactment of a Federal Human Rights Act/Charter (**Federal Human Rights Act**) that incorporates the rights and protections of all the international human rights conventions and instruments to which Australia is a signatory or has endorsed.¹ Such an Act would advance the proper, domestic consideration of human rights in Australia and ensure consequences for the failure to uphold and protect human rights. A Federal Human Rights Act would ensure equal access of all Australians seeking to assert their human rights.
6. Australia is increasingly isolated internationally as a nation without domestic federal recognition and protection of human rights. Some UN member states have enshrined human rights in their constitution, anti-discrimination legislation, or human rights acts or charters.² However, differing approaches in Australian States and Territories have led to inconsistent outcomes and legislation that lacks sufficient safeguards to guarantee the protection of human rights.
7. Hence, there is a real need for federal recognition and protection of human rights. Accordingly, we concur with the submission made by the Australian Human Rights Commission (**AHRC**) that a Federal Human Rights Act exposure draft should be developed and tabled as soon as possible.³
8. Within the Federal Human Rights Act, we propose that the following rights be explicitly included:

The Right to a Safe, Clean, Healthy, and Sustainable Environment

9. A fundamental weakness in Australia's current federal laws is the lack of broad-based and binding legal mechanisms to set and implement pollution and waste controls at the national level, including a duty requirement for prevention of environmental harm. The existing framework is bureaucratic and discretionary, dependent on convoluted intergovernmental arrangements, and has no requirement to reflect best available science or to act based on emerging international standards.⁴
10. Current Federal and State mechanisms to protect human rights, and particularly the right to a healthy environment, are either inadequate or non-existent. The recent 2021 State of the Environment Report is evidence that the right to a healthy environment is inadequately protected in Australia⁵.
11. To enshrine and protect this right, we advocate for federal recognition of the right to a safe, clean, healthy, and sustainable environment. The right is recognised in law by more than 80

¹ [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).

² [Human Rights Act 2004 \(ACT\)](#); [Human Rights Act 2019 \(Qld\)](#); [The Charter of Human Rights and Responsibilities Act 2006](#) (Vic).

³ As part of the legislative reform, and to ensure that the Federal Human Rights Act is integrated into Australian government action, it should be given consideration when passing federal law in a Statement of Compatibility prepared and tabled pursuant to s 8 of the [Human Rights \(Parliamentary Scrutiny\) Act 2011 \(Cth\)](#).

⁴ See Environmental Justice Australia, [Clearing the Air: Why Australia Urgently Needs National Air Pollution Laws \(2014\)](#); Scope of coverage of national measures regulating toxics remains constrained, for example in failure to regulate mercury, PVCs and POPs under air pollution standards and failure to set national water pollution or contamination standards. By comparison with analogous US laws (such as the Clean Air Act or Clean Water Act) regulatory coverage is limited and fails to establish binding measures for reduction of pollution and waste.

⁵ Independent State of the Environment Authors, [Australia, State of the Environment 2021: Overview](#).

per cent of members of the United Nations but has yet to be enshrined in Australian law.⁶ To account for the continued development in emerging international law and environmental science, the right should not include substantive elements. However, if any substantive elements are developed, we have proposed they align with the elements outlined 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, delivered to the Human Rights Council.⁷

12. We also recommend that an integral component of this right should be contained in the procedural rights in environmental decision-making. This would include enshrining the principles outlined in the *Convention on Access to Information, Public Participation in decision-making and Access to Justice in Environmental Matters (Aarhus Convention)* and ratifying the convention.
13. Further, the Federal Human Rights Act should include a duty on federal public authorities to act compatibly with the human rights in the Act and to consider human rights when making decisions. This public authorities' duty should also be extended to ensure private actors act compatibly with the human rights contained in the Federal Human Rights Act. In order to deter harmful actions and allow access to remedy for harm, the right should include a separate stand-alone cause of action with the ability for third parties to bring forward actions.

The Distinct Cultural and Environmental Rights of Australia's First Peoples

14. We submit that any Federal Human Rights Act should enshrine the protection of Australia's First Peoples' distinct cultural and environment rights, as those rights relate to the protection of, access to and connection with traditional lands, waters, and holistic care for Country. We support legislative protection of a safe, clean, healthy, and sustainable environment and submit that the right should also include specific procedural and participation rights for First Nations peoples and their distinct cultural and environmental rights.
15. The *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* is the leading international instrument on the rights of Indigenous Peoples and it should serve as minimum benchmark for expressing the rights of Indigenous Peoples within the proposed Federal Human Rights Act. Australia should implement UNDRIP rights into the Federal Human Rights Act, in line with the multi-avenue approach outlined in the AHRC's Position Paper and developed in 'deep' consultation with First Nations Australians.

The Right to Protest, specifically in Defence of the Environment

16. Democratic society relies on ensuring its citizens have the freedom to advocate for change, and draconian protest laws undermine this right and limit the access of individuals and groups to decision-makers. To protect civic participation in the right to protest, we support the proposal in the AHRC's Position Paper to include the freedom of movement, freedom of expression, right to peaceful assembly, and freedom of association in any Federal Human Rights Act.
17. We submit that with the national trend towards criminalising peaceful protest, specifically as it relates to environmental protest, enshrining protection of the human right to protest on

⁶ Special Rapporteur, [Good practices on the right to a safe, clean, healthy and sustainable environment](#), UN Doc. A/HRC/43/53 (30 December 2019).

⁷ Ibid.

environmental issues would protect the necessary role of civic participation and would be in line with Australia's international obligations. We consider this right could be drafted in similar terms to 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)*⁸.

18. We provide a list of recommendations at the conclusion of this submission.

3 Human Right to a Safe, Clean, Healthy, and Sustainable Environment

19. We strongly recommend the right to a **safe, clean, healthy, and sustainable environment** be included as a protected right under any Federal Human Rights Act.
20. A safe and healthy environment is broadly accepted as a precondition to the realisation of most other human rights.⁹
21. While some other human rights, such as the right to life or to health, arguably can be interpreted to include a right to a safe and healthy environment, they are not sufficient to safeguard this right.
22. This right is not merely focused on environment conservation, but the failure to protect this right has tangible, far-reaching effects on human life. See for example, the UN report on the intersection between the right to healthy environment and pandemics:

“The environmental context is particularly important because the risks of zoonotic pandemics are closely connected to environmental factors. Land-use change, agricultural expansion, livestock intensification, deforestation, climate change, biodiversity loss, and wildlife trade and consumption are increasing the risks of spillover.”¹⁰

[...]

“In numerous States, including Brazil, Colombia, Costa Rica, Hungary, India, Indonesia, Mexico and the Philippines, Governments, local communities and civil society organizations have effectively used the right to a clean, healthy and sustainable environment to address drivers of zoonotic disease risk... As the right to a clean, healthy and sustainable environment gains wider legal recognition across the world, it will be increasingly useful in efforts to address deforestation, agricultural expansion, livestock intensification, illegal wildlife trade and the other environmental drivers of zoonotic disease.”¹¹

23. The right to a clean, healthy, and sustainable environment is recognised as a human right by the United Nations General Assembly.¹² It was also recognised by the Human Rights Council

⁸ [Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean](#) ('Escazú Agreement'), opened for signature 9 April 2018, 3397 UNTS (entered into force 22 April 2021).

⁹ Human Rights Council, UN Doc. [A/HRC/RES/48/13](#), 8 October 2021.

¹⁰ David R Boyd, [Summary of the expert seminar on human rights and environmental conservation in the prevention of future pandemics - Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment](#), Un Doc. A/HRC/52/44 (21 December 2022).

¹¹ Ibid.

¹² United Nations General Assembly, UN Doc. [A/RES/76/300](#), 28 July 2022.

as a precursor right that was important for the enjoyment of all other human rights and related to other rights in existing international law.¹³

24. In terms of how this right should be articulated in Australian legislation, we consider the definition outlined in the related Special Rapporteur's report to be the most appropriate, being the 'right to a safe, clean, healthy and sustainable environment'.¹⁴ Express recognition of the necessity of a 'safe' environment as a component of the right reflects the necessary need to recognise and respond to the reality of climate change when articulating and realising the right to a healthy environment.

25. This is also consistent with statements by the Human Rights Council that have affirmed that States have an obligation to:

*“respect, protect and promote human rights, including in all actions undertaken to address environmental challenges, and to take measures to protect the rights of all, as recognized in different international instruments and reflected in the framework principles on human rights and the environment, prepared by the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, and that additional measures should be taken for those who are particularly vulnerable to environmental harm”.*¹⁵

26. Despite voting to adopt the General Assembly's resolution on the right to a clean, healthy, and sustainable environment,¹⁶ there is currently no legislative recognition of this right in any Australian jurisdiction.

27. Existing environment laws at both State and Federal level have proven inadequate to protect our environment. One need only look at Australia's 2021 State of the Environment report to consider that the current measures are not sufficient:

*“Although there have been numerous environmental initiatives at both national and state and territory levels, there is insufficient overall investment and lack of coordination to be able to adequately address the growing impacts from climate change, land clearing, invasive species, pollution and urban expansion.”*¹⁷

28. Therefore, the right to a safe, clean, healthy, and sustainable environment should be enshrined federally and should be done so in a Federal Human Rights Act. Any such right should be applied equally to all.

29. We concur with the AHRC's submission that a Federal Human Rights Act should include a right to a healthy environment. However, with respect, we consider the wording of this right is too narrow and should be broadened to reflect international standards.¹⁸

30. The AHRC's proposed wording states as follows:

¹³ Human Rights Council, UN Doc. [A/HRC/RES/48/13](#), 8 October 2021.

¹⁴ John H Knox, [Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment](#), UN Doc. A/73/188 (19 July 2018).

¹⁵ Human Rights Council, UN Doc. [A/HRC/RES/48/13](#), 8 October 2021.

¹⁶ United Nations General Assembly, UN Doc. [A/RES/76/300](#), 28 July 2022.

¹⁷ [Australia state of the environment 2021: Overview](#), 14.

¹⁸ The ACT is currently progressing the inclusion of the right to a healthy environment in its *Human Rights Act 2004* (ACT). Its discussion paper has useful comparisons of the different approaches taken by other jurisdictions to incorporate the right. [Discussion Paper – Right to a Healthy Environment](#), 8 – 9.

(1) Every person has the right to an environment that does not produce adverse health consequences in the following respects:

(a) Every person has the right not to be subject to unlawful pollution of air, water and soil.

(b) Every person has the right to access safe and uncontaminated water, and nutritionally safe food.

(c) No unjustified retrogressive measures should be taken with regard to this right.

(d) No one should be subject to discrimination regarding the realisation of this right.

31. We consider the right to a safe, clean, healthy, and sustainable environment **should not be defined with a substantive element but defined broadly to accept evolving definitions of international law and scientific evidence.**

32. However, should a substantive element be explored in a future exposure draft, we have given consideration to how this should be approached.

3.1 Substantive Elements of the Right to a Safe, Clean, Healthy and Sustainable Environment

33. In the event that a substantive element is explored in a future exposure draft, we consider the substantive elements proposed by the AHRC may be too prescriptive. Instead, a substantive element **should include but not be limited to** the right to:

- i. Clean air
- ii. A safe climate¹⁹
- iii. Access to safe drinking water and sanitation
- iv. Healthy biodiversity and ecosystems
- v. Toxic free environments in which to live, work and play
- vi. Access to healthy and sustainably produced food²⁰

34. The above list is taken directly from the substantive elements outlined 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, delivered to the Human Rights Council.²¹

35. We reiterate that any substantive element must not limit the ways in which the right will evolve at international law and in a changing environment (and with changing scientific knowledges).

¹⁹ We have included the right to a safe climate as this is consistent with the Special Rapporteur's report and emerging laws and frameworks in other countries. It is also consistent with Australia's international and domestic commitments to climate change and emissions reduction strategies. See for instance, Australia's updated target to reduce greenhouse gas emissions under its Nationally Determined Contribution under the Paris Agreement and commitment to net zero by 2050: [Australia NDC 2022 Update | UNFCCC](#).

²⁰ Additionally, we have deviated slightly from the AHRC's wording of the right to access food to include the wording of 'healthy and sustainably produced'. This is congruent with the reasoning in the abovementioned Special Rapporteur's report, which highlights the international shift towards sustainable food production systems and implementing climate-resilient agricultural practices.²⁰

An executive summary of the Special Rapporteur's report on the importance of healthy and sustainable food systems can be found here: [UN Doc. A/76/179 Executive Summary](#).

²¹ Special Rapporteur, [Good practices on the right to a safe, clean, healthy and sustainable environment](#), UN Doc. A/HRC/43/53 (30 December 2019).

Therefore, any substantive element must include that the right is not limited by the elements described.

36. Further, we do not consider that the right to a safe, clean, healthy, and sustainable environment should be minimised to protect rights holders from 'unlawful pollution' as defined in the AHRC's Position Paper. The right to not be subjected to harmful pollution should not be confined to legal interpretation of what is 'lawful' and 'unlawful' or potential 'carve-outs' in legislation that could make harmful pollution lawful. The right to a healthy environment should not be confined to those adverse impacts that are 'unlawful'. Such framing has the potential to seriously reduce the circumstances in which the right would be relied upon and implies that lawfulness eliminates the need for protection of the right.

3.2 Procedural Rights of a Right to A Safe, Clean, Healthy and Sustainable Environment

37. An integral component of the right to a safe and healthy environment is the procedural rights in environmental decision-making. This aspect is not necessarily provided for in existing environment laws across the board. A rights-based approach to environmental protection provides participation rights as well as remedies for impacted communities or individuals as a result of harm caused by public or private actors.
38. A procedural element should be incorporated into the right to a safe, clean, healthy, and sustainable environment. It is crucial to the realisation of this right that this procedure allows for:
 - (a) the public to have free involvement in assessing environmental impacts and making environmental information public;
 - (b) facilitating public participation in decision-making regarding the environment including by protecting freedom of expression and association; and
 - (c) providing access to remedies for harm, including against private actors and all public authorities with the ability for third parties to bring forward actions.
39. Further, communities must be given the opportunity to contribute to and participate in decision-making about remediation and rehabilitation. If public participation is properly conducted, communities that are directly impacted by an environmental issue will be empowered to contribute their ideas to how it is managed and remediated on an ongoing basis. This will ensure social, environmental, health and economic benefits are generated for the very communities that have borne the impacts of environmental issues.

3.3 The Aarhus Convention and Best Practice Public Participation in Environmental Decision-Making

40. The public must be given the opportunity to contribute to and participate in environmental decision-making, especially communities that live close to sources, or possible sources of contamination and pollution. Community involvement is critical to ensure that forward planning and environmental decisions are made to thoroughly protect environmental and community health. These principles were enshrined in international law about 30 years ago in the Aarhus Convention.
41. The Aarhus Convention outlines what best practice public participation in environmental decision-making must involve. It is founded on the notion of participatory democracy and

aims to protect both environmental and human rights by ensuring that the principles of access to information, public participation, and access to justice is embedded in environmental planning and decision-making, as outlined below:

Principle	Best Practice Public Participation
Access to information	The public must be able to request, and be provided with, information about the environment from public authorities. Public authorities are also obliged to collect and publish information, of public interest (such as water monitoring and environmental management plans) without the need for the public to specifically request it.
Public participation	Access to accurate and up-to-date information is fundamental to proper public participation. There are three parts to public participation. First, public participation for people who may be affected by or interested in decisions related to an activity – such as the ability to comment on a proposed coal ash dam remediation plan or power station licence amendment. Secondly, public participation in the development of plans, programmes and policies related to the environment, such as ash dam management plans. Finally, the public should be involved in the preparation of laws and rules.
Access to justice	Public participation must occur without obstruction. The public must have an enforceable right to access information through review processes for denials of access to information. The public must also have review rights regarding decisions made about the environment or developments that impact it. This is a way for the public to directly enforce environmental law.

42. Although Australia is not a signatory to the Aarhus Convention, its principles have been considered by Australian courts.²² EJA strongly recommends that the Australian Government ratify the Aarhus Convention. Regardless of Australia’s position on the Convention itself, we consider that the equivalent of its procedural rights should be enshrined into any Federal Human Rights Act.

3.4 A Positive Duty to Comply and Providing Access to Remedies for Harm

43. In addition to the rights outlined in the Aarhus Convention, any Federal Human Rights Act should include a positive duty on government decision-makers to act consistently with human rights outlined in the Federal Human Rights Act, including the right to safe, clean, healthy, and sustainable environment.
44. This public authorities’ duty should also be extended to ensure private actors act compatibly with the human rights contained in the Federal Human Rights Act. It should also include the ability for third parties and individuals to seek remedy for harm. Such a remedy should be a standalone cause of action which does not require a ‘piggyback’ provision as is required by

²² [Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd \(No 3\) \[2010\] NSWLEC 59.](#)

some other jurisdictions, including in Victoria under section 39 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Victorian Charter**).

45. A key weakness in Australia's current federal laws is an absence of a broad-based and binding legal mechanism to set and implement pollution and waste controls at the national level, including a duty requirement for prevention of environmental harm. This includes the 'General Environmental Duty' which arises in Victoria under section 25 of the *Environment Protection Act 2017* (Vic) but is **not** a positive obligation to realise a healthy environment or to, even, avoid environmental harms. Instead, it imposes only a duty on some actors to minimise the risk of harm to the environment in certain situations. The existing approaches in Australia represent a standard-setting mechanism that is bureaucratic and discretionary, dependent on convoluted intergovernmental arrangements, absent the requirement to reflect best available science or to act based on emerging international action.²³
46. Some exceptions where there has been national regulation include pollution arising from sea dumping²⁴ or the mining, processing, or use of nuclear materials.²⁵ Pollution and waste significantly impacting listed threatened species, Ramsar sites, World Heritage areas or certain other matters may be regulated indirectly under national environmental law.²⁶ Federal regulation extends to agricultural chemicals and pesticides. This scheme and its administration are highly permissive and under scrutinised.²⁷ Poor regulation of pesticides and agricultural chemicals is well established with little positive government response, despite Australia being among the countries most at risk of pesticide pollution.²⁸
47. Accordingly, it would be prudent to ensure a positive duty for government decision-makers (and private actors) to act consistently with the right to a safe, clean, healthy, and sustainable environment as well as with other internationally recognised human rights.
48. However, it is not merely enough to legislate the right be protected – there needs to be access to remedies to ensure there is an ability to repair the harm caused and provide deterrent. This would include granting of damages. This would be consistent with the international law requirement that people whose rights are violated have an 'effective remedy'.²⁹ As above, this should be expressed as a standalone cause of action and should not be required to be tied to another cause of action.
49. Any Federal Human Rights Act must ensure that the public can bring forward actions against any private actors and all public authorities for breach of human rights, including the right to a safe, clean, healthy, and sustainable environment.

²³ See Environmental Justice Australia, [Clearing the Air: Why Australia Urgently Needs National Air Pollution Laws](#) (2014). Scope of coverage of national measures regulating toxics remains constrained, for example in failure to regulate mercury, PVCs and POPs under air pollution standards and failure to set national water pollution or contamination standards. By comparison with analogous US laws (such as the Clean Air Act or Clean Water Act) regulatory coverage is limited and fails to establish binding measures for reduction of pollution and waste.

²⁴ [Environment Protection \(Sea Dumping\) Act 1981 \(Cth\)](#).

²⁵ [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#), s 21.

²⁶ *Ibid*, Part 3

²⁷ See for example Radcliffe et al, '[Pesticide Use in Australia](#)' (Australian Academy of Technological Sciences and Engineering, 2002).

²⁸ Tang et al '[Risks of pesticide pollution at the global scale](#)' (2021) 14 *Nature Geoscience* 206-210.

²⁹ See, for example, [ICCPR](#) art 2(3).

3.5 The Rights of Nature

50. We acknowledge that incorporating the right to a safe, clean, healthy, and sustainable environment is influenced by western views, and is anthropocentric in nature rather than eco-centric.³⁰ Any proposed wording around the right to a safe, clean, healthy, and sustainable environment should not preclude rights of nature, as their own legal entity, to exist and thrive.³¹
51. Further, we acknowledge that this right does not adequately acknowledge the distinct cultural and environmental rights that First Nations peoples hold. This will be explored in further detail below.

³⁰ Aguila, Yann '[Right to a Healthy Environment](#)' IUCN, 29 October 2021.

³¹ See for example, the granting of legal personhood to Whanganui River in Aotearoa or the Colombian Supreme Court recognising Colombia's Amazon as an entity subject of rights.

4 Human Rights of First Nations People

4.1 Federal Human Rights Act

52. We support the inclusion of the distinct and additional cultural and environmental rights of First Nations people in a Federal Human Rights Act and in comparable, dedicated human rights legislation in all Australian States and Territories.
53. We note that the UNDRIP represents the leading international instrument on the rights of Indigenous Peoples and, while the declaration is not universally accepted by First Nations peoples, the articulation of rights serves as a well-founded and authoritative benchmark for nations implementing First Nations rights. As such, it should be regarded as the minimum for the articulation of First Nations peoples' rights in a Federal Human Rights Act and the basis for interpretation of those rights.³²
54. We support the full implementation of UNDRIP rights into Australian domestic law and endorse the multi-avenue approach to implementation proposed in the AHRC's Position Paper.³³ We add our support to the implementation of Voice, Treaty and Truth-telling in the Uluru Statement from the Heart. We support constitutional change to establish an Indigenous Voice to Parliament. We believe this will correct a historical legal injustice, advance self-determination, and give First Nations people a meaningful say in federal law making. We believe this is an important step that will make much more ambitious and transformative justice possible.
55. We confine the majority of our subsequent comments here to those First Nations human rights that intersect with environmental rights. However, we note that, commonly, assertions of rights to manage and restore Country are intimately connected to assertions of Aboriginal and Torres Strait Islander sovereignty and the fact that sovereignty was never ceded to the British state in the course of colonisation or subsequently.³⁴ In our view, recognition of such assertions of sovereignty and conditions of effective co-sovereignty with the state³⁵ should expressly be incorporated into a human rights framework.

4.1.1 First Nations Cultural Rights

56. We endorse the enactment of the cultural rights of First Nations peoples as the right is proposed in the AHRC's Position Paper.³⁶
57. The drafting of AHRC's proposed section 2(d) recognises that Aboriginal cultural rights are often practiced in relationship with traditional lands and waters. This aspect of First Nations cultural rights derives from UNDRIP articles 11, 12 and 31. The realisation of First Nations'

³² See, also, EJA Submission in response to the Senate Legal and Constitutional Affairs References Committee Inquiry into Application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia, 16 June 2022, 10-18 (**Annexure 1**).

³³ Australian Human Rights Commission Position Paper '[Free & Equal: A Human Rights Act for Australia](#)', Chapter 5, Section 5.4, 132-133.

³⁴ Cf [Advancing the Treaty Process with Aboriginal Victorians Act 2018 \(Vic\)](#), Preamble: 'Victorian traditional owners maintain that their sovereignty has never been ceded, and Aboriginal Victorians have long called for treaty. These calls have long gone unanswered. The time has now come to take the next step towards reconciliation and to advance Aboriginal self-determination. Aboriginal Victorians and the State are ready to talk treaty.'

³⁵ See [Uluru Statement from the Heart](#) (2017).

³⁶ Australian Human Rights Commission Position Paper '[Free & Equal: A Human Rights Act for Australia](#)', Chapter 5, Sections 5.2 and 5.4, 114 and 132-133.

cultural rights is fundamentally dependent on the health of traditional lands and waters as well as access to and authority over those lands. As such, protection of the environmental values of traditional lands and First Nations peoples' cultural connections with those lands deserve special protection in cultural rights provisions of human rights legislation.

58. Similarly, section 2(e) is a close reflection of UNDRIP article 29, which is an important declaration of Aboriginal peoples' rights and cultural obligations to care for and protect Country.
59. We support the inclusion of 'waters' and 'coastal seas' in sections (2)(d) and (e) as a crucial reflection of Australian First Nations peoples' holistic view of Country. Australian settler law imposed a legal system that treats land, water, biodiversity, minerals and other natural elements as disaggregated constituents which can be dealt with, extracted and disposed of, independently. As a result, advances in First Nations access to land has not necessarily been coupled with access to, or rights over, water or other aspects of Country, undermining the effectiveness of these wins and the fulfilment of cultural rights associated with water.³⁷
60. It is fundamental that First Nations cultural rights be defined or protected alongside traditional lands and waters.

4.1.2 First Nations Environmental Rights

61. We support legislative protection of the right to a healthy environment and submit that the right should also include specific procedural and participation rights for First Nations peoples and their distinct cultural and environmental rights. The realisation of many First Nations human rights articulated in UNDRIP is predicated on healthy Country and First Nations peoples' rights to access and care for their Country. Denial of the distinctive environmental rights of First Nations peoples undermines movement towards self-determination, which is the central tenant of UNDRIP and Indigenous peoples' rights.

The violations of indigenous peoples' rights to self-determination and other economic and social rights are strongly linked to indigenous peoples' historical experiences of marginalization, dispossession from and environmental destruction of their ancestral lands and lack of self-determination over development pathways.³⁸

62. There are both substantive and procedural rights that form the normative content of the First Nations environmental rights. The United Nations Special Rapporteur Framework Principle 15 on human rights and the environment summarises the obligations of member states in applying First Nations environmental rights as:

- (a) *Recognizing and protecting their rights to the lands, territories and resources that they have traditionally owned, occupied or used;*
- (b) *Consulting with them and obtaining their free, prior and informed consent before relocating them or taking or approving any other measures that may affect their lands, territories or resources;*

³⁷ Hartwig et al '[Australia has an ugly legacy of denying water rights to Aboriginal people. Not much has changed](#)' *The Conversation*, 24 July 2020; Jackson et al '[Water injustice runs deep in Australia. Fixing it means handing control to First Nations](#)' *The Conversation*, 17 February 2021.

³⁸ Ed Wensing '[Indigenous Peoples' Human Rights, Self-Determination and Local Governance – Part 1](#)' (2020) 24 *Commonwealth Journal of Local Governance* 98.

- (c) *Respecting and protecting their traditional knowledge and practices in relation to the conservation and sustainable use of their lands, territories and resources;*
- (d) *Ensuring that they fairly and equitably share the benefits from activities relating to their lands, territories or resources.*³⁹

63. We submit that a Federal Human Rights Act should contain these aspects of First Nations rights within the right to a healthy environment to the extent that they are not expressly included within the cultural rights of First Nations peoples.
64. One of the important differences between cultural rights provisions contained in some existing domestic human rights laws, such as section 19(2) of the Victorian Charter, and certain important UNDRIP provisions is that the latter include express provisions concerning Indigenous peoples' rights to be involved in and set priorities and pathways for development and to exercise agency over traditional lands and natural resources.⁴⁰ These rights are distinct from a cultural right to 'maintenance' solely of a relationship and connection with those lands and resources.⁴¹ We therefore note the importance of environmental rights which do more than allow only for the recognition or maintenance of traditional cultural relationships to land.

4.1.3 *Procedural Rights and the Participation Duty*

65. We support the proposal put by the AHRC in their Position Paper to apply a general procedural right or 'participation duty' across a federal Human Rights Act for First Nations peoples.⁴² Without the publication of a draft version of this duty it is difficult to comment in depth. However, we make several general comments on the proposal as it stands.
66. Firstly, we recommend that the participation duty on public authorities be extended to all people, not only those identified in the Position Paper: people with a disability, First Nations people and children. Best practice government decision-making and law-making should be founded on full participation rights across society.
67. Secondly, we have concerns that a general participation duty, framed broadly, may lose specific procedural rights that belong with a right to a healthy environment. Specific and tailored First Nations participation rights in relation to a right to a healthy environment are fundamental to securing substantive environmental rights and to the realisation of many other First Nations human rights.
68. The need for unique and enhanced procedural rights in relation to environmental rights for First Nations Australians is premised on the historical denial of participation in land and water governance. It is well expressed here:

“Expansion of models of citizenship to encompass greater democratic involvement in environmental matters, such as the Aarhus ‘pillars’, may not be sufficient to achieve just and equitable outcomes for communities who have been historically or structurally

³⁹ 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) 18.

⁴⁰ [United Nations Declaration on the Rights of Indigenous Peoples](#), Articles 23, 29 and 32.

⁴¹ Ibid Articles 25 and 26.

⁴² Australian Human Rights Commission Position Paper '[Free & Equal: A Human Rights Act for Australia](#)', Chapter 7, and specifically Section 7.6.

*marginalised from citizenship. The relationship of Aboriginal peoples to the democratic state and governance, is such an example.*⁴³

69. The standard procedural rights, asserted in the Aarhus Convention, that underpin a right to a healthy environment are discussed above in section 3 of this submission. Here we recommend additional participation rights for First Nations peoples to enhance the realisation of environmental rights.
70. Commentary on the Framework Principles notes that ‘States must ensure the full and effective participation of indigenous peoples and traditional communities in decision-making on the entire spectrum of matters that affect their lives’.⁴⁴
71. Framework Principle 15(b) pulls together a fundamental principle echoed in articles 19, 29 and 32 of UNDRIP: that States owe a duty in relation to First Nations environmental rights to ensure that the free, prior and informed consent (**FPIC**) of Indigenous communities is gained as a prerequisite to decisions that will impact their traditional lands and waters. This is a procedural right that must be protected in federal law in order to ensure full and effective participation of First Nations peoples in decision-making on environmental matters and as an essential foundation of self-determination.
72. Federal legislation establishing a right to a health environment that did not provide for First Nations specific rights in relation to FPIC would leave a significant gap in the implementation of UNDRIP into domestic law. This principle should not be relegated to human rights guidance or policy.
73. Therefore, we recommend that a generalised participation right across the Federal Human Rights Act is coupled with clear articulation, within the right to a healthy environment, of Australia’s duties in relation to FPIC for First Nations peoples and the associated UNDRIP participation principles set out in articles 19, 29 and 32.

4.2 Existing Federal Laws

74. The implementation in Australian domestic law of international environmental obligations as they relate to First Nations peoples’ rights is limited and ad hoc. Currently, key federal environment laws do not adequately establish First Nations environmental rights.
75. The primary federal environment law, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), lists objects that include recognising and promoting Indigenous peoples’ role in environmental management and conservation. However, the EPBC Act was roundly criticised in the 2020 Samuels Report for its failure to fulfill the objectives relating to First Nations environmental rights and for the ‘culture of tokenism and symbolism’ in decision-making under the Act.⁴⁵ The EPBC Act fails to properly grapple with the implementation of substantive rights over traditional lands and waters and procedural rights relating to the use and protection of traditional lands and waters.⁴⁶ It does not refer to

⁴³ Australian Panel of Experts on Environmental Law (**APEEL**), *Democracy and the Environment: Technical Paper 8*, April 2017, 25.

⁴⁴ 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) 19 [50].

⁴⁵ Graeme Samuels [Independent Review of the EPBC Act: Final Report](#) (2020), 57.

⁴⁶ For a more fulsome explanation, please see our attached Submission in response to the Senate Legal and Constitutional Affairs References Committee Inquiry into Application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia, 16 June 2022, 10-18 (**Annexure 1**).

or implement the rights contained in UNDRIP. The EPBC Act does not integrate the concept of FPIC to development plans on traditional lands. As noted above, FPIC is a foundational environmental procedural right for First Nations people, is well-developed in international jurisdictions and is a repeated concept in UNDRIP.⁴⁷

76. The inclusion of First Nations substantive and procedural environmental rights in a Federal Human Rights Act would assist in addressing some of the shortcomings of the EPBC Act.
77. The second significant federal law governing environmental resources is the Commonwealth *Water Act 2007* (Cth) (**the Water Act**). Two leading Indigenous organisations involved in Murray Darling Basin advocacy, have noted the lack of, and requirement for, a human rights based approach to water management under the Water Act.⁴⁸ Again, the duties around FPIC are markedly absent from the Water Act, and the scarce consultation rights fall far short of those contained in UNDRIP articles 18 and 32. The Act fails to incorporate UNDRIP principles or implement Indigenous consultation standards that reflect relevant UNDRIP articles. Without reform to establish a much stronger legal platform for the realisation of First Nations environmental rights in water management, the Act will continue to provide insufficient protection of those rights.
78. For a more fulsome identification of the shortcomings of the EPBC Act and the federal Water Act, please see our attached submission in response to the Senate Legal and Constitutional Affairs References Committee Inquiry into Application of UNDRIP in Australia⁴⁹ (**Annexure 1**).

4.3 Existing State and Territory Laws

4.3.1 First Nations cultural rights

79. All three Australian jurisdictions with a Human Rights Act or Charter (ACT, Qld and Vic) have a specific cultural right for First Nations Australians. All three Acts provide for a cultural right that exists in relationship to land and some form of recognition of, or maintenance of that relationship.
80. The *Human Rights Act 2019* (Qld) further elaborates by providing that First Nations peoples should not be denied the right to 'conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources'.⁵⁰ This is a direct expression of UNDRIP article 29, a key environmental right for First Nations peoples, which is missing from both the *Human Rights Act 2004* (ACT) and the Victorian Charter.
81. The importance of the inclusion of this provision in a Federal Human Rights Act is evidenced by the paucity of successful litigation under the cultural rights provisions in the *Human Rights Act 2004* (ACT) and Victorian Charter. Despite being enacted many years earlier, 2004 and 2006 respectively, as far as we are aware the ACT and Victorian First Nations cultural rights

⁴⁷ [United Nations Declaration on the Rights of Indigenous Peoples](#), Articles 19, 28, 29 and 32.

⁴⁸ The two organisations are Murray and Lower Darling Rivers Indigenous Nations (**MLDRIN**) and Northern Basin Aboriginal Nations (**NBAN**). Walker [Murray Darling Basin Royal Commission Report](#) (2019), 500.

⁴⁹ EJA Submission in response to the Senate Legal and Constitutional Affairs References Committee Inquiry into Application of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Australia, 16 June 2022, 10-18 (**Annexure 1**).

⁵⁰ [Human Rights Act 2019 \(Qld\)](#), s 28(2)(e).

provisions have generated very limited jurisprudence and have not been successfully utilised to protect environmental rights.

82. The relatively recent *Human Rights Act 2019* (Qld) has yielded the successful litigation in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)*.⁵¹ In *Waratah*, Youth Verdict successfully argued that a mining lease should be refused on the basis, inter alia, that approval of the lease would amount to a denial of the cultural rights of the First Nations people whose cultural practices would be impeded by the environmental and climate impacts of the mine. The Court noted the importance of the inclusion of section 28(2)(e) in allowing for protection and conservation of Country and for linking the ‘active commitment to and participation in caring for country’ by the First Nations witnesses to the protection of their cultural rights.⁵² The Court used UNDRIP article 29 and the UN Expert Mechanism on the Rights of Indigenous Peoples to interpret the scope of the First Nations cultural right contained in section 28(2).⁵³
83. This demonstrates the importance of the full articulation of the environmental aspects of First Nations cultural rights based on UNDRIP, particularly articles 25 and 29. Without expanding the cultural right to expressly include protection and conservation of Country, there is a risk the right cannot offer genuine protection to the full scope of First Nations cultural practices nor recognise the significance of access to and management of healthy Country as the foundation of those cultural practices.

4.3.2 *First Nations environmental rights in existing domestic legislation*

84. Currently, as no Australian jurisdiction has legal protection for the right to a healthy environment, the associated First Nations substantive and procedural environmental rights are not directly protected.
85. There are state laws which offer some indirect protection of First Nations cultural and environmental rights. In Victoria for instance, First Nations rights in relation to environmental management exist under the *Marine and Coastal Act 2018* (Vic)⁵⁴, *Parks Victoria Act 2018* (Vic)⁵⁵, *Water Act 1989* (Vic)⁵⁶, and the *Catchment and Land Protection Act 1994* (Vic)⁵⁷, among others. Many contain aspirational but non-binding objects provisions and/or relatively weak procedural rights to consultation or consideration in environmental governance. Others contain limited substantive rights, such as exemption from wildlife offences.⁵⁸
86. More extensive environmental management rights and some cultural rights exist for groups recognised under the *Aboriginal Heritage Act 2006* (Vic), the *Traditional Owner Settlement Act 2010* (Vic) and the *Native Title Act 1993* (Cth). Many of the rights are available only to those groups with formal State recognition of Traditional Owner status which leaves many

⁵¹ [Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors \(No 6\)](#) [2022] QLC 21.

⁵² *Ibid* [1557] specifically and [1534].

⁵³ *Ibid* [1526]-[1536].

⁵⁴ See for example, [Marine and Coastal Act 2018 \(Vic\)](#) ss 7, 32, 46, 51 and 69.

⁵⁵ See for example, [Parks Victoria Act 2018 \(Vic\)](#) ss 7, 40, 44, 48 and 51. See also the [Parks Victoria Statement of Obligations 2021](#), issued under the *Parks Victoria Act 2018* (Vic), Part 3, Div 2.

⁵⁶ See for example, [Water Act 1989 \(Vic\)](#) ss 1, 8A, 22C(3), 22D, 22M, 22P(2), 22Q(2), 22R(1), 29, 31 and 32. See also the Statement of Obligations for Catchment Management Authorities, 5 January 2018, issued under s186A of the *Water Act 1989* (Vic).

⁵⁷ See for example, [Catchment and Land Protection Act 1994 \(Vic\)](#) ss 4, 7, 24, 30.

⁵⁸ [Wildlife Act 1975 \(Vic\)](#) ss 4C and 47A and 58.

First Nations groups with diminished environmental rights.⁵⁹ Noting this discrepancy, we recommend that availability of First Nations cultural and environmental rights should not be constrained only to those groups or peoples with formal State or Commonwealth recognition of their Traditional Ownerships status.

87. We finally note that none of these rights amount to a stand-alone right to a healthy environment and the attendant substantive and procedural rights that should accrue to First Nations peoples.

⁵⁹ Traditional Ownership is formally recognised under three Acts in Victoria: the [Aboriginal Heritage Act 2006 \(Vic\)](#), the [Traditional Owner Settlement Act 2010 \(Vic\)](#) and the [Native Title Act 1993 \(Cth\)](#).

5 The Human Right to Protest

88. Australia has a long history of peaceful protest leading to significant social, cultural and environment outcomes. The health of a democratic society relies on ensuring its citizens have the freedom to advocate for change, and draconian protest laws undermine this right and limit the access of individuals and groups to decision-makers.
89. We support the proposal in the Position Paper to include the freedom of movement, freedom of expression, right to peaceful assembly, and freedom of association⁶⁰ in a Federal Human Rights Act and submit that the Federal Human Rights Act should be consistent with Australia's obligations under international law to protect the democratic right to protest, including under the *Universal Declaration of Human Rights*⁶¹ and the *International Covenant on Civil and Political Rights*.⁶²
90. Recent amendments to protest laws in Australian States have sought to disproportionately criminalise those engaged in environmental and climate protest. Amendments have included significant increases in maximum penalties, and extensive powers and broad discretion conferred on police and other authorised officers to regulate and respond to protest activity. Other measures such as surveillance, harsh bail conditions and pre-emptive arrests further undermine the democratic rights and freedom in Australia.
91. A summary of recent amendments to protest laws in Australia is as follows:
- (a) In Queensland, the *Summary Offences and Other Legislation Amendment Act 2019* (Qld) introduced new criminal offences for protest, expanded police powers to search and seize property and increased penalties for the use of "dangerous attachment devices".
 - (b) In New South Wales, laws were passed in 2016 criminalising any disruption to fossil fuel projects with penalties of up to seven years imprisonment. In 2022, amendments to the *Roads Act 2014* (NSW) introduced fines of up to \$22,000 and/or prison terms of up to two years for protesting illegally on public roads, rail lines, tunnels, bridges and industrial estates. These laws have since been used to prosecute numerous activists, many of whom have received prison sentences.
 - (c) In Tasmania, the *Workplaces (Protection from Protesters) Act 2014* (Tas) was passed in 2014 threatening forest protestors with up to four years in prison for engaging in protests on land or a business premises where forestry operations were taking place. Elements of these laws were ultimately ruled to be inconsistent with the implied right to freedom of communication and therefore unconstitutional by the High Court of Australia in a challenge brought by Bob Brown.⁶³ In 2022, further amendments to protest laws were passed under the *Police Offences Amendment (Workplace Protection) Act 2022* (Tas).

⁶⁰ Australian Human Rights Commission Position Paper '[Free & Equal: A Human Rights Act for Australia](#)', Chapter 5, Section 5.2, 111.

⁶¹ Article 20.

⁶² Articles 19, 20, 21.

⁶³ [Brown v Tasmania](#) (2017) 349 ALR 398.

- (d) In 2015, Western Australia introduced the *Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015* (WA), which sought to create broad offences for protesting “lawful activity”. The Bill was subsequently withdrawn after the United Nations High Commissioner for Human Rights released a statement strongly criticising the Bill and urging that it not be adopted due to its inconsistency with Australia’s obligations under international human rights laws.⁶⁴
 - (e) In Victoria, amendments passed under the *Sustainable Forests Timber Amendment (Timber Harvesting Safety Zones) Bill 2022* (Vic) in 2022 mean that protesters attempting to prevent native forest logging now face up to 12 months’ jail or fines of up to \$22,000, and bans from forest areas for up to 28 days.⁶⁵
 - (f) Most recently, last month South Australia passed the *Summary Offences (Obstruction of Public Places) Amendment Bill 2023* (SA) to expand the offence of obstructing a free passage of a public place in the *Summary Offences Act 1953* (SA) and increase the maximum penalty from a fine \$750 to \$50,000 or 12 months imprisonment. The Bill was introduced in response to the protest activity of oil and gas protesters and introduced and passed within a period of two weeks. Concerningly, the Bill was passed in the lower house before a copy had been made publicly available.
92. In some cases, including most recently in South Australia, Bills amending protest laws have been rushed through State parliaments in response to disruptive environmental protest and, as a result, lack sufficient safeguards to protect the human rights of activists under State regimes. For States and Territories without their own Human Rights Acts or Charters, there is no process under which government is required to properly and explicitly consider human rights when exercising its legislative function in the preparation of a Statement of Compatibility, for example.
93. Industrial action “carve outs have been implemented in some States to explicitly exclude union activity from harsh protest laws.⁶⁶ This has the effect of unfairly discriminating against protest not captured by these exemptions, including climate and environmental activism. In effect, this establishes a hierarchy of causes created by the government which is an inappropriate use of its law-making powers.
94. The national trend towards criminalising peaceful protest, specifically environmental protest, is concerning and a Federal Human Rights Act would go some way to ensuring the consistency and protection of rights and freedoms across States and Territories that align with Australia’s international obligations. Importantly, it would ensure that vibrant, necessary and productive protest can continue to contribute to the health of Australia’s democracy.

⁶⁴ United Nations Office of the High Commissioner [‘UN human rights experts urge Western Australia’s Parliament not to pass proposed anti-protest law’](#) (Press Release, United Nations, 15 February 2016).

⁶⁵ The Australian Greens [‘Greens push back with plan for national laws to protect the right to protest’](#) (Media Release, The Australian Greens, 20 December 2022).

⁶⁶ See, for example, [Roads and Crimes Legislation Amendment Bill 2022](#) (NSW), Schedule 1, clauses [7] and [9].

95. We submit that the rights and freedoms guaranteed under the Federal Human Rights Act should be drafted in similar terms to article 9 of the Escazú Agreement⁶⁷, which provides:
- “1. Each Party shall guarantee a safe and enabling environment for persons, groups and organizations 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.”
96. At a minimum, the relevant provisions in the Federal Human Rights Act should be consistent with the rights and freedoms guaranteed in articles 19, 20, 21 and 22 of the *International Covenant on Civil and Political Rights*⁶⁸, to which Australia is a signatory. The circumstances in which those rights and freedoms can be limited should also align with the circumstances set out in those articles, to ensure no restrictions may be placed on the exercise of those rights and freedoms “unless prescribed by law and necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”⁶⁹
97. Similar wording is contained in the Victorian Charter and an example of a “lawful and proportionate” limitation of the freedom of movement arose in the recent case of *Loiello v Giles* (2020) 63 VR 1.⁷⁰ In that case, the plaintiff sought to challenge the lawfulness of a curfew included in a suite of measures imposed by the Chief Health Officer in Victoria during the COVID-19 pandemic. The plaintiff argued that the curfew unlawfully limited her rights to freedom of movement and liberty under the Charter. The Court accepted that, whilst the plaintiff’s freedom of movement had been limited, the measure was a proportionate response to the urgent circumstances and was reasonably necessary to protect public health.
98. The Court considered the significance of human rights in times of emergency, and observed that “human rights are of importance even in urgent or emergency situations, if governments and executives can disregard them, they are not rights of any real value.”⁷¹ The Court referred to the findings in the case of *Certain Children v Minister for Families and Children*⁷² that “in an emergency or extreme circumstance, or where critical decisions have to be made

⁶⁷ [Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean](#) (‘Escazú Agreement’), opened for signature 9 April 2018, 3397 UNTS (entered into force 22 April 2021).

⁶⁸ ICCPR.

⁶⁹ *Ibid.*

⁷⁰ *Loiello v Giles* (2020) 63 VR 1; [2020] VSC 722.

⁷¹ *Ibid* [17].

⁷² *Certain Children (by their Litigation Guardian, Sister Marie Brigid Arthur) v Minister for Families and Children* (2016) 51 VR 473.

with great haste, there are grave risks that human rights may be overlooked or broken, if no life or limb endangered. The existence of an emergency, extreme circumstances or haste confirms, not obviates, the need for proper consideration to be given to relevant human rights.”⁷³

99. An example of the human right to peaceful assembly being asserted to lessen criminal culpability in the context of environmental protest arose in a Queensland decision of *EH v QPS; GS v QPS* [2020] QDC 205. The appellants in that case were climate activists who had been charged and convicted of offences for direct action against the expansion of coal mines in the Bowen basin. The appellants successfully appealed their sentences on the basis that they were manifestly excessive, which was not disputed by the Crown. In deciding the appeal, her Honour had regard to the right to protest recognised in the *International Covenant on Civil and Political Rights* and enshrined in the *Human Rights Act 2019* (Qld) and the *Peaceful Assembly Act 1992* (Qld), specifically that the appellants had “the right to express their views and to protest against an activity to which they object subject only to such restrictions as are prescribed by law and are necessary in a democratic society for (amongst other legitimate aims) the prevention of disorder or crime or the protection of the rights and freedoms of others.”⁷⁴
100. Her Honour ultimately found that the appellants’ motivation for the offending was relevant to “lessen their moral culpability in a way that reduced the need to focus on denunciation and rehabilitation as sentencing considerations.”⁷⁵ Her Honour also referred to jurisprudence in England where it is well established that “the fact that acts of deliberate disobedience to the law were committed as part of a peaceful protest is a relevant factor in assessing culpability for the purpose of sentencing in a criminal case”.⁷⁶ A Federal Human Rights Act would ensure that human rights are given proper consideration when Parliament is passing new laws, and in the application of existing laws. Further, it would deliver consistency across Australia, as the laws of States and Territories found to be inconsistent with those rights and freedoms would be declared invalid.⁷⁷
101. The Australian Constitution does not expressly guarantee important rights and freedoms, including the right to peaceful assembly, freedom of movement, expression, and association. A Federal Human Rights Act expressing these rights and freedoms in a positive sense is critical in the absence of other clear and binding federal legal protections and would ensure that individuals are empowered to assert their right to protest.

⁷³ Ibid, 508 [188].

⁷⁴ [EH v QPS; GS v QPS](#) [2020] QDC 205. [66].

⁷⁵ Ibid [77].

⁷⁶ Ibid [69], citing [Cuadrilla Bowland Ltd & Ors v Lawrie & Ors](#) [2020] EWCA Civ 9 at 87 (per Lord Justice Leggatt).

⁷⁷ Section 109, [Australian Constitution](#).

6 Recommendations

We make the following recommendations:

102. **The Australian Parliament should enact a Federal Human Rights Act.**
103. **The Federal Human Rights Act should include and protect all the rights protected under the international human rights treaties which Australia has ratified.**
104. **The Australian Government should ratify the Aarhus Convention.**
105. **The Australian Government should commit to the full implementation of UNDRIP rights into the Federal Human Rights Act and other domestic laws, in line with the multi-avenue approach outlined in the Australian Human Rights Commission's Position Paper and developed in 'deep' consultation with First Nations Australians.**
106. **The Federal Human Rights Act should recognise that Aboriginal and Torres Strait Islander sovereignty has never been ceded and that self-determination and sovereignty are foundational to the realisation of UNDRIP rights.**
107. **The Federal Human Rights Act should include distinct and additional cultural rights for First Nations peoples highlighting the importance of protection and conservation of Country, as expressed in the Australian Human Rights Commission's Position Paper.**
108. **We endorse the inclusion in the Federal Human Rights Act of the Participation Duty proposed in the Australian Human Rights Commission's Position Paper but recommend that this duty is extended to all society. We support enhanced procedural rights for groups historically excluded from public participation, decision-making and law-making.**
109. **The Federal Human Rights Act should protect the procedural rights included in the Aarhus Convention.**
110. **The Federal Human Rights Act should include a procedural right which allows for the public to have free involvement in 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, including against private actors and all public authorities with the ability for third parties to bring forward actions.**
111. **The Federal Human Rights Act should include a duty on federal public authorities to act compatibly with the human rights in the Federal Human Rights Act and to consider human rights when making decisions. This public authorities' duty should also be extended to ensure private actors act compatibly with the human rights contained in the Federal Human Rights Act.**
112. **The Federal Human Rights Act should include the right to a safe, clean, healthy, and sustainable environment. This should include:**
 - (a) **That right be applied equitably.**
 - (b) **The right should include specific procedural and participation rights for First Nations peoples, developed by First Nations peoples. The principle of FPIC for**

decisions impacting traditional lands and waters should underpin First Nations rights in the Federal Human Rights Act.

- (c) It should not include a substantive element, but rather be defined broadly so that it will evolve with international instruments and developing understandings of the environment. In the event a substantive element is developed, it should include but not be limited to the right to:
- i. Clean air
 - ii. A safe climate
 - iii. Access to safe drinking water and sanitation
 - iv. Healthy biodiversity and ecosystems
 - v. Toxic free environments in which to live, work and play
 - vi. Access to healthy and sustainably produced food
113. The Federal Human Rights Act should include duties to recognise, protect and promote protest rights in environmental matters, as follows:
- (a) The Federal Human Rights Act should include a provision drafted in similar terms to article 9 of the Escazú Agreement such that the duty should extend to the protection of human rights defenders’ “rights 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 Australia’s international obligations in the field of human rights, its constitutional principles and the basic concepts of its legal system.”
 - (b) The limitations that can be placed on the freedoms of movement, expression, peaceful assembly and association should align with articles 12, 19, 21 and 22 of the *International Covenant on Civil and Political Rights* to ensure no restrictions may be placed on the exercise of those rights and freedoms “unless prescribed by law and necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”