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SUBMISSION TO THE INQUIRY INTO PETITION 32-21 (NO RIGHTS WITHOUT REMEDY)

Acknowledgement of Country

We recognise that Aboriginal and Torres Strait Islander nations are the first sovereigns of the lands and waters of this continent. This sovereignty was never ceded and continues to this day, informing Indigenous connection to land, waters and community.

Indigenous respect and guardianship over the Australian land is an integral part of environmental justice and must be acknowledged and respected for the realisation of environmental justice in this country. Indigenous leadership, autonomy and justice are also critical to broader climate justice in Australia.

GreenLaw and its members acknowledge we meet on Indigenous land and, in working towards environmental justice, stand beside the traditional guardians of these lands. We recognise that during the writing of this guide we met on Ngunnawal and Ngambri Country, as well as the lands of the Dharug and Gadigal Peoples. We pay our respects to Elders past and present.

GreenLaw

GreenLaw welcomes the opportunity to provide a submission in response to the ACT Legislative Assembly's Inquiry into Petition 32-21 (No Rights Without Remedy).

GreenLaw is a young person-led law reform and legal research institute leveraging the expertise and imagination of the next generation of lawyers to tackle the climate crisis. GreenLaw works in partnership with Universities, NGOs and other industry partners to deliver policy development, legal research and law reform recommendations. GreenLaw conducts novel research in four core research areas: democracy and the environment, a just transition, thriving ecosystems, and future communities. GreenLaw was recognised as a key civil society group addressing the climate crisis by the Pro Bono Centre's 2020 Pro Bono Guide to the Climate Crisis.

GreenLaw is currently engaged in a joint campaign with Australian Lawyers for Human Rights on enshrining the right to a healthy environment in the *Human Rights Act 2004* (ACT). This submission is intended to supplement that work. The ACT Legislative Assembly committed to exploring options for enshrining the right to a healthy environment in a motion passed on 10 February 2022.

This submission reflects the views of GreenLaw researchers and is not intended to be an institutional submission by the Australian National University or University of Sydney nor is it intended to represent the views of our respective employers. If it would be of assistance, we are happy to be contacted for further comments or to provide a full report on our research, please email: green_law@outlook.com.

Executive Summary

GreenLaw **strongly supports** amendment to the *Human Rights Act 2004* (ACT) (**HRA**) to enable a complaint about breach of the HRA to be made to the Human Rights Commission for confidential conciliation, and the option to enable that complaint to be made to the ACT Civil and Administrative Tribunal (**ACAT**) in the event confidential conciliation is unsuccessful.

This submission is intended to provide the Inquiry with further information on how the proposed amendments to the HRA both benefit Canberrans more broadly and specifically in relation to environmental human rights. The ACT Legislative Assembly committed to exploring options for enshrining the right to a healthy environment in a motion passed on 10 February 2022.¹ We, therefore, **strongly encourage** the Inquiry to consider crafting an accessibility mechanism that ensures the protection of both the human rights currently enshrined under the HRA and those rights that may be imminently codified in the Act.

The following submission will outline our broad support for the two-tiered complaints mechanism contemplated by Petition 32-21 and the need for additional funding and logistical support to ensure the ACT Human Rights Commission, and other specialist bodies, are able to manage an accessible complaints mechanism effectively.

Summary of Recommendations

Recommendation 1

The Inquiry implement a two-tiered complaints mechanism as called for by Petition 32-21.

Recommendation 2

The two-tiered complaints mechanism should utilise the existing infrastructure of the ACT Human Rights Commission and the ACT Civil and Administrative Appeals Tribunal.

Recommendation 3

The Inquiry should explore reform options that provide a pathway within the Human Rights Act to extend conciliatory and referral powers to other specialist bodies for certain human rights. For example, the Sustainability Commissioner of the ACT may be best placed to conduct conciliation in the event of a breach of an environmental human right.

Recommendation 4

The Inquiry ensure appropriate funding and logistical support are provided to the ACT Human Rights Commission to ensure they are able to carry out the functions of an accessible complaints mechanism.

¹ Motion on the Right to a Healthy Environment (ACT) 2022.

The Right to a Healthy Environment in the ACT

On 8 October 2021, the Human Rights Council formally recognised the human right to a healthy environment:

The Human Rights Council ... (1) Recognizes the right to a safe, clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights; (2) Notes that the right to a safe, clean, healthy and sustainable environment is related to other rights that are in accordance with existing international law.²

This recognition came after sustained activism over many decades, including in Australia. It is pertinent to note that connecting human rights struggles with environmental crises emerged from, and has been championed by, the grassroots struggles of Indigenous groups and those communities disproportionately affected by environmental degradation, particularly communities of colour.³

A healthy environment is the foundation for the achievement of all other human rights. For example, the right to a life of dignity is put at risk by pollution and natural disasters.⁴ We are 'ecologically embedded beings',⁵ we exist within our environment and require clean air, safe water and sustainable food to live and thrive. If our environment is seriously polluted or unsafe, all our human rights are at risk.

Earlier this year, the ACT Legislative Assembly – which already leads in the protection of human rights in this country – recognised this reality and passed a motion to consult with the community on enshrining the right to a healthy environment in domestic law (through the HRA).

This motion was met with strong community support⁶ and GreenLaw looks forward to consulting with the government and community in respect of this reform.

This Inquiry is therefore an **opportunity** to craft a forward-looking complaints mechanism that meets the access to justice needs of Canberrans in the present and future, especially when the right to a healthy environment is eventually enshrined in the HRA.

² *United Nations Human Rights Council*, GA Res 48/13, UN Doc A/HRC/RES/48/13 (18 October 2021, adopted 8 October 2021).

³ Tănăsescu, M. 2020, "Rights of Nature, Legal Personality, and Indigenous Philosophies", *Transnational Environmental Law*, vol. 9, no. 3, pp. 429-453.

⁴ Human Rights Committee, *Views: Communication No 2751/2016*, UN Doc CCPR/C/126/D/2751/2016 (20 September 2019) [7.3] (*Portillo Cáceres v Paraguay*).

⁵ Woods Kerri, *The rights of humans as ecologically embedded beings* (Taylor and Francis Group 2017) <https://doi.org/10.4324/9781315188249>.

⁶ For example see, Twyford Lottie, ACT introduces 'nation-leading' consideration of the 'right to a healthy environment' (RiotACT 2022).

Accessible Complaints Mechanisms Are a Core Part of Environmental Human Rights

The right to a healthy environment includes both procedural and substantive elements.⁷ The procedural components of the right are important because they provide pathways for the public, civil society and business to understand the right to a healthy environment and enforce their rights. The substantive elements of the right to a healthy environment focus on the protection of those aspects of the environment that are necessary to uphold the right, including clean air, safe water and stable ecosystems.⁸

Access to justice and substantive remedies, to ensure the public is able to enforce the right to a healthy environment, is a critical procedural element of the right. The UN Special Rapporteur on Human Rights and the Environment identified three major obstacles to access to justice: standing to sue, economic barriers and lack of judicial expertise in environmental matters.⁹ A further barrier is access to substantive remedies.¹⁰ These obstacles must be overcome to protect human rights in practice not just on paper.

We encourage the Inquiry focus on reform pathways that ensure the accessible complaints mechanism in the ACT is designed to overcome these barriers. This will contribute to the attainment and protection of all human rights, not just the right to a healthy environment.¹¹

As the Inquiry is no doubt aware, individual complaints under the HRA are limited to the Supreme Court of the ACT.¹² However, litigation in the Supreme Court is expensive and complex, limiting access to justice for ordinary Canberrans.

There are not only significant costs barriers associated with the Supreme Court of the ACT, but as a generalist judicial institution, the Court will not always have the necessary human rights (or environmental) expertise to appropriately balance the human rights of an individual, community needs and the service being provided by a government agency (that may be in breach of its human rights obligations).¹³

⁷ Ponton Revel 'Legal analysis: The right to a healthy environment in Australia' (2019) 7 Griffith Journal of Law & Human Dignity, 75.

⁸ Reynolds Annika, Bulling Peta, 'Renewable energy to fulfil our human rights: the Australian Capital Territory's potential to lead the nation'(2021).

⁹ *United Nations Human Rights Council*, UN Doc A/HRC/RES/43/53 (2020) Special Rapporteur on the issue of human rights obligations, *Right to a Healthy Environment: Good Practices*.

¹⁰ Inter-American Commission on Human Rights, 'Access to Justice As A Guarantee Of Economic, Social, And Cultural Rights. A Review of The Standards Adopted By The Inter-American System Of Human Rights' (2019), *The Substance Of The Right To Effective Judicial Protection Against Violation Of Social Rights*.

¹¹ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) Art 8; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Art 2.

¹² Human Rights Act 2004 (ACT) s40C.

¹³ Bourloyannis-Vrailas Christine, *Specialized Courts: Human Rights The European Court of Human Rights* 4 (Brill 2012), 321.

Additionally, there are currently no options for individuals to receive compensation for breaches of their human rights. This gap in the HRA will only become more pronounced if the right to a healthy environment is enshrined in the Act. Many of the potential breaches to the substantive dimensions of the right to a healthy environment will require compensation to achieve justice. For example, breaches of the right to a healthy environment that result in pollution of the environment and cause harm to human health.

The people of the ACT need easier, simpler and cheaper pathways to make a complaint if their rights are breached under the HRA. Without such reform, the ACT is hampered in its capacity to protect and promote human rights.

Therefore, we recommend:

Recommendation 1

The Inquiry implement a two-tiered complaints mechanism as called for by Petition 32-21.

Recommendation 2

The two-tiered complaints mechanism should utilise the existing infrastructure of the ACT Human Rights Commission and the ACT Civil and Administrative Appeals Tribunal.

Recommendation 3

The Inquiry should explore reform options that provide a pathway within the Human Rights Act to extend conciliatory and referral powers to other specialist bodies for certain human rights. For example, the Sustainability Commissioner of the ACT may be best placed to conduct conciliation in the event of a breach of an environmental human right.

Ensuring the Accessible Complaints Mechanism is Appropriately Structured and Funded

We support the petition's call for the establishment, and resourcing, of a two-tiered complaints mechanism. This proposed model uses the existing infrastructure of the Human Rights Commission and the ACAT to provide a no-cost, simple pathway for individuals to make complaints.

The first tier enables individuals to make an initial written or oral complaint to the Human Rights Commission regarding an alleged breach of their human rights. The Commission is then empowered to facilitate conciliation to, where possible, resolve the issue. If this is unsuccessful, the Commission can refer to complaint to the ACAT. The Tribunal is designed to be simple, fast and no-cost process that does not require an individual to pay for legal representation to have access to justice.

Such a process is already enshrined in Queensland's Human Rights Act 2019.¹⁴ In that Act, individuals are able to access conciliation through the Queensland Human Rights Commission. Since it commenced this process has been utilised to achieve accessible, cost-effective and meaningful outcomes for the people of that state.

To maximise the success of the Commission it is critical that the Commission receive additional funding and support to effectively respond to the additional workload of managing an accessible complaints mechanism. We encourage the Inquiry to privilege the insights of any submissions by those bodies to guide what is logistically required. We also encourage the Inquiry to specifically seek insights from other specialist bodies in the ACT to assess the feasibility of specialist conciliatory functions being enshrined in their portfolios where they have relevant expertise.

Therefore, we recommend:

Recommendation 4

The Inquiry ensure appropriate funding and logistical support are provided to the ACT Human Rights Commission to ensure they are able to carry out the functions of an accessible complaints mechanism.

¹⁴ Human Rights Act 2019 (Qld) Sub div 4.