



GRIFFITH JOURNAL OF  
**LAW & HUMAN DIGNITY**



# GRIFFITH JOURNAL OF LAW & HUMAN DIGNITY

---

*Editor-in-Chief*

Lisa Neubert

*Executive Editors*

Danyon Jacobs

Dillon Mahly

Samantha Raey

*Editors*

Stuart Brown

Tara Byrne

Elizabeth Danaher

Ana-Catarina De Sousa

Lenett Hillman

Dylan Johnson

Iva Markova

Olivia Morgan-Day

Samantha Reay

Natasha Robbemand

*Consulting Executive Editor*

Dr Allan Ardill

---

Volume 7 Issue 2  
2019

Published in December 2019, Gold Coast, Australia by the *Griffith Journal of Law & Human Dignity*

ISSN: 2203-3114

## CONTENTS

---

BEN WHITE & LINDY WILLMOTT	<i>A MODEL VOLUNTARY ASSISTED DYING BILL</i>	1
ANNETTE GREENHOW & KIM WEINERT	<i>DIVERSITY, EQUITY AND INCLUSION (OR EXCLUSION) IN SPORT: A REVIEW OF THE CASTER SEMENYA CASE</i>	48
REVEL POINTON & DR JUSTINE BELL-JAMES	<i>THE RIGHT TO A HEALTHY ENVIRONMENT IN AUSTRALIA</i>	75
SIMON LEVETT	<i>PROTECTING SOURCES OF EMBEDDED JOURNALISTS</i>	95
KATHRYN E. VAN DOORE & REBECCA NHEP	<i>ORPHANAGE TRAFFICKING, MODERN SLAVERY AND THE AUSTRALIAN RESPONSE</i>	114
DR BRUCE BAER ARNOLD & DR WENDY BONYTHON	<i>THE INDIGNITY OF ABSTRACTION: DATAMINING AND AUTONOMY IN THE AGE OF DIRECT-TO-CONSUMER GENOMICS</i>	139
GEORGINA DIMOPOULOS	<i>'DIVORCE WITH DIGNITY' AS A JUSTIFICATION FOR PUBLICATION RESTRICTIONS ON PROCEEDINGS UNDER THE FAMILY LAW ACT 1975 (CTH) IN AN ERA OF LITIGANT SELF-PUBLICATION</i>	161
MICHEIL PATON & PHOEBE TAPLEY	<i>DIGNITY AND THE FUTURE OF FAMILY LAW</i>	196
LAURA ENSINGER	<i>ABANDONING THE INNOCENT: RECOMMENDATIONS FOR THE LONG- TERM HOLISTIC SUPPORT OF EXONEREES</i>	222
DR SARAH MOULDS	<i>MAKING THE INVISIBLE VISIBLE AGAIN: PATHWAYS FOR LEGAL RECOGNITION OF SEX AND GENDER DIVERSITY IN AUSTRALIAN LAW</i>	245

# THE RIGHT TO A HEALTHY ENVIRONMENT IN AUSTRALIA

REVEL POINTON\* AND DR JUSTINE BELL-JAMES\*\*

*While Australia does not have human rights enshrined in our Constitution, and only limited reflection through other federal laws, various states have introduced legislation that seeks to recognise and protect human rights. As the dialogue around legal protection of human rights in Australia grows, where does the right to a healthy environment sit in this discussion? The right to a healthy environment has been integrated into over 150 legal frameworks around the world; Australia remains one of only 15 countries without the right to a healthy environment enshrined in our federal laws or constitution. This article reviews how the right has been both characterized and put into practice overseas, with a view to determining how Australian jurisdictions could benefit from this right being legislated.*

## CONTENTS

I INTRODUCTION – WHAT IS THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT? .....	76
II THE AUSTRALIAN CONTEXT .....	79

---

\* Revel Pointon is a Senior Solicitor at the Environmental Defenders Office (EDO), where she primarily works on law reform, advice and education. She focuses on ensuring that our environmental laws and policies adequately protect our environment, provide for accountable and transparent governance and provide meaningful community participation in decisions that affect our environment and communities. Revel has a Bachelor of Laws and Bachelor of Environmental Management from the University of Queensland, a Masters in Culture and Development Studies from KU Leuven, Belgium and a Graduate Certificate in Policy and Governance from Queensland University of Technology.

\*\* Justine Bell-James is an Associate Professor at the TC Beirne School of Law, teaching undergraduate and postgraduate courses in the areas of environmental law and property law. Justine completed a PhD at the Queensland University of Technology in 2010, and was a postdoctoral fellow at the Global Change Institute at the University of Queensland from 2011-2013. Her interdisciplinary postdoctoral research considered legal, policy and insurance responses to coastal hazards and sea-level rise. Justine's current research focuses on legal mechanisms for protection of the coast under climate change, incorporating both human settlements and coastal ecosystems. She currently leads an ARC Discovery Project (2019-2021) considering how wetland ecosystem services can be integrated into legal frameworks. Justine is also particularly interested on how the law can facilitate 'blue carbon' projects in Australia and internationally.

III	HOW DOES A RIGHT TO A HEALTHY ENVIRONMENT OPERATE IN PRACTICE? .....	82
IV	COULD OTHER HUMAN RIGHTS PROVIDE FOR A RIGHT TO A HEALTHY ENVIRONMENT?.....	83
V	THE BENEFITS OF THE RIGHT TO A HEALTHY ENVIRONMENT.....	85
VI	CONCLUSION.....	88

## I INTRODUCTION – WHAT IS THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT?

That all humans deserve to enjoy basic human rights is well accepted,<sup>1</sup> even though these rights may not be enshrined in all legal systems, including Australia’s national legal system. The fact that enjoyment of many of these rights is dependent on the existence of a healthy environment is not yet as widely recognised, but is definitely gaining traction.<sup>2</sup> To date, the right to a healthy environment has not been incorporated into an international convention, but it has been reflected in various forms in many constitutions and sub-national legal frameworks globally. In fact, Australia is one of only 15 countries that have not yet included the right to a healthy environment in our constitution.<sup>3</sup> There is broad consensus that the protection of the environment ‘is a vital part of contemporary human rights doctrine and a *sine qua non* [essential element] for numerous rights, such as the right to health and the right to life’.<sup>4</sup>

There were early indications that recognition of this right would develop internationally — for example, the Stockholm Convention in 1972 recognised that ‘man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future

<sup>1</sup> See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>2</sup> See, eg, John H Knox and Ramin Pejan (eds) *The Human Right to a Healthy Environment* (Cambridge University Press, 2018); Bridget Lewis, *Environmental Human Rights and Climate Change: Current Status and Future Prospects* (Springer, 2018).

<sup>3</sup> David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press, 2011).

<sup>4</sup> Gabcikovo Nagymaros Project (Hungary v Slovakia) (Separate Opinion of Vice President Weeramantry) [1997] ICJ 97, 110 [Separate Opinion]; Asia Pacific Forum Secretariat, Human Rights and The Environment Background Paper (September 2007) Asia Pacific Forum <[http://www.mcmillan.ca/Files/SOCarroll\\_HumanRightsandtheEnvironment.pdf](http://www.mcmillan.ca/Files/SOCarroll_HumanRightsandtheEnvironment.pdf)>; Human Rights and Equal Opportunity Commission, *Human Rights and Climate Change* (Background Paper, April 2008), 3.

generations'.<sup>5</sup> However, Knox argues that the UN has not come close to this level of recognition to a right to a healthy environment since,<sup>6</sup> noting even the 1992 Rio Declaration provided only that 'human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature'.<sup>7</sup>

The tendency to separate concepts of human rights and environmental protection in our laws is arguably a symptom of the same ideological constructs that have led to the significant environmental degradation and poor health that plague our world today. Fundamentally, our laws rarely reflect the physiological reality that we are integrally connected to our environment; the health of our environment is a major, if not greatest, determiner of our human health and wellbeing. It is trite but true to say that, without clean air to breathe, clean water to drink and safe, healthy and clean food to eat, our lives can become substantially shorter and our ability to enjoy other basic human rights can be substantially diminished. Recognition of the human right to a healthy environment in legislation is a step towards seeking to clearly recognise our own health's dependency on the health of our environment. Recognition of a right to a healthy environment has also had many other benefits for the countries that have introduced this right in their laws, which will be examined in more detail below.

The right to a healthy environment can be distinguished from another concept gaining momentum globally — the rights of nature. Whereas the human right to a healthy environment seeks to provide a human-centric recognition that humans are dependent on the environment and therefore deserve a right to a healthy environment, the rights of nature concept acknowledges that environmental values have intrinsic rights existing separately from any reliance we may have on them for our survival.<sup>8</sup> Arguably, this is how the law currently frames environmental protection measures; without reference to the right (and requirement) of a healthy environment for humans, our environmental laws provide some regulation of our impacts with a purpose of ensuring the protection

---

<sup>5</sup> Declaration of the United Nations Conference on the Human Environment in 'Report of the United Nations Conference on the Human Environment' UN Doc A/CONF.48/14/Rev.1 (1973) Principle 1.

<sup>6</sup> John Knox, 'The Global Pact for the Environment: at the Crossroads of Human Rights and the Environment' (2019) 28(1) *Review of European, Comparative & International Environmental Law* 40.

<sup>7</sup> *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF/151/26 (12 August 1992) annex I ('*Rio Declaration on Environment and Development*'), Principle 1.

<sup>8</sup> Hillebrecht, Anna, 'Disrobing Rights: The Privilege of Being Human in the Rights of Nature Discourse' (2017) 6 *Rachel Carson Center Perspectives* 15.

of the environment. However, there is no explicit recognition in Australian laws that other species or ecosystems deserve, and hold the legal right, to exist and thrive.

While the rights of nature concept is gaining momentum globally in a way that is leading to real changes to environmental impact regulation,<sup>9</sup> integration of the right to a healthy environment may be more feasible in Australian jurisdictions at this point in time; particularly, there is growing movement at the state and territory level to introduce human rights laws. Furthermore, it is important to acknowledge that the rights of nature concept separates humans from nature. This is arguably incongruous with the relationship of Aboriginal and Torres Strait Islander Peoples to country, in which they are a part of, and custodians over, their country. That said, the relationship that First Nations peoples have with land is also distinct from the right to a healthy environment, as it is based more on an obligation to *maintain* a healthy environment, rather than a right *to* a healthy environment.<sup>10</sup> Neither of these concepts therefore entirely reflects the relationship of Aboriginal and Torres Strait Islander Peoples to country, but the right to a healthy environment does reflect the human/environment interface to a degree.

This article will commence with a brief overview of environmental protection in the Australian context, highlighting the myriad problems which could be addressed by an enshrined right to a healthy environment. It will then consider how the right to a healthy environment has been used in other jurisdictions. It will acknowledge that existing human rights protections in some jurisdictions could be used for environmental arguments — for example, the right to life — but ultimately concludes that the enshrined human right to a healthy environment would provide a host of additional, wide-ranging benefits for society.

---

<sup>9</sup> See Michelle Maloney, 'Rights of Nature, Earth democracy and the Future of Environmental Governance' in The Green Institute *Rebalancing rights: Communities corporations and nature* (Report, March 2019) 11.

<sup>10</sup> Deborah Bird Rose, *Nourishing Terrains: Aboriginal Views of Landscape and Wilderness* (Australian Heritage Commission, 1996).

## II THE AUSTRALIAN CONTEXT

Australia is signatory to numerous international agreements which carry obligations protect our environment.<sup>11</sup> These agreements are sought to be reflected in our environmental laws, particularly in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). There is, however, widespread concern that both national and sub-national laws are not adequately protecting the environment, with Australia currently ranked fourth in the world for extinct and critically endangered species,<sup>12</sup> first for mammalian extinctions,<sup>13</sup> and increasing acceptance that we are in the midst of an extinction crisis.<sup>14</sup> The reasons for the failures in our environmental laws are varied, but it is known that these failings have led to the high rate of biodiversity loss through excessive habitat clearing and fragmentation, increased incidence of invasive species, and climate change impacts.<sup>15</sup> Environmental laws are viewed by some as endorsing a licence to pollute, and a mechanism to manage the competing priorities of our demands for and upon natural resources, rather than actually protecting our environmental values.<sup>16</sup>

Not only have our environmental laws failed to prevent significant biodiversity loss and environmental degradation, their operation has created scenarios of deep environmental injustice, particularly in regional areas of Australia. This injustice is perhaps most obvious in the regulation of air emissions under the remit of state and territory legislation. While many urban areas enjoy some level of regular monitoring and reporting of air quality, regional areas frequently do not enjoy this right, even if

---

<sup>11</sup> See, eg, Commonwealth Government website: <<https://www.environment.gov.au/about-us/international>> which lists the international agreements which Australia is party to.

<sup>12</sup> IUCN, *Red List: Table 6a: Red List Category Summary Country Totals (Animals)* (Webpage Statistics, 2018) <[http://cmsdocs.s3.amazonaws.com/summarystats/2018-1\\_Summary\\_Stats\\_Page\\_Documents/2018\\_1\\_RL\\_Stats\\_Table\\_6a.pdf](http://cmsdocs.s3.amazonaws.com/summarystats/2018-1_Summary_Stats_Page_Documents/2018_1_RL_Stats_Table_6a.pdf)>.

<sup>13</sup> J. C. Z. Woinarski, et al. 'The Disappearing Mammal Fauna of Northern Australia: Context, Cause, and Response' (2011) 4(3) *Conservation Letters* 192.

<sup>14</sup> Parliament of Australia, *Environment and Communications References Committee: Australia's Faunal Extinction Crisis* (Interim Report, 2019), ch 2; Afshin Akhtar-Khavari et al, 'Why do Australia's Environmental Law Fail to Save Our Species from Extinction' *IUCN News* (online, 13 July 2019) <<https://www.iucn.org/news/world-commission-environmental-law/201907/why-do-australias-environmental-laws-fail-save-our-species-extinction>>.

<sup>15</sup> Department of Environment and Energy, *State of the Environment* (Report, 2016) Overview, vii.

<sup>16</sup> Australian Conservation Foundation, World Wildlife Fund, The Wilderness Society and The University of Queensland, *Fast-tracking Extinction: Australia's National Environmental Law* (Report, 2018) Gunther, Handl, "Human Rights and Protection of the Environment: A Mildly Revisionist View" in A. Cançado Trindade (ed), *Human Rights and Environmental Protection* (1995) 117, 121; Rebecca Bratspies, 'Claimed Not Granted: Finding a Human Right to a Healthy Environment' (2017) 26 *Transnational Law and Contemporary Problems* 263.



they are situated next to emissions intensive industries such as power stations or mines. A study published in 2014 found 'significant and systemic inequities in the social distribution of industrial air pollution in Australia. Regardless of how air pollution was measured; facility presence, emission volume, or toxicity, our analysis indicated a consistent and disproportionate impact on indigenous and socially disadvantaged communities'.<sup>17</sup> Monitoring requirements are often provided with reference to the size of the population; currently a national law suggests that only populations of 25,000 or more people will trigger the need to provide the suggested number of monitoring stations.<sup>18</sup>

How air emissions are regulated differs considerably depending on the town and the type of activity emitting the pollution, as project-level environmental authorities stipulate what level of emissions are allowed for each pollutant and how, if at all, emissions must be monitored and reported.<sup>19</sup> In Queensland, many environmental authorities for fossil fuel projects only require that emissions be monitored and reported after a complaint is registered from the community raising the concern that emissions are too high. For example, in the Land Court objection decision for the New Acland Coal (NAC) mine Stage 3 expansion, the presiding Member found that over 100 complaints had been recorded since the mine commenced 15 years earlier, yet the mine had only monitored air quality and dust for 27 days over an 11 year period.<sup>20</sup> This community has had no benefit of independent, regular government monitoring of the range of air pollutants likely to be emitted from this site. This information would provide necessary information for the community to know what they are breathing and whether the environmental authority conditions are being breached. Further, this information is only provided by the very company that is producing the problem, and there is no requirement for regular monitoring. By conditioning the mine in such a way that air quality monitoring only occurs once the community puts in a complaint, this makes it incumbent on the community to be aware that there is a problem and then for the company and regulator to take action in time based on a complaint. Given the

---

<sup>17</sup> Jayajit Chakarabarty and Donna Green, 'Australia's First National Level Quantitative Environmental Justice Assessment of Industrial Air Pollution' (2014) 9(4) *Environmental Research Letters* 1.

<sup>18</sup> *National Environment Protection (Ambient Air Quality) Measure 2015* (Cth) s 14.

<sup>19</sup> Brendan Dobbie and Donna Green, 'Australians Are Not Equally Protected from Industrial Air Pollution' (2015) 10(5) *Environmental Research Letters* 1.

<sup>20</sup> *New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection* (No. 4) [2017] QLC 24, [580]-[581].

variables of weather and timing of mine activities which cause emissions, this regulatory method makes it extremely difficult to determine when the mine has breached their conditions unless the community themselves are constantly monitoring the site with high quality monitoring equipment.

The connection between the need to recognise the right to a healthy environment and other basic human rights can also clearly be seen through the experiences of a community in central Australia, Mulga Bore. This community was allegedly known by the Australian Government to have water with nitrate levels that were 150 per cent higher than the World Health Organisation's standards, putting pregnant mothers, babies and young children all at serious risk of health issues.<sup>21</sup> In February 2008, water stopped running completely in the town, at which point the Mulga Bore School closed, depriving the students of their right to an education.<sup>22</sup> More recently, environmental injustice was documented in the remote mining city of Mount Isa, where studies found higher geometric mean blood lead levels among Indigenous children compared to non-Indigenous children.<sup>23</sup>

A recent Human Health and Wellbeing Climate Change Adaptation Plan for Queensland found that vulnerable populations, such as First Nations persons, older people, young people, disabled and socio-economically disadvantaged people, are already suffering disproportionate adverse health impacts associated with climate change such as heatwaves, extreme weather events, access to food and water and sea level rise in the Torres Strait Islands, with this disadvantage is likely to grow.<sup>24</sup> With heatwaves and energy prices both increasing, many socio-economically disadvantaged Australians must make the difficult choice as to whether to turn on their air conditioner and face financial detriment, or to risk potentially deadly health impacts from serious heatwaves.<sup>25</sup>

---

<sup>21</sup> Russell Skelton, 'Not a Single Drop to Drink: This is Australia', *The Sydney Morning Herald* (online, 28 February 2008) <<https://www.smh.com.au/national/not-a-single-drop-to-drink-this-is-australia-20080228-gds2we.html>>.

<sup>22</sup> *Ibid.*

<sup>23</sup> Nathan Cooper et al, 'Environmental Justice Analyses May Hide Inequalities in Indigenous People's Exposure to Lead in Mount Isa, Queensland' (2018) 13(1) *Environmental Research Letters* 8.

<sup>24</sup> Queensland Government, *Queensland Climate Adaptation Strategy: Human Health and Wellbeing Climate Change Adaptation Plan for Queensland* (Sector Adaptation Plan, 2018) 1, 4, 8, 9, 16, 19, 24, 25.

<sup>25</sup> *Ibid.*

In a robust review of our environmental laws in Australia, the Australian Panel of Experts in Environmental Law ('APEEL') has recommended, *inter alia*, legislating 'a substantive right to a safe, clean and healthy environment', recognising the benefits that a right to a healthy environment would provide.<sup>26</sup> This, coupled with procedural environmental rights (including the right to information, to public participation and to access to justice in environmental matters), is considered by APEEL to be a core element of improving environmental laws in Australia, and would assist with rectifying failings of the regulatory and governance frameworks around environmental protection.<sup>27</sup>

Given that Australia's environmental laws are not providing adequate protection for the environment, whilst permitting environmental injustices to occur, the question as to whether the human right to a healthy environment can assist is pertinent.

### III HOW DOES A RIGHT TO A HEALTHY ENVIRONMENT OPERATE IN PRACTICE?

More than 150 nations have recognised the right to a healthy environment in various forms, be it through their constitutions, regional agreements, other national laws or court decisions.<sup>28</sup> The effect of entrenchment of the right has varied between countries, with some methods proving merely symbolic. However, in many countries the right has led to its practical application.<sup>29</sup> For example, in *Ashgar Leghari v Federation of Pakistan*, a citizen brought a suit against the government alleging that their failure to implement climate policy offended his fundamental rights, including the right to a healthy environment.<sup>30</sup> The Court ultimately held that the delay in implementing policy 'offends the fundamental rights of the citizens which need to be safeguarded', agreeing that these fundamental rights include a right to a 'healthy and clean environment'.<sup>31</sup>

Despite its successful use in some jurisdictions, the right to a healthy environment has also been criticized as being too diffused and void of a precise meaning, such that it is

---

<sup>26</sup> Australian Panel of Experts on Environmental Law, *Democracy and the Environment* (Technical Paper 8, 2017) 3.

<sup>27</sup> Australian Panel of Experts on Environmental Law, *The Future of Australian Environmental Laws* (Overview Paper, 2017) 5.

<sup>28</sup> Knox (n 6) 42.

<sup>29</sup> Boyd (n 3).

<sup>30</sup> *Ashgar Leghari v Federation of Pakistan* (W.P. No. 25501/2015), Lahore High Court Green Bench, Orders of 4 Sept and 14 Sept 2015.

<sup>31</sup> *Ibid* [8].

difficult to enforce.<sup>32</sup> Indeed, successful application of the right is predicated upon finding answers to a number of critical questions, including: how do we define what is a 'healthy environment'? What standard/s should we use? Are we referring to every element of our environment and/or the interactions between all of these elements, or should only certain elements of the environment be our determiners, such as air and water quality? Must the health of the environment be determined against how it impacts the health of humans, or is it assessed in accordance with the normal health of that environmental element regardless of its impact on humans?

Ilie argues that in order to be effective, a right to a healthy environment must be underpinned by the following elements: precise legal rules which regulate conduct around the environment; standards and accepted limits, both individually from projects, and overall in a more ambient form; and, sufficient, enforced liability for environmental damage to act as a deterrent.<sup>33</sup> Interestingly, these are the same key concepts underpinning current environmental laws in Australia. However, Ilie also argues that to be effective, the right must be matched by cultural awareness of the need to protect the environment,<sup>34</sup> as laws are always most effective if backed by social awareness of the utility of those laws. This aspect may be more challenging in the Australian context.

Thus, while the right to a healthy environment has been successfully utilised in overseas jurisdictions, there are a number of issues which must be considered as part of its implementation.

#### IV COULD OTHER HUMAN RIGHTS PROVIDE FOR A RIGHT TO A HEALTHY ENVIRONMENT?

The Australian legal landscape is not entirely void of human rights protections — Victoria, the Australian Capital Territory and Queensland all have legislative protection for human rights.<sup>35</sup> Whilst none of these Acts recognise a specific right to a healthy environment, they do recognise other rights that may be used as a vehicle to argue for the right to a healthy environment. One of the clearest rights which may be read to include a right to a healthy environment is the right to life.

---

<sup>32</sup> Barbu, Ilie Adrian, 'The Right to a Healthy Environment – between a Basic Human Right and a Policy of Form without Substance' (2016) 52(1) *Revista de Stinte Politice* 14.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.* 22.

<sup>35</sup> *Human Rights Act 2018* (Qld); *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Internationally, the right to life has been used in the context of environmental harm. For example, in *Taskin v Turkey*, the European Court of Human Rights found a violation of the right to life had occurred in relation to a community's concerns over the use of cyanide in a prospective gold mine and its potential effects on human health in future years.<sup>36</sup> In the Colombian case of *Future Generations v Minister for the Environment*, citizens alleged that the government's failure to reduce deforestation and ensure compliance with a target for zero-net deforestation in the Amazon by 2020 threatens plaintiffs' fundamental rights, including a right to life and health.<sup>37</sup> The Court found that, in the absence of a healthy environment, humans will not be able to survive. Therefore, increasing deterioration of the environment is a violation of the right to life and other fundamental rights.

A more recent Hague Court of Appeal decision, *State of Netherland v Urgenda Foundation*, provided more precedent demonstrating internationally that the right to life includes environment-related situations that threaten or affect the right to life.<sup>38</sup> Of relevance closer to home, but also taking place in the international law arena, a group of Torres Strait Islander people has lodged a complaint with the United Nations Human Rights Committee against the Australian Government.<sup>39</sup> The group is asserting that the Australian Government has failed to take action to reduce greenhouse gas emissions and failed to fund adequate coastal defences against sea level rise to address the climate change crisis in a way that has breached their fundamental human rights obligations to Torres Strait Islander people living on a low lying island.<sup>40</sup> The human rights claimed to be impacted include the right to culture, the right to be free from arbitrary interference with privacy, family and home, and the right to life. It is yet to be seen whether the right to life will here also be interpreted with reflection on the right to a healthy environment in this instance.

---

<sup>36</sup> *Taskin v Turkey* [2004] Eur Court HR 179, 208.

<sup>37</sup> *Demanda Generaciones Futuras v Minambiente* (2018) STC4360-2018 (unofficial translation).

<sup>38</sup> Court of Appeal of The Hague, *The State of the Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation*, C/09/456689 / HA ZA 13-1396, 9 Oct. 2018, available at: <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610>> (*Urgenda 2*) [40], [43].

<sup>39</sup> Kristen Lyons, 'Torres Strait Islanders Ask UN to Hold Australia to Account on Climate 'Human Rights Abuses'', *The Conversation* (online, 27 May 2019) <<https://theconversation.com/torres-strait-islanders-ask-un-to-hold-australia-to-account-on-climate-human-rights-abuses-117262>>.

<sup>40</sup> *Ibid.*

While the interpretation of the right to life as incorporating a right to a healthy environment has not yet been tested in jurisdictions with human rights laws, there is no reason in principle why the human right to life cannot also be used in the Australian context as a vehicle for environmental-based claims. For example, there is widespread evidence regarding the human health impacts from climate change in Australia, including health impacts from heatwaves, increased incidence of infectious diseases, and mental health impacts.<sup>41</sup> It could be argued that a failure to implement climate change policy therefore violates the right to life.

Lewis argues that an enshrined right to a healthy environment is not a precursor to environmental protection via human rights regimes.<sup>42</sup> Rather, she argues that effort might be better placed in improving human-rights based approaches utilising existing rights.<sup>43</sup> Whilst this may be true, the symbolic and other benefits of an enshrined human right to a healthy environment must also be borne in mind.

#### V THE BENEFITS OF THE RIGHT TO A HEALTHY ENVIRONMENT

There are a myriad of other benefits associated with specifically recognizing the right to a healthy environment. Canadian environmental lawyer and current Special Rapporteur to human rights and the environment, David Boyd, has examined the repercussions of introducing the right to a healthy environment across dozens of nations which have this right represented in their legal frameworks. Boyd found that recognition of the right has assisted in strengthening the environmental legal frameworks of those countries, including improving governance and democratic process around environmental decision making.<sup>44</sup> It has also facilitated successful litigation to achieve better protection against exploitation of natural resources, in order to ensure they are enduring for current and future generations.<sup>45</sup> Further, it has guarded against regression of existing laws under multiple governments.<sup>46</sup> This is because some countries have supplemented the right to a healthy environment with the doctrine of non-regression, which comes from the principle of progressivity recognised as a norm from international human

---

<sup>41</sup> Ying Zhang et al, 'The MJA-Lancet Countdown on Health and Climate Change: Australian Policy Inaction Threatens Lives' (2018) 209(11) *Medical Journal of Australia-Lancet* 474.

<sup>42</sup> Lewis (n 2).

<sup>43</sup> *Ibid.*

<sup>44</sup> Boyd (n 3).

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

rights law.<sup>47</sup> This is a helpful means of ensuring that environmental laws cannot be rolled back from where they are today; they can only be improved upon. In a country plagued by significant politicization around environmental laws, where countless election cycles have led to panic clearing and significant peaks and troughs in clearing rates in Queensland alone, the introduction of the doctrine of non-regression would be a wonderful antidote to remove ourselves from this enduringly destructive cycle.

In March 2012, the United Nations Human Rights Council established a mandate on human rights and the environment, which studied the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, and promoted best practices relating to the use of human rights in environmental policymaking. The first report of the then UN Special Rapporteur on human rights and the environment, John Knox, to the UN General Assembly recommended that the UN recognise a right to a healthy environment for numerous reasons.<sup>48</sup> In this report, Knox firstly argued that recognition of the right raises awareness of, and reinforces the concept that, the enjoyment of human rights relies on protection of the environment and vice versa.<sup>49</sup> Further, it assists in ensuring the continued, coherent and integrated development of human rights norms relating to the environment, providing a more unified and integrated presence of environmental laws into the legal system. Additionally, acknowledging this right assists in highlighting and seeking to prevent environmental injustices which so frequently are not addressed in our environmental or other laws. Finally, Knox recognized that entrenching the right to a healthy environment leads to stronger environmental laws generally and can empower citizens to more effectively defend against environmental impacts.<sup>50</sup>

Indeed, implementing a right to a healthy environment may enable the further introduction of, or at least dialogue around, the role of the 16 Framework Principles developed by Knox to clarify what the right should entail in practice.<sup>51</sup> In order to ensure the right is not merely symbolic, but is practically sought to be achieved, the 16

---

<sup>47</sup> Lynda Collins and David Boyd, 'Non-Regression and the Charter Right to a Healthy Environment' (2016) 29(1) *Journal of Environmental Law and Practice* 285.

<sup>48</sup> John Knox and David Boyd, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, 73<sup>rd</sup> sess, UN Doc A/73/188 (19 July 2018).

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

Principles provide for a range of actions for States to seek to undertake. The Principles include ensuring environmental justice through prohibiting discrimination to ensure equal and effective achievement of the right, the right of peaceful assembly in relation to environmental matters, the right to access environmental information in a timely and effective manner, public participation in decision making, and proper prior assessment of possible environmental impacts, amongst other things. These are worthy Principles that Australia could benefit from, even in the context of benchmarking current environmental laws against to assess how adequately their objectives are being achieved.

One benefit of enshrining a right to a healthy environment, rather than relying on existing forms of environmental law, is that the rights framework taps into the well-established narratives built around human rights that help them act as a 'trump' against injustice.<sup>52</sup> For example, the UN General Assembly stated that 'each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms'.<sup>53</sup> This duty is expected to trump domestic laws that may be contrary to the right, empowering the right to a healthy environment to overcome the typical application of environmental laws which favour economic gain over environmental protection.<sup>54</sup>

The expression and form of implementation of the right to a healthy environment would be the determiners as to how much benefit Australia or any of its jurisdictions could gain from introducing this right. The existing human rights instruments in Victoria, the ACT and Queensland have introduced human rights through the 'dialogue model', in which responsibility for the interpretation and enforcement of human rights is shared between courts and parliaments, with judicial powers limited to considering human rights arguments only when they are 'piggybacked' onto another legal claim.<sup>55</sup> Although the dialogue model has its drawbacks,<sup>56</sup> including that Parliament has discretion to pass

---

<sup>52</sup> Bratspies (n 16) 265.

<sup>53</sup> *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, UN GAOR, A/RES/53/144 (8 March 1999), art 2[1] UN General Assembly Resolution 53/144, (1999).

<sup>54</sup> Bratspies (n 16) 268.

<sup>55</sup> Irina Kolodizner, 'The Charter of Rights Debate: A Battle of the Models' (2009) 10(1) *Australian International Law Journal* 219.

<sup>56</sup> See, eg, Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Review, 2015).



legislation which may be incompatible with human rights, incorporating the right to a healthy environment would still have considerable benefits, including normalizing the concept in general discourse.<sup>57</sup> The numerous determiners suggested by Ilie, referred to above,<sup>58</sup> would need to be considered in the effective introduction of this right, to ensure it is more than just symbolic and has practical beneficial applications in our legal system and interactions with the environment.

## VI CONCLUSION

The former Special Rapporteur on human rights and the environment, John Knox, stated that '[w]ithout a healthy environment, we are unable to fulfil our aspirations or even live at a level commensurate with minimum standards of human dignity.'<sup>59</sup> Knox has drawn a link between environmental harm and threats to a vast range of human rights, including rights to life, health, property, home and family life, food, water, culture and self-determination.<sup>60</sup> While those jurisdictions that enjoy recognition and protection of human rights generally may have the ability to argue substantively for the right to a healthy environment to be protected within other rights (eg the right to life), recognizing the right to a healthy environment directly in our legal instruments will have multiple benefits. Clear recognition of the right can lead to broader recognition of our dependence on the health of the environment for our own health, more effective environmental laws and governance around environmental decision making, and improved environmental justice. Ideally, Australia would entrench this right, along with all basic human rights, in our national Constitution. However, given that this seems unlikely in the current political climate, states and territories are encouraged to consider introducing the right to a healthy environment, along with other human rights where not already recognised, into their legal frameworks. This would enable all

---

<sup>57</sup> Meg Good, 'Should Australia Recognise the Human Right to a Healthy Environment?' *The Conversation* (online, February 22 2018) <<https://theconversation.com/should-australia-recognise-the-human-right-to-a-healthy-environment-92104>>.

<sup>58</sup> *Ibid* at [28].

<sup>59</sup> John Knox, Special Rapporteur on human rights and the environment (former Independent Expert on human rights and the environment), United Nations Human Rights, Office of the High Commissioner, accessed online 21 April 2016, <<http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SREnvironmentIndex.aspx>>

<sup>60</sup> John H Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* UN Doc A/HRC/25/53 (30 December 2013).

citizens to gain the benefits that a legislated human right to a healthy environment can bring for communities around Australia, and the environments we all depend on.

## REFERENCE LIST

*A Articles/Books/Reports*

Asia Pacific Forum, *Human Rights and The Environment* (Background Paper, 24-27 September 2007)

Australian Conservation Foundation, World Wildlife Fund, The Wilderness Society and The University of Queensland, *Fast-tracking Extinction: Australia's National Environmental Law* (Report, 2018)

Australian Panel of Experts on Environmental Law, *The Future of Australian Environmental Laws* (Overview Paper, 2017)

Australian Panel of Experts on Environmental Law, *Democracy and the Environment* (Technical Paper 8, 2017)

Barbu, Ilie Adrian, 'The Right to a Healthy Environment – between a Basic Human Right and a Policy of Form without Substance' (2016) 52(1) *Revista de Stinte Politice* 14

Boyd, David, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press, 2011)

Bratspies, Rebecca, 'Claimed Not Granted: Finding a Human Right to a Healthy Environment' (2017) 26 *Transnational Law and Contemporary Problems* 263

Brett Young, Michael, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Review, 2015)

Chakaraborty, Jayajit and Donna Green, 'Australia's First National Level Quantitative Environmental Justice Assessment of Industrial Air Pollution' (2014) 9(4) *Environmental Research Letters* 1

Collins, Lynda and David Boyd, 'Non-Regression and the Charter Right to a Healthy Environment' (2016) 29(1) *Journal of Environmental Law and Practice* 285

Cooper, Nathan, Donna Green, Marianne, Sullivan and David, Cohen, 'Environmental Justice Analyses May Hide Inequalities in Indigenous People's Exposure to Lead in Mount Isa, Queensland' (2018) 13(1) *Environmental Research Letters* 8

Department of Environment and Energy, *State of the Environment* (Report, 2016)

Dobbie, Brendan and Green, Donna, 'Australians Are Not Equally Protected from Industrial Air Pollution' (2015) 10(5) *Environmental Research Letters* 1

Gunther, Handl, "Human Rights and Protection of the Environment: A Mildly Revisionist View" in A. Cançado Trindade (ed), *Human Rights and Environmental Protection* (1995) 117

Human Rights and Equal Opportunity Commission, *Human Rights and Climate Change* (Background Paper, April 2008)

Hillebrecht, Anna, 'Disrobing Rights: The Privilege of Being Human in the Rights of Nature Discourse' (2017) 6 *Rachel Carson Center Perspectives* 15

Knox, John, 'The Global Pact for the Environment: at the Crossroads of Human Rights and the Environment' (2019) 28(1) *Review of European, Comparative & International Environmental Law* 40

Knox, John H and Pejan, Ramin (eds) *The Human Right to a Healthy Environment* (Cambridge University Press, 2018)

Kolodizner Irina, 'The Charter of Rights Debate: A Battle of the Models' (2009) 10(1) *Australian International Law Journal* 219

Lewis, Bridget, *Environmental Human Rights and Climate Change: Current Status and Future Prospects* (Springer, 2018)

Maloney, Michelle, 'Rights of Nature, Earth democracy and the Future of Environmental Governance' in The Green Institute *Rebalancing rights: Communities Corporations and Nature* (Report, March 2019) 11

Parliament of Australia, *Environment and Communications References Committee: Australia's Faunal Extinction Crisis* (Interim Report, 2019)

Queensland Government, *Queensland Climate Adaptation Strategy: Human Health and Wellbeing Climate Change Adaptation Plan for Queensland* (Sector Adaptation Plan, 2018)

Rose, Deborah Bird, *Nourishing Terrains: Aboriginal Views of Landscape and Wilderness* (Australian Heritage Commission, 1996)

Woinarski, John CZ, Sarah Legge, Sarah, James A Fitzsimons, Barry J Traill, Andrew A Burbidge, Alaric Fisher, Ron SC Firth, Iain J Gordon, Anthony D Griffiths, Christopher N Johnson, Norm L McKenzie, Carol Palmer, Ian Radford, Brooke Rankmore, Euan G. Ritchie, Simon Ward and Mark Ziembecki, 'The Disappearing Mammal Fauna of northern Australia: Context, Cause, and Response' (2011) 4(3) *Conservation Letters* 192

Zhang, Ying, Paul Beggs, Hillary Bambrick, Helen L Berry, Martina K Linnenluecke, Stefan Trueck, Robyn Alders, Peng Bi, Sinead M Boylan, Donna Green, Yuming Guo, Ivan C Hanigan, Elizabeth G Hanna, Arunima Malik, Geoffrey G Morgan, Mark Stevenson, Shilu Tong, Nick Watts, Anthony G Capon, 'The MJA-Lancet Countdown on Health and Climate Change: Australian Policy Inaction Threatens Lives' (2018) 209(11) *Medical Journal of Australia-Lancet* 474

#### B Cases

*Ashgar Leghari v Federation of Pakistan (W.P. No. 25501/2015)*, Lahore High Court Green Bench, Orders of 4 Sept and 14 Sept 2015

Court of Appeal of The Hague, *The State of the Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation*, C/09/456689 / HA ZA 13-1396, 9 Oct. 2018,

<<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610>>

*Demanda Generaciones Futuras v Minambiente* (2018) STC4360-2018 (unofficial translation)

*New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection* (No. 4) [2017] QLC 24

*Taskin v Turkey* [2004] Eur Court HR 179

#### C Legislation

*Charter of Human Rights and Responsibilities Act 2006* (Vic)

*Human Rights Act 2004* (ACT)

*Human Rights Act 2018* (Qld)

*National Environment Protection (Ambient Air Quality) Measure 2015* (Cth)

#### D Treaties

*International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

#### E Other

Afshin Akhtar-Khavari, Elizabeth MacPherson, Erin O'Donnell, Katie Woolaston, Julian Yates, Alessandro Pelizzon and Rebecca Nelson, 'Why do Australia's Environmental Law Fail to Save Our Species from Extinction' *IUCN News* (online, 13 July 2019)

<https://www.iucn.org/news/world-commission-environmental-law/201907/why-do-australias-environmental-laws-fail-save-our-species-extinction>

Declaration of the United Nations Conference on the Human Environment in 'Report of the United Nations Conference on the Human Environment' UN Doc

A/CONF.48/14/Rev.1 (1973) Principle 1

Department of the Environment and Energy, *International Activities*, Australian Government (Webpage) <<https://www.environment.gov.au/about-us/international>>

*Gabcikovo Nagymaros Project (Hungary v Slovakia)* ICJ 97 [1997] (Separate Opinion of Vice President Weeramantry)

Good, Meg 'Should Australia Recognise the Human Right to a Healthy Environment?' *The Conversation* (online, February 22 2018) <<https://theconversation.com/should-australia-recognise-the-human-right-to-a-healthy-environment-92104>>

Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2018) A/HRC/37/58

IUCN, Red List: Table 6a: Red List Category Summary Country Totals (Animals) (Webpage, 2018) <[http://cmsdocs.s3.amazonaws.com/summarystats/2018-1\\_Summary\\_Stats\\_Page\\_Documents/2018\\_1\\_RL\\_Stats\\_Table\\_6a.pdf](http://cmsdocs.s3.amazonaws.com/summarystats/2018-1_Summary_Stats_Page_Documents/2018_1_RL_Stats_Table_6a.pdf)>

Knox, John, Special Rapporteur on Human Rights and the Environment, United Nations Human Rights, Office of the High Commissioner (Webpage, 21 April 2016) <<http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SREnvironmentIndex.aspx>>

Knox, John H, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* UN Doc A/HRC/25/53 (30 December 2013)

Knox, John and David Boyd, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, 73rd sess, UN Doc A/73/188 (19 July 2018)

Lyons, Kristen, 'Torres Strait Islanders ask UN to Hold Australia to Account on Climate 'Human Rights Abuses' *The Conversation* (online, 27 May 2019) <<https://theconversation.com/torres-strait-islanders-ask-un-to-hold-australia-to-account-on-climate-human-rights-abuses-117262>>

*Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF/151/26 (12 August 1992) annex I ('*Rio Declaration on Environment and Development*')

Skelton, Russell, 'Not a Single Drop to Drink: This is Australia', *The Sydney Morning Herald* (online, 28 February 2008) <<https://www.smh.com.au/national/not-a-single-drop-to-drink-this-is-australia-20080228-gds2we.html>>