Environmental Defenders Office

19 October 2023

The Committee Secretary
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

By email only: human.rights@aph.gov.au

Dear Committee Secretary

Inquiry into Australia's Human Rights Framework – Response to Questions on Notice from Senator Thorpe

Thank you again for inviting the Environmental Defenders Office (**EDO**) to appear at the Committee's hearing in Sydney on Thursday 28 September 2023. In this letter, we address the two additional questions from Senator Thorpe that were put to us following the hearing.

1. **Australia has now recognised the Yarra River (Victoria) as 'one living and integrated natural entity' although not (yet?) as a legal person. What do you think of the potential benefits of legal personhood for rivers and the environment and how could this interact with the right to a healthy environment and the principles of UNDRIP and the rights of First Peoples to care for their land, waters and skies.**

As noted by Senator Thorpe, the Yarra River was recognised as a 'living and integrated natural entity' in 2017.[1] The Birrarung Council (**Council**) was established under the *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) in 2018.[2] The Council, which is comprised of up to 12 members, must include at least two members nominated by the Wurundjeri Tribe Land and Compensation Cultural Heritage Council.[3] The Council provides independent advice to the Victorian Government on matters including the protection and improvement of the Yarra River.[4]

Recognition of the Yarra River as a legal entity is not the same as 'legal personhood' that other rivers globally have been afforded, such as Lake Erie in Canada and Whananui River in New Zealand. The Yarra River does not have a legal means to exercise or hold legal interests or rights in the same way as legal persons, people or corporations can under Victorian and Commonwealth (both statutory and common) law.

EDO is not a First Nations organisation and has yet to undertake substantial work considering the benefits (or otherwise) of recognising the rights of nature, including legal personhood for the

[1] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) (**Yarra Protection Act**) s 1.
[2] Yarra Protection Act s 46.
[3] Yarra Protection Act s 49.
[4] Yarra Protection Act s 48.

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environment. As such, EDO does not advocate a particular position regarding this matter. In our submission to the Inquiry, we recommended that the Commonwealth Government should not strictly delineate between humans and our rights and the rights of the broader environment in a Charter, or in any explanatory memorandum, guidelines or policies developed in support of a Charter (**recommendation 4**). By making this recommendation we were seeking to acknowledge that there are legal frameworks being developed internationally that seek to reconceptualise nature, which can be expected to influence the development of the right to a healthy environment under international law.

It is EDO's position that the right to a healthy environment and any other rights in the Charter must be developed in accordance with the principles of UNDRIP, including that it is undertaken with free, prior and informed consent of First Nations peoples (**FPIC**). This was addressed in our **recommendation 7**:

> *"The Charter should include the cultural rights of First Nations Peoples proposed by the Commission. In addition, the Charter should enshrine all rights protected under the Universal Declaration of the Rights of Indigenous Peoples (UNDRIP). Alternatively, the Australian Government should enact legislation to give domestic effect to UNDRIP. Any provision relating to the rights of First Nations Peoples must be developed in culturally appropriate consultation with First Nations Peoples."*

As noted in our report *A Healthy Environment is a Human Right*,[5] the foundations of the right to a healthy environment come from a number of cultural knowledges and traditions of Indigenous peoples around the world, including First Nations peoples' cultural knowledges and traditions, which have existed in Australia for over 60,000 years. Noting this, and the connection between First Nations People and Country, it is important that the right to a healthy environment is defined in a way that is consistent with First Nations peoples' views.

In addressing the above issues, EDO acknowledges that there are multiple perspectives held by First Nations peoples in Australia on the appropriateness of the rights of nature, including legal personhood, and its application in Australia. These perspectives are derived from different cultures, customs and laws. Accordingly, in Australia, the rights of nature and/or legal personhood of rivers and the environment should only be considered with FPIC from the First Peoples of the specific Country in which a consideration of legal personhood relates. Although EDO does not currently advocate a position on the rights of nature, we note that there are several academics and organisations in Australia conducting research and advocating on this matter.

2. Your office is pursuing a constitutional challenge to s214A of the *Crimes Act 1900* against the harsh crack down on protesting by the New South Wales government which is also happening in other jurisdictions. This freedom of information, opinion and expression has been attacked in NSW before – how well is the High Court able to protect against repeated instances?

The Constitution does not specifically recognise and protect freedom of information, expression or opinion. The High Court however has held that an *implied* freedom of political communication exists in Australia as an indispensable part of the system of representative and responsible

[5] EDO, *A Healthy Environment is a Human Right: Report on the Status of the Right to a Healthy Environment in Australia* (2022) (Attachment 1 to our submission to the Inquiry).

government that is created by the Constitution. This freedom operates as a restraint on Australian Parliaments' legislative power – rather than as a separate right conferred directly on and held by individuals in Australia – and only to the extent where the exercise of such legislative power would impose a burden on political communication that is *not reasonably appropriate and adapted* to the prescribed system of representative and responsible government prescribed by the Constitution. When considering whether a law is appropriate and adapted, current High Court authority favours consideration as to whether:

(a) the law is suitable (does it exhibit a rational connection to its purpose?);

(b) necessary (is there an obvious and compelling alternative equally practicable and available that would result in a significantly lesser burden?); and

(c) adequate in balance (is the benefit that the law seeks to achieve manifestly outweighed by the law's adverse effect on the implied freedom?).

In the case of the constitutional challenge to s 214A of the *Crimes Act 1900* (NSW),[6] the position of our clients, Helen Kvelde and Dominique Jacobs, is that s 214A imposes an unjustified burden on the implied freedom to communicate, via peaceful protest, on governmental and political matters. In our clients' view, as the law currently stands, s 214A may have the effect of criminalising certain acts of peaceful protest in NSW. The matter was heard in the Supreme Court of NSW in May 2023 and the decision remains reserved.

The implied freedom can be contrasted with international human rights law and other jurisdictions that recognise a specific right to freedom of opinion and expression that centres the right of an individual to expression or opinion, which is not necessarily related to matters of government or political communication. Relating specifically to rights to protest, particularly relating to climate and environmental protests, 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**) enshrines rights to protect environmental human rights defenders. This right is underpinned by enabling rights so that environmental human rights defenders are able to act free from threat, restriction and insecurity (Article 9(1)), and other protest rights including the rights to freedom of opinion and expression, peaceful assembly and association and free movement (Article 9(2)). EDO recommended in our submission to the Inquiry that the Charter should include the rights contained in article 9 of the Escazú Agreement, including the right to a safe and enabling environment (**Recommendation 8**). EDO considers this right as distinct but complimentary to a broader right of freedom of opinion and expression, a core human right provided for under article 19 of the *International Covenant on Civil and Political Rights* (**ICCPR**). We note that EDO also recommended to the Inquiry that the Charter should enshrine all rights protected under the international human rights treaties ratified by Australia (which includes the ICCPR) (**Recommendation 6**).

In response to the Senator's question about how well the High Court is able to protect against future legislation that may impede on the right to freedom of opinion and expression, in light of the limitations on the scope of the implied freedom (discussed above), we consider that Australian courts would be better equipped to protect such freedoms if these rights were explicitly enshrined in a Charter. In relation to our clients' constitutional challenge of s 214A of the *Crimes Act 1900*

[6] *Kvelde & Ors v State of NSW* (2022/304510).

(NSW), as we are still awaiting a decision, it remains to be seen what approach the Supreme Court of NSW will take with respect to the application of the implied freedom of political communication to protect peaceful protest action.

Further and separately, currently freedom of information is a separate legislative regime governed by the *Freedom of Information Act 1982* (Cth). This is a legislated right to access of information that is at least, ostensibly, intended to promote and enhance the process of democracy and representative government by increasing access to information held by the government.[7] As noted in the Wilderness Society's recent report, access to information under Australia's national and state freedom of information regimes are inadequate.[8] For this reason, EDO recommends that the Commonwealth Government ratify the Aarhus Convention, which provides for express rights to access to information, and that the rights protected under the Aarhus Convention be enshrined in a Charter (**Recommendation 2**).

For further information, please do not hesitate to contact me.

Yours sincerely,
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[7] Abigail Rath, NSW Parliamentary Library Research Service, 'Freedom of Information and Open Government' (Background Paper No 3, 2000).
[8] The Wilderness Society, *Who holds the power? Community rights in environmental decision-making* (2022) p 5 (Attachment 6 to our submission to the Inquiry).