



Australia's National Institute for Aboriginal  
and Torres Strait Islander Health Research

# **Australian Capital Territory Government public consultation to inform consideration of the introduction of a right to a healthy environment in the Human Rights Act 2004**

*We Care for Country, Country Cares for Us*

**Submission to Justice and Community Safety Directorate**

**The Lowitja Institute, September 2022**



Justice and Community Safety Directorate  
GPO Box 158  
Canberra ACT 2601 Australia

To Whom It May Concern,

**Re: The Lowitja Institute's submission to the public consultation to inform consideration of the introduction of a right to a healthy environment in the Human Rights Act 2004**

The Lowitja Institute is Australia's national institute for Aboriginal and Torres Strait Islander health research, named in honour of our Patron, Dr Lowitja O'Donoghue AC CBE DSG.

We welcome the opportunity to provide a submission to the Justice and Community Safety Directorate's public consultation to inform consideration of the introduction of a right to a healthy environment in the Human Rights Act 2004 (the Act).

We see the potential inclusion of a right to a healthy environment in the Act as an opportunity for the ACT Government to continue to lead the nation when it comes to protecting human rights, addressing climate change, and recognising the importance of the environment to human health and wellbeing.

Thoughtfully enshrining such a right could achieve several significant impacts for all Australians, but in particular Aboriginal and Torres Strait Islander peoples who hold a unique relationship to Country as Traditional Owners and Custodians and who are disproportionately impacted by climate change, environmental degradation, loss of biodiversity and the consequential adverse health and wellbeing impacts.

Enshrining such a right will contribute to improved health outcomes for our peoples and ensure our children and the next generations have bright futures. The Australian Capital Territory Government can better ensure these outcomes if they draft this new right in a way that also supports and overlays the collective and cultural rights of Aboriginal and Torres Strait Islander peoples. This is because a healthy environment connects with key social and cultural determinants of health for our peoples, which are unique in some significant ways.

The inclusion of a right to a healthy environment would be a solid foundation for strong action for working towards a healthy environment, and for prevention of, mitigation against and adaptation to climate change. Improved outcomes that are



likely to flow from such a right would include increased food security, and improvements to life expectancy, rates of childhood chronic and acute illness, social and emotional wellbeing, and reduced vulnerability to epidemics and pandemics, and climate-related adverse health impacts. These outcomes would also contribute to fulfilling the ACT's commitments under the new National Agreement on Closing the Gap 2021.

Further, including our peoples in decision-making processes regarding our lands, waterways and seas would support self-determination, our leadership and thereby influence the political determinants of our health and wellbeing. Enshrining this statutory right could oblige the ACT Government to engage with our peoples in decision-making process that impact on us as Traditional Custodians. This would strengthen territorial support for and align well with the intent of the Uluru Statement from the Heart.

The ACT government could also consider bolstering the right to a healthy environment with additional protections for economic, social and cultural rights pertaining to health, and housing. Housing is intimately connected with building climate change resilience, and the health of an environment and the community that resides within it. Further, we encourage the Directorate to consider future legislation to fully implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in the ACT. This would support and align well with protecting and defending the right to a healthy environment in a way that respects our peoples' self-determination.

Please find our submission attached. We would welcome the opportunity to further discuss any of the issues contained therein.

Warm regards



Dr Janine Mohamed

## 1. About the Lowitja Institute

The Lowitja Institute is a national Aboriginal and Torres Strait Islander Community Controlled Organisation working for the health and wellbeing of Australia's First Peoples through high impact quality research, knowledge translation, and by supporting Aboriginal and Torres Strait Islander health researchers.

Established in January 2010, we operate on the key principles of Aboriginal and Torres Strait Islander leadership, a broader understanding of health that incorporates wellbeing, and the need for the work to have a clear and positive impact.

The Lowitja Institute has a longstanding commitment to the National Agreement on Closing the Gap, as both members of the Close the Gap Steering Committee and in authoring the Close the Gap Report over the past 4 years. We are also members of the National Health Leadership Forum and the Coalition of Peaks.

In 2021, the Lowitja Institute worked in partnership with the Climate and Health Alliance (CAHA) to publish a discussion paper, *Climate Change and Aboriginal and Torres Strait Islander Health* and convened a roundtable (Climate Roundtable). The roundtable brought together many Aboriginal and Torres Strait Islander and other First Nations experts to discuss this important policy issue. The discussion paper identified a series of health risks associated with changes in the climate and environments, as well as highlighting the widespread exclusion of Aboriginal and Torres Strait Islander local knowledges within national conversations. The Lowitja Institute is also a member of CAHA, a national network that advocates for national leadership and far-ranging cross-portfolio policy change to responses to climate change and continue to work closely with CAHA to conduct knowledge translation activity.

Based on this experience we offer the following general comments and responses to some of the questions put forward in the Justice and Community Safety Directorate's (Directorate) Discussion Paper Discussion Paper (Discussion Paper).

## 2. General preamble

Before responding to the Discussion Paper, we encourage the Directorate and the ACT Government to reflect deeply on the long history of Aboriginal and Torres Strait Islander peoples as Traditional Custodians of these lands, waterways and seas. Over millennia we have cared for Country and for our communities in this place now called Australia. Despite the traumatic and ongoing consequences of colonisation



and institutional racism, we have maintained and continue to develop our sophisticated and diverse cultures and knowledge systems.

From the early days of European settlement in Australia in 1788, racism against our peoples has taken many forms, including murder, exploitation and dispossession from our traditional lands and cultures. Our peoples were forced off Country onto missions, reserves, and into housing commissions with prohibitive rules that prevented our peoples from connecting with family, community and culture.<sup>1</sup> This removed us from the connected and strong communities, cultures and Country that had previously sustained our good health and social and emotional wellbeing.

The health inequity imposed on our peoples since colonisation persists to this day, with profound health impacts across multiple generations. As noted in *Climate Change and Aboriginal and Torres Strait Islander Health*, “Climate change is compounding these historical injustices, increasing inequities and feelings of powerlessness as communities despair over the desecration of their land-, water- and seascapes.”<sup>2</sup>

Colonisation is ongoing in this country; one of its methods was and still is locking our peoples out of decision-making regarding Country (e.g. resource exploration and mining licensing). In this way, we can view climate change as a direct consequence of colonisation and colonial practices and policies. In the most recent International Panel on Climate Change (IPCC) report, the connection between climate change on colonisation was explicitly recognised.

*“Vulnerability of ecosystems and people to climate change differs substantially among and within regions (very high confidence), driven by patterns of intersecting socioeconomic development, unsustainable ocean and land use, inequity, marginalization, **historical and ongoing patterns of inequity such as colonialism, and governance** (high confidence).<sup>3</sup> (emphasis added)*

Indigenous experts have identified anthropomorphic climate change as an extension of ongoing colonisation and “climate change impacts as the

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<sup>1</sup> Anderson, I., Baum, F. & Bentley, M. (eds) 2004, *Beyond Band-aids: Exploring the Underlying Social Determinants of Aboriginal Health*. Papers from the Social Determinants of Aboriginal Health Workshop, Adelaide, July 2004, Cooperative Research Centre for Aboriginal Health, Darwin, p. 27

<sup>2</sup> HEAL Network & CRE-STRIDE, 2021, *Climate Change and Aboriginal and Torres Strait Islander Health*, Discussion Paper, Lowitja Institute, Melbourne p. 9.

<sup>3</sup> IPCC, 2022: Summary for Policymakers [H.-O. Pörtner, D.C. Roberts, E.S. Poloczanska, et.al (eds.)], in: *Climate Change 2022: Impacts, Adaptation and Vulnerability*. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, Cambridge, UK, p. 12.



intensification of a sustained colonial process.”<sup>4</sup> Addressing climate change therefore requires climate justice, redress, and decolonisation.

Climate change has many health impacts on our peoples; to physical, individual and community health, and to social and emotional wellbeing. There are many indirect impacts because climate change adversely influences many social and cultural determinants of health and wellbeing. For example, forced migration off Country and displacement from home and community can cause significant harm to our peoples’ social and emotional wellbeing. Some of the impacts include those listed in **Appendix 1**.

It has also been noted that the solutions to the problem of climate change are not just related to the identified ecological tipping points that are commonly discussed. There are also “relational tipping points” that require consideration:

*[W]e need to invest in restoration of relationships – between humans and between humans and our more than human relatives. There is a need to balance urgent and incremental change and ensure action does not perpetuate existing inequities. Climate action, mitigation, and adaptation will not be enough on their own. Climate justice, including the cultural and social determinants of health, must be the goal.<sup>5</sup>*

This is one of the significant ways in which a human rights framework is vital to action on climate change. Enshrining a right to a healthy environment can go towards recognising the very real and important relational and ethical factors intrinsically connected to climate change and climate change responses. Moreover, a rights-based framework can push policymakers and governments to move beyond a reactive harm-minimisation approach and towards an approach that includes goals of decolonisation, health equity, climate justice, empowerment, and ultimately human health and wellbeing. We expand on this in response to the specific questions for discussion below.

A challenge for policymakers that we also expand on below is that while we know that climate change will exacerbate health inequities, and that this intersects with other social determinants of health such as housing, and cultural determinants of health, a poorly conceived climate change response also risks exacerbating health inequities. Similarly, a rights-based response can be powerful, but it can also risk harm.

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<sup>4</sup> HEAL Network & CRE-STRIDE, op cit, p. 6.

<sup>5</sup> Ibid, p. 6

### 3. Specific Questions for Discussion

#### **Should a right to a healthy environment be included in the Human Rights Act?**

The Lowitja Institute is supportive in-principle of the inclusion of an individual right to a healthy environment in the ACT's Human Rights Act 2004. However, we are only supportive if it is done in a way that takes into account, manages and mitigates the challenges and risks such an individual right may impose on our peoples.

#### **1. POTENTIAL CHALLENGES AND RISKS**

When we consider individual human rights in Australia, we must reflect on who the individual is. This is influenced by dominant cultural biases, and by the ongoing legacy of colonisation and racism; whiteness is the default. So when mainstream Australia thinks of the 'individual' as a human rights concept, the 'individual' is not by default considered to be Aboriginal or Torres Strait Islander. This poses challenges for the equitable implementation of individual rights for a couple of reasons.

Aboriginal and Torres Strait Islander worldviews are collectivist. As expressed in the Lowitja Institute's submission to the Senate Legal and Constitutional Affairs Reference Committee's Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia:

*Another challenge to implementation is that the individualistic individual rights based UNDRIP framework trades off our peoples' collectivist perspectives and approaches. It is vital to consider the importance of every person, and at the same time hold in mind Aboriginal and Torres Strait Islander understandings of collective sovereign rights and a different notion of being in the world, understanding power, and understanding polity. In this way, the UNDRIP is a good base for achieving equity, including in the health sector, and reinforcing individual rights as long as we can simultaneously view it with the above collectivist approach. Implementation requires government to keep these different paradigms in mind.<sup>6</sup>*

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<sup>6</sup> Lowitja Institute 2022. Submission to the Senate Legal and Constitutional Affairs Reference



An individual human rights framework can be a powerful foundation for action, and it may function as a powerful environmental protector and instigator of action on climate change. However, the potential clash between statutory individual rights frameworks and subsequent policies and action, and an Indigenous collectivist worldview carries risk of further harm to our peoples. We are concerned that such clashes may lead to indirect negative health and wellbeing outcomes for our peoples, and work against our collective goals under the National Agreement on Closing the Gap 2021.

As Dr. Rhys Jones, Ngāti Kahungunu, Public Health Medicine Specialist and Senior Lecturer in Māori Health at the University of Auckland, writes,

*Climate change will progressively undermine Indigenous rights to health and there is significant risk that policies adopted to address climate change, both mitigation and adaptation, could exacerbate inequities and further erode Indigenous rights (15).*

*In order to respond to these threats, it is important to examine the processes by which Indigenous health is affected by climate change and climate action.<sup>7</sup>*

Furthermore, the individual rights enshrined in the Act (or any human rights act or framework) may conflict with the Indigenous rights expressed in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Creating statutory individual human rights without also creating statutory rights of Indigenous peoples risks elevating the former as more important than the latter, and may mean that individual rights may be prioritised above our people's rights.

While s. 27 of the Act does enshrine a couple of rights codified in the UNDRIP's Articles 25 and 31, this does not do nearly enough to protect nor elevate the entirety of our rights as First Peoples.

## **2. CONSIDERATION OF OUR PEOPLES' WORLDVIEWS**

Further, our collective and holistic worldviews do not make the sharp distinction between human rights and rights of nature as articulated in the Discussion Paper. Respecting our rights means protecting the natural world, not just for what it gives

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Committee into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, p. 6.

<sup>7</sup> Rhys Jones 2019. Climate Change and Indigenous Health Promotion, *Global Health Promotion*, vol. 26; issue 3, Supplement Article, p. 74.



humans, but because of the specific obligations and duties that our peoples have to Country through our peoples' laws/lore. We care for Country, Country cares for us.

When discussing the limitations of an individualist human rights framework in supporting Aboriginal and Torres Strait Islander rights and decolonisation, Tamara Mackean, Waljjan woman, Associate Professor, College of Medicine and Public Health, Flinders University explained:

*And for Aboriginal people that actually means water as a living entity, the earth as a living entity, the air as a living entity, not just creatures. And I think that that's the bit, when push comes to shove, is often about power.*

So Individual rights are helpful, but when the individual in question is Aboriginal and/or Torres Strait Islander person, there is a necessary overlay of the rights of Indigenous peoples, which are collective rights. Empowerment of our peoples entails respecting our worldviews and aligning policies with them.

While the Lowitja Institute supports the creation of an individual right to a healthy environment, this is conditional on the wording and implementation. Legislators must be mindful of the interface between individual human rights, Indigenous rights as expressed in the international human rights frameworks (the UNDRIP) and importantly collective Indigenous rights as understood within Aboriginal and Torres Strait Islander worldviews. They must ensure that our peoples and our peoples collective rights are respected, prioritised and strengthened. With this in mind, we make the below suggestions.

Further, we recommend that the Directorate consider the interplay between a right to a healthy environment and other economic, social and cultural rights. We also expand on this below.

**Could the right to a healthy environment be defined broadly with the right expressed general terms? Alternatively, could the definition of right to a healthy environment be more specific and incorporate substantive aspects?**

We recommend a mixed approach. It is our view that climate change is a health crisis, and it needs to be primarily viewed through a health lens. The definition of this right therefore ought to be aspirational and explicitly framed by the goal of improving human health and wellbeing. This would also align with the CAHA



*Framework for a National Strategy on Climate, Health and Well-being for Australia*, which sees climate change action as a health promotion activity.<sup>8</sup>

A couple of ways to manage the above risk of deprioritising the rights of and causing harm to our peoples is to articulate the right to a healthy environment in broad terms as a substantive right. Such a right could then be supported with specific procedural elements. We recommend that the Directorate consider including the following in the Act in addition to a health promotion focused definition:

- ❖ A procedural obligation on the ACT government to include Aboriginal and Torres Strait Islander peoples as the Traditional Custodians of the lands, waterways, and seas in any decision-making under that section of the Act.
- ❖ Specific decision-making principles within the Act that require decision-makers under the Act to consider the collective sovereign rights of Aboriginal and Torres Strait Islander peoples and our unique and unbreakable connection to Country.

Such an approach would further strengthen our peoples' rights under the Act over and above the protections imbued by s. 27 of the Act. These changes to be co-designed in partnership with Aboriginal and Torres Strait Islander stakeholders.

### **What additional obligations and or duties could be included for the Government to ensure the protection of individuals' right to a healthy environment?**

#### *A right to health*

While the Discussion Paper identifies the individual right to health as an economic, social and cultural right under the international human rights framework, it is not explicitly protected in the Act as an individual right. Since the right to a healthy environment is fundamentally about individual and collective health, we recommend that the Directorate consider enshrining a right to health, and social and emotional wellbeing in the Act. Such a right would be more culturally safe and inclusive if it were expressed as both an individual and collective right in line with our worldviews.

#### *A right to a healthy home*

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<sup>8</sup> Climate and Health Alliance 2017. *Framework for a National Strategy on Climate, Health and Well-being for Australia*.



As a social determinant of health, housing and its connection to climate, the health of environment that it is located within, and our peoples' health cannot be overstated.

It is widely agreed by health experts around the world, that housing is a social determinant of health. That is, there is a direct relationship between housing and health outcomes. Housing is also recognised as a social determinant in the *National Aboriginal and Torres Strait Islander Health Plan 2021*,<sup>9</sup> which encourages cross-sector solutions that include health and housing.<sup>10</sup>

As experts and Aboriginal Community Controlled Peak organisations have highlighted, the "construction of Aboriginal housing has been plagued by inappropriate design, use of cheap, substandard materials and inconsistent maintenance."<sup>11</sup> Poor build quality, inadequate basic infrastructure such as plumbing, energy poverty, inequitable access to public and private housing markets and issues such as overcrowding must be addressed. These issues reduce resilience to climate related health impacts such as increasing infectious diseases, extreme heat, and inundation.

The Discussion paper highlights that a failure to enforce environmental standards may contravene Article 12 of the United Nations Universal Declaration of Human Rights (UNDHR) (noting that this is enshrined in s. 12 of the Act). This right pertains to privacy; Under s.12 of the Act, a person has a right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily.<sup>12</sup> So, the creation of new right to a healthy environment may well complement Article 12 and s. 12 of the Act.

We encourage the Directorate to consider that if a person's 'home' for the purposes of the Act is conceived of in the dominant cultural way, it may not align with our conception of 'home'. A failure to protect the environment or interference with the lands, waterways or seas can amount to, for our peoples, interference with or the destruction of our homes. This is because the dominant cultural conception of

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<sup>9</sup> Department of Health, Australian Government 2021. *Aboriginal and Torres Strait Islander Health Plan 2021-2023*, pp. 20 & 46. Accessed 2 March 2022 at: [National Aboriginal and Torres Strait Islander Health Plan 2021-2031](#)

<sup>10</sup> Objective 1.4; Coalition of Aboriginal and Torres Strait Islander Peak Organisations and all Australian Governments 2020, *National Agreement on Closing the Gap*. Accessed 25 January 2022 at: *National Agreement on Closing the Gap*, p. 25.

<sup>11</sup> HEAL Network & CRE-STRIDE op cit, p. 18.

<sup>12</sup> s. 12 *Human Rights Act 2006* (ACT)



'housing' as something that people *live within* – as pertaining to shelter, lodging<sup>13</sup> or dwellings<sup>14</sup> – is not the same for our peoples.

We view housing as much more than shelter. Our 'homes' are tied to our traditional lands and waterways, to our connection to Country, culture and our kinship ties. When we think about the future of housing and health, and climate change, our duties as Traditional Custodians to nourish and protect our traditional lands and waterways are foundational. Being able to access and live on Country is a requisite part of sustaining our culture, identity, health and wellbeing. Being able to care for Country is vital to our health and wellbeing. Climate change is a threat to Country, and therefore it also threatens our homes and our health and wellbeing.

It is therefore imperative to take a holistic view of housing as connected to climate change. Decisions or actions, such as planning decisions, development, or mining activity that impact on or ignore climate change will also impact on our peoples' economic, social and cultural rights. For example, Rio Tinto's destruction of the Juuken Gorge was an irreversible destruction of *Puutu Kunti Kurrama* and *Pinikura* peoples' traditional home, and such displacement cannot be undone. This was an act of colonisation, which is ongoing in this country.

We therefore suggest that the Directorate consider the protections that s. 12 of the Act provides and whether or not they are sufficiently inclusive of and aligned to our peoples' worldviews.

#### *Implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*

We encourage the Directorate to consider future legislation to fully implement the UNDRIP. In addition to better recognising and supporting our peoples' rights as Aboriginal and Torres Strait Islander peoples, this would also align well with the right to a healthy environment.

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<sup>13</sup> See the Merriam-Webster definition of 'housing': Housing Definition & Meaning - Merriam-Webster

<sup>14</sup> Productivity Commission, Australian Government 2022. National Housing and Homelessness Agreement Review: Issues Paper, p. 3. Accessed on 3 March 2022 at: [Issues paper - National Housing and Homelessness Agreement Review \(pc.gov.au\)](https://www.pc.gov.au/issues-paper/national-housing-and-homelessness-agreement-review)



***How could the right to a healthy environment recognise the specific importance of 'country' for Aboriginal and Torres Strait Islander people?***

We recommend consideration of the above suggestions and recommendations as they will contribute to ensuring that the importance of Country to our peoples is appropriately recognised, valued, and included within the Act.

***How could the Government go about fulfilling the right to a healthy environment? How could the right be fulfilled while balancing other socially and economically beneficial activities?***

It is important that the ACT Government employ a decolonising approach to environmental decision making. This means shifting away from dominant cultural paradigms about land, water and sea management and seeing those things are economic resources. It also means respecting and elevating our peoples' leadership and traditional knowledge and wisdom.

At a policy level, this means investment in Aboriginal and Torres Strait Islander led projects and initiatives. For example, traditional food sources fulfill three different goals: a healthy environment, social needs (jobs, connection, cultural safety etc.) and an economic imperative. Sometimes the solutions can go towards multiple goals. The Indigenous Rangers Program is a fantastic example of such an approach, where our peoples' traditional knowledge and roles as Traditional Custodians are being respected, elevated and supported; there are positive outcomes for all Australians as a result.

# Appendix 1

Some of the direct and/or indirect health impacts that are and will result from climate change include:

*Rising temperatures and extreme heat;*<sup>15</sup>

- ❖ impacting on workforce productivity
- ❖ exacerbating chronic disease
- ❖ increasing heat-related mortality and morbidity (e.g. heat stroke)
- ❖ worsening heat-related adverse pregnancy outcomes
- ❖ increasing hospital admission for mental health and chronic conditions
- ❖ reduced physical activity
- ❖ increasing rates of interpersonal violence
- ❖ increased incidence of infectious disease

*Sea-level rise associated impacts on wellbeing resulting from;*<sup>16</sup>

- ❖ inundation of townships, burial sites, and turtle breeding grounds
- ❖ impacts on cultural sites
- ❖ increasing risk of salt inundation of freshwater supplies
- ❖ collapse of protective mangrove systems
- ❖ coastal erosion
- ❖ forced migration off Country, especially when permanent (e.g. as is already occurring for some Torres Strait Islander communities)

*Extreme fire weather, bushfires, smoke and air pollution;*<sup>17</sup>

- ❖ increasing deaths due to bushfire smoke inhalation
- ❖ exacerbating of pre-existing conditions (e.g. respiratory or cardiovascular conditions)
- ❖ increasing displacements from home and community
- ❖ food insecurity
- ❖ loss of biodiversity
- ❖ water insecurity
- ❖ damage or destruction of cultural sites
- ❖ increasing mortality from higher concentrations of ground-level ozone (smog)

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<sup>15</sup> HEAL Network & CRE-STRIDE, 2021, *Climate Change and Aboriginal and Torres Strait Islander Health*, Discussion Paper, Lowitja Institute, Melbourne, pp. 23-24.

<sup>16</sup> Ibid, pp. 24-25

<sup>17</sup> Ibid, p. 25

*Drought and desertification*<sup>18</sup>

- ❖ food insecurity and impacts to food production
- ❖ increasing bushfire risk
- ❖ economic impacts
- ❖ reduced air quality and increased air pollution
- ❖ impacts on mental health, especially in rural and Aboriginal and Torres Strait Islander communities
- ❖ sense of loss seeing land 'sick'
- ❖ reduced ability to undertake cultural responsibilities
- ❖ exposure to wind erosion
- ❖ impacts on cardiovascular disease from dust storms

*Cyclones, extreme rainfall, floods*

- ❖ increasing risk of injury and death
- ❖ food insecurity
- ❖ increased risk of water contamination
- ❖ increasing infrastructure damage, with associated higher psychological morbidity, rates of PTSD and lower social capacity reducing adaptive ability
- ❖ increasing displacement and resulting trauma

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<sup>18</sup> Ibid, pp. 26-27