



Submission to the Environment and Communications Legislation Committee on the Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023

Acknowledgment of Country

Youth Law Australia acknowledges the Traditional Owners and Elders of the Bedegal People of the Eora Nation and all the custodians of the other lands on which we live and work. We pay our respects to their Elders past, present and emerging, and commit ourselves to the ongoing journey of Reconciliation.

About us

1. Youth Law Australia (YLA) is an accredited national community legal service that is dedicated to helping young people understand their legal rights, and find solutions to their legal problems. Any child or young person (or an adult representing them) can ask us about any legal problem at any time, and receive free and confidential legal advice and help. Youth Law Australia seeks to be as accessible as possible to children and young people, in particular by facilitating help-seeking through online means.
2. Youth Law Australia is also dedicated to addressing the human rights abuses of children and young people in Australia, and we monitor and advocate for their rights and best interests.

Introduction

3. The United Nations Committee on the Rights of the Child has this year recognised that ‘The extent and magnitude of the triple planetary crisis, comprising the climate emergency, the collapse of biodiversity and pervasive pollutions, is an urgent and systemic threat to children’s rights globally.’ It has unequivocally stated that ‘States bear the responsibility for foreseeable environment-related threats arising as a result of their acts or omissions now, the full implications of which may not manifest for years or even decades’.¹
4. Against this background, we welcome the introduction of the Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023 (**‘the Duty of Care Bill’**). We urge

¹ United Nations Committee on the Rights of the Child, *General comment No. 26 (2023) on children’s rights and the environment, with a special focus on climate change* [1, 11].



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all members of parliament and all political parties to support this Bill as an important step towards Australia meeting its international child rights obligations, and safeguarding the future of all children and young people.

5. We recommend that the Committee endorse this Bill, and that the Government implement it as a matter of priority. We also recommend:
 - a. **That the Duty of Care Bill be amended to explicitly refer to children’s rights and require these to be considered in addition to the health and wellbeing of children.** For the reasons set out in this submission, climate change will impact a broad range of children’s rights. It is appropriate that these rights are considered holistically as part of any decision-making that will increase greenhouse gas emissions.
 - b. **That the Duty of Care Bill be accompanied by regulations and guidelines or policies that promote children’s procedural rights in relation to significant decisions.** These include the rights to participation and information throughout the decision-making process, and the right to access to justice with effective remedies. In particular, it includes meaningful, accessible and child-friendly consultation with children when assessing their rights, health and wellbeing.
 - c. **That the Committee, in the course of this Inquiry, consider how it can itself give effect to the procedural rights of children.** This should include child-friendly consultation, ensuring that the best interests of children are at the heart of its reasoning, and ensuring that children’s voices are given appropriate weight in its deliberations.
6. We consider that this Bill will introduce greater transparency and accountability into government decision-making relevant to the climate emergency, and help to ensure that children’s views, rights and health and wellbeing are given due weight.

What is at stake

7. In 2020, eight children led by Anjali Sharma started a court case against the Federal Minister for the Environment. This was a case ‘led largely by young people, for young people’, one that hoped to force our legal system ‘to confront one simple fact. Climate change will disproportionately affect the younger generation’.²
8. In the first judgment in this case (*Sharma and others v Minister for the Environment* [2021] FCA 560), Justice Bromberg heard substantial evidence of the risk of harm to the children who started the case, none of which was contested by the then Minister.³ Justice Bromberg wrote: ‘To say that the Children are vulnerable is to understate their predicament.’ He observed:

It is difficult to characterise in a single phrase the devastation that the plausible evidence presented in this proceeding forecasts for the Children. As Australian adults know their country, Australia will be lost and the World as we know it gone as well. The physical environment will be harsher, far more extreme and devastatingly brutal when angry. As for the human experience – quality of life, opportunities to partake in nature’s treasures, the capacity to grow and prosper – all will be greatly diminished. Lives will be cut short. Trauma

² Anjali Sharma, ‘Caring for intergenerational justice’ (2022) 47(3) *Alternative Law Journal* 167.

³ *Sharma and others v Minister for the Environment* [2021] FCA 560 [286].

*will be far more common and good health harder to hold and maintain. None of this will be the fault of nature itself. It will largely be inflicted by the inaction of this generation of adults, in what might fairly be described as the greatest inter-generational injustice ever inflicted by one generation of humans upon the next.*⁴

9. Justice Bromberg found that the Minister had ‘a duty to take reasonable care to avoid causing personal injury’ to the children when deciding whether to approve a coal mine proposal that would contribute to climate change through its greenhouse gas emissions.⁵ In other words, the Court found that ‘governments have a duty to care about the dangers of climate change to future generations’.⁶
10. Anjali Sharma has described this judgment as ‘the brightest the future had ever looked’.⁷

What does the law say now?

11. The then Minister appealed this decision. On appeal, the Full Court of the Federal Court essentially agreed with Justice Bromberg’s factual findings about climate change. However, the three judges found, for different reasons, that the Minister did not owe Australian children a duty of care when making decisions that would lead to an increase in greenhouse gas emissions.⁸

‘The Full Court of the Federal Court unanimously overturning this duty feels like a win for legal technicalities at the complete expense of a robust moral argument, and at the expense of intergenerational justice as a whole.’⁹

12. The decision of the Full Court of the Federal Court illustrates just how far Australian law has to go to provide meaningful protection of children’s rights in the face of the climate emergency. For example, when describing the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (‘EPBC Act’) – the main piece of Commonwealth environmental legislation – the Chief Justice had this to say:

*The Act is not concerned generally with the protection of the environment nor with any response to global warming and climate change...Nor, for the reasons later set out is the protection of the interests and safety of human beings in the environment a primary object of the Act, nor is human safety an implied mandatory consideration in the exercise of the Minister’s statutory function under ss 130 and 133.*¹⁰

⁴ *Sharma and others v Minister for the Environment* [2021] FCA 560 [293-294].

⁵ [490-491]. See also Jacqueline Peel and Rebekkah Markey-Towler, ‘A Duty to Care: The Case of *Sharma v Minister for the Environment* [2021] FCA 560.

⁶ Jacqueline Peel and Rebekkah Markey-Towler, ‘A Duty to Care: The Case of *Sharma v Minister for the Environment* [2021] FCA 560 at 729.

⁷ Anjali Sharma, ‘Caring for intergenerational justice’ (2022) 47(3) *Alternative Law Journal* 167.

⁸ *Minister for the Environment v Sharma* [2022] FCAFC 35.

⁹ Anjali Sharma, ‘Caring for intergenerational justice’ (2022) 47(3) *Alternative Law Journal* 167.

¹⁰ *Minister for the Environment v Sharma* [2022] FCAFC 35, 101 per Allsop CJ.

The climate crisis and Australia's international child rights obligations

‘to the people who decry our acts of protest, who dismiss our concerns and voices because we are young, who tell us we should just keep our heads down and stay in the classroom – I hope you know that the day the Australian government stops burning my future is the day I’ll stop protesting’.¹¹

13. Australia is a signatory to the Convention on the Rights of the Child (the **Convention**), which opened for signature in November 1989. On 22 August 2023, the United Nations Committee on the Rights of the Child published *General comment No. 26 (2023) on children’s rights and the environment, with a special focus on climate change (General Comment 26)*. General Comment 26 was informed by contributions from over 16,000 children, as well as a ‘diverse and dedicated children’s advisory team’.¹²
14. While recognising that children’s rights are ‘indivisible, interdependent and interrelated’, General Comment 26 emphasises the following rights as those that are specifically impacted by the climate emergency:
 - a. **The right to non-discrimination (article 2 of the Convention)** – ‘Children in general, and certain groups of children in particular, face heightened barriers to the enjoyment of their rights, due to multiple and intersecting forms of discrimination.’¹³ Climate change has, and will increasingly have, a discriminatory effect on certain groups of children such as ‘Indigenous children, children belonging to minority groups, children with disabilities and children living in disaster-prone or climate-vulnerable environments.’¹⁴
 - b. **The right to life, survival and development (article 6 of the Convention)** – climate change threatens the right to life, and jeopardizes children’s ability to achieve their full developmental potential, which has implications for a wide range of other Convention rights.¹⁵
 - c. **The right to freedom from all forms of violence (article 19 of the Convention)** – ‘the climate crisis, is a form of structural violence against children and can cause social collapse in communities and families’.¹⁶ ‘Poverty, economic and social inequalities, food insecurity and forced displacement aggravate the risk that children will experience violence, abuse and exploitation.’¹⁷
 - d. **The right to the highest attainable standard of health (article 24)** – ‘Climate change, biodiversity loss and the degradation of ecosystems are obstacles to the realization of children’s right to health. These environmental factors often interact, exacerbating existing health disparities. For example, rising temperatures caused by

¹¹ Jeremy Phu Howard, 16 years old, western Sydney. As cited in Jeremy Phu Howard, ‘As a student, I’m striking for climate action. If you’re worried or angry about the climate crisis, join us’, *Guardian Australia*, 17 November 2023.

¹² General Comment 26 [2].

¹³ General Comment 26 [14].

¹⁴ General Comment 26 [14].

¹⁵ See General Comment 26 [20-23].

¹⁶ General Comment 26 [35].

¹⁷ General Comment 26 [35].

climate change increase the risk of vector-borne and zoonotic diseases and concentrations of air pollutants that stunt brain and lung development and exacerbate respiratory conditions.¹⁸ Further, 'The effects of climate change, including water scarcity, food insecurity, vector-borne and waterborne diseases, the intensification of air pollution and physical trauma linked to both sudden- and slow-onset events, are disproportionately borne by children'.¹⁹

- e. **The right to an adequate standard of living** – the climate crises threatens rights to adequate housing, food, water and sanitation.²⁰
- f. **The right to education (articles 28 and 29)** – the right to education is highly vulnerable to the impact of environmental harm, including from the climate crisis, as 'it can result in school closures and disruptions, school dropout and the destruction of schools and places to play'.²¹ Indeed, climate change is already negatively impacting the right to education in Australia, with school closures occurring during bushfires and floods.

'There is no school if we're in a climate disaster, and especially if temperatures get really high ... It's very anxiety inducing for students, which is not very good for their mental health.'²²

- g. **The rights of Indigenous children and children belonging to minority groups (article 30)** – 'Indigenous children are disproportionately affected by biodiversity loss, pollution and climate change.'²³
- h. **The right to rest, play, leisure and recreation (article 31)** – The impacts of climate change, like other environmental degradation leading to unsafe and hazardous environments, will undermine the realisation of these rights, along with children's health, development and safety. In addition, 'climate change-related stress on household incomes may reduce children's available time for, and ability to engage in, rest, leisure, recreation and play'.²⁴
- i. **The right to a clean, health and sustainable environment** – 'This right is implicit in the Convention and directly linked to' the rights we have referred to above.²⁵

15. The UN Committee on the Rights of the Child has stated that 'Insufficient progress in achieving international commitments to limit global warming exposes children to continuous and rapidly increasing harms associated with greater concentrations of greenhouse gas emissions and the resulting temperature increases.'²⁶ It noted the individual responsibility of

¹⁸ General Comment 26 [39].

¹⁹ General Comment 26 [40] citing the Intergovernmental Panel on Climate Change, Sixth Assessment Report, Summary for Policymakers, figure SPM.1.

²⁰ See General Comment 26 from [45].

²¹ General Comment 26 [51].

²² Min Park, 16 years old, as cited in Emily Wind, 'Australian schoolchildren to strike for climate action on Friday backed by 'climate doctor's' note', *Guardian Australia*, 15 November 2023.

²³ General Comment 26 [58].

²⁴ General Comment 26 [60].

²⁵ General Comment 26 [63].

²⁶ General Comment 26 [96].

countries to ‘mitigate climate change in order to fulfil their obligations under the Convention and international environmental law, including the commitment contained in the Paris Agreement’.²⁷

16. The Committee has also observed that ‘delaying a rapid phase out of fossil fuels will result in higher cumulative emissions and thereby greater foreseeable harm to children’s rights’.²⁸ Every decision of the Australian Government that will or may result in greater greenhouse gas emissions, or that delays the transition from fossil fuels, should be viewed through the lens of children’s rights.

The Duty of Care Bill

‘Children are far more likely than adults to suffer serious harm, including irreversible and lifelong consequences and death, from environmental degradation. **Given their heightened duty of care**, States should therefore set and enforce environmental standards that protect children from such disproportionate and long-term effects.’²⁹

17. We commend the work that Anjali Sharma and other young people, in particular, have done to bring about the Duty of Care Bill. We support this Bill, although we acknowledge it is only one measure in the package of legal, policy and other measures required urgently to address the climate emergency.
18. The Duty of Care Bill implements Australia’s children’s rights obligations in a number of ways. Drawing on General Comment 26, we note:
- a. **Australia must ensure that the best interests of the child is a primary consideration in the adoption and implementation of environmental decisions.**³⁰ This means that where an environmental decision may have a significant impact on children, it is necessary to conduct a more detailed procedure to assess and determine children’s best interests in a way that provides opportunities for their effective and meaningful participation.³¹ The Duty of Care Bill requires certain decision-makers to consider ‘the health and wellbeing of current and future children in Australia as the paramount consideration’.³² In this way, it reflects Australia’s obligations under article 3 of the Convention. We note that General Comment 26 recognises that ‘environmental decisions that seem reasonable individually and on a shorter timescale can become unreasonable in aggregate and when considering the full harm that they will cause to children throughout their life courses’.³³
 - b. **Australia must ensure that age-appropriate, safe and accessible mechanisms are in place for children’s views to be heard regularly and at all stages of environmental decision-making processes for legislation, policies, regulations, projects and activities that may affect them, at the local, national and international levels.**³⁴ The

²⁷ General Comment 26 [98(b)].

²⁸ General Comment 26 [98(d)].

²⁹ General Comment 26 [73].

³⁰ General Comment 26 [16].

³¹ General Comment 26 [16].

³² For example s 15D(1)(b).

³³ General Comment 26 [19].

³⁴ General Comment 26 [27].

Duty of Care Bill extends standing under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to Australian children. In this way, it is a step towards ensuring children's participation as required by article 12 of the Convention. However, we consider that this legislation should be accompanied by regulations and/or policies or guidelines that allow and encourage the voices of children to be heard at each stage in the decision-making process and, relevantly, before a significant decision is made.

- c. **Australia should 'foster, recognise and support the positive contribution of children to environmental sustainability and climate justice, as an important means of civil and political engagement through which children can negotiate and advocate for the realization of their rights, including their rights to a healthy environment, and hold states accountable'.³⁵** This is derived from the rights to freedom of expression, association and peaceful assembly under articles 13 and 15 of the Convention. The Duty of Care Bill, for the reasons set out immediately above, provides one avenue for children to use the Courts to advocate for the realisation of their rights and hold Governments accountable. Courts can be an important source of independent oversight of Government decisions and decision-making processes. Judicial scrutiny (or the threat of such scrutiny) can increase the transparency and rigour of Government decision-making, and ensure decisions are made in accordance with the law.
- d. **Australia must ensure children have access to accurate and reliable environmental information, including about the causes, effects and actual and potential sources of climate and environmental harm, adaptive responses, relevant climate and environmental legislation, findings from climate and environmental impact assessments, policies and plans.**³⁶ The Duty of Care Bill will enable children to obtain information, in particular: findings on material questions of fact, the evidence or other material on which those findings were based, and the reasons for the decision.³⁷ In this way, it will be a step towards ensuring children have access to information about certain decisions relevant to their rights. This is required under articles 13 and 17 of the Convention, and it is also 'a crucial prerequisite for realizing the rights of children to express their views, to be heard and to effective remedy regarding environmental matters.'³⁸

19. In summary, General Comment 26 recognises that 'Procedural elements, including access to information, participation in decision-making and child-friendly access to justice, with effective remedies, have equal importance to the empowerment of children, including through education, to become agents of their own destiny.'³⁹

³⁵ General Comment 26 [31].

³⁶ General Comment 26 [33].

³⁷ Duty of Care Bill, s 15H.

³⁸ General Comment 26 [32].

³⁹ General Comment 26 [66].

Our recommendations

20. We submit that the Committee should recommend that the Government implement the Duty of Care Bill as a priority, noting it is an important step in more fully implementing Australia's international child rights obligations.
21. In addition, we recommend:
 - a. **That the Duty of Care Bill be amended to explicitly refer to children's rights and require these to be considered in addition to the health and wellbeing of children.** For the reasons set out in this submission, climate change will impact a broad range of children's rights. It is appropriate that these rights are considered holistically as part of any decision-making that will increase greenhouse gas emissions.
 - b. **That the Duty of Care Bill be accompanied by regulations and guidelines or policies that promote children's procedural rights in relation to significant decisions.** These include the rights to participation and information throughout the decision-making process, and rights access to justice with effective remedies. In particular, it includes meaningful, accessible and child-friendly consultation with children when assessing their rights, health and wellbeing.
 - c. **That the Committee, in the course of this Inquiry, consider how it can itself give effect to the procedural rights of children.** This should include child-friendly consultation, ensuring that the best interests of children are at the heart of its reasoning, and ensuring that children's voices are given appropriate weight in its deliberations.
22. We thank you for considering our submission on this important Bill. We look forward to reading the Committee's report.

Youth Law Australia

30 November 2023

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