



Environmental
Defenders Office

**Submission to the Inquiry into the Climate Change
Amendment (Duty of Care and Intergenerational Climate
Equity) Bill 2023**

23 November 2023

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

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Acknowledgement of Country

The EDO recognises First Nations Peoples as the Custodians of the land, seas, and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present, and emerging, and aspire to learn from traditional knowledge and customs so that, together, we can protect our environment and cultural heritage through both Western and First Laws. In providing submissions, we pay our respects to First Nations across Australia and recognise that their Countries were never ceded and express our remorse for the deep suffering that has been endured by the First Nations of this country since colonisation.

Executive Summary

Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023 (**the Bill**). EDO strongly supports the Bill as an important step in addressing the climate change crisis and its impact on the health and wellbeing of current and future children. The health and wellbeing of current and future children has, to date, not been effectively embedded in decision-making relating to climate change.

This Bill follows the decision in the *Minister for the Environment v Sharma* [2022] FCAFC 35 (**Sharma**), in which the Full Federal Court considered whether the Federal Minister for the Environment has a duty to take reasonable care to avoid causing personal injury to Australian children when making decisions that could impact climate change. In that case, the primary judge's findings of fact about the risk of harm from climate change to children remained uncontested, however the Full Federal Court ultimately found that the question of the duty was not one for judicial determination, but rather a matter for the parliament. The Bill therefore is intended to implement this duty into statutory decision-making. EDO supports the Bill as an important step to legislate the duty of care considered in *Sharma*.

While supporting the Bill, in this submission EDO makes **5 recommendations** to further strengthen the Bill. In making these recommendations, EDO draws on key principles of international law as best practice guidelines to ensure the efficacy of the proposed legislation.

Summary of Recommendations

- 1. Ensure the Bill will capture all relevant decisions which could lead to major emitting developments by:**
 - **Supplementing the 100,000 tonne threshold with a designated project list which will capture decisions about developments which fall below the threshold, but will materially contribute to climate change; and**
 - **Add an additional threshold which will capture decisions which could jeopardise Australia's obligations under the Paris Agreement in relation to temperature goals.**
- 2. Insert a requirement on decision-makers to undertake Child Rights Impact Assessments and age-appropriate consultation with children and other key stakeholders when fulfilling the duties outlined in the Bill. Measures should be taken to engage and consult with children from overburdened communities, in particular, First Nations communities.**
- 3. Expand definition of "material risk" so that causation arguments about emissions and direct impacts are avoided.**
- 4. Provide a definition of impact which ensures any emission of greenhouse gases that will likely result from a relevant decision is directly linked to climate impacts, and therefore the wellbeing of current and future children in Australia.**

5. Introduce hierarchy of considerations in relation to assessing Australia’s greenhouse gas emissions reduction targets/impact of climate change on health and wellbeing.

Introduction

Australians are increasingly feeling the impact of climate change, as demonstrated by the Australia State of the Environment Report of 2021 (**SoE Report**), released in June 2022, which reported that the general outlook of Australia’s environment is poor and deteriorating. Some of the impacts on Australia’s environment that were reported on include:¹

- The impact of climate change and environmental extremes on Australia’s ecosystems, including on the Great Barrier Reef from marine heatwaves causing mass coral bleaching events, and impacts from bushfires leading to whole ecosystems burning;
- The significant impact of climate change on Australia’s agriculture, including damage to tree crops caused by more severe storms and cyclones, the effects of heat stress on domestic animals, and impacts that disrupt the lifecycles of pollinators and beneficial predatory insects; and
- Environmental damage to Country and First Nations Peoples’ heritage, cultural connections and obligations to Country caused by clearing of land, climate change and expansion of mining.

The SoE Report identifies that climate action failure and human environmental damage are key risks that increase the likelihood of having significant negative impacts within the next 10 years.²

The connection between atmospheric concentration of GHGs and increases in temperature was recently acknowledged by the Land Court of Queensland in *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* (No 6).³ In this matter, President Kingham accepted that there is sufficient certainty in the science to understand the relationship between emissions and temperature, and that there is an almost linear relationship between increases in the atmospheric concentration of greenhouse gas and increases in temperature.⁴ Put simply, the climate science could not be clearer. The Synthesis Report of the IPCC Sixth Assessment Report (**IPCC AR6 Synthesis Report**)⁵ confirms it is unequivocal that human influence has heated the atmosphere, ocean and land; and that this unprecedented human-induced climate change is already affecting many weather and climate extremes in every region across the globe. IPCC AR6 Report confirms that **every tonne of carbon dioxide emissions adds to global warming**.

Climate change is associated with many adverse implications for both human health and the health of our environment. It has been increasingly recognised that human health and the health of our environment are both interdependent and indivisible. As humans, we are part of the natural environment. It is essential to have a healthy environment for humans to thrive. The IPCC Sixth Assessment Report, *Climate Change 2022: Impacts, Adaption and Vulnerability*, reported that

¹ Australia State of the Environment Report of 2021. Available at: [State of the Environment report - DCCEEW](#)

² Ibid.

³ [2022] QLC 21.

⁴ Ibid at [28]-[29].

⁵ Hoesung Lee et al., ‘Synthesis Report of the IPCC Sixth Assessment Report (AR6)’ (2023) IPCC, Figure 3.5, 56, https://report.ipcc.ch/ar6syr/pdf/IPCC_AR6_SYR_LongerReport.pdf (**IPCC Sixth Assessment Report**).

Australians are experiencing a number of impacts on our health and wellbeing caused by anthropogenic climate change, including extreme water shortages and water insecurity,⁶ heat stress,⁷ changing rainfall patterns including floods and drought,⁸ climate-sensitive air pollution including that caused by wildfires,⁹ and other natural disasters including bushfires.

The impacts of climate change are not felt equally by all Australians. Climate change and environmental harm disproportionately impacts overburdened people and communities such as First Nations, older people, young people, women, people from culturally and linguistically diverse backgrounds, and people with a disability – who are most at risk of environmental harm, but who are often least responsible for such harm. As noted in the Explanatory Memorandum to the Bill, “*one of the most significant inequalities is intergenerational.*” Notwithstanding this, the health and wellbeing of current and future children has, to date, not been embedded in decision making relating to climate change.

This submission sets out our support for the Bill and identifies 5 areas where the Bill could be strengthened relating to:

- **Decisions to which the Bill applies: clause 15C ‘significant decisions’**
- **Duty to consider the health and wellbeing of children in Australia when making significant decisions: clause 15D**
- **Duty not to make significant decisions that pose a material risk of harm to the health and wellbeing of children in Australia: clause 15E**
- **Consideration of climate change impacts from greenhouse gas emissions: clauses 15D(1) (a) and 15E (1) (a).**
- **Australia’s greenhouse gas emissions reduction targets/impact of climate change on health and wellbeing: clauses 15D(2) (a) and (b), 15E (2) (a) and (b)**

Support for the Bill

This Bill follows the decision in the *Minister for the Environment v Sharma* [2022] FCAFC 35 (**Sharma**), in which the Full Federal Court considered whether the Federal Minister for the Environment has a duty to take reasonable care to avoid causing personal injury to Australian children when making decisions that could impact climate change. In that case, the primary judge’s findings of fact about the risk of harm from climate change to children remained uncontested, however the Full Federal Court ultimately found that the question of the duty was not one for judicial determination. As Allsop CJ stated at [2], ‘*there are challenges to some of the primary judge’s findings (which should be rejected), but, by and large, the nature of the risks and the dangers from global warming, including the possible catastrophe that may engulf the world and humanity was not in dispute.*’ That is, the risks to children and future generations were found to be present, but the duty could not be applied by the courts. It depends on the legislature to remedy this problem.

In the original decision of *Sharma v Minister for the Environment*, Bromberg J articulated the importance of the duty in terms of intergenerational justice:

⁶ Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability*, IPCC WGII (Sixth Assessment Report, 28 February 2022) Ch 11, 53 (**IPCC 6th Assessment Report**).

⁷ *Ibid*, Ch 11, 60.

⁸ *Ibid*, Ch 11, 61.

⁹ *Ibid*, Ch 11, 61.

“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 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 intergenerational injustice ever inflicted by one generation of humans upon the next.”¹⁰

The concern for future generations is not a new concept, with Australian governments recognising the **principle of intergenerational equity** as a key foundation for ecologically sustainable development.¹¹ The Bill operationalises this principle, present in many environmental decision-making contexts, by implementing a clear duty on decision-makers with a focus on climate change and its impacts on health. EDO strongly supports the Bill as an important step to legislate the duty of care considered in *Sharma*.

EDO supports the Bill’s holistic approach and expansive definition of “health and wellbeing” to include emotional, spiritual and cultural health and wellbeing. This importantly recognises the far-reaching impact of climate change on emotional and mental health. The inclusion of spiritual and cultural health is particularly important for First Nations communities as it relates to the protection of Country, resources and cultural heritage.

EDO also notes the timeliness of the Bill coinciding with the adoption of *General Comment No. 26 on children’s rights and the environment with a special focus on climate change (General Comment 26)*¹² published in August 2023 (and noted in the Explanatory Memorandum), which confirms that **children have a right to a clean, healthy and sustainable environment** and emphasises the urgent need to address the adverse effects of environmental degradation and climate change on the enjoyment of children’s rights. General Comment 26 provides best practice guidelines for States to adopt to respect, protect and fulfil children’s rights and we have drawn on these guidelines to assist with making this submission.

The remainder of this submission outlines recommendations intended to strengthen the operation of the Bill, as to ensure it will achieve its intended outcomes as outlined in the Explanatory Memorandum.

¹⁰ *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment (No 2)* [2021] FCA 774 [293].

¹¹ See, for example *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3A(c).

¹² CRC/C/GC/26: *General comment No. 26 (2023) on children’s rights and the environment with a special focus on climate change*.

5 opportunities to strengthen the Bill

While EDO supports the Bill, we consider there are opportunities to strengthen it and we draw on international best practice when making the below recommendations. Per clause 15D, the Bill inserts a duty for decision makers to “consider” the health and wellbeing of children in Australia when making significant decisions. The requirement to merely consider the health and wellbeing of children when making decisions, may not always translate into the desired outcome, as decision-makers can simply state they have considered the factor yet make a decision resulting in the harm the duty is intended to prevent. This is ameliorated somewhat by the duty outlined in clause 15E, but may limit the efficacy of clause 15D in preventing specific harmful outcomes, which, as outlined in the Explanatory Memorandum, the Bill is intended to do. We suggest the requirement to “consider” the health and wellbeing of children and future children could be strengthened to require decision makers to make the consideration a key priority in decision making.

EDO has identified **five** opportunities to strengthen the Bill, in accordance with General Comment 26 and international best practice. These relate to:

- **Decisions to which the Bill applies: clause 15C ‘significant decisions’**
- **Duty to consider the health and wellbeing of children in Australia when making significant decisions: clause 15D**
- **Duty not to make significant decisions that pose a material risk of harm to the health and wellbeing of children in Australia: clause 15E**
- **Consideration of climate change impacts from greenhouse gas emissions: clauses 15D(1) (a) and 15E (1) (a).**
- **Australia’s greenhouse gas emissions reduction targets/impact of climate change on health and wellbeing: clauses 15D(2) (a) and (b), 15E (2) (a) and (b)**

1. Decisions to which the Bill applies: clause 15C ‘significant decisions’

Clause 15C of the amended Bill defines the meaning of “significant decision.” The definition of significant decision is limited to certain administrative decisions that are likely to result directly or indirectly, over the lifetime of one or more facilities, in the emission of greenhouse gases that:

- (i) are scope 1 emissions, scope 2 emissions or scope 3 emissions; and
- (ii) have a carbon dioxide equivalence of at least 100,000 tonnes (gross).

EDO strongly supports the Bill’s attempt to capture the cumulative impact of the greenhouse gas emissions of different facilities over time as well as the capturing of scope 1, 2, and 3 emissions. As Australia is a major exporter of fossil fuels, it is crucial that these emissions are captured by the definition.

The minimum 100,000 tonne carbon dioxide threshold for significant decisions should be clarified to ensure that cumulative emissions from multiple developments are captured; and that projects with significant emissions but which sit under 100,000 tonnes, can be captured by the definition in line with the objectives of the Bill. For example, the threshold could be supplemented by a provision for projects on a designated development list (including land use change) to trigger the duty. This would ensure that development decisions which do not directly emit 100,000 tonnes of CO₂e but which will still have a significant impact on the climate, will still be subject to the duty.

In addition, as a second limb to the definition EDO suggests that an additional provision could be inserted to account for likely cumulative impacts from multiple developments. For example, an alternative provision could be inserted that reads “or could prevent Australia from meeting its obligations under the Paris Agreement in relation to temperature goals.” This is line with the objective of the Bill as stated in the Explanatory Memorandum [quote], to ensure decision makers consider climate impacts in making decision about major emitting projects.

Finally we note that EDO is of the view climate change considerations should be integrated into decision-making at all levels and across all governments. We would support further reform across jurisdictions. We also note that the Bill doesn’t apply to decisions made by private entities, and note that it is increasingly being acknowledged that States have obligations in relation to the impact of private actors on climate change.¹³ For further recommendations for comprehensive climate reform, we refer the committee to our [Roadmap for Climate Reform](#).

Recommendation 1: Ensure the Bill will capture all relevant decisions which could lead to major emitting developments by:

- **Supplementing the 100,000 tonne threshold with a designated project list which will capture decisions about developments which fall below the threshold, but will materially contribute to climate change; and**
- **Add an additional threshold which will capture decisions which could jeopardise Australia’s obligations under the Paris Agreement in relation to temperature goals.**

2. Duty to consider the health and wellbeing of children in Australia when making significant decisions: clause 15D

The proposed clause 15D provides that decision makers must consider the health and wellbeing of Australian children when making significant decisions.

As noted above, EDO welcomes the broad definition of “health and wellbeing” and its inclusion of emotional, spiritual and cultural health and wellbeing. The inclusion of spiritual and cultural health and wellbeing has particularly important implications for children from overburdened communities, such as First Nations and culturally and linguistically diverse communities. The inclusion of emotional health and wellbeing recognises the clear emerging link between environmental harm and children’s mental health, such as depression and eco-anxiety, requires pressing attention.¹⁴

While clause 15D provides certain factors that decision makers may take into account when considering the “likely impacts of the likely emission of greenhouse gases, as a direct or indirect result of the decision, on the health and wellbeing of current and future children in Australia”, it does not provide for consultation with children by the decision-maker or the inclusion of Child Rights Impact Assessments. General Comment 26 provides that children’s views should be “proactively sought and given due weight” in relation to environmental challenges they face.¹⁵ Further to this, States must:

¹³ General Comment 26 [80].

¹⁴ Ibid [41].

¹⁵ Ibid [26].

...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.¹⁶

Accordingly, we recommend the Bill be amended to include a requirement for consultation with children and other key stakeholders, such as experts working at the interface of children's rights and the environment, and a requirement for decision-makers to take these views into account when making significant decisions. This consultation should be age appropriate, safe and accessible.

Further to this, measures must be taken to meaningfully engage children from First Nations communities, including by "integrating concepts from Indigenous cultures and traditional knowledge in mitigation and adaptation measures."¹⁷ General Comment 26 provides that similar measures should also be taken to consult children belonging to non-indigenous minority groups.¹⁸

General Comment 26 also provides that measures should be adopted to ensure the best interests of the child are a primary consideration. It recommends the use of Child Rights Impact Assessments (**CRIA**) to evaluate the environmental impact of all implementation measures, such as any proposed policy, legislation, regulation, budget or other administrative decision concerning children in accordance with article 3(1) of the Convention on the Rights of the Child.¹⁹ A CRIA tool was developed by the Australian Human Rights Commission with support from UNICEF, in order to assist governments and service providers assess how children's rights and wellbeing will be affected by new laws and policies.²⁰ The CRIA would require decision makers to assess the social and economic impact of their decisions on children.

Accordingly, EDO recommends that a requirement is inserted into the Bill for decision makers to consult with children and other stakeholders and undertake CRIsAs when making decisions that fall within the ambit of the Bill. CRIsAs should be undertaken as early as possible in the decision-making process and should include the views of children and experts.

Recommendation 2: Insert a requirement on decision-makers to undertake Child Rights Impact Assessments and age-appropriate consultation with children and other key stakeholders when fulfilling the duties outlined in the Bill. Measures should be taken to engage and consult with children from overburdened communities, in particular, First Nations communities.

3. Duty not to make significant decisions that pose a material risk of harm to the health and wellbeing of children in Australia: clause 15E

Proposed subclause 15E(1) imposes a statutory duty on decision makers not to make a significant decision involving the exploration or extraction of coal, oil or natural gas if the likely emissions of greenhouse gas poses a material risk of harm to the health and wellbeing of current and future children in Australia. A non-exhaustive list of considerations that decision-makers must take into

¹⁶ Ibid [27].

¹⁷ Ibid [58].

¹⁸ Ibid.

¹⁹ Ibid [18].

²⁰ See [cria_2023 - standalone assessment tool - 18 aug 2023 1.pdf \(humanrights.gov.au\)](#)

account when considering whether a significant decision poses a material risk to the health and wellbeing of current and future children is provide in proposed subclause 15E(2).

We recommended defining ‘material risk’ widely, so that causation arguments about emissions and direct impacts are avoided. For example, a risk may be ‘material’ notwithstanding that the action causing that risk may be spatially or temporally remote from its possible or foreseeable impacts. The definition should ensure that risks in this context may be material, even where specific emissions from a specific project may not be directly attributable to impacts felt by the specific class of people, or where risks may arise in the future. This is consistent with the IPCC finding that every tonne of greenhouse gas emissions contributes to climate change.

Recommendation 3: Expand definition of “material risk” so that causation arguments about emissions and direct impacts are avoided.

4. Consideration of climate change impacts from greenhouse gas emissions: clauses 15D(1) (a) and 15E (1) (a).

EDO supports the required assessment of the impacts of climate change on the health and wellbeing of children in both clauses 15D and 15E, and that this consideration must be in reference to the most recent and up to date IPCC information. However, both clauses similarly require assessment of the “likely impacts of the likely emission of greenhouse gases, as a direct or indirect result of the decision”. The Bill does not define the term ‘impact’, beyond allowing for it to be a direct or indirect result of the relevant decision. If the intention is that the Bill would adopt the definition in s.527E of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), this should be clearly stated.

However, EDO notes the difficulty under other statutory regimes that has been apparent in linking greenhouse gas emissions from specific projects to specific impacts on, for example, matters of national environmental significance under the EPBC Act.²¹ The EDO also notes the complicated nature of s.527E of the EPBC Act and the difficulties associated with its application to the impacts of greenhouse gas emissions.

Under existing definitions of impact, when considering the likely impacts of the likely emission of greenhouse gases [as a result of the decision] on the health and wellbeing of current and future children in Australia, it may be hard to attribute specific emissions to specific climate impacts, and therefore on a class of people as described. For example, where there is difficulty in attributing emissions from a single project to a climate impact in Australia, or where decision-makers rely on assumptions that other projects or decisions would substitute for decision in question, if it was not made, and that those other projects or decisions may have the same or better consequences for the climate.

EDO therefore suggests additional wording be included in the Bill to specify that, for the purposes of the assessment required by clauses 15D and 15E:

²¹ Professor Jacqueline Peel Legal opinion – gaps in the Environment Protection and Biodiversity Conservation Act and other federal laws for protection of the climate Report for the Climate Council <https://www.climatecouncil.org.au/wp-content/uploads/2023/10/Peel-Opinion-Climate-and-the-EPBC-Act-October-2023-EMBARGO.pdf>

- (a) The assessment is required to consider the likely impacts of all of the greenhouse gas emissions that are likely to result from the decision, or the project the subject of that decision, including emissions:
- (1) characterised as Scope 1, Scope 2 and/or Scope 3;
 - (2) characterised as direct and/or indirect;
 - (3) occurring in Australia and/or overseas; and
 - (4) released under the control of the proponent of the project the subject or the decision and/or released under the control of some other person and/or entity;
- and
- (b) The assessment is prohibited from considering potential counterfactuals relating to the net global greenhouse gas emissions that are likely to result if the decision is not made, or the project the subject of the decision is not approved, and instead some other decision is made or some other project is approved, hypothetical or not, whether or not that other decision or project occurs in Australia or overseas.

Recommendation 4: Provide a definition of impact which ensures any emission of greenhouse gases that will likely result from a relevant decision is directly linked to climate impacts, and therefore the wellbeing of current and future children in Australia.

5. Australia's greenhouse gas emissions reduction targets/impact of climate change on health and wellbeing: clauses 15D(2) (a) and (b), 15E (2) (a) and (b)

Currently the best available scientific knowledge shows that Australia's emissions target and NDC are not compatible with a safe climate. In order to achieve its anticipated outcomes, the Bill should be ambitious in approach and give greater weight to the best available scientific knowledge. We recommend creating a hierarchy of considerations here, with scientific knowledge the primary factor, followed by the Paris Agreement temperature goals, followed by Australia's domestic targets and NDC commitments.

Recommendation 5: Introduce hierarchy of considerations in relation to assessing Australia's greenhouse gas emissions reduction targets/impact of climate change on health and wellbeing.

Conclusion

The Bill presents a significant opportunity for progress towards reducing Australia's greenhouse gas emissions and consequently, protecting the health and wellbeing of current and future children from the impacts of climate change. EDO is supportive of the proposed reforms, however, has provided key recommendations for strengthening the Bill in line with international best practice. Importantly, EDO notes it is critical that children and young people are appropriately consulted regarding decisions that will impact them. The amendments recommended strive to ensure a safer climate for current and future generations.

We recommend these amendments be made, and the Senate pass the Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023.

Please do not hesitate to contact our office should you have further enquiries.