Melbourne Climate Futures

THE UNIVERSITY OF MELBOURNE

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Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023

The Environment and Communications Legislation Committee is seeking submissions in relation to the Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023.

This Bill "seeks to amend the Climate Change Act 2022 to require decision makers to consider the wellbeing of current and future children when making certain decisions that are likely to contribute to climate change, including decisions that will increase scope one, two or three emissions".

This submission brings together expertise from researchers from the University of Melbourne, as part of the Melbourne Climate Futures (MCF) initiative. MCF brings together academics from across all disciplines at the University, to develop evidence-based and practical solutions to climate related challenges.

Our submission outlines two, non-mutually exclusive options that could be pursued:

1. Adopt a broader rights-based approach enacted through, inter-alia, a Federal Human Rights Act; and/or
2. Broaden the proposed duties of care in the *Climate Change Act 2022* (Cth).

Proposal 1: A child rights-based approach

Rather than enactment through a narrow duty-oriented lens through the *Climate Change Act 2022* (Cth), we recommend that the Australian government adopt a broader rights-based approach enshrined through, inter-alia, a Federal Human Rights Act.

This could be pursued through the Parliamentary Joint Committee on Human Rights' current inquiry into Australia's human rights framework. As part of the inquiry, the Committee is considering whether Australia should adopt a Federal Human Rights Act and, if so, what elements it should include. A report is due by 31 March 2024.

A Federal Human Rights Act would enshrine Australia's obligations under a range of international treaties. However, here, we concentrate on the opportunity for the Act to enact a child rights-based approach to climate change.

Below we consider: (1) What a child rights-based approach to climate change would look like; (2) Strengths of a rights-based approach; (3) Challenges of the duty-focused approach included in the proposed Bill; and (4) Some domestic and international case law developments.

Children's rights and climate change

We recommend that the government at least adopt the recommendations of the UN Committee on the Rights of the Child in their *General comment No. 26 on children's rights and the environment, with a special focus on climate change.* Below we outline some of the key points from the General comment.

At the outset, the Committee acknowledged that applying a child rights-based approach to the environment means that there is full consideration of their rights under the *United Nations Convention on the Rights of the Child* ('the Convention'). Moreover, the Committee recognised the prevailing importance of enshrining 'the principle of intergenerational equity and the interests of future generations, to which the children consulted overwhelmingly referred'.

Adopting a child rights-based approach would include the Australian government at least taking the following steps:

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- **Recognising and enacting their obligation to respect, protect and fulfil children's rights** in a Federal Human Rights Act and beyond. This includes ensuring a clean, healthy and sustainable environment by refraining from causing harm, protecting children from harm by third parties, and providing for an environment for children to enjoy their rights.
- **Requiring child rights impact assessments** for proposed environment-related legislation, policies, projects, regulations, budgets and decisions, and those already in force. This includes assessment of the possible direct and indirect impact on the environment and climate, both before and after implementation on the enjoyment of children's rights.
- **Recognising businesses' responsibility to respect children's rights and states' obligation to protect** against any violations. This includes requiring businesses to undertake child rights due diligence procedures to identify, prevent, mitigate and account for their impact on the environment and children's rights.
- **Taking proactive and timely action to prevent foreseeable harm and child rights violations, in line with principles of prevention and precaution**. This includes taking timely, adequate, and appropriate measures to address reasonably foreseeable risks and to help ensure children's access to critical rights and resources.
- **Ensuring access to justice, involvement in processes and adequate remedies**. This includes access to justice pathways that are child-friendly, gender responsive and disability-inclusive, as well as providing adequate access to remedies. It also includes ensuring that children's rights to be heard are fulfilled.
- **International cooperation** on these matters. This includes fulfilling their obligations under the Paris Agreement to mitigate, adapt to and provide finance to respect, protect and proactively fulfil children's rights.

In terms of children's substantive rights that ought to be protected, a Federal Human Rights Act should give full effect to Australia's commitments under the Convention. The Act should also include recognition that '[c]hildren have the right to a clean, healthy and sustainable environment'. Other rights apart from the Convention rights that relate to the environment and that ought to be protected include:

- Right to non-discrimination (art 2);
- Best interests of the child (art 3);
- Right to life, survival and development;
- Right to be heard (art 12);
- Freedom of expression, association and peaceful assembly (arts 13 and 15);
- Access to information (arts 13 and 17);
- Right to freedom from all forms of violence (art 19);
- Right to the highest attainable standard of health (art 24);
- Right to social security and adequate standard of living (arts 26 and 27);
- Right to education (arts 28 and 29(1)(e));
- Rights of Indigenous children and children belonging to minority groups (art 30); and
- Right to rest, play, leisure and recreation (art 31).

Moreover, in order to ensure that children's human rights are enshrined in the face of a changing climate, Australia should take urgent action to enhance its ambition in acting on climate change. This at least includes, as put by the Committee:

- **Mitigation**: 'urgent collective action by all States to mitigate greenhouse gas emissions, in line with their human rights obligations. In particular, historical and current major emitters should take the lead in mitigation efforts'.
- **Adaptation**: '[s]ince climate change-related impacts on children's rights are intensifying, a sharp and urgent increase in the design and implementation of child-sensitive, gender-responsive and disability-inclusive adaptation measures and associated resources is necessary'.
- **Loss and damage**: 'States should undertake measures, including through international cooperation, to provide financial and technical assistance for addressing loss and damage that have an impact on the enjoyment of the rights under the Convention'.
- **Businesses**: 'States must take all necessary, appropriate and reasonable measures to protect against harms to children's rights related to climate change that are caused or perpetuated by business enterprises, while businesses have the responsibility to respect children's rights in relation to climate change'.
- **Climate finance**: 'Both international climate finance providers and recipient States should ensure that climate finance mechanisms are anchored in a child rights-based approach aligned with the Convention and the Optional Protocols thereto'.

Strengths of rights-based approach

We recommend that the Australian government adopt a broader approach than the proposed duties of the Climate

Change Amendment Bill 2023 due to the strengths of a child rights-based approach.

In particular, one of the key strengths of a rights-based approach to matters involving children, like climate change, is that this approach does not see children as a 'passive object in need of care and assistance'. Rather, this approach sees children as 'an active subject with capacities, insights and evolving autonomy' (Tobin, 2021, p. 284). Children are not defined by their vulnerability. Rather they are defined by their 'capacity for resilience and insight'. The distinction between these two approaches is captured in the table below (Tobin, 2021, p. 284):

Table 11.1: Competing conceptualisations of children

Conceptualisation of children under a welfare approach	Conceptualisation of children under a rights-based approach
Objects of intervention	Subjects with entitlements to assistance
In need of protection	Protection necessary but capacity for supported decision-making
Incompetent	Evolving capacities
Dependent on adults' welfare	Capacity for resilience independent of adults
Victims and passive recipients of assistance	Victims and potential agents and collaborators
Lacking in expertise	Possessing expertise
Silenced (seen but not heard)	Active participants (seen, heard and listened to)

As such, at its core, a rights-based approach emphasises values underpinning human rights standards and uses these to inform policies involving children. The question is not only whether there has been violation of a child's rights but also how can policies and decisions be approached so that they fulfil children's rights. Principles informing a rights-based approach are:

- Mainstreaming children's rights into the resolution of the issue at hand;
- Express principles such as 'accountability, non-discrimination, participation, survival and development, best interests, evolving capacities and due deference'; and
- Implied or foundational/underlying principles such as 'dignity, interdependence and indivisibility and cultural sensitivity' (Tobin, 2021, pp. 285–289).

A child rights-based approach could therefore provide a preferable framework to ensuring that children are not only protected but also empowered as the impacts of climate change materialise.

Concerns with the proposed duty-based approach

Above, we have endorsed a child rights-based approach, as opposed to codification of statutory duties of care in the proposed Climate Change Amendment Bill.

This, in part, reflects concerns that this may be an overly narrow approach to protecting and promoting children's rights in relation to the environment. This might reflect a welfare-oriented, passive recipient approach to children (as discussed in the preceding section). Our submission also reflects concerns about children's involvement in courtroom proceedings, as discussed below.

While it is true that there are benefits in involving children and young people in climate litigation—as the youth climate movement 'illustrates the powerful ideas and moral authority that young people contribute to this issue' and potentially fulfills children's 'right to be heard' on issues that affect them—there are also potential issues with their involvement in climate cases (Donger, 2022, p. 281).

These potential costs, risks and trade-offs have not been empirically researched, which is a significant gap in the existing literature. However, some of the possible drawbacks are as follows:

- Litigation is time and energy intensive;
- Litigants may be exposed to bullying and criticism; and
- Legal process can disempower or generate cynicism (Donger, 2022, pp. 283–284).

Proposal 2: Broader duties of care

In the alternative, if the narrower approach is taken to codifying the Australian government's duties of care in relation to children and climate change, we provide the following recommendations to strengthen the proposed Bill. In the following section, we consider: (1) Some of the national and international case law developments in relation to children and climate change; and (2) Specific reflections on sections of the Bill.

Youth-led climate change cases

Climate litigation involving children is a unique sub-set of cases notable for its emphasis on intergenerational equity. The aim of such litigation is to 'provide redress to the youth already experiencing the effects of climate change, as well as to protect future generations from climate-related harms' (Parker et al., 2022, pp. 66–67).

In recent years, there have been several high-profile cases involving children, particularly arguing that states have a responsibility to respond to climate change and that their rights have been, and will be, violated because of the failures of this generation.

In the United States, for example, in *Held v Montana*, the youth plaintiffs challenged the constitutionality of provisions in Montana's legislation that prohibited the state from considering the impacts of greenhouse gas emissions or climate change in their environmental reviews. The Court upheld the plaintiffs' challenge finding that the provisions violated the plaintiffs' right to a clean and healthful environment.

In Australia, in *Minister for the Environment v Sharma*, the youth plaintiffs argued that the Federal Environment Minister owed them a duty of care in negligence in

considering whether to approve or disapprove a proposed coal mine. The Court of Appeal held that no duty of care existed but for different reasons. While recognising that the risk of harm was reasonably foreseeable, Allsop CJ was primarily concerned that the dispute concerned issues of 'high policy' that were not suitable for judicial determination. Wheelahan J reached a similar conclusion but considered that the risk of harm was not reasonably foreseeable. Beach J considered that the risk of harm was reasonably foreseeable and that the features of control and vulnerability were present. However, his Honour cited concerns about indeterminacy and considered that the relationship between the Minister and Australian children was not sufficiently close and direct to substantiate a finding of a duty of care (Bush, 2022, p. 9).

In addition, in *Youth Verdict v Waratah Coal*, the youth plaintiffs challenged the proposed Galilee Coal Project in the Queensland Land Court on human rights grounds. President Kingham recommended that Waratah Coal's application for a mining lease and environmental authority ought to be refused based on public interest and human rights grounds relating to climate change and the destruction of the Bimblebox Nature Refuge. In particular, the precautionary principle and intergenerational equity were key considerations in her Honour's decision, as well as human rights, namely the right to property, privacy and home for the owners of Bimblebox, and in relation to climate change, the cultural rights of First Nations' peoples, the rights of children, the right to property and to privacy and home, the right to enjoy human rights equally and the right to life.

Human rights law also provided the basis for a challenge brought under the International Covenant on Civil and Political Rights by eight Torres Strait Islanders and on behalf of six of their children against Australia. In *Daniel Billy et al. v Australia*, the Human Rights Committee found Australia failed to adequately protect Torres Strait Islanders from the adverse effects of climate change in violation of their rights to enjoy their culture and to be free from arbitrary interferences with their private life, family and home. The timing of action was key, and the Committee found that the threats posed by climate change were reasonably foreseeable and that these violations were due, in part, to Australia's 'failure to adopt timely adequate adaptation measures to protect the author's collective ability to maintain their traditional way of life, to transmit to their children and future generations their culture and traditions and use of land and sea resources...'.

Commentary on provisions

We recognise that the proposed Bill aims to provide a legislative codification of the duties of care owed to children considered in cases like *Sharma*. It also aims to reflect considerations of a human-rights based approach considered in cases like *Youth Verdict*. In the following section, we provide specific commentary proposed sections of the Bill in order to strengthen its approach.

Definitions and significant decision

child means an individual who has not reached 18 years

health and wellbeing includes the following:

(a) emotional health and wellbeing;

(b) cultural health and wellbeing;

(c) spiritual health and wellbeing.

relevant enactment means the following:

(a) the Environment Protection and Biodiversity Conservation 10 Act 1999;

(b) the Export Finance and Insurance Corporation Act 1991;

(c) the Infrastructure Australia Act 2008;

(d) the National Reconstruction Fund Corporation Act 2023;

(e) the Northern Australia Infrastructure Facility Act 2016;

(f) the Offshore Petroleum and Greenhouse Gas Storage Act 16 2006;

(g) an instrument made under an Act mentioned in any of the 18 above paragraphs;

(h) any other Act or instrument prescribed by the rules for the 20 purposes of this paragraph.

scope 3 emission of greenhouse gas, in relation to a facility, means the release of greenhouse gas (other than scope 1 emissions or scope 2 emissions of greenhouse gas) into the atmosphere:

(a) as a result of an activity, or series of activities (including ancillary activities), of the facility, whether the activity, or series of activities, form part of the facility or not; but

(b) from sources that are not owned or controlled by the facility.

In relation to the definition of 'child', it is important to emphasise that children are a diverse group, and there are important intersections that make some children more vulnerable than others to the impacts of climate change. There is a need to recognise that there will be differentiated impacts on children in Australia, and beyond, for example First Nations' and Torres Strait Islander children. At the same time, we also note that, children have their own resources and strengths to contribute to build more sustainable and resilient communities, and have a right to have a say in matters that affect them.

We also consider that the definition of 'health and wellbeing' may be overly narrow. The current proposed definition of children's health and wellbeing involves emotional, cultural and spiritual components, but there is no mention of, for example, children's development, education or physical health/survival or participation. A

recent report details literature on health and wellbeing outcomes associated with increasing emissions (Haswell et al., 2023, pp.53-67). We consider that an alternative could be to protect the rights of children, as understood under the Convention (as set out above). The right should also be expanded to reflect the considerations of the Committee set out above, including children's right to a clean, healthy and sustainable environment.

Finally, in relation to definitions, we query limiting the duty of care to 'significant decisions' under a relevant enactment that are likely to result in scope 1, 2 and 3 emissions greater than 100,000 tonnes from facilities. We consider that the impact of climate change on children should be relevant to *all* government decision making, rather than just the approval of specific projects under specific pieces of legislation. For example, the government could allow mergers of oil and gas companies to proceed, and this might not include consideration of the impacts of climate change on children.

Duty to consider the health and wellbeing of children in Australia when making significant decisions

Section 15D sets out a prescriptive duty to consider the health and wellbeing of children in Australia when making decisions. Under s 15D, in making a decision, decision-makers must not only consider the likely impacts of greenhouse gas emissions on the health and wellbeing of current and future children in Australia, but also to take the health and wellbeing of current and future children in Australia as the paramount consideration.

While it is positive that the proposed Bill emphasises to decision-makers that children's health and wellbeing should be an important consideration in making decisions, this is arguably a narrow approach. For example, it does not require decision-makers to consider the impacts of climate change more generally including on other communities such as First Nations and Torres Strait Islander peoples or people from lower socio-economic backgrounds, and nor does it require decision-makers to think about the impacts of climate change on areas such as Australia's environment and biodiversity itself or the country's economic prosperity now and into the future.

Moreover, this approach focuses on the particular vulnerability of children and does not take a broader approach to considering their full range of rights and capacities. As set out in the section above, for example, children ought to have a right to be heard and to be involved in decision-making that relates to their future.

Duty not to make certain significant decisions that pose a material risk of harm to the health and wellbeing of children in Australia

Section 15E sets out a proscriptive duty requiring a decision-maker to *not* make a decision if it is likely that greenhouse gas emissions pose a material risk of harm to the health and wellbeing of current or future children in Australia and the decision relates to coal, oil or natural gas activities.

Again, while it is positive that the proposed Bill emphases to decision-makers the importance of not making decisions that would be contrary to the best interests of children, this duty is still potentially narrow in its ambit. For example, it remains to be seen what 'material' would mean in terms of impacting upon children. Moreover, the scope of the Bill is restricted to decisions relating to coal, oil and natural gas. However, many other government decisions could also impact on the health and wellbeing of not just children but on society, the environment and economy more generally.

Judicial Review

We recognise that the Bill includes provisions to ensure that decisions are judicially reviewable. However, case law in Australia has consistently shown the limitations of judicial review as a mechanism to ensure accountability for government decision-making on climate change. Providing an avenue for merits review could be an important extension to the proposed Bill.

For example, in terms of the limits of judicial review, despite there being no denial of the science of or the existential threat posed by climate change, the Federal Court dismissed a judicial review application for the Minister's decision to approve extensions of the Mount Pleasant and Narrabri coal mines in *Environment Council of Central Queensland Inc v Minister for the Environment and Water* ('Living wonders legal intervention').

This decision reinforces the difficulties of climate litigation seeking to bring climate impacts within the scope of the federal *Environment Protection and Biodiversity Conversation Act 1999* (Cth) ('EPBC Act') in the absence of an explicit direction to the Minister to consider the impacts of climate change. Moreover, it points to the fact that the lack of merits review in the EPBC Act significantly limits the capacity to look closely at the factual basis of decisions.

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