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To the Secretary, Senate Environment and Communications Legislation Committee,

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

Thank you of the opportunity to provide a submission to the current enquiry in respect of the Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023.

**About the authors**

The [Ecological and Social Governance Research Group](#) is a research collective at the School of Law, Queensland University of Technology. We are experts in international and domestic environmental law, climate law and human rights, and we conduct multidisciplinary research aimed at bringing about institutional, legal and structural change to protect our environment.

This submission was led by [Associate Professor Bridget Lewis](#). Associate Professor Lewis is an expert on human rights-based approaches to climate change and has a particular interest in children’s rights and intergenerational justice. She has published widely on these topics and is currently writing a book for Cambridge University Press entitled *Environmental Rights for Future Generations*.

Other contributing authors are Professor Saiful Karim, Dr Hope Johnson, Dr Katie Woolaston, Dr Brydon Wang, and Marcelo Feitosa de Paula Dias.

**Summary**

The QUT Environmental and Social Governance Research Group (‘ESGRG’) has prepared this document to assist the Parliament of Australia in deliberating the proposed amendment to the *Climate Change Act 2022* (Cth) (‘*Climate Change Act*’), the *Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023* (‘*Duty of Care Bill*’). There is a growing trend of ‘greening human rights’, and human rights are becoming more closely linked to climate change as climate change impacts intensify. Children are particularly at risk from climate change due to their specific vulnerabilities and the fact that they depend on adults to care for them while they develop. Currently, Australian legislation is ill-equipped to address the human rights impacts of climate change for children and future generations.

The inadequacy of Australia's current legislation has been identified in scholarly literature,<sup>1</sup> and domestic and international courts. The *Duty of Care Bill* presents a unique opportunity to close the intergenerational equity gap in Australia's climate change legislation and align Australian legislation with global trends and obligations under human rights and environmental law.

The ESGRG strongly supports the *Duty of Care Bill's* objective to recognise a duty of care for decision-makers when deciding the relevant enactments, as current decisions will likely lead to negative human rights outcomes for young people. We recommend that the Commonwealth Government:

1. Support the *Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023*;
2. Incorporate principles of intergenerational equity into all legislation where a decision made under the Act could affect the rights of future generations; and
3. Develop further policies to facilitate strong adherence to the *Convention on the Rights of the Child*, considering the new interpretation of States' roles in protecting children from climate change, provided by General Comment No. 26.

## **AUSTRALIA'S INTERNATIONAL OBLIGATIONS WITH RESPECT TO CHILDREN'S RIGHTS, ENVIRONMENTAL RIGHTS, AND CLIMATE CHANGE**

Legislative change is required in Australia in order for us to meet our obligations under international human rights and climate law. A failure to take appropriate steps to mitigate climate change is likely to constitute a violation of human rights, especially children's rights, as well as other international laws.

### ***Climate Change Violates Children's Human Rights***

Climate change is an existential threat to children's rights.<sup>2</sup> Rising temperatures and changes in rainfall patterns are leading to food scarcity, and rising sea levels are reducing the availability of fresh water.<sup>3</sup>

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<sup>1</sup> Peter W.G. Newman, 'Net Zero in the Maelstrom: Professional practice for Net Zero in a Time of Turbulent Change' (2023) 15(6) *Sustainability* 4810, 4817; Piers Versteegen, 'Safeguarding Fossil Fuels: How Loopholes in the Australian Government's Climate Policy will Safeguard a Future for Fossil Fuels at the Expense of Australian Businesses, Consumers, and the Climate' (2023) *Australian Conservation Foundation* 1, 6; Climate Action Tracker, 'Australia' (Web Page, 2022) < <https://climateactiontracker.org/countries/australia/>>; Kate Crowley, 'Fighting the Future: The Politics of Climate Policy Failure in Australia (2015-2020)' (2021) 12(5) *WIREs Climate Change* 725.

<sup>2</sup> Bridget Lewis 'Children's Human Rights-based Climate Litigation at the Frontiers of Environmental and Children's Rights' (2021) 39(2) *Nordic Journal of Human Rights* 180, 184; Elizabeth D. Gibbons, 'Climate Change, Children's Rights, and the Pursuit of Intergenerational Climate Justice' (2014) 16(1) *Health and Human Rights* (available at <https://www.hhrjournal.org/2014/07/climate-change-childrens-rights-and-the-pursuit-of-intergenerational-climate-justice/>).

<sup>3</sup> John Knox, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* (Report to the Human Rights Council, UNGA 37<sup>th</sup> sess, Agenda item 3, UN Doc NO A/HRC/37/58, 24 January 2018) 8 ('*Children's Rights Report*'); Human Rights Council, *Resolution 35/20 on Human Rights and Climate Change* (UNGA 35<sup>th</sup> sess, Agenda item 3, UN Doc A/HRC/RES/35/20, 7 July 2017) 4-5 ('*HRC Resolution 35/20*').

Children are particularly vulnerable to the health impacts of climate change, such as water-borne diseases and heat stress due to their physical development. They lack the ability to avoid climate change impacts due to their dependency on adults to provide for them.<sup>4</sup> The increased frequency and severity of natural disasters, such as bushfires and floods, threaten the lives of children, disrupt their education and can lead to relocation and separation from families.<sup>5</sup> The cultural rights of Aboriginal and Torres Strait Islander peoples are also at risk.<sup>6</sup> As highlighted in the 2022 United Nations Human Rights Committee decision, *Daniel Billy and others v Australia* (the ‘Torres Strait Eight case’), climate change threatens the ability of Torres Strait Islander children to participate in crucial cultural ceremonies on their ancestral lands as these places become inaccessible due to rising sea levels.<sup>7</sup>

The planet is currently on track to overshoot the international target of keeping global warming below 2°C, let alone the *Paris Agreement’s* ambitious limit of 1.5°C.<sup>8</sup> Further, the lifespan of carbon dioxide means that the planet would continue to warm for decades to come, even if all emissions stopped immediately.<sup>9</sup> Consequently, today’s children will experience at least some levels of global warming and the associated human rights impacts.<sup>10</sup> As children make negligible contributions to greenhouse gas emissions and have no say in the decision-making that has led to the current climate crisis, this represents a significant intergenerational injustice.<sup>11</sup> This injustice is exacerbated for unborn future

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<sup>4</sup> *Convention on the Rights of the Child 1989*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 24(2)(c), (e) (‘CRC’); Lewis (n 1) 184; Knox, *Children’s Rights Report* (n 1) 7; Ann V. Sanson, Judith Van Hoorn and Susie E. L. Burke, ‘Responding to the Impacts of the Climate Crisis on Children and Youth’ (2019) 13(4) *Child Development Perspectives* 201,202; Ann V. Sanson and Susie E. L. Burke, ‘Climate Change and Children: An Issue of Intergenerational Justice’ in Nikola Balvin and Daniel J. Christie (eds) *Children and Peace From Research to Action* 343,345.

<sup>5</sup> Bridget Lewis (n 2) 184.

<sup>6</sup> Owen Cordes-Holland, ‘The Sinking of the Strait: The Implications of Climate Change for Torres Strait Islanders’ Human Rights Protected by the ICCPR’ (2008) 9(2) *Melbourne Journal of International Law* 405 (‘The Sinking of the Strait’); Donna Green et al, ‘An Assessment of Climate Change Impacts and Adaptation for the Torres Strait Islands, Australia’ (2010) 102(3) *Climatic Change* 405.

<sup>7</sup> Human Rights Committee, *Views: Communication No.3624/2019*, 135<sup>th</sup> sess, UN Doc CCPR/C/135/D/3624/2019 (22 September 2022) (‘*Daniel Billy et al. v Australia*’).

<sup>8</sup> *Paris Agreement on Climate Change*, opened for signature 12 December 2015, entered into force 4 November 2015, art 2.1(1); Intergovernmental Panel on Climate Change, ‘Climate Change 2023 Synthesis Report, Summary for Policy Makers’ 1, 23 (‘AR6’).

<sup>9</sup> Valérie Masson-Delmotte and others, *Summary for Policy Makers* in Intergovernmental Panel on Climate Change, ‘Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change’ (Report, 7 August 2021) 5, [A.2] <[https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_QGI\\_SPM.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_QGI_SPM.pdf)>; Bridget Lewis (n 2) 184.

<sup>10</sup> Bridget Lewis, ‘Human Rights Duties Towards Future Generations and Achieving Climate Justice’ in D.C. Michalos, A.C. (eds) *Encyclopedia of Business and Professional Ethics* (Springer, 2021) 1, 2; AR6 (n 9) 18.

<sup>11</sup> Sumudu Atapattu, ‘Intergenerational Equity and Children’s Rights: The Role of Sustainable Development and Justice’ in Claire Fenton-Glynn (ed), *Children’s Rights and Sustainable Development: Interpreting the UNCRC for Future Generations* (1<sup>st</sup> edn Cambridge University Press, Cambridge 2019) 167, 171, 189; Bridget Lewis (n 2) 184.

generations, who have contributed nothing to the climate crisis yet will be burdened with the worst of its impacts.<sup>12</sup>

Australia is a signatory to the *Convention on the Rights of the Child* ('CRC'). Underpinning the rights contained in the CRC are several principles that inform a child rights-based approach to policy-making, including obligations to act in the best interests of the child.<sup>13</sup> The principle of putting the best interests of children first in all decisions that affect them is considered a fundamental norm of children's rights and part of customary international law.<sup>14</sup>

The CRC also places specific importance on the environment in relation to the rights of children. Article 24 requires states to reduce environmental pollution due to the adverse health impacts environmental pollution can have on children.<sup>15</sup> In recent years, international law has increasingly recognised the important relationship between the environment and human rights, most recently with the recognition of the human right to a healthy environment by the UN Human Rights Council and the UN General Assembly.<sup>16</sup> As a result of this broader trend of 'greening human rights', the CRC implicitly guarantees the environmental quality necessary to safeguard and fulfil all the rights of children.

The United Nations Committee on the Rights of the Child has explicitly recognised children's rights to a safe climate. On 29 August 2023, the Committee released a long-awaited General Comment on the rights of children with respect to climate change, General Comment No. 26.<sup>17</sup> General Comments are authoritative interpretations of the content of rights and the duties that states are legally bound to perform. General Comment No. 26 says that governments must act in the best interest of children when adopting and implementing environmental decisions affecting children and that the best interests of the child should be the primary consideration in the adoption and implementation of policy decisions.<sup>18</sup>

When assessing what is in the best interests of children, States should conduct detailed assessments, including assessments of the specific circumstances that place children at risk of environmental harm,

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<sup>12</sup> Antonio Guterres, *Our Common Agenda: Report of the Secretary-General* (2021)

<[https://www.un.org/en/content/common-agenda-report/assets/pdf/Common\\_Agenda\\_Report\\_English.pdf](https://www.un.org/en/content/common-agenda-report/assets/pdf/Common_Agenda_Report_English.pdf)>; Peter Lawrence, *Justice for Future Generations: Climate Change and International Law* (Edward Elgar Pub, 2015); Bridget Lewis, 'Human Rights Duties towards Future Generations and the Potential for Achieving Climate Justice' (2016) 34(3) *Netherlands Quarterly of Human Rights* 206.

<sup>13</sup> Committee on the Rights of the Child, *General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child* (UN Doc CRC/GC/2003/5, 34<sup>th</sup> sess, 27 November 2003) 4.

<sup>14</sup> Geraldine van Bueren, 'New Challenges for the Convention on the Rights of the Child upon Reaching Middle Age' [2020] (1) *European Human Rights Law Review* 38, 40; Bridget Lewis (n 2) 186.

<sup>15</sup> *Convention on right of Child*, opened for signature 20 November 1989, 1557 UNNTS 3 (entered into force 2 September 1990) ('CRC') art 23(2)(c).

<sup>16</sup> United Nations General Assembly, 'Resolution 76/300: The Human Right to a Clean, Healthy and Sustainable Environment'; United Nations Human Rights Council, 'Resolution 48/13: The Human Right to a Clean, Healthy and Sustainable Environment' <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/289/50/PDF/G2128950.pdf?OpenElement>>.

<sup>17</sup> Committee on the Rights of the Child, *General Comment No. 26 (2020) on children's rights and the environment, with a special focus on climate change*, CRC/C/GC/26 (22 August 2023).

<sup>18</sup> *Ibid* [16].

taking into consideration the possibility of future harm.<sup>19</sup> Importantly, States should provide children with opportunities for effective and meaningful participation in the decision-making process.<sup>20</sup> Where there are conflicts between the best interests of the child and other rights, these should be assessed and resolved on a case-by-case basis. Decision-makers should give appropriate weight to the primacy of the best interests of the child and need to consider the fact that decisions that seem reasonable in a short timeframe may be unreasonable when considering the harm a decision may cause to children over their whole lifetime.<sup>21</sup> General Comment No. 26 states that **a clean, healthy, and sustainable environment is a human right in and of itself. This right is necessary for the full enjoyment of children’s rights, which are at risk from climate change and environmental harm.**<sup>22</sup>

### ***Australia’s Other Human Rights Obligations***

As stated, Australia is a party to the *Convention on the Rights of the Child* (‘CRC’). Under this treaty, Australia is obliged to ‘respect and ensure’ the rights of all children within Australia.<sup>23</sup> The CRC expands upon the rights of children in other human rights treaties, such as the *International Covenant on Civil and Political Rights* (‘ICCPR’) and the *International Covenant on Economic, Social and Cultural Rights* (‘ICESCR’). These rights include the rights to health, food, water, housing, and education, which are all at risk from climate change. Further, these international treaties protect the rights to community and culture, particularly for Indigenous persons.

Aboriginal and Torres Strait Islander peoples have continually critiqued the Australian Government’s action on climate change due to the impacts climate change will have on their ability to retain their culture. This criticism has culminated in recent years with the *Torres Strait Eight* case.<sup>24</sup> Here, a group of eight Torres Strait Islanders, who also represented six of their children, submitted a petition against the Australian Government to the United Nations Human Rights Committee, claiming that climate change has harmful consequences on their livelihood, traditional way of life and culture.<sup>25</sup> The Torres Strait Eight argued that the Australian Government had violated their rights by not upgrading seawalls or reducing greenhouse gas emissions.<sup>26</sup>

On 22 September 2022, the Human Rights Committee found that the Australian Government had failed to adequately protect Torres Strait Islanders from the adverse impacts of climate change, thereby violating their rights to culture and to be free from arbitrary interferences with private life, family and

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<sup>19</sup> Ibid [17].

<sup>20</sup> Ibid [16].

<sup>21</sup> Ibid [19].

<sup>22</sup> Ibid [8].

<sup>23</sup> CRC (n 15) art 2. Article 1 defines ‘child’ as a person under the age of 18, unless the age of majority is set at a younger age under the relevant domestic law.

<sup>24</sup> *Daniel Billy et al. v Australia* (n 7).

<sup>25</sup> Ibid [2.2].

<sup>26</sup> Ibid [3.1].

home.<sup>27</sup> The Committee ordered that Australia pay compensation to the Torres Strait Islanders for the harm caused and engage in consultation with the communities to take meaningful action to preserve their communities on their islands.<sup>28</sup> The decision in the *Torres Strait Eight* case shows that Australia is under a legal obligation to address the current and future impacts of climate change on human rights. It illustrates the legal consequences that can flow from a failure to take adequate mitigation and adaptation actions. **The proposed *Duty of Care Bill* will help Australia fulfil these legal duties by ensuring that decision-makers adequately consider the human rights impacts that a project will have on children and future generations.**

### ***Failure to Reduce Greenhouse Gas Emissions Breaches International Law***

Further, it is likely that a country that fails to mitigate and address the intergenerational impacts of climate change will be in breach of other international laws. Recently, Australia joined 130 other states to co-sponsor a request from the United Nations General Assembly for an Advisory Opinion from the International Court of Justice.<sup>29</sup> The Advisory Opinion aims to clarify the nature of states' obligations with respect to climate change and specifically asks about the nature of obligations to protect future generations. Similar requests are also ongoing before the International Tribunal on the Law of the Sea and the Inter-American Court of Human Rights. These legal opinions are likely to confirm that states have duties to reduce greenhouse gas emissions and put in place adaptation measures that can protect children and future generations from future climate harms.

Adding to Australia's international obligations, the Paris Agreement requires that countries set themselves ambitious emission reduction targets.<sup>30</sup> Australia has now legislated its commitment to net-zero by 2050,<sup>31</sup> and updated its Nationally Determined Contributions, which are now aiming to reduce emissions to 43% below 2005 levels by 2030.<sup>32</sup> Despite Australia's new commitments, the scientific community has warned that Australia will not meet its international targets, due to the opening of new fossil fuel projects.<sup>33</sup> Further, the Climate Change Performance Index shows that Australia is still in the bottom ten worst-performing countries due to failures to adequately reduce emissions.<sup>34</sup> If Australia

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<sup>27</sup> Ibid [8.12], [8.14], [12].

<sup>28</sup> Ibid [11].

<sup>29</sup> International Court of Justice, 'Obligations of States in Respect of Climate Change (Request for Advisory Opinion)' <<https://www.icj-cij.org/sites/default/files/case-related/187/187-20230412-app-01-00-en.pdf>>.

<sup>30</sup> *Paris Agreement* (n 8) art 2.

<sup>31</sup> *Climate Change Act 2022* (Cth) s 10.

<sup>32</sup> Ibid.

<sup>33</sup> Jan Burck et al, 'Results: Monitoring Climate Change Mitigation Efforts of 59 Countries Plus the EU – Covering 92% of Global Greenhouse Gas Emissions' *Climate Change Performance Index (2023)*, 24 ('Climate Change Performance Index') <<https://ccpi.org/wp-content/uploads/CCPI-2023-Results-3.pdf>>; Leonardo Nascimento et al, 'Greenhouse Gas Mitigation Scenarios for Major Emitting Countries; Analysis of current climate policies and mitigation commitments: 2022 Update' *New Climate Institute* (2022) 1, 15 <[https://pure.iiasa.ac.at/id/eprint/18278/1/EC-PBL2022\\_CurrentPolicies\\_Oct22.pdf](https://pure.iiasa.ac.at/id/eprint/18278/1/EC-PBL2022_CurrentPolicies_Oct22.pdf)>

<sup>34</sup> *Climate Change Performance Index* (n 33) 24.

continues to open new fossil fuel projects, it is likely to be in breach of international law, adding to Australia's poor human rights record in respect to climate change.

The *Duty of Care Bill*, if enacted, will help Australia to achieve its emissions reduction commitments. By requiring decision-makers to consider the rights of children when deciding whether to approve a fossil fuel project under the *Environment Protection and Biodiversity Conservation Act 1999* ('EPBC Act'), for example, it is more likely that decisions will reflect the need to reduce emissions. Consequently, it is more likely that future generations will be able to enjoy their rights to the environment, health and culture. **The proposed *Duty of Care Bill* will be an important step in preserving the human rights of children into the future as climate change impacts worsen and they transition into adulthood and will help to align Australia's law with our international human rights and climate obligations.**

### **CLOSING THE GAPS IN EXISTING LEGISLATION**

The rights of children and future generations have remained absent in climate change law and policy in Australia. They are not currently reflected in the Commonwealth *Climate Change Act*. Intergenerational equity does form part of the principles of ecologically sustainable development, which underpin decisions within the EPBC Act.<sup>35</sup> Its inclusion in Australian environmental law can be traced back to the 1992 Intergovernmental Agreement on the Environment, an agreement between the Commonwealth and state and territory governments. That agreement named intergenerational equity as one of the principles that should inform environmental policy-making and program implementation. It defined the principle to mean that 'the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.'<sup>36</sup> Intergenerational equity is included in some state legislation, such as section 22(e) of the Victorian *Climate Change Act 2017*. Other state legislation incorporates ecologically sustainable development, which implicitly includes intergenerational equity among its principles (see e.g. *Environmental Protection Act (Qld)* s3).

Despite the inclusion of intergenerational equity and ecologically sustainable development in environmental legislation, the interests of children and future generations have only rarely been given weight as a reason to refuse permission for a new or expanded fossil fuel development. The decisions of Chief Justice Preston in *Gloucester Resources* and President Kingham in *Waratah Coal* are notable examples where courts applied intergenerational equity as a decisive consideration. However, for the most part, the principle has received little attention.

**The gap regarding the rights of children in the current legislation has led to harmful activities going ahead.** We strongly support imposing a duty of care on decision-makers to consider the health and well-being of current and future children in Australia when making administrative decisions that contribute to climate change.<sup>37</sup>

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<sup>35</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s3A(c)

<sup>36</sup> *Australian Intergovernmental Agreement on the Environment 1992* 3.5.2.

<sup>37</sup> *Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2022* s15B.

The gap in the current law in relation to intergenerational responsibility was highlighted in *Minister for the Environment v Sharma*.<sup>38</sup> In 2020, eight young Australians, led by Anj Sharma, filed a class action in the Federal Court of Australia to block the extension of the Whitehaven Vickery coal mine. They argued that the Minister for the Environment owed a common law duty of care to young people and that by approving the Whitehaven Vickery coal mine expansion, the Minister would breach this duty due to the mine's contributions to climate change.<sup>39</sup> On 27 May 2021, Bromberg J found that the applicants had successfully established that the Minister has a duty to take reasonable care to avoid causing injury to children when making a decision under sections 130 and 133 of the EPBC Act.<sup>40</sup> When making this decision, the Court found that the foreseeable harm from the project could lead to catastrophic climate change outcomes. Therefore, the Minister should consider the applicants' interests when making a decision under the EPBC Act.<sup>41</sup> On 8 July 2021, the Court issued a declaration regarding the scope of the duty, stating that "[the Minister] has a duty to take reasonable care, in the exercise of her powers under s 130 and s 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)... to avoid causing personal injury or death to persons who were under 18 years of age and ordinarily resident in Australia at the time of the commencement of this proceeding arising from emissions of carbon dioxide into the Earth's atmosphere."<sup>42</sup>

The Minister appealed this decision and on 15 September 2021, the Full Federal Court of Australia unanimously overturned Bromberg J's decision to impose a duty of care on the Minister.<sup>43</sup> The Full Federal Court found that the duty articulated by Bromberg J covered matters that should properly be considered as part of the policy response of the Australian Government with respect to climate change and, therefore, went beyond the scope of the Judicial branch of government.<sup>44</sup> As a result, Bromberg J did not have the authority to place a duty of care on the Minister with respect to climate change. Significantly with respect to the *Duty of Care Bill*, in the Court's later determination as to whether the proceedings continue as a representative proceeding, the Court stated that, while it did not impose a duty of care in Sharma's case, children should not be precluded from pursuing future proceedings on this topic, as climate change impacts worsen or as the law of negligence in Australia develops.<sup>45</sup> Importantly, the Full Court did not dispute the scientific evidence presented in the case or Bromberg J's conclusion that **climate change would expose current and future children to harm**.<sup>46</sup>

This litigation pointed a spotlight at the hole in the legislation designed to protect our environment. **Currently, Australia's environmental protection legislation fails to protect future generations from the**

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<sup>38</sup> [2022] FCAFC 35.

<sup>39</sup> *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560, [9]-[14].

<sup>40</sup> *Sharma No. 1* (n 39) [491], [513].

<sup>41</sup> *Ibid* [257].

<sup>42</sup> *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment (No 2)* [2021] FCA 774 [1].

<sup>43</sup> *Minister for the Environment v Sharma* [2022] (n 38) [7].

<sup>44</sup> *Ibid* [15]-[17].

<sup>45</sup> *Minister for the Environment v Sharma (No 2)* [2022] FCAFC 65, [10]-[11]

<sup>46</sup> *Minister for the Environment v Sharma* [2022] FCAFC 35 (n 38) [7].



**harms of climate change.** A decision-maker may approve a mining lease without consideration of the project's impact on climate change or the consequential effect on future generations. Decisions made under the relevant enactments have significant potential to harm current and future generations, and the lack of consideration given to the rights of future generations when making a decision represents an intergenerational injustice.<sup>47</sup> Significantly, the Full Federal Court noted in *Sharma* that the state of development of the law of negligence in Australia could likely lead to a different outcome in future proceedings.<sup>48</sup> **The proposed *Duty of Care Bill* would help to close the intergenerational justice gap in Australia's environmental legislation by ensuring that the Minister can be held responsible for the harm their policy decisions will cause.** If the Government does not close this gap, it is likely Australia will expose itself to more litigation in the future as climate change impacts worsen.

In the same vein, the proposed *Duty of Care Bill* seeks to ensure that there is a statutory duty to consider the health and well-being of current and future children in respect of 'significant decisions' made under the *Infrastructure Australia Act 2008* (Cth). These decisions are likely to include the evaluation of infrastructure proposals, the development of Infrastructure Plans and the provision of advice on infrastructure matters.<sup>49</sup> As mentioned above, the Torres Strait Eight successfully argued that the Australian Government had violated their human rights by failing to upgrade seawalls, thus failing to adequately protect Torres Strait Islanders from the adverse impacts of climate change on their human rights.<sup>50</sup> This crucial link between infrastructure development and delivery and the protection of human rights in the face of climate change cannot be overstated. Close to 11% of the global population (just under 900 million people) live in low-lying coastal urban centres that are vulnerable to the incursion of water through sea level rises.<sup>51</sup> Climate change is also leading to greater incidences of floods that have significantly disrupted our way of life in Australia.<sup>52</sup> Without considering the health and well-being of current and future children in respect of the infrastructure we design, finance, develop and deliver infrastructure, our cities will not be fit for purpose, and our vulnerabilities to climate change will increase. **The *Duty of Care Bill* will fill a critical gap in current legislation by ensuring that our infrastructure decision-making advances climate adaptation.**

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<sup>47</sup> *The Minister for the Environment v Sharma (No 2)* [2022] (n 45) [10].

<sup>48</sup> *Ibid.*

<sup>49</sup> *Infrastructure Australia Act 2008* (Cth) ss 5 – 5C.

<sup>50</sup> *Daniel Billy et al. v Australia* (n 7) [8.12], [8.14], [12].

<sup>51</sup> Glavovic, BC, R Dawson, W Chow, M Garschagen, M Haasnoot, C Singh, and A Thomas, 'Cities and Settlements by the Sea' (2022) *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. 2163–2194.

<sup>52</sup> Lucy Cradduck and Georgia Warren-Myers, 'Development in a state of climate change: an Australian case study of government response' (2022) 40(4) *Journal of Property Investment and Finance* 362-380.

## ALIGNMENT WITH OVERSEAS JURISDICTIONS

**There is a clear global trend recognising the rights of children and future generations with respect to climate change and embedding intergenerational equity into law and policy.** Increasingly, this is taking the form of recognising a legal duty of care to current and future children.

The *Urgenda* case, handed down in 2019, is a notable example. The Dutch Supreme Court held that the Government of the Netherlands owes a duty of care to its citizens and must significantly reduce emissions to meet its human rights obligations.<sup>53</sup> Unlike Australia, the Netherlands has a statutory duty of care. Article 6:162 of the *Dutch Civil Code* states:

1. A person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof;
2. As a tortious act is regarded as a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour.
3. A tortious act can be attributed to the tortfeasor [the person committing the tortious act] if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles (common opinion).<sup>54</sup>

*Urgenda*, an environmental NGO, alleged that greenhouse gas emissions from the Netherlands have dangerously contributed to climate change, demonstrated by the Netherlands' significant per capita emissions. Therefore, the Netherlands had breached its duty of care to Dutch citizens and is obligated to reduce emissions to prevent climate change.<sup>55</sup>

The Dutch Courts have also recognised the duty of care of corporations to protect against future climate harm. In *Milieudefensie et al v Royal Dutch Shell PLC*, a class action commenced by several environmental NGOs, the Hague District Court found that Shell was bound by a duty of care to prevent climate harm and was required to reduce emissions by 45% by 2030, relative to 2019 levels. This obligation extended across both its operations and the fossil fuel products it sells (that is, Scope 1, 2 and 3 emissions).<sup>56</sup> These cases have led the way in articulating the duty of care public and private actors have to address the serious risks posed by climate change.

In other jurisdictions, courts have articulated a duty to protect the rights of children and future generations. In *Neubauer et al v Germany*, the German Federal Constitutional Court concluded that 'one generation must not be allowed to consume large portions of the CO<sub>2</sub> budget while bearing a relatively

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<sup>53</sup> Urgenda Foundation, 'Landmark Decision by Dutch Supreme Court' (Web Page 2022)  
<https://www.urgenda.nl/en/themas/climate-case/>

<sup>54</sup> *Dutch Civil Code 1992* (The Netherlands) art 6:162

<sup>55</sup> *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* [2019] ECLI:NL:HR:2019:2007 - Rode Raad, 20-12-2019/19/00135 (Engels) [2.2.2]

<sup>56</sup> *Milieudefensie et al v Royal Dutch Shell PLC* [2021] Hague District Court C/09/571932.

minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom.<sup>57</sup>

In *D. G. Khan Cement Company v. Government of Punjab*, the Supreme Court of Pakistan held that: “[a]nother important dimension of climate change is intergenerational justice and the need for climate democracy. The tragedy is that tomorrow’s generations aren’t here to challenge this pillaging of their inheritance. The great silent majority of future generations is rendered powerless and needs a voice.”<sup>58</sup> Courts are playing an increasingly powerful role in employing intergenerational equity in decisions around the world.<sup>59</sup>

Around the world, more than fifty countries recognise some form of intergenerational obligations in their constitutions. Some recognise the rights of future generations explicitly, while others contain general principles of responsibility towards future generations or duties linked to sustainable development. Many countries recognise a constitutional duty to protect the environment, which extends to protect both current and future generations.<sup>60</sup>

For example, the Colombian constitution declares that ‘It is the duty of the State to protect the diversity and integrity of the environment, to conserve the areas of special ecological importance, and to foster education for the achievement of these ends.’<sup>61</sup> In 2018, the Constitutional Court of Colombia handed down a decision in *Demanda Generaciones Futuras v Minambiente*, in which it interpreted this and other constitutional rights to impose a duty on the government to protect the rights of future generations from the effects of climate change.<sup>62</sup> The case had been brought by 25 young people aged 7-25 years who claimed that the state had failed to address climate change, including by allowing deforestation of the Amazon rainforest. The Court ruled that the government’s obligations extended not only to young people living today but also to future generations.

A number of countries also have dedicated legislation, institutions or processes designed to safeguard the interests of future generations. In Wales, the *Well-being of Future Generations Act 2017* places obligations on public entities to consider the long-term impacts of their actions and prevent negative impacts on future generations. The Act also creates a Future Generations Commissioner tasked with overseeing compliance with the Act and being a guardian for future generations. In Hungary, the *Fundamental Law 2011* includes protections for future generations, and the Ombudsman for

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<sup>57</sup> *Neubauer, et al v Germany* [2021] Federal Constitutional Court 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20.

<sup>58</sup> *D. G. Khan Cement Company Ltd. v. Government of Punjab through its Chief Secretary, Lahore, etc.*, C.P.1290-L/2019, 15 April 2021, <https://www.paklegaldatabase.com/wp-content/uploads/supremecourt/pdf/c.p. 1290 | 2019.pdf>

<sup>59</sup> *Ibid.*

<sup>60</sup> Iñigo González-Ricoy, ‘Constitutionalizing Intergenerational Provisions’ in Iñigo González-Ricoy and Axel Gosseries (eds), *Institutions For Future Generations* (Oxford University Press, 2016) 170, 171–172 <<https://doi.org/10.1093/acprof:oso/9780198746959.003.0010>>.

<sup>61</sup> Colombian Constitution 1992 art 79

<sup>62</sup> *Demanda Generaciones Futuras v. Minambiente* (Constitutional Court of Colombia, 2018)

Fundamental Rights has responsibility for overseeing compliance with these constitutional rights and responsibilities. This office is home to a Deputy Commissioner dedicated to protecting the interests of future generations.

Other countries have agencies that oversee compliance with sustainable development and intergenerational equity, some of which can hear complaints or provide advice to the government (for example, Canada, New Zealand, Malta, and Belgium). In countries like Finland, Germany, Brazil and Chile, parliamentary committees or other expert bodies are in place to scrutinise proposed legislation and ensure that future generations' interests are considered in the law-making process.

Obligations to future generations have also been recognised by regional human rights bodies. Notably, the Inter-American Court of Human Rights recently acknowledged an autonomous right to a healthy environment based on its interpretation of Article 26 of the *American Convention on Human Rights*, which promotes economic, social, and cultural rights. In 2020, the Court ruled that states are obliged to respect and guarantee the right to a healthy environment, including by protecting components of the environment such as forests, rivers, and seas.<sup>63</sup> The Court relied on its 2017 Advisory Opinion, in which it stated that the right to environment has both individual and collective dimensions, and the collective understanding has 'universal value that is owed to both present and future generations'.<sup>64</sup>

Climate change knows no boundaries and impacts everyone across the world. The proposed *Duty of Care Bill* presents a unique opportunity for Australia to safeguard the global rights of children and the environment. While Australia is working towards reducing pollution and bolstering environmentally friendly practices, becoming a climate leader necessitates further and more ambitious action that examines our practices and the cumulative impacts our domestic action has on the world at large. Overall, there is a clear trend of governments, courts and human rights bodies recognising the duty of care owed to children and future generations to address climate harms. This Bill serves as a gateway to broader discussions that highlight the interconnectedness of human rights issues and climate change, which **can help Australia become a world leader on climate change and align Australian law and policy with global trends.**

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<sup>63</sup> *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina* (Inter-American Court of Human Rights, 6 February 2020) ('*Lhaka Honhat*'); Stéphanie de Moerloose, 'The Lhaka Honhat Case Of The Inter-American Court Of Human Rights: The Long-Awaited Granting Of 400,000 Hectares Under Communal Property Rights', *EJIL: Talk!* (16 July 2020) <<https://www.ejiltalk.org/the-lhaka-honhat-case-of-the-inter-american-court-of-human-rights-the-long-awaited-granting-of-400000-hectares-under-communal-property-rights/>>; Maria Antonia Tigre, 'Lhaka Honhat Association vs. Argentina: The Human Right to Environment in the Inter-American Court', *Global Network for the Study of Human Rights and the Environment* <<https://gnhre.org/2020/04/10/lhaka-honhat-association-vs-argentina-the-human-right-to-environment-in-the-inter-american-court/>>.

<sup>64</sup> Inter-American Court of Human Rights, *Environment and Human Rights: Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia* (Official summary issued by the Inter-American Court, 15 November 2017) <[http://www.corteidh.or.cr/docs/opiniones/resumen\\_seriea\\_23\\_eng.pdf](http://www.corteidh.or.cr/docs/opiniones/resumen_seriea_23_eng.pdf)> ('*Advisory Opinion on Environment and Human Rights*').

## Conclusion and Recommendations

The Full Federal Court in *Sharma No. 2* held that it was not the place of the court to impose obligations on the Minister. However, if the Minister had a duty to consider the rights of children before making a decision under the relevant enactments, it would lead to decisions that better protect the rights of children and, consequently, improve the future for all Australians. The *Duty of Care Bill* provides the **unique opportunity to protect the rights of future generations** in Australia by ensuring the Minister considers the possible impacts a fossil fuel project could have on children. These changes will **align Australian climate legislation with international obligations and trends** and ensure that Australian youth do not get left behind.

The ESGRC urges the Commonwealth Government to support the *Duty of Care Bill*. The *Duty of Care Bill* provides an opportunity to **fill the legislative gaps** that have led to intergenerational injustices. This Bill is a welcome change that will help ensure that our environmental protection legislation is fit for purpose and protects the rights of the most vulnerable members of our society. However, it is important that this Bill is not the end, but the start of **wider reforms of Australian policy to protect the environment and human rights**. Therefore, we recommend that the Australian Government:

1. Supports the *Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023*;
2. Incorporates principles of intergeneration equity into all legislation involving decisions that could affect the rights of future generations; and
3. Develop further policies to facilitate strong adherence to the *Convention on the Rights of the Child*, considering the new interpretation of States roles in protecting children from climate change, provided by General Comment No. 26.