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

ANU Institute for Climate, Energy & Disaster
Solutions

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**Australian
National
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Committee Secretary
Senate Standing Committees on Environment and Communications
Parliament House
PO Box 6100
Canberra ACT 2600

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

Dear Senate Standing Committees on Environment and Communications,

Please find enclosed a submission by the ANU Institute for Climate, Energy and Disaster Solutions (ICEDS) on the Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023.

ICEDS connects industry, governments and communities with climate, energy & disaster-risk research from the Australian National University. Our goal is to advance innovative solutions to address climate change, energy system transitions and disasters. We facilitate integrated research, teaching and policy engagement across disciplines. The enclosed submission contains contributions from experts in epidemiology, primary and special education, law, climate adaptation and youth climate anxiety.

Our network of ANU researchers will gladly offer further consultation.

Sincerely,

Professor Mark Howden
Director, Institute for Climate, Energy and Disaster Solutions



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Executive Summary

The Australian National University (ANU) Institute of Climate, Energy and Disaster Solutions (ICEDS) expresses its support for the proposed Climate Change Amendment (Duty of Care and intergenerational Equity) Bill 2023. ICEDS believes that this amendment is a crucial step towards ensuring the well-being of current and future generations in the face of climate change.

Children and young people are politically unrepresented, have contributed little to current climate change or to policy decisions that will impact future climate outcomes, and they will suffer disproportionately from the effects of future climate change, including the escalation of climate disasters. Acknowledging the increased risk of harm due to climate change children and future generations face as a result of policy decisions will support Australia's decision-makers to protect the interests and future of our youth, who have no control over the environment that they inherit.

Part of the current government's legacy should be to ensure there is a codified duty of care to protect current and future children from potential future attempts to subvert or undermine responsibility. While legislation could be repealed, putting protections in place is a valuable administrative measure, forcing future governments wishing to argue against a duty of care to debate it in both the Senate and House of Representatives.

While ICEDS supports the premise and intent of this amendment, this submission offers evidence supporting the case for a duty of care and advice on crafting language that is more robust and enforceable.

As such, ICEDS puts forward the following recommendations to strengthen the proposed amendment:

1. Expand and clarify the definition of health and wellbeing.
2. Include special considerations for marginalised young people.
3. Look to international examples of intergenerational justice embedded in law.
4. Focus on repairing government relationships with Australia's children and young people.
5. Advocate for a duty of care to be embedded in all relevant legislation.



Recommendation 1: Expand and clarify the definition of health and wellbeing.

Currently, the amendment invokes the concepts of emotional, cultural and spiritual health and wellbeing. The amendment should expand its considerations to include physical health and wellbeing, which would align the definition with the World Health Organisation's constitution¹ and with public expectations that physical health is an integral element of health and wellbeing. Further, it is unclear whether mental health would be considered as an element of emotional, cultural and spiritual health and wellbeing. Given the established connection between the climate decisions governments make on the mental health of young people, including mental health would strengthen the amendment. Recommendation 4 further explores the connection between climate decisions made by government and the mental health of young people.

Additionally, the amendment could strengthen its approach to health and wellbeing by further defining metrics that meaningfully describe physical, emotional, cultural and spiritual health and wellbeing. For a more holistic approach to quantifying health and wellbeing, the amendment could draw upon publicly available metrics that describe quality of life. For example, the Eurostat's Quality of Life Indicators² which focus on individuals' practical abilities to pursue their self-determined sense of wellbeing and the individuals' attainment of life satisfaction and overall wellbeing, could be used to understand how health and wellbeing can manifest in a measurable way. The indicators measure the following dimensions:

- Material living conditions
- Leisure
- Social interactions
- Economic security and physical safety
- Governance and basic rights
- Natural and living environment
- Overall experience of life

It is important to note that Eurostat do not claim the indicators to be exhaustive. While not all of these metrics are directly related to the climate change impact on health and wellbeing, they represent a potentially useful source of information about what things contribute to human health and wellbeing. Additionally, the amendment could draw upon the Organisation for Economic Co-operation and Development's sources of useful wellbeing measurements from the Better Life Index.³ Relevant indicators from this index include:

- Environmental quality, including exposure to air pollution and access to green space⁴
- Health, including life expectancy, perceived health, deaths from suicide, alcohol and drugs, and depressive symptoms⁵
- Subjective well-being, including life satisfaction and negative affect balance⁶

While neither index provides a perfect measure of health and wellbeing, both could be valuable in setting up a framework against which to test the likely impacts of a decision on the health and wellbeing of current and future children.

¹ World Health Organisation, 2023

² Statistics explained: Quality of Life Indicators (2023)

³ OECD Better Life Index

⁴ OECD (2020a)

⁵ OECD (2020b)

⁶ OECD (2020c)



Physical health of pregnant people and mothers at present should also be considered, given its impact on the health of future children. Research suggests that oil and gas developments (especially fracking) currently contribute to a broad range of health impacts. The health risks of approving new or extending fossil fuel projects are being realised now. A synthesis report⁷ noted that a rise in heart disease, respiratory disorders, all-cause mortality and reduced life expectancy were associated with living in areas with greater exposure to oil and gas developments. Of particular relevance is the report's findings as they relate to the impact of mothers' exposure to oil and gas during pregnancy on foetuses and infants. A higher incidence of negative birth outcomes, severe birth defects in infants and higher incidence of antenatal depression and anxiety, hypertension and pre-eclampsia in pregnant people were found to be related to such exposure.⁸

Similarly, the increase in intensity and frequency of disasters, including bushfires, flooding and cyclones, have been found to negatively impact pregnancy outcomes.^{9,10,11}

Recommendation 2: Include special considerations for marginalised young people.

Not all children are likely to be impacted by climate change to the same degree. For communities where social inequality is entrenched and successive generations will experience increased exposures, there is increased susceptibility to damage from and reduced ability to cope and recover from, climate change impacts. In applying the duty of care, decision-makers should be required to give special consideration to children that may suffer disproportionate harm to health and wellbeing as a result of climate change due to their socioeconomic and/or geographic circumstances as a way to strengthen the amendment. Intersectional issues, including race, gender, poverty, disability, other forms of social oppression, can compound vulnerability to climate change and should be considered as part of a duty of care in decision-making. Climate change has been described as a chronic stressor, worsening health and psychological disparities already affecting individuals of marginalised identities.¹² For example, remote living First Nations young people are likely to face disproportionate impacts due (amongst other things) to the combined effects of remoteness factors and socioeconomic factors. In September 2022, the United Nations (U.N.) Human Rights Committee (HRC) found that Australia had violated the rights of indigenous Torres Strait Islanders to enjoy their culture and be free from arbitrary interferences with private life, family and home, by failing to adequately protect them against adverse climate change impacts.¹³

As observed in the U.N. General Comment No. 26 on children's rights and the environment with a special focus on climate change: "As rights holders, children are entitled to protection from infringements of their rights stemming from environmental harm and to be recognized and fully respected as environmental actors. In taking such an approach, particular attention is paid to the multiple barriers faced by children in disadvantaged situations in enjoying and claiming their rights."¹⁴

⁷ Haswell et al. (2023) p61

⁸ Ibid. p64

⁹ Mallett and Etzel (2018)

¹⁰ Davis et al. (2023)

¹¹ Parayiwa et al. (2022)

¹² Versey (2021)

¹³ United Nations Human Rights Office of the High Commissioner (2022).

¹⁴ UNCRC (2023)



Recommendation 3: Look to international examples of intergenerational justice embedded in law.

With attention to increased instances of climate change litigation aimed at challenging legislation that violates the human rights of children and young people, the amendment should support the interests expressed by young plaintiffs. The amendment has the opportunity to draw upon international examples where climate change and intergenerational justice has been embedded into law.

Recent legal challenges based on intergenerational climate justice

Basic Law for the Federal Republic of Germany, Article 20a

German law specifies that, mindful of its responsibility to future generations, the state will protect the natural foundations of life and animals as part of its constitution. In February 2020, a group of German youth alleged that Germany's Federal Climate Protection Act violated the Basic Law by mandating insufficient short and medium greenhouse gas reduction targets, placing an unfair burden on young people to achieve the required reductions to meet the Paris Agreement obligations. The legal challenge was successful.¹⁵ Following the ruling, federal legislators enacted a bill endorsing a modified Federal Climate Protection Act, mandating a higher minimum reduction in greenhouse gas emissions from 1990 levels by 2030. This legislation has been in force since August 31, 2021.¹⁶

U.S. State of Montana Environmental Policy Act

In August 2023, a group of young plaintiffs won a case alleging that the Montana Environmental Policy Act (MEPA) was unconstitutional as it violated their state constitutional rights to a clean and healthy environment.¹⁷ The plaintiffs challenged a provision of MEPA that prohibited the consideration of greenhouse gas emissions and climate change impacts in environmental assessments. The court's decision was founded on comprehensive evidence presented during a seven-day trial, featuring expert testimony on climate science, the effects of greenhouse gas emissions in Montana and the consequences of climate change on the state's children. The court's findings highlighted the severe threat that climate change posed to public health, underscoring that the plaintiffs suffered harm due to the state's inadequate response to greenhouse gas pollution and climate change. The court acknowledged the global ramifications of climate change, emphasising the MEPA provision has consequences for fossil fuel energy systems, CO₂ emissions and global warming. The court determined that the state's allowance of fossil fuel activities without assessing their environmental impact exacerbated climate change and harmed Montana's environment, particularly its youth.

Examples of intergenerational justice embedded into law

U.N. Convention of the Rights of the Child

The proposed amendments to the Climate Change Act 2022 align with Australia's international obligations and norms set by the international community. U.N. General Comment No.26 (on children's rights and the environment with a special focus on climate change) states: "Children

¹⁵ BVerfG, (2021)

¹⁶ Neubauer, et al. v. Germany (2022)

¹⁷ Held v. state (2023)



are far more likely than adults to suffer serious harm, including irreversible and lifelong consequences and death, from environmental degradation. Given their heightened duty of care, States should therefore set and enforce environmental standards that protect children from such disproportionate and long-term effects".¹⁸ Further that "[m]echanisms should be available for claims of imminent or foreseeable harms and past or current violations of children's rights. States should ensure that these mechanisms are readily available to all children under their jurisdiction, without discrimination, including children outside their territory affected by transboundary harm resulting from States' acts or omissions occurring within their territories."

Wellbeing of Future Generations Act (2015), Wales

While there are plenty of examples of existing legislation being challenged for failing to account for the rights of young people, there are few examples of jurisdictions proactively embedding the duty of care into law. The Welsh Wellbeing of Future Generations Act (2015) compels government to consider impacts on children and young people, having a duty of care in any and all decisions. Additionally, the act includes the appointment of a Future Generations Commissioner for Wales, whose role is to act as a guardian for the interests of future generations in Wales. The role includes advisory, research, review, recommendation and reporting functions.¹⁹

Recommendation 4: Focus on repairing government relationships with Australia's children and young people

Young people around the world are experiencing significant levels of distress related to the climate crisis, which can pose negative implications for their mental health and wellbeing. Importantly, this distress has been associated with a sense of betrayal by governments for failing to adequately address climate change, potentially constituting moral injury.²⁰ In Australia, young people have consistently identified environmental and climate issues as top concerns^{21,22,23} yet only 13% of young Australians feel their views are listened to by leaders in government.²⁴

The important context of the Federal Court of Australia's ruling that then-Environment Minister Sussan Ley has a common law duty of care to Australian children being overturned on appeal should also be considered. The primary ground for success on appeal was that "[the assertion of a duty of care] throws up for consideration at the point of assessing breach the question of the proper policy response to climate change and considerations unsuitable for resolution by the Judicial branch of government."²⁵ Appealing against a duty of care to Australian children sends a clear message to young people, who already feel betrayed, as to whether the government has their interests in mind when making decisions. The proposed amendments to the Climate Change Act represent a response to the court's findings that could demonstrate the current government's commitment to intergenerational justice.

¹⁸ UNCRC (2023)

¹⁹ Well-being of Future Generations Act (2015)

²⁰ Hickman et al. (2021)

²¹ Mission Australia (2022)

²² Australian Conservation Foundation (ACF) (2022)

²³ Australian Institute for Disaster Resilience (AIDR) (2020)

²⁴ Ibid.

²⁵ Federal Court of Australia (2022)



The current government has an opportunity to demonstrate that it can be trusted by young people through this amendment. Although commendable steps have been taken towards meaningful climate action, such as the introduction of the Climate Change Act in 2022 and the development of a National Climate Risk Assessment, the current government is still approving new and extending current fossil fuel projects. These actions are inconsistent with Australia's climate targets and, more importantly, with a duty of care towards our youth. Minister Tanya Plibersek has approved or extended the life of eight fossil fuel projects since taking office in May 2022,²⁶ contributing to potential emissions that could reach 4.8 billion tonnes by 2030.²⁷ This trend has continued into October 2023, when the Federal Court of Australia dismissed landmark cases against Minister Plibersek, Narrabri Coal Operations (a subsidiary of Whitehaven Coal) and MACH Energy, ruling that the Minister is not obliged to explicitly consider the harmful effects of climate change when considering whether to approve new fossil fuel projects.²⁸

The amendment would challenge political decision-makers, giving a mechanism for young people's interests to be considered, for instance, when new or current fossil fuel projects are seeking approvals. It would demonstrate that the current government cares about what happens to Australians in the future, beyond their political careers.

Recommendation 5: Advocate for a duty of care to be embedded in all relevant legislation.

A common law duty of care should be codified beyond the narrow scope of the Climate Change Act and those acts defined by the amendment (namely, the Export Finance and Insurance Corporation Act 1991, the Infrastructure Australia Act 2008, the National Reconstruction Fund Corporation Act 2023, the Northern Australia Infrastructure Facility Act 2016).

²⁶ Foote, C. (2023)

²⁷ Campbell, R., Verstegan, P. and Ogge, M. (2023)

²⁸ Living Wonders (2023)



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