Committee Secretary
Senate Standing Committee on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600
Phone: +61 2 6277 3526
ec.sen@aph.gov.au

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

Dear Secretary,

The Australian National University Law Reform and Social Justice Research Hub ('ANU LRSJ Research Hub') welcomes the opportunity to provide this submission to the Senate Standing Committee on Environment and Communications.

The ANU LRSJ Research Hub falls within the ANU College of Law's Law Reform and Social Justice program, which supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members of the group are students of the ANU College of Law, who are engaged with a range of projects with the aim of exploring the law's complex role in society, and the part that lawyers play in using and improving law to promote both social justice and social stability.

Summary of Recommendations:

1. That physical and mental health and wellbeing are included in the definition of health and wellbeing in the Bill.
2. That a comprehensive set of health and wellbeing indicators, modelled on the OECD frameworks outlined below, are included to define and measure health and wellbeing under Schedule 1 Item 4 of the Bill.
3. That the Parliament supports the Bill.

If further information is required, please contact us at

On behalf of the ANU LRSJ Research Hub,
Authors: Jae Brieffies, Hannah Vardy and Venni Baliyan

Introduction

This submission is about the relationship between the young people of Australia and the government which they will come to inherit. As young people and young voters, and moreover as emerging members of the legal community, we are custodians not only of an increasingly precarious ecological and economic future as a result of the consequences of climate change, but of a system of law and government which has, thus far, proven to be unable to prevent and mitigate these consequences.

The *Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023* ('the Bill') before the Committee today presents a once-in-a-generation opportunity for the Parliament to commit to a framework for government decision-making consistent with Australia's commitments to mitigate climate change, and the principles of intergenerational equity which exist at international law.

The Bill respects the principle of Parliamentary sovereignty and places the Australian Parliament at the centre of a rightfully democratic process of creating both sound climate change policy and frameworks for executive decision-making consistent with that policy. It is a legally sound amendment that poses minimal additional litigation risk, and affirms the Commonwealth's commitment to intergenerational equity for young people across the electorate.

The Bill aligns with the Government's stated renewable energy and legislated emissions reduction targets. It is also an important mechanism by which the desired outcomes of the Safeguard Mechanism can be achieved, especially in light of the substantial number of proposed new projects, and also aligns well with the National Health and Climate Strategy.

A key recommendation of this submission is that the definition of health and wellbeing is more precisely defined to agree with general conceptions of physical and mental health and wellbeing, and that health and wellbeing frameworks such as those outlined by the OECD are included in the Bill or other supporting materials so they can be used by decision makers in the course of their duties under the Bill.

We nonetheless strongly commend the committee to recommend that the Parliament adopt the Bill.

1. Health and Wellbeing Definitions & Frameworks

As it stands, the Bill defines health and wellbeing as including emotional, spiritual and cultural health and wellbeing. The inclusion of these indicators is important when considering the multi-faceted effects that climate change will have on diverse groups of young people around the country, especially on Indigenous communities.[1] However, the explicit inclusion of physical and mental health under the definition of health and wellbeing would bring the Bill closer in line with commonly recognised understandings of health and wellbeing. Their inclusion would also align with the definition of health enshrined by the World Health Organisation's constitution as a 'state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity.'[2]

Furthermore, there are several existing frameworks that could be incorporated into the definition of health and wellbeing under the bill to provide greater specificity for decision makers considering their duties. OECD indicators were examined below as they are most relevant to Australia's economically developed society and high standard of living.

1.1 Measuring Health: OECD Health at a Glance Indicators

The Organisation for Economic Cooperation and Development (OECD) outlines several key health indicators, under five key themes.[3]

1. **Health status** includes life expectancy, preventable and treatable mortality, self-rated health and diabetes prevalence.

2. **Risk factors** include smoking and obesity prevalence, alcohol consumption, and, most importantly for the implications of the Bill, deaths and illnesses related to air pollution.

3. **Quality of care** includes mortality after stroke and heart attack, avoidable hospital admissions, safe prescription of antibiotics and screening for preventable conditions such as breast cancer.

4. **Access to care** includes the percentage of the population that is satisfied with the availability of quality healthcare, the financial coverage of healthcare by publicly mandated schemes (eg Medicare) compared to out-of-pocket expenditure, and a percentage of the population reporting unmet medical care needs.

5. **Health system resources** include spending per capita on healthcare, and number of doctors, nurses and hospital beds per capita.

Climate change and its impacts are intrinsically connected to all these indicators. The OECD predicts that 'without new policies, by 2050, air pollution is set to become the world's top environmental cause of

[1] Nina Lansbury Hall and Lucy Crosby, 'Climate Change Impacts on Health in Remote Indigenous Communities in Australia' (2022) 32(3) *International Journal of Environmental Health Research* 487.
[2] 'Health and well-being', *World Health Organisation* (Web Page) <https://www.who.int/data/gho/data/major-themes/health-and-well-being>.
[3] 'Health at a Glance 2023: Highlights for Australia', *Organisation for Economic Cooperation and Development* (PDF Document) <https://www.oecd.org/australia/health-at-a-glance-Australia-EN.pdf>.

premature mortality', surpassing deaths due to unsafe water supply, chemical hazards and malaria.[4] Furthermore, according to the *OECD Environmental Outlook to 2050*:

> 'Climate change affects human health adversely through extremes in temperature, weather disasters, photochemical air pollutants, vector-borne and rodent-borne diseases, and food-related and waterborne infections. The impacts may be direct – such as temperature-related mortality (i.e. heat and cold stress) – or indirect by increasing the incidence of flooding, malnutrition, diarrhoea and malaria.'[5]

Therefore, the OECD *Health at a Glance* indicators could be used as a measurement for health under the Bill.

1.2 Measuring Wellbeing: OECD Better Life Initiative

In 2011, the OECD published the *How's Life* report, as part of the *Better Life Initiative*. It outlines several keys indicators, beyond GDP, to measure overall wellbeing under two broad dimensions:

1. **Material living conditions** includes:
    a. household net disposable income and wealth,
    b. jobs and earnings (employment rate and annual earnings per employee) and
    c. housing (number of rooms per person and percentage of dwellings without basic facilities (flushing toilets)).
2. **Quality of life** includes:
    a. health status (life expectancy at birth and self reported health status),
    b. work life balance (leisure time, percentage of employee working very long hours and employment of women with school-age children),
    c. education and skills (educational attainment and student's cognitive skills),
    d. civic engagement,
    e. air quality,
    f. personal security (homicide rate and self-reported victimisation (measured by feelings of safety walking alone at night)) and
    g. subjective wellbeing (evaluated and experienced wellbeing).[6]

---

[4] Richard Sigman, Henk Hilderink, Nathalie Delrue, Nils Axel Braathen and Xavier Leflaivei, 'Health and Environment' in OECD, *OECD Environmental Outlook to 2050* (OECD Publishing, 2012) 317.
[5] Ibid.
[6] OECD, *How's Life?: Measuring well-being* (Report, 2011) 25 <https://unstats.un.org/unsd/broaderprogress/pdf/How's%20life%20-%20Measuring%20well-being.pdf>

As these indicators go beyond the direct impact of climate change on human health to include measures of overall wellbeing, they could also be used to define or measure wellbeing in the Bill. Climate change, marked by more severe and frequent extreme weather events that include heat waves, bushfires and flooding, will touch every corner of everyone's life in some way in the decades to come. Therefore, it is important to consider a comprehensive set of wellbeing measures when making decisions that could materially worsen climate change and its impacts.

Recommendation 1a: Include physical and mental health and wellbeing in the definition of health and wellbeing in the Bill.

Recommendation 1b: Include a comprehensive set of health and wellbeing indicators, modelled on the OECD frameworks outlined above, to define and measure health and wellbeing under Schedule 1 Item 4 of the Bill.

2. The Justiciability of Climate Change under the Bill: Building on the Judgement of the Full Court of the Federal Court in *Minister for Environment v Sharma*

In 2021, a group of Australian children brought a negligence claim before the Federal Court alleging that the Minister for the Environment of the Commonwealth owed a common law duty of care to exercise their powers under the Environmental Protection and Biodiversity Conservation Act with reasonable care so to avoid causing harm to Australian children through the future consequences of climate change - including negative effects on physical and mental health, property damage, and economic harm.[7] The children sought not only to establish the existence of the duty of care in tort, but an injunction to prevent the Minister from making a decision to approve an application for the expansion of the Vickery Coal Mine in New South Wales.

In the first instance, Bromberg J of the Federal Court decided in favour of the children's claim in determining that a common law duty was owed to them by the Minister, finding that the elements of the duty had been successfully established in tort: climate-induced harm was reasonably foreseeable, and moreover the Minister had knowledge of the risk of that harm to children;[8] and there were 'salient features' which connected the Minister's actions to the children, including the Minister's position of control, in respect of climate-related harm, created by the EPBC Act, the vulnerability of the children as a result of their powerlessness to avoid the prospective harm,[9] and their reliance on the Minister to prevent the harm from eventuating.[10] However, Bromberg J stopped short of ordering an injunction against the Minister's decision-making, as they were not satisfied that the injunction was a justified restriction on statutory discretion in response to the duty of care owed.[11]

When Bromberg J's initial judgement was reversed on appeal in the Full Court of the Federal Court, one reason given by several justices related to the unsuitability of the judiciary as a forum for resolving and adjudicating the 'multidisciplinary' considerations which underlie climate change policy-making.[12] In this submission, we suggest that the Bill in question responds to and builds on this concern of the Court in the appeals judgement, by providing a legally sound policy framework for consideration and decision-making by the executive in relation to these 'multi-disciplinary' factors referenced by the Court. In doing so, the Bill addresses the preoccupation of the judiciary with reserving consideration of climate policy for the executive and legislative arms of government, insulating itself from questions of policy sufficiency, and preventing inconsistency from arising between the existence of a common law duty of care, and the discretion provided for by statute in a Minister's decision-making.

[7] *Sharma v Minister for the Environmen*t [2021] FCA 560.
[8] Ibid [286].
[9] Ibid [296].
[10] Ibid [299].
[11] Ibid [502].
[12] *Minister for the Environment v Sharma* [2022] FCAFC 35 [246] (Allsop CJ) and [868] (Wheelahan J).

2.1 International jurisprudence on the justiciability of climate change-related duties

2.1.1 New Zealand: Smith v Fonterra Cooperative Group Limited

In *Smith v Fonterra Co-operative Group Limited*[13] ('*Fonterra*'), the appellant alleged that the harm caused by several companies' greenhouse gas emissions constituted public nuisance, negligence, and breached an inchoate duty to cease contributing to climate change, seeking an injunction which would require each respondent to achieve net zero emissions by 2030. Upon appeal, the Court found that concerns that the considerations relating to climate change which arose under the duty contention were 'examples of a polycentric issue not amenable to judicial resolution', but which called for 'a sophisticated regulatory response at a national level' (at [26] and [28]). The reasoning of the Appeals Court closely resembles the justiciability concerns which caused the Full Court of the Federal Court to strike down the duty on appeal in *Sharma*.

2.1.2 State of the Netherlands v Urgenda Foundation; Neubauer, et al. v Germany; Notre Affaire à Tous and Others v. France

In *State of the Netherlands v Urgenda Foundation*,[14] plaintiffs alleged that the Dutch Government had a duty to take steps to reduce greenhouse gas emissions to an extent consistent with limiting global warming to an average of 1.5 degrees above pre-industrial levels. The basis of the plaintiff's claim was the rights set out in the European Convention for Human Rights (ECHR). Both the lower courts and the Dutch Supreme Court approved the plaintiff's claim. The Court stated that the reduction of greenhouse gas emissions was the natural constitutional domain of the Parliament and Executive, within which they exercised significant discretionary powers, but that the Court maintained the power to determine whether, in the exercise of this discretion, the Parliament and Executive were remaining within the limits of the law - including the ECHR. In determining that they had not remained within these constraints, the Court imposed upon the Dutch government an obligation to take further steps to ensure the legality of its climate change policies.

Similarly, in *Neubauer, et al. v. Germany* (2020)*,*[15] a group of German young people challenged Germany's Federal Climate Protection Act ('Bundesklimaschutzgesetz' or 'KSG') in the Federal Constitutional Court, arguing that the legislated target of reducing GHGs by 55% until 2030 from 1990 levels was insufficient and therefore that the Act violated their human rights as protected by the Basic Law (the German Constitution) which requires that political processes respect the natural foundations of life in responsibility for future generations of German people.

Similarly again, in *Notre Affaire à Tous and Others v. France* (2018),[16] four NGOs brought a private legal action known as 'recours en carence fautive' (action for failure to act) before the Administrative Court of Paris against the Prime Minister and 12 members of the French government. The Court found their claim to be successful, ordering symbolic compensation of one euro to be paid in recognition of the fact that the

[13] *Smith v Fonterra Co-operative Group Limited* [2021] NZCA 552.
[14] *Urgenda Foundation v State of the Netherlands* (Supreme Court of the Netherlands, 19/00135, ECLI:NL:HR:2019:2006, 20 December 2019).
[15] Bundesverfassungsgericht [German Constitutional Court], 1 BvR 2656/18, 24 March 2021.
[16] *Notre Affaire à Tous and Others v. France* (2018) (Administrative Tribunal of Paris).

French Government's failure to act on climate change had caused ecological damage. It also ordered the French Government to take immediate and concrete action to meet its legislated emissions reduction targets.

What these European cases share is a human rights framework on which an implied duty on the part of their respective governments to take certain actions in relation to climate change is premised. The effect of these human rights frameworks is to create a legislative basis for the justiciability of climate change policy. In 2023, Australia lacks such a framework, and therefore a similar legal launchpad for the implication of a similar duty at private law, as well as a settled solution to the outstanding question of the justiciability of climate change policy before Australian courts.

2.2 This Bill resolves the justiciability question by distinguishing the administrative duty it creates from private law duties alleged in domestic and international strategic litigation

This Bill does not propose to create a framework from which a private duty of care can be implied, such as that which was relied on both in *Sharma* and in comparative European litigation. It does not propose to supplant standards of administrative decision making with standards of reasonable care owed in private law, which would create unacceptable incoherence.[17] Instead, it creates an administrative law duty to take into account certain mandatory considerations relating to climate change impacts in the course of administrative decision-making. In this way, the Bill diverts from the approach of *Sharma*, *Fonterra*, and other examples of efforts to imply a private law duty of care at common law or on the basis of legislated human rights frameworks.

The Duty created in the Bill is an administrative one - to take certain factors into account in decision-making and to follow a specific course of action when an established statutory threshold for risk is crossed - it is not a private duty owed as between individuals. Similarly, the right of individuals to bring an action under the Bill is with regard to the validity of a decision as adjudged against statutory criteria, rather than with regard to a breach of a duty of care in tort.

The distinction between the duty of care claim brought by the plaintiffs in *Sharma*, and the approach set out in the current Bill for the establishment of an administrative duty to consider the effects of decisions on climate change, is perhaps best encapsulated in the appeal judgement. Allsop CJ states that '[t]he natural places for the development of such policy and the making of decisions as to the implementation of such policy is the Executive branch of government, and Parliament. Both have the power and the ability to obtain all relevant up-to-date information bearing upon policy. Both arms of government are, in a parliamentary democracy, responsible to the people of the polity'.[18] This Bill does exactly that. It builds on the strong work of the *Climate Change Act 2022* in setting out a clear policy pathway for action on climate change, creating frameworks for decision-making consistent with that policy pathway, and providing mechanisms by which the people of the polity can hold the executive to account for decision-making done with reference to statutory criteria for legality and sufficiency, as determined by the legislated policy framework.

---

[17] *Sharma v Minister for the Environment* (n 7) [424].
[18] *Minister for the Environment v Sharma* (n 12) [250].

The Court, in its appeals judgement in *Sharma*, was at pains to remove the question of adequacy of certain national and State policies with regard to climate change from the realm of judicial determination. Correctly, the Court noted that the formulation of good policy requires 'consideration of information, of judgement, of political considerations of an international and national character, many of which are incapable of being assessed and evaluated by frames of reference amenable to reduction to a legal standard or duty in private litigation by reference to evidence led by individual parties'.[19] The Bill addresses these concerns neatly, and is a ripe opportunity for the Parliament to fulfil its policy-making mandate in this area. The Bill does not require the judiciary to determine the adequacy of certain policies, but to adjudge the legality of administrative decision-making against established criteria set out by the Legislature in the Act (see 15D(2)).[20] In this way, the Bill addresses the court's appeal for the Parliament to take up its 'natural province' in carrying out its 'duty of consideration and policy formulation…' with reference to 'attending the safety and wellbeing of all Australians' through its approach to climate change policy.[21]

[19] *Minister for the Environment v Sharma* (n 12) [249].
[20] Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023 (Cth) sch 1 item 6 s 15D(2).
[21] *Minister for the Environment v Sharma* (n 12) [246].

3. Litigation Risks Associated with the Bill: A Response to the 'Floodgates Litigation' Argument

A number of Members and other parties, through various channels, have raised concerns that the passage of the Bill would 'open the floodgates' of litigation in Courts relating to the Commonwealth's climate change policy. We suggest that this is not the case, as a result of the administrative law nature of the duty created, and due to the resourcing limitations of the group of potential litigants prescribed by the Bill. Furthermore, we suggest that the Bill provides an ample alternative to costly strategic litigation which has faced, is facing, and will otherwise continue to be brought against the Commonwealth on this matter. In light of implied duties alleged in *Sharma v Minister for Environment* and *Pabai Pabai v Commonwealth of Australia*, we suggest that the Bill will address the concerns of the electorate as to the legislature's ethical, ergo legal, obligations to protect them from negative impacts of climate change. The Bill does so in a manner consistent with the principle of parliamentary sovereignty, retaining the primacy of the Parliament in determining the standards of decision-making against which a legal challenge might be mounted.

3.1 The administrative law duty created provides a narrow scope for legal challenge on the basis of Commonwealth decision-making covered by the Bill.

In light of the administrative nature of the duty created by the Bill, what is left for determination by a Court in the context of a legal challenge is not an assessment of the adequacy of the Commonwealth's policy on climate change, nor the adequacy of the Minister's decision-making with reference to an indeterminate standard for climate change policy as decided by the judiciary, as it was in *Sharma*. Rather, it would be an assessment of the legality of the Minister's decision-making within the statutory framework set out by the Bill, as determined and regulated by the Parliament itself. This leaves scope for the broad range of mandatory considerations before the Minister in any decision-making process, meaning that unless the decision-making process rises to the high standard of 'serious irrationality',[22] it remains 'generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power'.[23]

3.2 The class of potential litigants prescribed by the Bill is not well-resourced to undertake 'floodgates litigation' of the type alleged by critics of the Bill.

Part 6 of the Bill inserts a provision 15F into the *Climate Change Act 2022* which amends the *Administrative Decisions (Judicial Review) Act* to extend the class of potential persons who may bring a legal challenge against decisions made under the framework of the Bill to an individual who is 'a child who is an Australian citizen or ordinarily resident in Australia or an external Territory'.[24]

Young people face a number of barriers to participating in formal legal processes in Australian courts. A lack of knowledge surrounding forms of legal redress, court processes and the legal system more broadly,

[22] *Minister for Immigration and Citizenship v Li* [2013] HCA 18.

[23] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40 (Mason J).

[24] Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023 (Cth) sch 1 item 6 s 15F..

often prevents young people from bringing actions to enforce their rights under law.[25] A sense of intimidation and marginalisation in legal and court settings further deters young people from participating in formal legal processes.[26] In addition, young people often lack the financial and temporal resourcing to undertake costly and time-intensive litigation, which may be more readily available to older and more well-connected litigants. On this basis, we consider that the success of the Bill is very unlikely to result in a 'floodgates litigation' scenario of young people pursuing actions against the Commonwealth in courts.

3.3 The Bill empowers the Legislature to determine and regulate the grounds for litigation arising under it, and thus provides for a democratic alternative to costly strategic litigation seeking to imply a duty of care

The litigation, initial success, and subsequent reversal of the duty of care found in *Sharma v Minister for the Environment* resulted in a significant reputational cost and loss of trust by young people in the Commonwealth. In *Pabai*, the Commonwealth now faces a similar challenge - as Torres Strait Islander leaders mount a class action suggesting that the Commonwealth owes a duty of care to all Torres Strait Islanders to take reasonable steps to protect them from climate change-related harms to their culture, livelihoods, health, and environment.

We join a significant portion of the legal community when we predict that strategic litigation claims alleging a common law duty of care owed by the Commonwealth are likely to increase in volume in the coming years, on the back of high-publicity cases such as *Sharma* and *Pabai*.[27] The Bill offers the Commonwealth the opportunity to address the evident discontent amongst the electorate caused by the growing consensus surrounding the negative consequences of climate change for current and future generations of Australian voters. This discontent has previously been exacerbated by the Commonwealth's defences against any suggestion that it owes the electorate a duty to take reasonable actions to protect them from those consequences, such as in *Sharma.*

Significantly, this Bill puts the legislature in the driving seat of the growing movement seeking to establish such a duty at law in Australia. The framework provided by the Bill means that the Parliament maintains oversight and awareness of the parameters of decision-making which may result in a legal challenge. The rise in strategic litigation on this matter suggests that the alternative to the Bill will likely be that young people and other aggrieved groups will continue to find support and resourcing to initiate strategic litigation against the Commonwealth to establish an implied equivalent duty, adjacent to those which have been found in comparative international jurisdictions. This alternative is costly to the Commonwealth - both in terms of litigation resources, but also in the potential legal indeterminacy which may arise if a duty is to be found arising from existing statutory or common law frameworks. On this basis, we believe that the Bill provides an important opportunity for the Parliament to address and quell

---

[25] Australian Law Reform Commission, *Seen and heard: priority for children in the legal process* (Report No 84, 19 November 1997) Ch 4 <https://www.alrc.gov.au/publication/seen-and-heard-priority-for-children-in-the-legal-process-alrc-report-84/4-children-in-the-legal-process/the-barriers-in-practice-inhibiting-childrens-participation/>.
[26] Ibid.
[27] Ilona Millar, Philippa Hofbrucker, Elizabeth Jones, Nina Pearse and Shanae Streeter, 'No 'Duty of Care' but risks of climate litigation continue to grow - insights from the Sharma decision', *Gilbert and Tobin Law* (Web Page, 21 March 2022) <https://www.gtlaw.com.au/knowledge/no-duty-care-risks-climate-litigation-continue-grow-insights-sharma-decision>.

the concerns of the electorate, that the Bill's passage will be a more resource-efficient alternative to likely future strategic litigation, and that the Bill preserves the principle of parliamentary sovereignty in empowering the Parliament to maintain oversight over the parameters of decision-making which may result in a legal challenge, thereby minimising litigation risk.

4. The Unsustainable Nature of Climate Litigation: Calling for a Regulatory Framework for Decision-Makers

To understand why the provisions of this Bill could be vital to implementing robust climate regulation, it is also important to analyse the long-term untenability of strategic climate change litigation to highlight the need for a robust regulatory framework for Ministers' decision making.

4.1. Existing Climate Change Litigation and its Implications

It is clear that climate change litigation has been on the rise as a means of holding governments and large polluters accountable for environmental damage. The United Nations Environment Programme (UNEP) estimates that cases have more than doubled from 884 in 2017 to 2,180 in 2022.[28] Climate change litigation has had far-reaching positive effects on creating pressure for large polluters and governments to reduce emissions (see paragraph 2.1.2). Aside from the social pressure created by the publicity of cases such as *Sharma and others v. Minister for the Environment,* there is a tangible impact on private companies that have cases filed against them. The LSE's Grantham Institute found that after an unfavourable judgement, the average relative value of a company reduced by 1.5% in the US and Europe.[29] Climate litigation clearly has the power to enact change.

4.2. The Limitations of Climate Change Litigation

However, a common issue has continued to present itself in many of these cases, particularly in the Australian legal context. In their judgements, Australian courts have repeatedly endorsed the issue of climate change regulation as a legislative issue, not a judicial one. In *Sharma*, Chief Justice Allsop of the Full Federal Court found that establishing a duty was a question of policy and 'unsuitable for the judicial branch to resolve'.[30] Therein lies the limitation of climate change litigation - it is a reactive solution to the destruction of the environment rather than a pre-emptive one. It is costly, inefficient and often involves multiple appeals processes.[31] Australian courts are hesitant to encroach upon questions of climate policy, which places this responsibility on the legislature (see section 2).

Furthermore, climate litigation remains largely inaccessible to those most vulnerable and most affected by climate change. Young people and people living in rural or regional areas are more likely to fall into the 'justice gap' where they have no or limited access to litigation as means of redress in the Australian legal system.[32] The NSW Land and Environment Court's Justice Pain and Justice Pepper have pointed out that courts will need to continue subsidising legal costs for litigants in public interest climate cases to reduce

[28] United Nations Environment Programme, *Global Climate Litigation Report: 2023 Status Review* (Report, 2023).
[29] Joana Setzer and Catherine Higham, *Global trends in climate change litigation: 2023 snapshot* (Report, 2023) 31.
[30] *Minister for the Environment v Sharma* [2022] FCAFC 35.
[31] Nicola Durrant, 'Tortious liability for greenhouse gas emissions? Climate change, causation and public policy considerations' (2007) 7(2) *Queensland University of Technology Law and Justice Journal* 403.
[32] Law Council of Australia, 'Addressing the legal needs of the missing middle' (Research Paper, November 2021) 4.

the inaccessibility to legal climate justice.[33] They highlight that there is no legal aid available in civil environmental cases, which adds to the barriers already faced by those attempting to litigate in the public interest.[34] This presents a complex challenge for the judicial system in having to utilise more resources to hear these cases. Climate change litigation and slow, incremental change in the common law is important but is not a feasible long-term tool to combat climate disaster.

4.3. The Need for a Regulatory Framework for Government Decision-Making

The limitations of climate change litigation highlight why regulation and a clear national framework is so important. This is why this bill holds such promise. It would give the Federal Government a uniform framework to refer to while making vital decisions impacting the climate, and by extension, the health and wellbeing of future generations. With such a framework, Ministers would be less likely to make decisions which breach the statutory duty contained in this bill. Public interest litigation against Ministers or the Government would be unlikely to increase if this framework was already adhered to by decision-makers.

Even for cases brought before the courts invoking this legislation, courts would have clear statutory, administrative duties to refer to in their judgements rather than deciding on the basis of existing tortious liability on a case-by-case basis. When comparing the costs of future litigation with the cost of climate change, both for the Australian judicial system and for the Australian economy, there is no equivalence. The Treasury predicts that climate change will cost the Australian economy up to $423 billion over the next four decades.[35] Any future legal costs as a result of litigation under this bill will undoubtedly pale in comparison. This framework could overall lead to a minimisation of legal costs for the Commonwealth and lead to a more efficient use of the courts with regard to climate change litigation.

The proposed bill has the ability to act as a gateway to climate justice for young people and for the most vulnerable. The framework it provides will ensure that government decisions concerning the climate are made with young people in mind. It also establishes the forethought to minimise climate litigation through maximising equitable climate outcomes for future generations through existing democratic processes.

---

[33] Justice Pepper and Justice Pain, ‘Legal Costs Considerations In Public Interest Climate Change Litigation’ (NSW Land and Environment Court Paper, 2023) 11.
[34] Ibid 1.
[35] Treasury, Parliament of Australia, *2023 Intergenerational Report* (Report, August 2023) 99.

5. Consistency and Necessity of the Bill in Achieving Climate & Energy Targets

The Bill is another tool in achieving Labor's legislated and announced climate and energy targets. It does not seek to compete with or antagonise these policies, but rather complement and strengthen the important work that is underway to reduce emissions and transition to clean energy.

5.1 The Measuring What Matters Framework

The Measuring What Matters Framework ('The Framework') was released in July 2023 as Australia's first wellbeing framework, to measure Australia's wellbeing beyond economic indicators. A legislated Duty of Care could be complementary to this Framework, specifically the emissions reduction indicator. This indicator measures both the reduction in greenhouse gas emissions from 2005 levels and the share of electricity generation provided by renewable energy.[36] This Framework currently isn't enshrined in legislation, and Treasurer Jim Chalmers admitted at the start of November that Australia currently is not on track to meet the 82% renewable energy by 2030 target.[37] This Bill could accelerate progress towards renewable energy investment and generation by disallowing new fossil fuel projects that would significantly harm the health and wellbeing of current and future generations of Australian children. This Bill would bolster, rather than compete against, other important and welcome climate policies, such as the recently announced expansion to the capacity investment scheme that aims to increase investment in renewable energy projects and initiatives.[38]

5.2 The Safeguard Mechanism

As of March 2023, there were 116 new fossil fuel projects on the Government's annual Resource & Energy Major Project list that were in the publicly announced, feasibility, committed or completed stages of the investment pipeline.[39] A recent Australia Institute report found that as currently proposed, 'the Safeguard Mechanism would deliver a *theoretical reduction* of these projects' emissions of just 86 million tonnes. This is less than 2% of the 4.8 billion tonnes of emissions the projects would create [until 2030].'[40] Another report by the Australian Conservation Foundation has found that 'for every tonne of carbon pollution that will be reduced by the Albanese government's current climate policies to 2030, over

[36] Commonwealth of Australia, 'Measuring What Matters: Australia's First Wellbeing Framework' (Report, July 2023) 48 <https://treasury.gov.au/sites/default/files/2023-07/measuring-what-matters-statement020230721_0.pdf>.
[37] Tom Lowrey, 'Treasurer Jim Chalmers concedes Australia risks missing its climate targets', *ABC News* (online, 2 Nov 2023) <https://www.abc net.au/news/2023-11-02/treasurer-concedes-australia-falling-short-climate-targets /103056018>.
[38] Katharine Murphy and Adam Morton, 'Albanese government to rapidly expand investment scheme for clean energy projects', *The Guardian* (online, 23 Nov 2023) <https://www.theguardian.com/australia-news/2023/nov /23/albanese-government-to-rapidly-expand-investment-scheme-for-clean-energy-projects>.
[39] Rod Campbell, Mark Ogge and Piers Verstegan, *New fossil fuel projects in Australia 2023* (Report, 21 March 2023) <https://australiainstitute.org.au/report/new-fossil-fuel-projects-in-australia-2023>.
[40] Ibid.

7 tonnes of pollution could result from new fossil fuel projects that have received approvals or other material support since the Albanese government came to office.'[41]

It is clear from these figures that more needs to be done to strengthen Labor's commitments to reduce emissions and transition to clean energy. This Bill is another mechanism to assist Labor in achieving its legislated targets and protecting the health and wellbeing of children and future generations.

5.3 The National Health and Climate Strategy

One of the four proposed objectives of the recently announced National Health and Climate Strategy is to 'maximise the synergies between good climate policy and public health policy by working across policy areas to lessen the impact of climate change on the social and cultural determinants of health and wellbeing.'[42] This Bill ties in well with this objective, as its aim is to protect the health and wellbeing of current and future generations of Australian children from the most severe impacts of climate change by prohibiting new fossil fuel projects that would materially worsen these impacts.

Recommendation 2: That the Parliament supports the Bill for its strengthening of the policies and strategies outlined above.

[41] Piers Verstegen, *Climate impacts of fossil fuel projects under the Albanese government* (Report, November 2023) <https://www.acf.org.au/climate-impacts-of-fossil-fuel-projects-under-the-albanese-govt>.
[42] Department of Health and Aged Care (Cth), 'National Health and Climate Strategy - Consultation Summary' (Paper, 27 June 2023) 2 <https://consultations health.gov.au/ohp-2013-environmental-health-and-health-protection-policy-branch/national-health-and-climate-strategy-consultation/>.