



FEDERATION
OF COMMUNITY LEGAL CENTRES VIC

**INQUIRY INTO THE CLIMATE CHANGE
AMENDMENT (DUTY OF CARE AND
INTERGENERATIONAL CLIMATE EQUITY)
BILL 2023**

**SUBMISSION TO THE SENATE STANDING COMMITTEES ON
ENVIRONMENT AND COMMUNICATION**

ABOUT THE FEDERATION

The Federation is the peak body for Victoria's Community Legal Centres (CLCs). Our members are at the forefront of helping those facing economic, cultural or social disadvantage and whose life circumstances are severely affected by their legal problem. For over 40 years CLCs have been part of a powerful movement for social change, reshaping how people access justice, creating stronger more equitable laws, and more accountable government and democracy.

We pursue our vision of a fair, inclusive, thriving community through challenging injustice, defending rights and building the power of our members and communities. As an influential advocate, our voice is distinct and courageous: we are not afraid to challenge government, big business, or other powerful actors to ensure equality and fairness for all.

Read our strategic plan online

fclc.org.au/about

WE WANT A COMMUNITY THAT IS FAIR, INCLUSIVE AND THRIVING: WHERE EVERY PERSON BELONGS AND CAN LEARN, GROW, HEAL, PARTICIPATE AND BE HEARD.

The Federation:

- ▼ Enables a strong collective voice for justice and equality;
- ▼ Mobilises and leads CLCs in strategic, well coordinated advocacy and campaigns;
- ▼ Works with members to continuously improve the impact of community legal services;
- ▼ Drives creativity and excellence in the delivery of legal services to communities;
- ▼ Helps make justice more accessible.

Our members lead collaboration and advocacy via several Working Groups, providing guidance and direction for the Federation's work, as well as opportunities for joint advocacy.

Together with our members and communities, we work to dismantle unjust systems that perpetuate racism, sexism, homophobia, ableism, economic injustice and other inequalities. Our priority is to be fully accountable to the communities we represent.



THE FEDERATION ACKNOWLEDGES THE TRADITIONAL ABORIGINAL OWNERS OF COUNTRY AND WE PAY OUR RESPECTS TO ELDERS PAST, PRESENT AND EMERGING. WE RECOGNISE THEIR CONTINUING CONNECTION TO LAND, WATER AND COMMUNITY. SOVEREIGNTY WAS NEVER CEDED.

SECTION 1: SUMMARY OF RECOMMENDATIONS

Recommendation 1:

That the Federal Government pass legislation with an express obligation for the benefit of future generations, especially in connection with climate change.

Recommendation 2:

That the Federal Government pass legislation that requires the health and wellbeing of current and future children in Australia as an express mandatory consideration to be taken into account when making a decision that potentially contributes to climate change, especially in connection with the exploration or extraction of coal, oil or natural gas.

SECTION 2: INTRODUCTION

The Federation of Community Legal Centres Victoria (Federation) welcomes the opportunity to make this submission on the Climate Change Amendment (Duty of Care and Intergenerational Equity) Bill 2023 (Cth) that has been proposed by independent Senator David Pocock (ACT).

The Federation has been increasingly engaged in climate justice and disaster response work. The community legal sector plays a vital role in providing advice and representation to clients impacted by climate change and extreme weather events as well as working with communities to strengthen their preparedness and resilience.

The Federation has taken the opportunity of making this submission to address issues that communities and Community Legal Centres face in the changing climate that is driven by rising emissions.

The focus of the Federation's submission is on:

- ▼ Rising legal needs and exacerbation of inequities experienced by Community Legal Centre clients stemming from climate change.
- ▼ Benefits of legal reforms in support of Intergenerational Climate Justice that will be achieved by the Climate Change Amendment (Duty of Care and Intergenerational Equity) Bill 2023 (Cth).
- ▼ Early and preventative intervention.

Climate and disaster justice are priorities for the Federation and Victorian Community Legal Centres. Intergenerational justice is inherent to achieving climate and disaster justice and requires a legislative framework to be realised.

Climate justice views the acceleration of environmental changes through a human rights lens and strives to address these inequities. **Disaster justice** focuses on the role of governing structures in creating and perpetuating risks, inequalities and injustices that are magnified by climate hazards.¹ Together, the principles of **climate and disaster justice** promote sustainable and just solutions to the challenges posed by climate change and disasters and ensure that all affected individuals and communities have access to the resources and support they need through all phases of prevention, preparation, response and recovery. This includes addressing legal needs and access to justice.

¹ Disaster justice is not limited to declarations of disaster by State or Federal governments: Robert RM Verchick, 'Disaster Justice: The Geography of Human Capability Disaster Law' (2012) 23(1) *Duke Environmental Law & Policy Forum* 23. Disaster recovery cannot happen without implicating justice outcomes: Krishna K. Shrestha, Basundhara Bhattarai, Hemant R. Ojha, Ayusha Bajracharya, 'Disaster justice in Nepal's earthquake recovery' (2019) 33 *International Journal of Disaster Risk Reduction* 207.

The Federation is concerned that the impacts of climate change will be intergenerational and, without an adequate legal framework, Australia faces widening inequalities and puts at risk our communities, places we love and a healthy, thriving, collective future.

On our current trajectory, we will leave to future generations a world of increasingly dangerous climate impacts and disasters. The impacts and disasters will constantly worsen until the ever-increasing growth of human greenhouse gas emissions is constrained and turned around as required by the Framework Convention on Climate Change (1992)² and the Paris Agreement (COP 21 2015).³

Human generations since industrialisation have engaged in excessive consumption of the planet's natural resources, including exhaustion of the natural capacity of the biosphere to sequester carbon emissions. This has set in motion chain reactions of climate disasters of unimaginable destructive power. This is a grave intergenerational injustice practised against future generations by past and present generations, even more so as we have understood it scientifically for decades but nevertheless fail to act. Climate and disaster justice demands that we turn around this slide into the bleakest of futures for the generations to come.

Legislation of a principle of intergenerational climate justice is therefore a matter of the highest importance.

Climate impacts are cascading, compounding, and aggregating across sectors and systems due to complex interactions. These impacts are projected to grow due to increases in heatwaves, droughts, fires, storms, floods and rises in sea levels.⁴ Australia is the most climate-vulnerable nation of all its high-income country counterparts.⁵ In 2019–2020, Australia experienced the worst bushfire season on record.⁶ Black Summer was followed by a La Niña event in 2022 which led to unprecedented flooding along the Eastern seaboard. This resulted in calls that Australia had entered a new era of 'unnatural disasters'⁷ with recovery time between extreme events contracting.⁸ The overall state and trend of the Australian environment is "poor and deteriorating" in large part due to increasing pressure from climate change.⁹ Examples of impacts of common extreme weather events are in the Appendix below.

² The Framework Convention on Climate Change (1992). <https://unfccc.int/resource/docs/convkp/conveng.pdf>.

³ The Paris Agreement (COP 21 2015).

https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf.

⁴ Judy Lawrence and others, 'Australasia' in *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, 2022) 1632.

⁵ Ross Garnaut, *The Garnaut Review 2011: Australia in the Global Response to Climate Change* (Cambridge University Press, 2011).

⁶ *The Royal Commission into National Natural Disaster Arrangements Report* (October 2020).

<https://naturaldisaster.royalcommission.gov.au/publications/royal-commission-national-natural-disaster-arrangements-report>.

⁷ Climate Council, *The Great Deluge: Australia's New Era of Unnatural Disasters* (Climate Council and Emergency Leaders for Climate Action, 2022) 45.

⁸ Martin Rice and others, *A Supercharged Climate: Rain Bombs, Flash Flooding and Destruction* (Climate Council of Australia, 2022).

⁹ Ian Cresswell, Terri Janke and Emma Johnston, *Australia State of the Environment 2021: Overview* (Independent report to the Australian Government Minister for the Environment, Commonwealth of Australia, 2021).

Extreme weather events have increased in frequency and severity in Australia over the past three decades and impact not only present generations but risk the livelihoods, health, and prospects of future generations of Australians. Weather factors increase the risk of injury in multiple ways. Extreme weather events such as storms, heatwaves, flooding, and bushfires cause physical injury and death and exacerbate existing health conditions. Sustained adverse weather conditions are also associated with an increase in the risk of intentional self-harm and assaults.¹⁰ The past decade has seen increasing injuries related to extreme weather.¹¹

Long Term Impacts

Extreme weather impacts leave a long tail socially, environmentally, economically and legally.¹² These longer-term, complex, compounding and cascading impacts of climate change will determine the lives of Australians for generations to come. Risks of climate harm for future generations, including those alive today, include:

- ▼ Loss of livelihoods and economic security.
- ▼ Long term health impacts including increased mortality and chronic conditions.
- ▼ Stressed social and community relationships.
- ▼ Displacement from regions and homes at risk of dangerous climate impacts.
- ▼ Persistent communications and energy uncertainty and fragility.
- ▼ Biodiversity degradation.
- ▼ Infrastructure and transport failures.
- ▼ Food and water insecurity.
- ▼ Loss of First Nations self-determination and cultural rights.

It is an ethical and good governance imperative that the Australian government take all precautionary and preventative measures to avoid future generations facing any of the dire climate harms listed above. This requires a robust legal and policy framework at the highest level to ensure Australia's governance is fit for purpose in a climate-changed world and that we have in place all legal measures to achieve that, including the insertion of the obligation towards future generations. Climate and disaster justice are oriented to the future; to mitigation of worsening climate change by achieving zero net carbon emissions as rapidly as

¹⁰ Australian Institute of Health and Welfare, Australian Government, *Let's talk about the weather: injuries related to extreme weather*, Canberra, 2023, 3–4. <https://www.aihw.gov.au/reports/injury/extreme-weather-injuries/contents/about>.

¹¹ Ibid.

¹² California Commission on Access to Justice, *Disasters in Rural California: The Impact on Access to Justice* (July 2019) 4; Jordan Ballard et al, 'Natural Disasters, Access to Justice, and Legal Services' (2013) 17(1) *CUNY Law Review* 1, 18; Sara Debus and Seri Irazola, *Delivering Legal Aid after Katrina: The Equal Justice Works Katrina Legal Initiative* (Urban Institute Justice Policy Center, 2009) 64.

possible, and to future adaptation to climate change impacts and disasters. Both perspectives are oriented to the welfare of future generations, as well as present generations.

The principle of intergenerational equity applies conceptually and persistently throughout environmental law. It is relevant, for example, in biodiversity conservation in the protection of biological diversity for the benefit of future generations.¹³ Climate change seriously exacerbates the struggle to conserve biodiversity. Intergenerational equity is a fundamental principle for social and environmental justice.

The legal needs related to climate and disaster justice can be complex. Some of the high-level policy and legal needs in these areas include:

- ▼ **Access to justice:** Communities affected by climate change and disasters may face barriers in accessing justice, such as lack of information, resources, and legal representation.
- ▼ **Human rights protections:** Climate change and disasters can have significant impacts on human rights, including the right to life, health, housing and water. Legal and policy strategies aimed at protecting and promoting human rights in the context of climate change and disasters are essential in preventing certain communities from being disproportionately affected or discriminated against.
- ▼ **Liability and accountability:** Holding decision makers accountable for actions that determine the level of risk mitigation and subsequent impacts of extreme weather is crucial to ensuring that they take responsibility for their decisions.
- ▼ **Planning and environmental protections:** Addressing the root causes of climate change and disasters requires strong environmental protections and equitable planning, land and hazard risk management laws and policies.

Overall, addressing the legal needs related to climate and disaster justice requires a comprehensive and integrated approach that takes into account the social, economic, and environmental factors that contribute to harms resulting from climate change impacts and disasters. Early intervention and risk reduction are essential when it comes to addressing the destructive impacts of extreme weather. Legislation that requires government and decisionmakers to take into account and consider future climate harms will prevent and protect communities and individuals from the intergenerational poverty, trauma and displacement that will result from projected climate disasters.

Community Legal Sector: Climate Disasters and Legal Need

The Federation is concerned that climate change will increase legal and social needs if we do not take preventative measures to mitigate against future harm to those Australian communities and eco-systems who are at risk. Numerous Australian commissions of inquiry and reports into bushfires and floods have found that legal assistance following a disaster is an essential element in the recovery of impacted individuals and communities.¹⁴ Evidence shows that legal need following disasters varies according to the

¹³ For example, sections 3A(c) and 136(2)(a) of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act).

¹⁴ Disaster Legal Help Victoria, *Royal Commission into National Disaster Arrangements: Disaster Recovery and Coordinated Legal Assistance* (No NND.600.00292_0001, Royal Commission into National Disaster Arrangements, 8

nature and scale of the hazard. Disasters create new legal needs whilst also exacerbating underlying legal and financial stress. They also result in new cohorts seeking legal help, especially small business owners and farmers.¹⁵

The 2023 Victorian Law Foundation *Public Understanding of Law Survey* (PULS) is a dataset on legal needs in the Victorian community¹⁶ which reveals that the 2019–20 bushfires resulted in significant legal need, with bushfire-affected individuals more likely to experience problem-clustering and to report adverse consequences flowing from those legal issues.¹⁷ However, despite evidence of higher problem prevalence, only a small number of bushfire-affected individuals actually linked their legal problem to the bushfires, revealing a lack of cognitive association.¹⁸ Evidence about increased legal need from the bushfires aligns with Community Legal Centre peak body reports of increasing demand for disaster-related legal services across the Victorian community legal sector, including for new types of legal assistance.¹⁹

The increase in frequency and intensity of extreme weather events and other climate change impacts has had an unprecedented impact on the communities that Community Legal Centres work with. During and after bushfire events, for example, sections of the community experience a clustering of legal issues that require timely and accessible attention.²⁰ Slow-onset climate impacts equally contribute to the exacerbation of existing legal needs.²¹

During 2022–2023 in Victoria, Community Legal Centres provided more than 120,000 legal services for Victorians and more than 1.5 million people used online tools and self-help resources developed by our centres.²² The demand for legal help from Community Legal Centres has grown significantly due to ongoing climate disasters which widen inequality. Victorian Community Legal Centres have provided and continue to provide free legal assistance to support those most affected by climate change impacts to overcome the legal barriers keeping them from effective recovery. Pre-existing legal needs have been compounded and new legal needs are emerging.

May 2020) 4; *The Royal Commission into National Natural Disaster Arrangements Report The Royal Commission into National Natural Disaster Arrangements Report* (October 2020).

<https://naturaldisaster.royalcommission.gov.au/publications/royal-commission-national-natural-disaster-arrangements-report>; Joel Townsend, 'Natural Disasters: Designing Services to Respond to Legal Need' [2016] *Australian Environment Review* 318; Justice Connect, 'Submission to the Royal Commission into National Natural Disaster Arrangements' 17.

¹⁵ Disaster Legal Help Victoria, *ibid*.

¹⁶ Nigel J Balmer and others, *The Public Understanding of Law Survey Report Volume 1: Everyday Problems and Legal Need* (Victoria Law Foundation, 2023).

¹⁷ *Ibid* 95–97.

¹⁸ *Ibid* 97.

¹⁹ Federation of Community Legal Centres Victoria, *Inquiry into the 2022 Flood Event in Victoria: Submission to Legislative Council Environment and Planning Committee* (June 2023) 10.

²⁰ Nigel Balmer (2023), 95–97.

²¹ Julia Dehm, 'Climate Change, "Slow Violence" and the Indefinite Deferral of Responsibility for "Loss and Damage"' (2020) 29(2) *Griffith Law Review* 220.

²² Statistics accounting for 35 of Victoria's 47 Community Legal Centres: Federation of Community Legal Centres Victoria, *Annual Report 2022-2023*, 25-28.

https://assets.nationbuilder.com/fclc/pages/30/attachments/original/1700456500/FCLC_AR23_Web%2820231114%29.pdf?1700456500.

The areas of law that arise in disasters address the essential needs of communities, such as housing, employment, health, human rights and financial security. These include tenancy, social security, family violence, insurance, planning, human rights, discrimination, employment, building contracts, statutory liabilities, emergency management, probate, farm succession and the administration of justice. Community Legal Centres work closely with communities to ensure they have access to the resources and support they need through all the phases of adaptation, prevention, preparation, response, and recovery including addressing legal need.

The community legal sector's capacity to meet the needs of the Victorian community has not kept up with increasing demand. This gap will only continue to grow as climate disasters become more frequent and intense. Nearly half of all Victorians will have a legal problem in the next 12 months, and nearly one third will have more than one legal issue.²³ The legal system is complex and hard to navigate without climate change impacts compounding access to justice issues. People experiencing economic, environmental and social precarity, people living with a disability, First Nations people, the elderly, people from migrant and refugee communities, people experiencing homelessness and single parents are even more likely to have complex legal problems as well as face greater complexity recovering from extreme weather events.²⁴ Although greater support may be required for these groups, access to legal resources and information is often unequal. This can lead to poor outcomes for people who are most in need, such as those facing homelessness, crippling debts, loss of livelihoods and mental health issues because of the impact of extreme weather events.

The exacerbation of climate harms on the livelihoods of present generations will have an inevitable impact on future generations. As Community Legal Centres focus upon an integrated approach to addressing access to justice for communities it is imperative that the slide into intergenerational poverty, trauma and precarity is prevented and these legislative changes will assist in that goal.

Risk of Litigation and Human Rights Considerations

The Federation is concerned about the risk of expensive and time-consuming litigation in relation to climate disaster impacts, as well as potential breaches of human rights, that will occur unless the rights of future generations are adequately considered. The area of liabilities and obligations at law in relation to disasters is emerging, uncertain and constantly evolving. Acknowledging this legal uncertainty, the Federation wishes to raise awareness that both the unaddressed legal needs of communities and the evolving legal obligations of government authorities and the private sector are risks in themselves, now and into the future.

CIVIL AND ADMINISTRATIVE LIABILITY

The acceleration of climate change and extreme weather is devastating for impacted communities and creates present and future legal risk for governments and statutory authorities. Where governments unreasonably fail to take account of climate change, this failure may cause or contribute to harm against

²³ Department of Justice and Regulation Victoria, *Access to Justice Review* (2016) 55.

²⁴ Hartmut Fünfgeld and others, *Facilitating Adaptation: Lessons Learnt from Engaging and Supporting the Primary Health and Community Services Sector in Climate Change Adaptation* (RMIT University, Monash University, Victorian Centre for Climate Change Adaptation Research, 2014) 5-7.

individuals, rendering the government liable under a cause of action in negligence or nuisance.²⁵ The obligation to consider future generations would assist in reducing the risk of future liabilities and potentially expensive damages payments to impacted communities.

The landscape of statutory exemptions for local government authorities in relation to acts or omissions causing harm is subject to change. The indemnity of these authorities is unknown when faced with potential cases of negligence, nuisance, breaches of statutory duty and other suits in the future. Former High Court Justice Robert French has observed this trend, warning Australian governments, large businesses, and regulators of an influx of landmark legal cases which is already being seen in Europe and North America.²⁶ The threat of litigation relating to the flood events of 2022 is already materialising. One example is the Echuca residents left on the other side of a three-metre makeshift flood levee who are reportedly considering legal action against local authorities. Resident Erin McCann reported that the residents left on the 'wrong' side of the levee were assembling to "talk about class action".²⁷

Australian governments at all levels cannot afford, morally and economically, to not consider the foreseeable risks we are passing onto future generations.

Human Rights Liability

The rights of future generations are rising in normative value as climate change exposes all communities and generations to climate harm. The link between climate change and human rights was made explicit in the preamble of the Paris Agreement, to which Australia is party, calling on states to respect, promote and consider their respective obligations concerning human rights in their decision-making processes. Climate change in Australia has largely been framed as an economic or environmental issue, but its implications for fundamental rights and liberties of present and future generations require urgent consideration. The state has an obligation to protect individuals from threats to human rights, and this should include threats posed by climate change where its effects exacerbate social inequality and expose individuals to discrimination and human rights breaches.

²⁵ Australian Local Government Association, *Local Council Risk of Liability in the Face of Climate Change*, 17 August 2011, 26. https://walga.asn.au/getattachment/Policy-Advice-and-Advocacy/Environment/Climate-Change/Climate-ChangeResources/Baker_and_McKenzie_Local_Government_Risk_Legal_Liability_Climate_Change_Feb2016.pdf.aspx?lang=en-AU.

²⁶ T. McIlroy 'Judge warns of tide of climate cases', *Australian Financial Review*, 5 February 2020. <https://www.afr.com/politics/federal/judge-warns-of-tide-of-climate-cases-20200204-p53xlt>.

²⁷ A Sciberras 'Residents on the 'wrong side' of Echuca flood levee consider legal action', 24 October 2022, 9 News. <https://www.9news.com.au/national/victoria-floods-2022-residents-wrong-side-echuca-levee-contemplate-legal-action/15fe24d4-d48e-4771-8859-0d672b9c0f53>.

SECTION 3: BENEFITS OF INTERGENERATIONAL EQUITY

Intergenerational Equity and Law

Intergenerational equity is a core principle comprising the international concept of sustainable development. In 1992 it was expressed in Principle 3 of the *Rio Declaration on Environment and Development* resolved and supported by Australia at the United Nations Conference on Environment and Development (UNCED), also known as the 'Earth Summit', held in Rio de Janeiro, Brazil, more than 30 years ago, in June 1992:

The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

All the governments of Australia, federal, state and territory, agreed to include intergenerational equity in the 'Principles of Environmental Policy' set out in clause 3.5.2 of the *Intergovernmental Agreement on the Environment*.²⁸

Intergenerational equity - the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.

The principle of intergenerational equity was legislated in a declaratory style in almost identical terms as one of the principles of sustainable development in s 3A(c) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). The EPBC Act requires sustainable development, and thus the principle of intergenerational equity to be considered during decision making empowered by the Act.

An international declaration such as the *Rio Declaration on Environment and Development* is not binding in International Law, in contrast to treaties and conventions. There is substantial jurisprudence to indicate the principle of intergenerational equity would be found by the International Court of Justice to be a binding principle of international customary law.²⁹ Uncertainty about the enforceability at the Australian level of these expressions of sustainable development and the principle of intergenerational equity would be solved by legislating it in the manner proposed by the *Climate Change Amendment (Duty of Care and Intergenerational Equity) Bill 2023* (Cth).

There are international calls to move away from tokenistic non-binding statements of the principle of intergenerational equity. The much-lauded *Well-being of Future Generations (Wales) Act 2015* (Wales) sets out a legal mechanism to advance an enforceable principle of intergenerational equity in the context of sustainable development. Section 3 requires that public bodies (broadly defined) "must carry out sustainable development" (emphasis added). Section 5 goes on to provide that this means a public body "must act in a manner which seeks to ensure that the needs of the present are met without compromising

²⁸ Schedule to the *National Environment Protection Council Act 1994* (Cth).

²⁹ In his separate opinion in the *Gabcikovo-Nagymaros Project Case (Hungary v Slovakia)* [1997] ICJ Rep 7, Vice-President Weeramantry found the broader principle of sustainable development to be such.

the ability of future generations to meet their own needs.” The success of this legal initiative to embed the principle of intergenerational equity in policy sets a precedent Australia should feel confident in following.

The *Climate Change Amendment (Duty of Care and Intergenerational Equity) Bill 2023* (Cth) strives to legislate the principle of intergenerational equity as a legally binding provision of domestic Australian law.³⁰ Governmental decision makers will be legally obliged to consider the impact of decisions that could harm the climate on the health and wellbeing of current and future children, especially in connection with decisions that facilitate the financing and development of projects that could harm the climate and consequently harm Australian communities. Decision makers would also be prevented by law from making decisions that would harm the climate if the decision were to pose a material risk of harm to the health and wellbeing of current and future children in Australia.

Recommendation 1

That the Federal Government pass legislation with an express obligation for the benefit of future generations, especially in connection with climate change.

³⁰ See https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=s1385
David Pocock has set up a website to promote the Bill:
https://adutyofcare.davidpocock.com.au/#homepage_section_about_the_bill

Governmental Decision Making – Relevant and Irrelevant Considerations

There is a long-standing principle of administrative law that a governmental decision maker must take into account relevant considerations and reject irrelevant considerations when making decisions. A decision that contravenes this principle should be overturned by a court undertaking judicial review.³¹

Whether climate change is a relevant consideration in decisions on the approval of new fossil energy extraction projects was thrown into doubt by the decision of the Full Federal Court in *Minister for the Environment v Sharma*,³² and decisions of Justice McElwaine in the Federal Court in the *Living Wonders Cases*,³³ which are now on appeal to the Full Federal Court. The requirements in the Climate Change Amendment (Duty of Care and Intergenerational Equity) Bill 2023 (Cth) that (1) the direct and *indirect* results of likely emissions of greenhouse gases on the health and wellbeing of current and future children in Australia must be taken into account, and that (2) the health and wellbeing of current and future children in Australia must be the paramount consideration, will resolve judicial doubt about the legal relevance of climate change considerations to intergenerational equity.

Recommendation 2

That the Federal Government pass legislation that requires the health and wellbeing of current and future children in Australia as an express mandatory consideration to be taken into account when making a decision that potentially contributes to climate change, especially in connection with the exploration or extraction of coal, oil or natural gas.

³¹ This long standing common law principle is also expressed in legislative models of judicial review. See for example s 5(2)(a) and (b) and s 6(2)(a) and (b) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

³² [2022] FCAFC 35.

³³ *Environment Council of Central Queensland Inc v Minister for the Environment and Water* [2023] FCA 1117 and *Environment Council of Central Queensland Inc v Minister for the Environment and Water (No 2)* [2023] FCA 1208.

SECTION 4: CONCLUSION

The Federation has been increasingly engaged in climate justice and disaster response work. The community legal sector plays a vital role in providing advice and representation to clients impacted by climate change and extreme weather events as well as working with communities to strengthen their preparedness and resilience now and into the future.

The Federation is also deeply concerned about the world that is emerging for future generations. In this submission, we have explored the denial of climate and disaster justice implicit in the conditions that will emerge by the end of this century.

Climate and disaster impacts that affect the clients of Community Legal Centres are becoming more and more extreme. In addition to impacts on their health and wellbeing, communities require additional legal services, often urgently, to assist them in managing situations they might never have envisaged. The Federation has taken the opportunity of making this submission to address issues that communities and Community Legal Centres face in the changing climate that is driven by rising emissions.

The Federation supports the reform embodied in the Climate Change Amendment (Duty of Care and Intergenerational Equity) Bill 2023 (Cth).

APPENDIX – IMPACTS

Extreme heat

Heatwaves are Australia's most dangerous weather hazard in terms of loss of life.³⁴ Heat is also the most frequent cause of extreme weather-related injury hospitalisations and deaths in Australia. Exposure to prolonged or severe heat can result in physical conditions ranging from mild heat stroke symptoms to death. Elevated temperatures are also linked to irritability, fatigue, and decreased performance, which can increase the risk of injury especially for those exposed to outdoor employment. Evidence suggests that higher daily temperatures are associated with an increased propensity for assault. The risk of drowning deaths has also been shown to increase during heatwaves.

Bushfires

Australia is the most fire-prone country in the world and the risk of severe bushfires is increasing. Climate impacts, such as high temperatures, low humidity, lack of recent rain and strong winds, contribute to increased risk of bushfire danger. Bushfires frequently occur in conjunction with extreme weather events, such as heatwaves, droughts, or storm activity, such as lightning strikes and high winds. Hospitalisations and deaths due to bushfire-related injury peaked in 2019–20, which was an El Niño year. There was a fifteen-fold increase in bushfire-related deaths in 2019–20 compared with 2018–19 which is concerning not only for future generations but also the present.³⁵

Floods

Rain and storm events are often interrelated, and include thunderstorms, cyclones and heavy or prolonged rainfall, which can lead to flooding and landslides. More frequent intense rainfall events increase the risk of floods in urban areas because of the larger areas of non-permeable surfaces found there. In less urban areas, extreme multi-day rainfall is usually needed to cause flooding.

In 2021–22, there were 60 rain and storm-related injury hospitalisations, which was the highest number for any year out of 10 years examined, three times the number in the previous year, and 1.9 times the yearly average over the nine years before.³⁶ Sea level rise will also lead to coastal inundation and flooding of estuaries and other tidal riverine environments. Future generations will be forced to suffer the grave dangers and financial burdens of all forms of flooding as routine events.³⁷

³⁴ Australian Institute of Health and Welfare, Australian Government, *Let's talk about the weather: injuries related to extreme weather*, Canberra, 2023, 12–14. <https://www.aihw.gov.au/reports/injury/extreme-weather-injuries/contents/about>.

³⁵ Ibid, 15–17.

³⁶ Ibid, 18–19.

³⁷ John Englander, *Moving to Higher Ground: Rising Sea Level and the Path Forward* (Science Bookshelf, 2021).