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Senate Standing Committee on Environment and Communications
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21 November 2023

RE: Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023 – Call for Submissions

The National Environmental Law Association Ltd ACN 008 657 761 (**NELA**) welcomes the opportunity to make a submission to the Senate Standing Committee on Environment and Communications on your inquiry into the *Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023* (Cth) (**Bill**).[1]

1. About NELA and its interest in this Senate Inquiry

NELA is the national peak body for advancing Australian environmental law and policy. It is an independent, multidisciplinary, member-based association focused on environmental law and sustainability. NELA is managed by a national board that includes directors with expertise in international and domestic legal frameworks for biodiversity conservation, climate change and natural disasters, environmental regulation and regulatory theory and natural resource management.

One of NELA's core objectives is to provide a forum for, and to otherwise assist in, the discussion, consideration, and advancement of environmental law across the legal profession and the wider community. NELA is also a member of the leadership committee of the Professional Bodies Climate Action Charter Australia and New Zealand Forum, which represents professional members in Australia across a wide range of sectors from finance, insurance, science, engineering, law, health, construction, and the built environment.

[1] Submission authorship by Dr Amy Steinepreis and members of the NELA Climate Change Working Group. This submission was reviewed and approved by the NELA Board.

Given the potential significance of the Bill, with its proposal to introduce two statutory duties, and its focus on the consideration of climate harms and the principle of intergenerational equity in administrative decision-making, the Bill is important to NELA's members. NELA is grateful for the opportunity to make a submission.

2. Background to this Submission

NELA supports the aims of this Bill. In particular, NELA welcomes the statutory duties in the Bill's proposed ss 15D and 15E as an important step, given the pressing need to address decision-making that is likely to result in significant greenhouse gas emissions.

Such statutory duties are necessary because the three judgments in *Minister for the Environment v Sharma* (***Sharma***)[2] make clear that without legislative intervention, Australian courts will be reluctant to:

- impose a common law duty of care on federal decision-makers in relation to climate change (at least under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**)); and
- alter the prevailing causation test in Australia to one that would accommodate the global nature of climate change and its potential for future harms.

3. Summary of Submission

NELA considers that the *Climate Change Act 2022* (Cth) would be the appropriate Act in which to include statutory duties relating to climate harms. This Bill would strengthen that Act by including Scope 3 emissions in its proposed ss 15C(1) and (2) definitions of 'significant decisions' for the purpose of the proposed statutory duties.

While generally supportive of the Bill's proposed reforms, NELA submits that the Bill requires amendment both to clarify its operation, and to capture decisions, harms, and plaintiff classes falling outside the reach of the statutory duties as currently proposed.

3.1 Clarification required

The Bill, Explanatory Memorandum, and Second Reading Speech should clarify whether the Bill's purpose is to:

[2] *Minister for the Environment v Sharma* (2022) 291 FCR 311 ('*Sharma*').

- make 'significant decisions' (as defined by the Bill) subject to judicial review by Australian children;
- give rise to claims for remedies of the type claimed in *Sharma*, or other common law remedies; and/or
- deter decision-makers from making decisions that would likely result in climate harms to Australia's current and future children.

The Bill should recognise that it creates absolute duties, not duties of care. The 'causation test' in proposed s 15E should also be expressed to apply to a decision that *materially increases the risk of harm*.

3.2 Gaps

The Bill in its current form likely does not capture:

- state-level decisions resulting in greenhouse gas emissions over the threshold stated in proposed ss 15C(1)(b)(ii) and (2)(b)(ii) (that do not enliven the controlled action provisions in the EPBC Act, and do not come within the other Commonwealth Acts listed in proposed ss 5 and 15C(3));
- other types of climate harm to Australian children that fall outside 'health and wellbeing'; and
- climate harm to other vulnerable classes of plaintiff (for example, the Torres Strait Islanders from the Guda Maluyligal Nation in *Pabai Pabai v Commonwealth* (***Pabai Pabai***), who are currently pleading property damage, loss of fulfillment of *Ailan Kastom*, loss of Native Title rights, and injury, disease, or death).[3]

4. <u>Detailed Submission</u>

4.1 Strengths of the Bill

4.1.1 NELA considers that the proposed statutory duties, although limited, are necessary as Australia's total greenhouse gas emissions are continuing to rise,[4] despite:

- the acceptance of uncontested expert evidence, led on a final basis, by the Full Court of the Federal Court of Australia in *Sharma* that there can be no new fossil fuel projects, nor extensions to such projects, if the world is to meet even a 2°C carbon budget;[5] and

[3] Pabai Pabai, 'Applicants' Amended Concise Statement', Submission in *Pabai Pabai v Commonwealth,* VID622/2021, 16 May 2023.
[4] Department of Climate Change, Energy, the Environment and Water, *National Greenhouse Gas Inventory Quarterly Update: March 2023* (Quarterly Update, 29 August 2023).
[5] *Sharma* (n 2) 402–3 [286]–[290] (Allsop CJ).

- the best available science underscoring the importance of meeting a 1.5°C target.[6]

4.1.2 NELA considers that the *Climate Change Act 2022* (Cth) is the logical statutory home for the proposed duties.

From the point of view of statutory interpretation and ease of public access, it is useful to have within the one statute both Australia's national emissions targets, and proposed provisions (ss 15D(2)(a) and 15E(2)(a)) requiring decision-makers not to make decisions that would prejudice those targets and Australia's Nationally Determined Contributions (**NDCs**) under the Paris Agreement.

4.1.3 NELA submits that the threshold referred to in ss 15C(1)(b)(ii) and (2)(b)(ii) is apposite, since it is likely to capture a wider range of projects than the Safeguard Mechanism.

The proposed threshold in the Bill is a carbon dioxide equivalence of at least 100,000 tonnes (gross) over the lifetime of one or more facilities, whereas the Safeguard Mechanism threshold captures facilities that emit that same figure of carbon dioxide in a year (and the Safeguard Mechanism does not require reporting of Scope 3 emissions).

NELA notes that given the lack of a mandatory requirement to report Scope 3 emissions in Australia, an alternative, desirable approach would be to follow the EU's Corporate Sustainability Reporting Directive by setting a threshold not based on emissions, but based on the criteria of 'large' and 'listed' corporations. This Directive is to take effect in the EU from 2024 onwards and is to include Scope 3 reporting as well as other measures of environmental, social, and governance performance over time.

4.1.4 NELA agrees that it is important that the Bill's definitions of 'significant decision' in proposed ss 15C(1) and (2) include Scope 3 emissions.

Consistent with the Paris Agreement's accounting mechanism for NDCs, the targets in the *Climate Change Act 2022* (Cth) s 10(1) do not refer to Scope 3 emissions. Yet exceeding *global* carbon budgets is likely to cause domestic climate harms, and certain countries (including Australia) bear disproportionate responsibility for Scope 3 emissions.

[6] Joeri Rogelji et al, 'Mitigation Pathways Compatible with 1.5°C in the Context of Sustainable Development' in Valérie Masson-Delmotte et al (eds), *Global Warming of 1.5°C* (Intergovernmental Panel on Climate Change, 2019) 93, 104.

In this context, NELA commends the Bill for including Scope 3 emissions in determining which decisions meet the threshold for a 'significant decision', since it is only if decision-makers consider Scope 3 emissions that the Bill's new proposed object s 3(d) of intergenerational equity can be achieved.

The Bill's clear provision that Scope 1, 2, and 3 emissions are all to be counted with respect to the threshold avoids the concern raised in *Sharma* that Federal (and State) Government policy on Scope 3 emissions is not an appropriate arena for judicial intervention.[7]

4.1.5 NELA appreciates the Bill's breadth, given the intention stated in the Explanatory Memorandum to capture (within proposed s 15C(1(a)) decisions giving public financing and development support to projects that would likely result in greenhouse gas emissions above the threshold.

4.1.6 NELA considers that the s 15E duty in its current wording strikes the right balance by leaving scope for a federal decision-maker to approve a project above the threshold, with stringent conditions in place (though the Minister for Environment currently has a limited power to attach conditions to approval of a project under the EPBC Act).

4.2 Where the Bill requires clarification

4.2.1 Clarify the purpose of the Bill, and remedies to which the Bill gives rise

NELA acknowledges that the Bill may have a deterrent effect on decisions that would likely result in climate harms to Australia's current and future children, and thus could have a wider impact than is reflected in judicial review applications or other claims.

NELA considers that proposed ss 15G and 15F are important inclusions in the Bill to enable Australian children to seek judicial review of a 'significant decision'. Proposed s 15G of the Bill extends judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**) to 'significant decisions' as defined by the *Climate Change Act 2022* (Cth), while proposed s 15F extends standing for judicial review to Australian children.

These proposed provisions may achieve the purpose of holding decision-makers accountable for certain decisions that would likely result in climate harms. Additionally, the provisions also give rise to the remedies in ADJR Act s 16(1), including the remedies of declaration (s 16(1)(c)) and injunction (s 16(1)(d)).

[7] See, eg, *Sharma* (n 2) 320–1 [15] (Allsop CJ).

- Recall that the *Sharma* plaintiffs sought both a declaration of a duty of care and an injunction,[8] and note that the *Pabai Pabai* plaintiffs seek the same two remedies (as well as damages).[9]

Since the Bill creates two statutory duties, it may also give rise to another cause of action: the tort of breach of a statutory duty. However, it is unclear whether the Bill intends to confer a cause of action in tort for breach of the ss 15D and 15E duties.

As this is a Bill creating a duty for the benefit of particular persons (current and future children in Australia), there is a *prima facie* inference that the Bill intends to create a correlative right to sue at common law for the class of persons who may be injured by the duty's contravention (see *Sovar v Henry Lane Pty Ltd*).[10]

It would be a matter of statutory interpretation to determine whether the Bill demonstrates a contrary intention,[11] undertaken by reference to the 'scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state of the law' and general relevant circumstances.[12]

Given that numerous provisions in the Bill focus on the ADJR Act, a court may consider it unlikely that the Bill's intention is to make available the common law remedy of damages for breach of statutory duty. However, it is also arguable that as the Bill's Second Reading Speech responds to the reasoning in *Sharma* at first instance, it is intended to make a common law cause of action available to Australian children.

Due to possible issues of indeterminacy, and personal liability in damages distorting decision-making processes,[13] the Bill may benefit from clarification that breach of ss 15D and 15E does not give rise to a common law right to damages, but rather limits plaintiffs to the ADJR Act remedies.

If the intention is instead to allow suits for breach of statutory duty, then the Bill should clarify that it limits plaintiffs to remedies at general law equivalent to the ADJR Act remedies (such as declaration and injunction).

4.2.2 Expressly recognise that the Bill creates absolute duties

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[8] *Sharma v Minister for the Environment* (2021) 391 ALR 1, 4–6 [4]–[17] (Bromberg J) ('*Sharma (No 1)*').
[9] Pabai Pabai, 'Applicants' Amended Concise Statement', Submission in *Pabai Pabai v Commonwealth,* VID622/2021, 16 May 2023 [33]–[34].
[10] *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, 400 (MacTiernan ACJ), 404 (Kitto J).
[11] Ibid 405 (Kitto J).
[12] Ibid.
[13] See *Sharma* (n 2) 397 [268] (Allsop CJ)

The title of the Bill contains the words 'Duty of Care', and the Second Reading Speech refers to the duty of care found by Bromberg J at first instance, as well as to the need for legislators 'to ensure we have a duty of care to our children'.

Yet unlike the duty pleaded in *Sharma*, the duties in proposed ss 15D and 15E are not statutory *duties of care* (duties *to take reasonable care* either to protect, or avoid harm to, plaintiffs). Instead, ss 15D and 15E are expressed as *absolute duties* (a duty to consider the health and wellbeing of Australia's children, and a duty not to make certain decisions).

Similarly, to proposed ss 15D and 15E, the Bill's Explanatory Memorandum also makes no reference to the concept of a 'duty of care'. NELA submits that the Bill should expressly recognise that it creates absolute duties rather than duties of care, for two reasons:

1. In the future, plaintiffs may well plead both a common law duty of care (as in *Sharma*) and the duties in proposed ss 15D and 15E in the alternative, resulting in confusion if the absolute duties in ss 15D and 15E are also referred to as 'duties of care'.
2. If a court finds ss 15D and 15E ambiguous as to whether they create absolute duties, or duties of care, a court may look to the references to *Sharma* and 'duty of care' in the Second Reading Speech to infer that the Bill's intention is to create duties of care. Yet duties of care would not achieve the Bill's object of intergenerational equity to the same extent as absolute duties.

Absolute duties make it easier for plaintiffs to demonstrate breach, which matters because even at first instance in *Sharma*, Bromberg J declined to grant an injunction on the basis that the plaintiffs had not established reasonable apprehension of breach of the common law duty of care pleaded.[14]

To assess breach of an absolute duty, a court simply needs to determine whether the Minister has breached the words of the statute. A court would not need to:

- deal with common law concepts that arise when dealing with breach of a duty of care, such as reasonable foreseeability (see *Deal v Father Pius Kodakkathanath*);[15] or
- determine whether a *reasonable* Minister would have considered the interests of children, or would have made a particular decision, as is required for the breach inquiry in negligence. Absolute duties therefore circumvent the 'policy' stumbling block in *Sharma* (the problem of calling on the judiciary to determine the reasonableness of government actions).

[14] See *Sharma (No 1)* (n 8) 117 [510] (Bromberg J).
[15] *Deal v Father Pius Kodakkathanath* (2016) 258 CLR 281, 301 [52] (French CJ, Kiefel, Nettle and Bell JJ).

4.2.3 Reword the 'causation' test in the s 15E duty

Proposed section 15E(1) creates a duty on a person not to make a significant decision if the likely emission of GHGe, as a direct or indirect result of the decision, *poses a material risk of harm* to the health and wellbeing of current or future children in Australia.

Greater clarity can be achieved by replacing the words 'poses a material risk of harm' with 'materially increases the risk of harm'. The test of a material increase in the risk of harm is:

- language with which the courts are familiar, and with which the Full Court in *Sharma* engaged[16] (material increase in risk being the test applied in the English case of *Fairchild v Glenhaven Funeral Services Ltd* (***Fairchild***)[17] in the limited context of asbestos claims); and
- more conducive to the analyses used in *Sharma* to consider (in obiter) the materiality of the greenhouse gas emissions of a particular project.

It is clearer to speak of an increase in greenhouse gas emissions materially *increasing* a risk of harm (either through increasing global temperatures in a roughly linear correlation, or through increasing the risk of triggering tipping points). NELA would support a clear introduction of the *Fairchild* test in s 15E(1), as a reform necessary to address causation of climate harms.

Two *Sharma* judgments (Allsop CJ and Beach J) indicated that Australian plaintiffs pleading a duty of care in relation to climate harms would not be able to establish causation unless Parliament legislated to recognise the test of 'material increase in risk'[18] or some other test appropriate to climate harms.

4.3 Decisions, harms, and claims falling outside the Bill's current reach

4.3.1 State-level decisions that do not enliven Commonwealth decision-making

The reason that the project extension in *Sharma* went to the Commonwealth Minister for the Environment for approval did not relate to the project's greenhouse gas emissions. It reached the Commonwealth Minister fortuitously, because the project enlivened 'controlled action' provisions in the EPBC Act with respect to two 'matters of national environmental significance' under the EPBC: listed threatened species and the water resource.[19]

[16] *Sharma* (n 2) 378 [181] (Allsop CJ), 425 [432]–[433] (Beach J).
[17] *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32.
[18] *Sharma* (n 2) 409 [326] (Allsop CJ).
[19] See ibid 348 [88], 412 [346] (Allsop CJ).

The Bill in its current form will not capture State-level decisions approving major greenhouse gas projects unless these projects are caught by the EPBC Act (or another Commonwealth Act listed in the Bill) for a reason unrelated to climate change.

NELA is therefore concerned that this Bill will not function as effectively without amendments to include a Climate Trigger in the EPBC Act (note the recent attempt to legislate such a trigger: *Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2022 (No 2)* (Cth), cls 146N, 146P).

4.3.2 Other types of climate harm that may be suffered by Australian children

Beach J in *Sharma* noted that the selection of personal injury was arbitrary, and that there was no good reason to exclude from the claim all those who would suffer property damage, or consequential economic loss.[20] This criticism could also apply to this Bill's selection of 'health and wellbeing' as the relevant harm.

- The definition of "health and wellbeing" in the Bill includes:
  (a) emotional health and wellbeing;
  (b) cultural health and wellbeing; and
  (c) spiritual health and wellbeing.
- For clarity, the definition of 'health and wellbeing' in proposed s 5 should include physical health.

4.3.3 Other plaintiff classes vulnerable to harm

NELA is supportive of the Bill's focus on current and future Australian children. NELA notes that General Comment No. 26 of the UN Committee on the Rights of the Child, released 22 August 2023, recognises that climate change, and the interlinked issues of biodiversity loss and pollution, are threats to the rights of children under international law.

- Intergenerational equity has been part of environmental law in Australia, uncontroversially, for decades.[21]

[20] Ibid 484 [746] (Beach J).

[21] See, eg, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3A(1); *Environmental Protection Act 1986* (WA) s 4A; *Protection of the Environment Administration Act 1991* (NSW) s 6(1); *Environment Protection Act 2017* (Vic) s 21 (and its predecessor *Environment Protection Act 1970* (Vic) ss 1B–1L); *Local Government Act 1993* (NSW) s 89 read with *Interpretation Act 1987* (NSW), definition of "ecologically sustainable development"; *Nature Conservation Act 1992* (Qld) s 11 as well as the national scheme - the *National Environment Protection Council* - Cth, ACT, WA, NSW, SA, Tas, Vic, NT: sch 1, cl 3.5.2, plus many decisions following *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256.

- Intergenerational equity has long been considered financially prudent for government finances.[22]

In the Philippines case of *Minors Oposa v Secretary of State of the Department of Environment and Natural Resources,*[23] plaintiffs were granted standing to represent themselves and the interest of future unborn citizens when challenging the issue of forest licences on the basis that the Constitutional right to a balanced and healthy ecology had been breached. However, as the Explanatory Memorandum to this Bill recognises, climate harms are not equally distributed. It is necessary to consider the potential impact of this Bill on other plaintiff classes vulnerable to climate harms, including First Peoples.

Taking the example of *Pabai Pabai* above, the Bill may be a double-edged sword, in that:

- the Bill may provide evidence of government knowledge of climate harms, including the relevance of Scope 3 emissions to domestic harm, for use by *Pabai Pabai* plaintiffs; but
- if the *Pabai Pabai* plaintiffs sought to rely on legislation such as this to support a common law duty of care, government counsel could argue that the Bill's amendments to the *Climate Change Act 2022* (Cth) establish a relationship between the Minister and Australian children, yet do not support a relationship between the Minister and a class such as the *Pabai Pabai* plaintiffs, potentially weakening other plaintiffs' arguments about a duty of care.

The Senate Standing Committee should consider widening the remit of this Bill to address the special vulnerability of plaintiff classes beyond children. This includes plaintiffs of any age, who may be able to demonstrate existing property damage referable to climate change, and provide stronger evidence of more immediate harm than children who are likely to suffer future climate harms.

5. Conclusion

NELA appreciates the opportunity to make submissions on the statutory duties proposed by this Bill, which has the potential to promote the accountability of decision-makers to Australians who are and will be vulnerable to climate harms.

NELA looks forward to further opportunities to participate in the consultation process. Any questions should be directed to president@nela.org.au.

Drafted by the NELA Climate Change Working Group on behalf of the NELA Board

[22] See, eg, *Local Government Act 1993* (NSW) s 8B(d).
[23] *Minors Oposa v Secretary of State of the Department of Environment and Natural Resources* (1994) 33 ILM 173.