



Australian
Human Rights
Commission

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

Australian Human Rights Commission

Submission to the Environment and Communications
Legislation Committee

23 November 2023

ABN 47 996 232 602
Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001
General enquiries 1300 369 711
Complaints info line 1300 656 419
TTY 1800 620 241

Australian Human Rights Commission
www.humanrights.gov.au

Contents

1	Introduction	3
2	Summary	3
3	Recommendations.....	5
4	Background	6
5	Support for what the Bill seeks to achieve	10
6	Concerns arising from the Bill’s approach	12
7	Preferred way to achieve the Bill’s objects	16
8	Safeguarding Children – A CRIA model for Australia.....	19
	Appendix A.....	21
	Endnotes	22

1 Introduction

1. The Australian Human Rights Commission (Commission) makes this submission to the Senate Environment and Communications Legislation Committee's inquiry into the Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023 (Bill).
2. The Commission is Australia's National Human Rights Institution (NHRI).¹
3. As identified in an Australian-led resolution to the United Nations Human Rights Council, adopted in October 2022,² it is important for the Commission to assist the Australian government to develop appropriate laws and policy to protect the human rights of people in Australia from the impacts of climate change.

2 Summary

4. Consistent with Australia's support of relevant resolutions of the United Nations Human Rights Council,³ and its obligations under the Paris Agreement,⁴ the *Climate Change Act 2022 (Cth)* (CCA) sets out Australia's greenhouse gas emissions reduction targets in accordance with its Nationally Determined Contributions and requires the relevant Minister to report annually on a number of matters, including progress made during the year towards achieving those targets.⁵
5. This Bill seeks to amend the CCA to include among its objects:

[the promotion of] intergenerational equity by requiring the health and wellbeing of current and future children in Australia to be considered by persons making certain administrative decisions that are likely to contribute to climate change.⁶
6. To achieve this object, the Bill proposes that the CCA:
 - a) impose a statutory duty on decision makers to consider the health and wellbeing of current and future children in Australia as the paramount consideration when making 'significant decisions' (as defined in the Bill),⁷ and
 - b) impose a statutory duty requiring decision makers to not make 'significant decisions' concerning the exploration and extraction of fossil fuels if the likely emission of greenhouse gases as a result of the decision poses a material risk of harm to the health and wellbeing of current and future children in Australia.⁸
7. The Bill also proposes to modify the application of certain definitions in the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* (ADJR Act),

including to give children residing in Australia standing to commence judicial review proceedings regarding decisions subject to those statutory duties.⁹

8. The Commission recognises that the Bill responds to the decision of the Full Court of the Federal Court of Australia (Full Federal Court) in *Minister for the Environment v Sharma & Ors*.¹⁰
9. The Commission supports legislative change to promote intergenerational equity as a means of protecting the human rights of current and future generations of people in Australia from the impacts of climate change. This includes support for imposing a statutory duty on decision makers to consider the rights of current and future children in Australia when making significant decisions that would result in greenhouse gas emissions.
10. The Commission also supports amending the objects of the CCA to promote intergenerational equity by requiring children's rights to be taken into account when making such decisions.
11. The Commission considers that incorporating a statutory requirement for a Child Rights Impact Assessment (CRIA) to inform certain decision making would be the most effective way to address the Bill's objects. This will ensure that the best interests of the child are assessed in a consistent manner in line with international best practice, which is vital for consistency, transparency and accountability in decision-making.
12. The Commission considers that the impacts of climate change are intrinsically linked to all aspects of human rights, not only to health and wellbeing outcomes. Any statutory duty seeking to promote intergenerational equity should therefore have regard to the full range of rights that are impacted by decisions that result in increased greenhouse gas emissions.¹¹ This is achieved through the CRIA approach.
13. Addressing environmental degradation caused by climate change by having regard to children's rights aligns with the global response to these issues and Australia's international commitments and obligations.¹² By taking this approach all people in Australia will benefit and enjoy the full realisation of their human rights.
14. The Commission makes recommendations for amendments to this Bill, that would bring the Bill into closer alignment with Australia's international obligations and commitments on children's rights and intergenerational equity in environmental decision making.

3 Recommendations

15. The Commission makes the following recommendations:

Recommendation 1

The Commission recommends that the CCA be amended so that its objects include the promotion and protection of intergenerational equity by requiring the full range of children’s human rights to be considered by persons making decisions under certain relevant Acts that would result in the significant emission of greenhouse gases.

Recommendation 2

The Commission recommends that Recommendation 1 is given effect in a manner consistent with Australia’s international obligations and commitments and recognised best practice. To achieve this, the Commission recommends that the statutory duty in Recommendation 1 require relevant decision makers to consider the best interests of the child as a primary consideration when making relevant decisions under a relevant Act.

Recommendation 3

The Commission recommends that statutes that empower persons to make relevant decisions that could result in the significant emission of greenhouse gases be amended to note the obligation on those decision makers set out in the CCA (as set out at Recommendations 1 and 2), to treat the best interests of the child as a primary consideration when making the relevant decision.

Recommendation 4

The Commission recommends that the CCA (or a related instrument) be amended so that the best interests of the child be required to be determined through a Child Rights Impact Assessment (CRIA).

Recommendation 5

The Commission recommends that the CCA be amended to require decision makers to publish their reasons for decision, including their CRIA outcomes, and publish a version of those reasons and outcomes in a child-friendly language, and in languages other than English that may be in widespread use by the children likely to be impacted by the decision.

Recommendation 6

The Commission recommends that matters set out in these submissions, and these recommendations, be used by government and other policy makers to guide future legislation and policy that is concerned with the impacts of climate change, greenhouse gas emissions, or intergenerational equity, as a means of aligning intended outcomes with Australia's human rights obligations and commitments.

4 Background

16. In December 1992, Australia signed the Rio Declaration on Environment and Development, which was made at the June 1992 United Nations Conference on Environment and Development held in Rio de Janeiro, Brazil.
17. The Rio Declaration expounded the 26 principles set out in the 1972 Stockholm Declaration,¹³ responsible for initiating global cooperation concerning environmental issues.
18. While recognising that nations have common but differentiated responsibilities within the international community, the Rio Declaration comprises a preamble and 27 principles that support a human right to a clean, healthy and sustainable environment, including principle 3:

The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.¹⁴
19. The United Nations Framework Convention on Climate Change (UNFCCC) entered into force on 21 March 1994 with sustainable development and protection from the adverse impacts of climate change at its core. Australia ratified the UNFCCC at the same time as it signed the Rio Declaration. Article 3 of the UNFCCC sets out the following guiding principles:

The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, developed country Parties should take the lead in combating climate change and the adverse effects thereof. ...

The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.¹⁵
20. Australia had already committed to respect children and ensure their rights as set out in the CRC, which it ratified in December 1990. The CRC affords every child the inherent right to life.¹⁶ It also provides for the right

of every child to the enjoyment of the highest attainable standard of health, including by considering the dangers and risks of environmental pollution.¹⁷

21. 'Intergenerational equity' emerged as a factor in international discourse on children's rights in the mid-1980s. The concept brought together principles of child participation in decision making and the universality (both in terms of location and time) of human rights. Importantly, the concept of intergenerational equity is not limited to today's children, who are the next generation, but also includes persons yet to be born.¹⁸
22. The Australian government has produced six 'Intergenerational Reports' since 2002, with issues of environmental sustainability considered since 2007.¹⁹ However, this is potentially the first time that the concept of intergenerational equity has been incorporated into proposed legislation concerning environmental decision making.²⁰
23. In September 2020, eight Australian children commenced proceedings against the federal Minister for the Environment in *Sharma & Ors v Minister for the Environment*.²¹ In that proceeding, the children submitted that the Minister had a duty of care to protect Australian children from the impacts of climate change when exercising particular decision-making powers.
24. At first instance, the children were successful. On 27 May 2021, the Federal Court of Australia determined that Australia's federal Minister for the Environment had a duty to take reasonable care to avoid causing personal injury to children in Australia when exercising decision-making powers under ss 130 and 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).²² Those powers related to the approval of 'controlled actions'. The relevant action in that case was the extension of a coal mine.
25. Six weeks later, on 8 July 2021, that Court made a declaration reflecting its findings – that Australia's federal Minister for the Environment had a duty to avoid causing personal injury or death arising from carbon dioxide emissions when exercising powers under ss 130 and 133 of the EPBC Act. That duty was owed to all persons who were under 18 years of age and ordinarily resident in Australia at the time the proceeding commenced.²³
26. On 15 March 2022, the Full Federal Court overturned the first instance decision, unanimously allowing the appeal against the declaration made by the primary judge about the existence of a common law duty of care.²⁴

27. In doing so, the Full Federal Court accepted that the threat of climate change and the nature of the risks and dangers from global warming, including possible global catastrophe, were not in dispute between the parties. This was of some significance, including because the federal Minister for the Environment was a party and did not challenge the issue in the appeal.
28. Each member of the Full Federal Court gave different reasons for allowing the appeal. Some of these reasons included that:
 - (a) decisions about the appropriate response to climate change should be made by the executive or Parliament, and should not be determined by the judiciary on the basis of an implied common law duty in private litigation
 - (b) the duty imposed by the primary judge was inconsistent and incoherent with the particular decision making in question under the EPBC Act, which was focused on the protection of identified species and communities of fauna and water resources
 - (c) control of carbon dioxide emissions and the protection of the public from personal injury caused by the effects of climate change were not roles that the Parliament conferred on the Minister under the EPBC Act
 - (d) imposing a duty in tort was inappropriate because there was a lack of proportionality between what the Minister was able to control (approval of a particular project) and the ultimate harm caused by climate change
 - (e) imposing the duty was inappropriate because there was insufficient closeness in the relationship between the Minister's exercise of the power and the risk of harm to Australian children; and
 - (f) recognising a duty in tort would result in indeterminate liability for damages if harm eventuated at some point in the future.
29. The EPBC Act provides a legal framework to protect and manage Australia's unique flora, fauna, ecological communities, and heritage places with the aim of conserving Australia's biodiversity and cultural

heritage. It requires approvals to be obtained from the federal Minister for the Environment for activities that may have a significant impact on these interests. However, despite being enacted five years after the Rio Declaration and three years after the UNFCCC coming into effect, the EPBC Act is silent on both climate change and greenhouse gas emissions.

30. International law and commentary has recognised the interconnectedness of climate change impacts on every aspect of development, energy, and environmental policy since the Stockholm Declaration. As discussed in more detail below, it is appropriate that the EPBC Act, and other Acts permitting decisions to be made with significant environmental consequences, directly consider the intergenerational impacts of climate change as part of their decision-making processes.
31. The CCA came into effect in September 2022. As noted above, the CCA sets out Australia's greenhouse gas emissions reduction targets, consistent with Australia's obligations under the Paris Agreement, and requires annual reporting by the Minister.
32. The CCA does not contain any enforceable duties in relation to particular decision-making which could impact on whether Australia meets these targets, nor does it require decision makers to consider intergenerational equity when making decisions concerning climate change, emissions, or the environment.
33. In August 2023, the UN Committee on the Rights of the Child published General Comment No. 26 on children's rights and the environment with a special focus on climate change. General Comment No. 26 elucidated how the CRC should be interpreted by duty bearers to ensure government obligations and responsibilities to children can be met.
34. General Comment No. 26 explains that regarding article 3 of the CRC, concerning the best interests of the child:

Environmental decisions generally concern children, and the best interests of the child shall be a primary consideration in the adoption and implementation of environmental decisions, including laws, regulations, policies, standards, guidelines, plans, strategies, budgets, international agreements and the provision of development assistance. Where an environmental decision may have a significant impact on children, conducting a more detailed procedure to assess and determine children's best interests that provides opportunities for their effective and meaningful participation, is appropriate.²⁵

35. Similarly, General Comment No. 26 explains that:

... the children constantly arriving are also entitled to the realization of their human rights to the maximum extent. ... States bear the responsibility for foreseeable environment-related threats arising as a result of their acts or

omissions now, the full implications of which may not manifest for years or even decades.²⁶

36. Finally, General Comment No. 26 notes that children are particularly impacted by environmental hazards, including climate change, beyond that of the general population because of their 'unique activity patterns, behaviours and physiology' and 'the importance of each stage [of childhood] for subsequent stages of maturation and development'.²⁷
37. The Commission also recognises that, in general, children face heightened barriers to the enjoyment of their rights.²⁸ The Commission supports a focus on children's rights and intergenerational equity as part of environmental decision making which, by generating less adverse environmental impacts, will assist all people in Australia to achieve the full realisation of their human rights.

5 Support for what the Bill seeks to achieve

38. The Commission supports what the Bill seeks to achieve.
39. At its core, the Bill proposes a statutory duty to promote intergenerational equity in decision making impacting the environment – a fundamental principle of international environmental law that present generations have a duty to protect the environment for the benefit of future generations. This aligns with Australia's long standing international obligations and commitments concerning both environmental protection from the impacts of climate change, and the protection of children's rights.
40. The Bill does this by incorporating the health and wellbeing of children as a mandatory consideration when making decisions that would result in significant greenhouse gas emissions. This approach is commendable both for recognising the importance of considering children as a unique group with their own vulnerabilities, and simultaneously for linking climate considerations and environmental law – as established by international principles but so far lacking in Australia's legislated framework.
41. Unlike the Federal Court's declaration in the *Sharma* proceedings, which limited the federal environment minister's duty of care to persons who were under 18 years of age and ordinarily residing in Australia at the commencement of that proceeding,²⁹ the duties proposed by the Bill would require future children to be considered by decision makers, properly recognising that the impact of greenhouse gas emissions are

not limited to here and now, but have long lasting impacts that will affect future generations.

42. This approach embodies the promotion of intergenerational equity, an approach Australia has committed to on the international stage, both with respect to seeking to limit the adverse effects of climate change and concerning the protection of child rights.
43. The Commission recognises that the Bill proposes modifying the operation of the ADJR Act to ensure children have standing to commence judicial review proceedings in relation to decisions impacted by the Bill as an attempt to enhance accountability and transparency around government decision making, while simultaneously working to improve access to justice and a remedy for children. These principles are endorsed by the Commission.
44. Accountability and transparency in government decision making are vital for good and responsible governance, and fuel society's confidence and trust in government processes and decisions. They are fundamental in Australia's democratic governance, and it follows that individuals to whom statutory duties are owed should be afforded the opportunity to participate in processes designed to ensure that these principles are upheld.
45. In relation to the environment, General Comment No. 26 explains that children have a right to be heard in matters that affect them:

States must ensure that age-appropriate, safe and accessible mechanisms are in place for children's views to be heard regularly and at all stages of environmental decision-making processes for legislation, policies, regulations, projects and activities that may affect them, at the local, national and international levels.³⁰
46. It does not automatically follow that children require standing for judicial review of decisions impacted by the Bill for the state to fulfill its obligations under the CRC in accordance with international guidance including as provided in General Comment No. 26. However, if standing is not extended to children, consideration should be given to how children affected by decisions related to the Bill can readily access their right to be heard and their right to justice.
47. Ultimately, Australia has international environmental and human rights obligations to restrict the approval of significant emissions that negatively impact the earth's climate. The CCA is the first step domestically in Australia meeting these commitments.

48. That climate change effects will dramatically and negatively impact the human experience, and the human rights of all people, is not in dispute. Globally accepted climate science calls for fossil fuel extraction and use to be rapidly phased out, and greenhouse gas emissions to be significantly reduced.
49. The duty proposed by the Bill to require issues of intergenerational equity to be considered in the approval of significant greenhouse gas emission projects³¹ enhances the national framework to assist in achieving a significant reduction of greenhouse gas emissions, as quickly as possible, and to help avoid the most severe impacts of climate change. The Commission supports initiatives that work to achieve this goal.

6 Concerns arising from the Bill's approach

50. The Commission supports the Bill's object and welcomes its contribution to Australian discourse regarding climate change and human rights, children's rights, and intergenerational equity in environmental decision making. These matters should be integrated as considerations for all environmental decision making.
51. However, the Commission considers that the current proposal is not consistent with Australia's international obligations and commitments. This is of particular concern, as General Comment No. 26 emphasises the need for a consistent global response to address the adverse effects of environmental degradation on the enjoyment of children's rights.³²
52. This section sets out five concerns raised by the Bill's approach to achieving its object. Section 7 below outlines an alternative mechanism that the Commission considers would be a more appropriate pathway to promote intergenerational equity in decisions that contribute to climate change and negatively impact rights realisation in Australia.
53. First, the Bill requires decision makers impacted by the proposed statutory duties to consider the health and wellbeing of the child. The Bill defines 'health and wellbeing' as including emotional, cultural, and spiritual health and wellbeing, but it does not provide any additional information to assist in the interpretation of what may be considered as part of each of these concepts.
54. It is also unclear whether health and wellbeing are intended as a singular concept, or two separate requirements, each of which must be impacted by risk. Looking to international commentary, it may be inferred from General Comment No. 26 that health and wellbeing are two separate

concepts. Wellbeing appears to be linked to physical environment, as well as social, spiritual and moral conditions that surround the child and support a child's development.³³ Meanwhile, the personal health of the child – both physical and mental – is referenced separately to wellbeing, and with regard to separate and additional obligations on States.³⁴

55. Even taken as separate concepts, neither the Bill nor the supporting materials provide guidance about the differences between each of health and wellbeing, or how they may each be impacted. This makes it difficult to undertake appropriate assessments, and may lead to inconsistency in how impacts are assessed.
56. Secondly, and arguably most importantly, the Bill limits decision makers' considerations to children's health and wellbeing, rather than requiring all children's rights to be considered. Neither the Explanatory Memorandum, nor the Second Reading Speech, have regard to broader human rights impacts.
57. The Commission considers this approach to be limited in scope and is of the view that it does not adequately apply a rights-based approach to environmental decision making, as required by Australia's international commitments and best practice.
58. A clean, healthy, and sustainable environment is a human right itself, and necessary for the full enjoyment of a broad range of children's rights.³⁵ This intersectionality of environmental impacts on the realisation of other children's rights requires the full range of children's rights to be considered as part of the decision-making process for intergenerational equity to be effectively promoted and protected.³⁶
59. Significantly, the approach taken in the Bill does not align with the CRC, which by article 3(1) mandates that the 'best interests of the child' be considered in 'all actions concerning children', including 'legislative and administrative action taken by governments and government entities'. This includes the adoption and implementation of environmental decisions, including laws concerning such decision making.³⁷
60. Considering the best interests of the child when making decisions, rather than limiting considerations to the child's health and wellbeing (however defined), enables a holistic assessment of all relevant factors impacted by a proposed decision. It permits all children's rights to be considered, which in turn may assist to achieve the full and effective enjoyment of all rights. The Commission considers it appropriate for a statutory duty seeking to promote intergenerational equity in environmental decision

making to apply this test, consistent with Australia's commitments under the CRC.

61. Thirdly, in requiring that certain decisions not be made if they could pose a 'material risk' of harm to children's health and wellbeing, the Bill does not clearly identify what may constitute harm, nor does it establish a clear threshold for an unacceptable level of harm.
62. Further, the risk of harm (to this uncertain threshold) is the sole determining factor, regardless of the other relevant factors that a decision maker may be required to take into account in making the relevant decision.
63. Two broad matters that may inform the risk of harm are included in the Bill,³⁸ namely, the extent to which emissions may prejudice Australia meeting its greenhouse gas emissions reduction targets, and scientific research on the likely impacts of climate change on the health and wellbeing of Australian children. However, expressed in this very general way, they provide little guidance to decision makers about how to assess the impact of a proposed decision on the lived experiences of children in Australia. The inclusion of these matters thus does not effectively aid in assessing potential harm, but rather suggest that *any* breach of Australia's emissions goals, set out in the CCA, may or would be harmful to the health and wellbeing of children in Australia.
64. Fourthly, the Bill approaches all current and future children as a single group, failing to acknowledge that the health and wellbeing of particular groups of children may be impacted differently from other groups of children, or that what may constitute a material risk of harm may not align for all children.
65. At a global level, it is recognised that certain groups of children face heightened barriers to the enjoyment of their human rights, with the risk of harm to some groups of children higher than for other children.³⁹
66. For example, Indigenous children are disproportionately affected by biodiversity loss, pollution, and climate change, and may face unique risks compared to the rest of the children in Australia. To comply with its international obligations and commitments, Australia must meaningfully engage with Indigenous children and their families when responding to environmental harm, including by acknowledging and integrating Indigenous culture, knowledge and concepts about mitigation and adaptation.⁴⁰

67. Similarly, children with disabilities may have different needs from other children. This may inform a different criterion for assessing what constitutes a material risk of harm to the health and wellbeing of children with a disability, compared to that relevant for children without disability.
68. To ensure that children’s health and wellbeing is considered in a non-discriminatory manner, consistent with Australia’s international commitments under the CRC,⁴¹ the Bill should actively address how the risks and harm impacts on particular groups of children are to be considered and measured, particularly children who may have specific vulnerabilities or be more susceptible to the negative effects of climate change.
69. Assessing the risk of harm should be informed by international expectations, which require Australia to analyse data available to it to understand the differential effects of environment-related harm on children, including by paying special attention to groups of children most at risk, and implementing measures to address barriers that may, intentionally or unintentionally, discriminate in the way a policy, decision, or environmental action may impact on certain groups of children.⁴²
70. Fifthly, the Bill requires the health and wellbeing of the child to be the *paramount* consideration when making ‘significant decisions’.⁴³ By comparison, article 3(1) of the CRC, requires the best interests of the child to be *a primary* consideration in actions concerning children. Neither the Explanatory Memorandum nor the Second Reading Speech explain why the Bill has differed from this approach.
71. The UNICEF Implementation Handbook for the Convention on the Rights of the Child provides the following guidance on article 3:
- The wording [of article 3] indicates that the best interests of the child will not always be the single, overriding factor to be considered; there may be competing or conflicting human rights interests, for example, between individual children, between different groups of children and between children and adults. The child’s interests, however, must be the subject of active consideration; it needs to be demonstrated that children’s interests have been explored and taken into account as a primary consideration.⁴⁴
72. In Australia, the Full Federal Court has considered how article 3 of the CRC should be applied by a decision maker when making a decision that would lead to a child’s parents being removed from Australia.⁴⁵ In that case, the Court said that the starting point is to identify what the best interests of the child indicate that the decision maker should decide.⁴⁶

This requires an examination of each child's best interests, bearing in mind their individual circumstances.⁴⁷

73. As a *primary consideration*, these interests must then be balanced against relevant competing interests.⁴⁸ It is legally open to a decision maker to make a decision that does not accord with the best interests of the child, however, to do so:
- (a) the decision maker must not treat any other factor as inherently more significant than the best interests of the child; and
 - (b) the strength of other relevant considerations must outweigh the consideration of the best interests of the child, understood as a primary consideration.⁴⁹
74. This approach differs from that proposed by the Bill, which elevates the child's health and wellbeing to be *the paramount consideration*.
75. A requirement to treat the child's best interest as the paramount consideration exists in Australian family law with respect to determining parenting orders.⁵⁰ This involves making decisions about a child's care, in the private relationship between the child and their carer. Australia's family law aligns with articles 9 and 21 of the CRC, which concern the separation of a child from their parents, and adoption, respectively. Article 9 requires that any separation of a child from their parents must be necessary for the best interests of the child, while article 21 requires the child's best interests to be the paramount consideration in the context of adoption.
76. In contrast, article 3 requires an examination of all factors relevant to a situation to inform a child's best interests, and then balancing the child's best interests with any other relevant interests, including the rights of others. Under international law, this is the correct approach to be applied in environmental decision making to protect intergenerational equity, and it is the approach that should be applied to decision making in Australia which may result in greenhouse gas emissions.

7 Preferred way to achieve the Bill's objects

77. Under the CRC, Australia is obliged to protect children against environmental damage and degradation, including by private enterprise and third parties, and must ensure that children have a clean, healthy

and sustainable environment.⁵¹ To meet this obligation, Australia must take deliberate and specific action, including through legislation.⁵²

78. The Commission substantially agrees with proposed s 15D of the Bill, with some modifications. The Commission considers that, consistent with international obligations and global best practice:
- (a) there should be a duty on a person who makes a ‘significant decision’ to take into account the likely impact of the emission of greenhouse gases on children’s rights (and not just their health and wellbeing) (Recommendation 1)
 - (b) the decision-making process must consider the best interests of the child, and the full realisation of their rights, in a manner that promotes intergenerational equity
 - (c) the best interests of the child must be taken into account as a primary consideration, along with the other relevant considerations required in the making of the decision (Recommendation 2); and
 - (d) children’s best interests are required to be balanced against other relevant interests, however, no other factor is to be treated as being inherently more significant than the best interests of the child.
79. The Commission considers it necessary for the legislation to identify the particular kinds of decisions that are ‘significant decisions’ to which the duty would apply. This is the approach taken within the Bill.
80. Recognising that the relevant decision-making powers and functions that would be impacted by the duty arise in instruments other than the CCA, the Commission considers it necessary for each instrument that empowers a person to make a ‘significant decision’ to be amended to refer decision makers to their additional obligations under the CCA (Recommendation 3). This is so that decision makers bound by the duty in the CCA are immediately aware that they are required to comply with that duty.
81. The Commission considers that the proposed duty in the CCA, for the best interests of the child to be a primary consideration, should be fulfilled through the completion of a Child Rights Impact Assessment (CRIA). CRIsAs are internationally recognised as an effective tool that

achieves this outcome.⁵³ They work to determine the best interests of the child through consideration of the full range of rights, and how they intersect and impact on each other thorough assessment of the specific circumstances that give rise to risk relevant to a particular situation.

82. Significantly, CRIAs enable special regard to be given to the differential impact of environmental decisions on specific groups of children who may be subject to different risks.⁵⁴ They also provide a platform that enables meaningful participation from children in ascertaining what is in their best interests.
83. Children should proactively be encouraged to participate in child rights impact assessments undertaken in connection with environmental decision making, consistent with their right to be heard.⁵⁵ Due weight must be given to children's voices both when assessing risk and impacts, and in the design and implementation of measures aimed at addressing the significant and long-term environmental challenges that shape their lives.⁵⁶
84. The Commission recommends that the CCA provide that the statutory duty to take children's rights into account, with the best interests of the child as a primary consideration, be implemented by requiring decision makers to undertake a CRIA as part of their decision-making process (Recommendation 4).
85. The Commission considers it appropriate for decision makers to be required to publish their CRIA outcomes, including in child-friendly language, and in languages other than English in widespread use by the children likely to be impacted by the decision.⁵⁷
86. The CRIA outcomes should be published together with a decision maker's reasons for a decision, which should identify all relevant factors taken into account in making the decision (Recommendation 5).
87. This recommendation goes beyond the rights currently afforded to persons who have standing to seek judicial review of a decision to obtain reasons for that decision upon request.⁵⁸ Instead, it imposes a positive obligation on decision makers to publish their reasons for decision. The Commission considers this approach to be appropriate in relation to these kinds of decisions:
 - (e) to enhance transparency in decision making by ensuring that all factors that contributed to determining the decision are readily accessible in a single location, without the need to navigate an

administrative process to access that information which creates an unnecessary barrier

- (f) to enhance accountability in decision making by requiring decision makers to demonstrate how the best interests of the child, including the unique vulnerabilities of special groups of children, were balanced against all other relevant factors in the decision-making process
- (g) to facilitate a consistent approach to environmental decisions required to consider the child's best interests as a primary consideration
- (h) to ensure information is available in a child-friendly form to assist children in accessing and understanding the information that informed a decision, and that might be relevant should they wish to exercise their right to judicial review; and
- (i) to assist applicants and the Court in judicial review proceedings.

8 Safeguarding Children – A CRIA model for Australia

- 88. On 25 October 2023, the Commission launched Australia's first national Child Rights Impact Assessment tool, *Safeguarding Children*.
- 89. Developed by the Commission with support from UNICEF, the tool aims to help governments and service providers assess how children's rights will be affected by new laws and policies.
- 90. Appendix A provides links to the tool and to further information about Australia's international obligations which inform why the use of CRIAs is an optimal approach to ensure children's rights are considered in decision making.
- 91. *Safeguarding Children* has been developed in accordance with international standards concerning the protection and realisation of children's rights, including their right to be heard. It aligns with the UN's General Comment No. 26 which recommends that:

All proposed environment-related legislation, policies, projects, regulations, budgets and decisions, and those already in force, require vigorous child rights impact assessments, in accordance with article 3 (1) of the Convention. States

should require the assessment, both before and after implementation, of the possible direct and indirect impact on the environment and climate, including the transboundary, cumulative, and both production and consumption effects, on the enjoyment of children's rights.⁵⁹

92. *Safeguarding Children* relies on a series of assessments that seek to ascertain the best interests of children, including with regard to the special needs of differentiated groups of children, as considered necessary by the UN:

[CRIAs] should incorporate a special regard for the differential impact of environmental decisions on children, in particular young children and other groups of children most at risk, as measured against all relevant rights under the Convention, including short-, medium- and long-term, combined and irreversible impacts, interactive and cumulative impacts and impacts in the different stages of childhood. For example, States that have substantial fossil fuel industries should assess the social and economic impact on children of their related decisions.⁶⁰

93. Ultimately, *Safeguarding Children* is a tool to assess the impact of a potential decision on the realisation of children's rights. Through this assessment, as well as through children's participation, it enables harm and impact to be measured to inform outcomes in the best interests of children.

Appendix A

Website:

[Safeguarding Children: Using a child rights impact assessment to improve our laws and policies](#)

Report:

[Safeguarding Children: Using a child rights impact assessment to improve our laws and policies](#)

Tool:

[Child Rights Impact Assessment \(CRIA\) tool](#)

Endnotes

- ¹ NHRIs are statutory bodies, independent of government, that have a broad legal mandate to protect and promote human rights at the national level. They must adhere to international standards endorsed by the United Nations General Assembly, which are assessed through an accreditation process.
- ² [A/HRC/RES/51/31](#). This Australian led resolution emphasised the role of NHRIs in assisting States to adopt effective frameworks to protect all human rights impacted by climate change.
- ³ In July 2023, Australia supported a UN Human Rights Council resolution that seeks to achieve net zero greenhouse gas emissions by 2050 ([A/HRC/RES/53/6](#)).
- ⁴ The [Paris Agreement](#) to the United Nations Framework Convention on Climate Change (UNFCCC), 12 December 2015, is an international treaty on climate change, which pursues limiting global warming. It was adopted by 196 parties including Australia at the 21st session of the Conference of Parties (COP21) in Paris in December 2015. See UN Doc [FCCC/CP/2015/L.9/Rev.1](#).
- ⁵ Under the [Paris Agreement](#), each country is expected to submit a national climate action plan, known as Nationally Determined Contributions, or NDCs. Each country's NDCs communicate the actions the country will take to reduce their greenhouse gas emissions to reach the Paris Agreement goals. Australia has legislated its NDCs through the [Climate Change Act 2022](#) (Cth) (CCA).
- ⁶ Schedule 1, clause 1 of the , which seeks to amend section 3 of the [CCA](#).
- ⁷ Schedule 1, clause 6 of the [Bill](#), which seeks to insert Part 4A, including section 15D, into the [CCA](#).
- ⁸ Schedule 1, clause 6 of the [Bill](#), which seeks to insert Part 4A, including section 15E, into the [CCA](#).
- ⁹ Schedule 1, clause 6 of the [Bill](#), which seeks to insert Part 4A including sections 15F, 15G and 15H into the [CCA](#).
- ¹⁰ [\[2022\] FCAFC 35](#) and [\[2022\] FCAFC 65](#) which overturned the decision of the Federal Court of Australia in *Sharma v Minister for the Environment* [\[2021\] FCA 560](#) and [\[2021\] FCA 774](#).
- ¹¹ This approach aligns with Committee on the Rights of the Child [General Comment No. 26](#) (2023) on children's rights and the environment, with a special focus on climate change. 93rd session, UN Doc [CRC/C/GC/26](#) (22 August 2023) at [6] (CRC General Comment No. 26).
- ¹² UNICEF, "UN Committee on the Rights of the Child calls on states to take action in first guidance on children's rights and the environment, with a focus on climate change", *UNICEF Press Release*, 28 August 2023, available at: <https://www.unicef.org/lac/en/press-releases/un-committee-rights-child-calls-states-take-action-general-comment-26-childrens-rights-environment-cimate-change>.
- ¹³ Principle 1 of the [Stockholm Declaration](#) acknowledges the responsibility to future generations: "[humans bear] a solemn responsibility to protect and improve the environment for present and future generations." Set out in the Report of the United Nations Conference on the Human Environment (1973) following the 48th conference in Stockholm in June 1972. See UN Doc [A/CONF.48/14/Rev.1](#).
- ¹⁴ [Rio Declaration on Environment and Development](#) at principle 3.
- ¹⁵ [UNFCCC](#) at art 3(1) and 3(3).
- ¹⁶ [Convention on the Rights of the Child](#) (CRC) at art 6(1).

- ¹⁷ [CRC](#) at art 24(2)(c).
- ¹⁸ Daly, A. "The Right of Children to a Healthy Environment: Intergenerational rights are children's rights", *GC Human Rights Preparedness*, 2 June 2022, available at: <https://gchumanrights.org/preparedness-children/article-detail/the-right-of-children-to-a-healthy-environment-intergenerational-rights-are-childrens-rights.html>.
- ¹⁹ Treasury, "Intergenerational reports", Australian Government, available at: <https://treasury.gov.au/intergenerational-report>.
- ²⁰ [Explanatory Memorandum](#) circulated by Senator David Pocock regarding the [Bill](#).
- ²¹ *Sharma & Ors v Minister for the Environment* [2021] FCA 560.
- ²² *Sharma & Ors v Minister for the Environment* [2021] FCA 560 at [513]. The duty applied to decisions by the federal minister for the environment made under s 130 or s 133 of the [Environmental Protection and Biodiversity Conservation Act 1999 \(Cth\)](#) (EPBC Act).
- ²³ *Sharma & Ors v Minister for the Environment (No 2)* [2021] FCA 774 at [58].
- ²⁴ *Minister for the Environment v Sharma & Ors* [2022] FCAFC 35.
- ²⁵ [CRC General Comment No. 26](#) at [16].
- ²⁶ [CRC General Comment No. 26](#) at [11].
- ²⁷ [CRC General Comment No. 26](#) at [24] and [25].
- ²⁸ [CRC General Comment No. 26](#) at [14].
- ²⁹ *Sharma & Ors v Minister for the Environment (No 2)* [2021] FCA 774 at [58].
- ³⁰ [CRC General Comment No. 26](#) at [27].
- ³¹ Schedule 1, clause 6 of the [Bill](#), which seeks to insert Part 4A, including section 15D, into the [CCA](#).
- ³² [CRC General Comment No. 26](#) at [12].
- ³³ [CRC General Comment No. 26](#) at [17] and [61].
- ³⁴ [CRC General Comment No. 26](#) at [H] from [37].
- ³⁵ [CRC General Comment No. 26](#) at [8].
- ³⁶ [CRC General Comment No. 26](#) at [17].
- ³⁷ [CRC General Comment No. 26](#) at [16].
- ³⁸ Schedule 1, clause 6 of the [Bill](#), which seeks to insert Part 4A, including section 15E(2), into the [CCA](#).
- ³⁹ [CRC](#) at art 2 and [CRC General Comment No. 26](#) at [14] and [15].
- ⁴⁰ [CRC General Comment No. 26](#) at [58].
- ⁴¹ [CRC](#) at art 2.
- ⁴² [CRC General Comment No. 26](#) at [15].
- ⁴³ Schedule 1, clause 6 or the [Bill](#), which seeks to insert Part 4A and s 15D(1)(a) into the [CCA](#).
- ⁴⁴ UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*, revised 3rd ed, p 38, available at: www.unicef.org/lac/media/22071/file/Implementation%20Handbook%20for%20the%20CRC.pdf
- ⁴⁵ *Wan v Minister for Immigration & Multicultural Affairs* [2001] FCA 568.
- ⁴⁶ *Wan v Minister for Immigration & Multicultural Affairs* [2001] FCA 568 at [26].
- ⁴⁷ Committee on the Rights of the Child [General Comment No. 14](#) (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 62nd session, UN Doc [CRC/C/GC/14](#) (29 May 2013) at [32] ([CRC General Comment No. 14](#)).
- ⁴⁸ *Wan v Minister for Immigration & Multicultural Affairs* [2001] FCA 568 at [33].
- ⁴⁹ *Wan v Minister for Immigration & Multicultural Affairs* [2001] FCA 568 at [32].
- ⁵⁰ [Family Law Act 1975 \(Cth\)](#), ss 60CA and 60CC.

⁵¹ [CRC General Comment No. 26](#) at [68].

⁵² [CRC General Comment No. 26](#) at [71].

⁵³ CRIsAs as a tool to inform assessments around the best interests of the child are supported internationally including by: CRC [General Comment No. 14](#) at [35]; Committee on the Rights of the Child General Comment No. 5 (2003) on the General Measures of Implementation (arts 4, 42 and 44, para 6), 34th session, UN Doc [CRC/GC/2003/5](#) (27 November 2003) at section E; The Canadian Bar Association, “Child Rights Impact Assessments”, *The CBA Child Rights Toolkit*, available at: <https://www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit/theSystem/Child-Rights-Impact-Assessments>; European Network of Ombudspersons for Children, “A guide on how to carry our CRIA”, *Common Framework of Reference on Child Rights Impact Assessment*, November 2020, pages 6 and 7, available at: <https://enoc.eu/wp-content/uploads/2020/12/ENOC-Common-Framework-of-Reference-FV.pdf>; and Scottish Alliance for Children’s Rights, “Support the use of Child Rights Impact Assessments (CRIsAs)”, *Briefings and Resources*, available at: <https://www.togetherscotland.org.uk/resources-and-networks/support-the-use-of-child-rights-impact-assessments-crias/>.

⁵⁴ [CRC General Comment No. 26](#) at [76].

⁵⁵ [CRC](#) at art 12.

⁵⁶ [CRC General Comment No. 26](#) at [26].

⁵⁷ This aligns with international best practice as recommended by [CRC General Comment No. 26](#) at [77].

⁵⁸ For example, [Administrative Decisions \(Judicial Review\) Act 1977](#) (Cth), s 13.

⁵⁹ [CRC General Comment No. 26](#) at [75].

⁶⁰ [CRC General Comment No. 26](#) at [76].