



Legislative Council Environment and Planning Committee

Inquiry: Inquiry into Climate Resilience

Hearing Date: 20 November 2024

Question[s] taken on notice

Directed to: Federation of Community Legal Centres

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Bronwyn LAY: I think what is coming out from the sector and a lot of the discussions we have where we try to address the legal needs of communities in relation to disaster and climate justice is that there is a need for a thorough look at a holistic approach to a lot of these issues. A lot are dressed in jurisdictional silos, such as insurance and tenancy, but they have a lot of impacts upon each other and we could see this with the communications as well as the essential services. We would recommend having a good look at those compounding impacts across jurisdictions, what occurs as a result and the abrogation of rights that may occur as a result of that.

1. **The CHAIR, page 15**

Question Asked:

Do you think any additional obligations are required on service providers with respect to that?

Bronwyn LAY: I will take that on notice, because we are still formulating that as a sector.

Response:

Community Legal Centres are advocating for legislative and policy models that holistically address the diverse legal and other needs of communities in relation to climate change, including essential services. There must, at the very least, be a legal obligation to keep the community informed about the reliability of services before, during and after extreme weather events.

As seen in the recent fires in Los Angeles, USA, the need for emergency management planning and response to be coordinated with other essential services is vital. Our submission noted that community legal centres are concerned about the resilience of communications services during extreme weather events and their dependency on other essential services for operations.

To ensure Victorians are climate resilient the question as to additional obligations essential service providers have in relation to extreme weather events touches on the systemic complexity and interdependency that needs to be addressed between service providers, as well as the efficacy of their regulatory frameworks that ensure these systems are themselves more resilient.

Note that the Federation defers to the expertise of the Victorian Essential Services Commission as to the viability of all our following suggestions concerning possible additional obligations of essential service providers.

To ensure a climate resilient Victoria additional obligations potentially include:

1) **Stronger Interoperability standards:**

Establishing interoperability standards for communication systems can ensure seamless coordination between different essential service providers and emergency management agencies.

To ensure comprehensive interoperability across all essential services during disasters, Victoria could benefit from:

- **Developing Unified Standards:** Creating a set of unified interoperability standards that apply to all essential services, not just healthcare.
- **Legislative Mandates:** Introducing legislation that mandates the adoption of these standards by all essential service providers.
- **Regular Updates and Audits:** Ensuring that these standards are regularly updated, and that compliance is audited periodically. Mandating regular audits and drills for essential service providers can help identify gaps in preparedness and improve response times.

2) **Backup Power Solutions:**

In Victoria, essential service providers, including those in the telecommunications sector, are expected to have planning in place to ensure service continuity during disasters. However, specific obligations regarding backup power can vary depending on the sector and the regulatory framework. To enhance resilience, it would be beneficial to have more explicit legislative requirements for backup power across all essential services, including telecommunications, ensuring that providers are adequately prepared for power outages during disasters.

This could include generators and battery backups, for critical infrastructure like cell towers, data centres and communities deemed as high risk for climate and health vulnerability. The Federation caveats this recommendation on the basis that a comprehensive risk analysis needs to be undertaken by technological and energy specialists as we do not have expertise in this area.

3) **Integrating climate change adaptation strategies into disaster management plans of essential service providers to address the increasing frequency and severity of climate related disasters.**

As per the recommendation in the Federation's submission, the Victorian Adaptation Action Plans (VAAPs) must include effective and actionable monitoring and accountability mechanisms, including for all essential services.

For example, the Energy Sector Adaptation Action Plan focuses on ensuring the resilience of electricity supply, including measures to protect infrastructure from extreme weather events and to enhance the reliability of power supply during emergencies. Similarly, the telecommunications sector is included in broader infrastructure resilience planning, ensuring that communication networks remain operational during and after disasters, but this is absent from VAAPs.

To make climate change adaptation compulsory for the telecommunications sector the following legislative changes could be considered:

- **Specific Inclusion in VAAPs:** Amend the VAAPs to explicitly include telecommunications as a critical sector requiring climate change adaptation measures.
- **Regulatory Requirements:** Introduce regulations that mandate telecommunications providers to develop and implement climate adaptation plans, including risk assessments and resilience strategies.
- **Compliance and Reporting:** Establish compliance and reporting requirements to ensure that telecommunications providers regularly update and report on their climate adaptation efforts.
- **Public Communication Plans:** Providers should have clear communication plans to keep the public informed about service disruptions and restoration efforts.

The experience, expertise and mandate of the Essential Services Commission would contribute to ensuring any additional obligations, including those proposed above, are both viable and equitable.

2. **David ETTERSHANK, page 15-16**

Question Asked:

I just want to get that in the context of potential greenfields developments where a precautionary principle should be applied, and it is very easy to do. I think this has confounded a number of committee members. Where you have got towns and suburbs that are subject to regular inundation or have just discovered they are, how is that actually reflected in flood plain management modelling, and have you had a specific legal focus that you have brought to that question?

Bronwyn LAY: No. I am going to caveat this: the community legal sector does not have a lot of expertise in planning law, and so I do not either. What we are seeing is the impacts of the lack of expertise and the lack of access to that expertise in communities and a desire to have more of it so we can also answer questions like that. I can take that on notice and get back to some of the experts within our sector. But as a sector, like you, we are confounded by a lot of this and looking forward to solutions as well.

David ETTERSHANK: They do seem to fit the wicked problem.

Bronwyn LAY: Yes, exactly. It is a very wicked problem.

David ETTERSHANK: Okay, if you could take that on notice.

Response:

The introduction of the precautionary principle as a mandatory consideration in planning applications, particularly greenfield developments, presents an opportunity to build climate resilient communities. The adoption of the precautionary principle will ensure these communities, infrastructure and

environments are climate resilient into the future. This is not only in relation to flood risk, but other climate related risks such as extreme heat where prior greenfields developments have put many individuals at risk with thermally deficient building standards, lack of green canopy and their contribution to the harmful heat island effect.

Relevant to greenfields developments and the precautionary principle our recommendations to the Committee, expanded on page 12 of our submission, are the following:

Victoria’s Response to Climate Change Impacts and the Need to Reform Planning Law – Inquiry Terms of Reference (b) and (d)

- *Base legislative, policy and planning activity on data and forecasting that is constantly updated and has sufficient veracity to be used with confidence.*
- *Legislate the precautionary principle in the Planning and Environment Act 1987 (Vic).*
- *Review planning systems to ensure that all future climate risks must be considered by decision makers.*
- *Develop a new flood plain model that will not subject land users to the cascading and compounding impacts of climate change, taking a precautionary approach to prevent damage to homes that government has approved in the past and declining approval of development that will be at risk in the future.*

Victorian development, flood management and planning legislative frameworks include an implicit rather than a mandatory consideration of the precautionary principle.

The application of the precautionary principle to greenfield developments can manage foreseeable risks and avoid future legal liabilities that may occur due these risks not being considered in planning and development decisions.

Without the application of the precautionary principle, governments could be responsible, and potentially liable, for actively and knowingly enabling and producing vulnerabilities and risks for the communities that eventually live and work on these sites.

Precautionary Principle

The precautionary principle is a risk management strategy that advocates for preventive action in the face of uncertainty. It emphasises caution before approving or implementing developments that may cause harm. In floodplain management, this principle can be applied to ensure that developments do not exacerbate flood risks and that communities are protected from potential future flooding events. The precautionary principle supports the duty of governments, developers and other decision makers to fulfil their duties of care obligations present in the *Climate Change Act 2017 (Vic)* (Climate Change Act).

The precautionary principle and the legal concept of reasonable foreseeability are both concerned with anticipating and mitigating potential risks. Reasonable foreseeability is a legal concept used to determine liability. It asks whether a reasonable person could have anticipated the potential consequences of their actions. This concept is often used in tort law to establish negligence. If harm

was reasonably foreseeable, then the party responsible for the action may be held liable.

Reasonable foreseeability is a relevant consideration as to why applying the precautionary principle in greenfield developments is a necessary proactive risk management tool against future harm. The precautionary principle is broader and more proactive, focusing on preventing harm before it occurs, while reasonable foreseeability is more reactive, focusing on whether harm could have been anticipated after the fact. They are two sides of the one coin. In planning law and policy, the precautionary principle can guide decisions to avoid high-risk developments in greenfield areas, aligning with the idea of reasonable foreseeability by ensuring that foreseeable risks are addressed proactively.

By integrating the precautionary principle, planners and policymakers can create more robust frameworks for managing risks and protecting communities from potential harm. For example, with the rising insurance crisis across Victorian communities threatening the social and economic viability of these towns, it may be reasonably foreseeable that developments in greenfield areas who do not apply the precautionary principle risk being uninsurable, and therefore not economically nor socially viable. The Federation is concerned by the simultaneous development of new housing sites and communities while many existing Victorian communities in regional and peri urban areas currently face the spectre of the unviability of their towns and communities due to increasing climate risk. This is seen in the symptom of rising and unaffordable insurance premiums.

By integrating mandatory considerations of precautionary principle into all planning schemes, Victoria can enhance its climate resilience, mitigate against future liabilities and harm as well as ensure that all developments are sustainable and safe for future generations.

3. **Gaelle BROAD, page 18**

Question Asked:

I know in Meadow Creek, for example, there is a proposed solar farm that is very extensive. It is close to 600 hectares and will cost about \$750 million. But neighbours to that have raised concerns about the liability when it comes to insurance costs if a fire starts on their farm and then goes on to the proposed development – they are at risk of losing everything. I know you mentioned insurance earlier. We have struggled to find any clarity on that. We have raised it in the state Parliament and written to the insurance council, but do you have any thoughts? You may want to take it on notice.

Bronwyn LAY: I would like to take that on notice, actually.

Response:

The Federation cannot provide specific legal advice to factual scenarios such as the Meadow Creek example provided. However, this example speaks to the social and economic risks our regional and rural communities increasingly face due to climate change and the responsibility of governments to lead climate change adaptation strategies with these communities.

Community legal centres in Victoria are increasingly concerned that

insurance issues, such as rising premiums due to climate risk, are determining the adaptation plans of our communities rather than government and community led engagement and planning. The issue of insurance is determining the future of not only individual property owners, but also communities and towns in regional Australia. Climate change has a compounding impact on the legal needs of all those involved, and community legal centres have seen this rise in the communities they work with, including insurance contracts and consumer rights, as well as the flow on effects to tenancy and employment rights.

As communities, businesses, homes and services providers face the spectre of un-insurability, this can result in movement away from these areas by small businesses, property investors such as landlords and community members.

Un-insurability in the current climate of non-government intervention in insurance policies, risks the unviability of certain communities, businesses and regions. This is occurring without community consultation and participation. As previously mentioned, and outlined in our submission on pages 26-33, the Victorian government has a duty of care to Victorian communities to ensure equitable adaptation is planned and implemented for all Victorian communities including the future of our regional and rural towns who face high climate risks.

Unlike insurance companies, government has a responsibility, at all levels, to work with communities to determine, resource and implement our climate resilience and adaptation policies.

4. Sarah MANSFIELD, page 19

Question Asked:

I am interested – in your submission you highlight the vagaries that are in the current adaptation plans, including the built environment climate change adaptation plan, which is the one that is most relevant to this inquiry. How do you think this plan could be more effective with respect to, I guess, addressing the legal barriers and opportunities people might face? Because it has been pointed out that it is very vague; there are not really accountability mechanisms in it.

Bronwyn LAY: I would love to take this on notice.

Response:

As outlined in our submission, the Federation is concerned that without robust and implemented adaptation plans that centre equity and climate justice, many communities will face compounding precarity and increased legal needs such as tenancy, family violence, social security and employment. Community legal centres understand the connection between individual legal needs and wider economic and social policy, including how and where we live. Our interest in ensuring just and equitable adaptation planning, including the Built Environment Climate Change Adaptation Plan 2022-2026, is that it determines the future legal needs of many Victorians.

To address the specific question, I refer to our submission which highlights the lack of legal mechanisms to ensure Victoria meets its obligations and duty of care to implement adaptation policies on page 30:

“The key VAAP relevant to this inquiry is the Built Environment Climate Change Adaptation Plan (BEAAP). In determining its key priorities for the 2022–2026 period, the BEAAP recommends 19 actions, yet just one of them considers the legal component of adaptation. Action 19 recognises that

legal mechanisms are needed to support climate resilient urban developments, and that it is the role of the Victorian Government to ‘identify legal barriers and reform opportunities to support long-term adaptation by assessing options across the legal framework’. Unfortunately, this recognition fails to provide specificity about which legal tools will be deployed and how they will be used to support climate resilient environments. Additionally, this action fails to consider the unmet legal needs that are being created or exacerbated by climate change impacts and to provide adequate resources to the legal assistance sector to meet these needs.”

The legal component of adaptation policies referred to in the above paragraph is to be identified and determined by the Victorian government and requires legislative expertise. However, this may include planning laws that have mandatory considerations of climate resilience such as the precautionary principle as well as mandated and regular reporting within the VAAPs.

On page 19 our submission states: *“As the 2022 Victorian floods demonstrated, communities cannot afford maladaptive policymaking that is not fit for purpose in a climate changed world. Climate harm because of poor or negligent planning decisions is a real and evident risk in Victoria. The clustering of legal issues around land, houses, ecosystems and property also highlights the need for a holistic climate justice framework to resolve this policy complexity and prevent future maladaptation.”*

A major factor towards preventing rising climate related legal need and climate harm in Victorian communities is to take action now to ensure that all Victorians live in communities with resilient infrastructure, essential services, houses and neighbourhoods.

Placing the principles of climate justice central to adaptation policy would contribute to preventing future legal needs and ensure access to justice for all Victorians. These principles are also a legal mechanism that can be incorporated into the VAAPS to ensure accountability and equitable adaptation.

The principles of climate justice are:

- First Nations peoples and their relationships to Country must be centred in the development of laws, policies and strategies to address climate change.
- Climate harm must be mitigated to ensure that both the risks of climate impacts and the benefits of the transition to a post-carbon world are shared equitably.
- Rights must be centred in all decision making in relation to climate change, including the rights of future generations and the right to a safe and healthy climate.
- Decision making that concerns climate change must be participatory, transparent and accountable.

5. **Sarah MANSFIELD, page 19**

Question Asked:

You touched on it then in your answer but also in your submission – the spectre of legal liability for governments if they do not adequately address some of these climate adaptation challenges and risks. Are there any examples of that already, and what do you foresee if we do not get some of this right?

Bronwyn LAY: I will take it on notice.

Response:

All governments, including the Victorian Government, face the significant risk of expensive litigation in relation to their obligation to reduce climate harm. As climate impacts become more severe, we can expect a rise in litigation against governments if they fail to take adequate adaptation measures. This could include lawsuits for damages caused by extreme weather events, sea-level rise, and other climate-related impacts. Court cases could result in significant financial costs for governments, including compensation for damages and the costs of implementing court-ordered measures. This could strain public resources and impact other areas of governance.

If governments do not address these challenges effectively, they risk not only legal consequences, but also the broader impacts of unmitigated climate change on their populations and economies including the rise of legal needs. Ensuring robust climate adaptation measures are resourced and implemented is crucial for minimising these risks.

Prior cases that will serve as precedent for any future litigation include:

Black Saturday Bushfires (2009): The Victorian government and power companies faced lawsuits following the devastating Black Saturday bushfires. The Royal Commission found that the failure to maintain power lines and inadequate emergency response contributed to the disaster.

- **Victorian Floods (2011):** There were legal actions against local councils and the Victorian Government for alleged failures in flood management and warning systems. A major class action lawsuit was filed against the Victorian Government and water authorities, alleging negligence in flood management and warning systems. In 2021, the Supreme Court of Victoria approved a settlement of \$150 million to compensate affected residents and businesses.
- **Wivenhoe Dam Floods (2009):** The Queensland government faced a class action lawsuit for the management of the Wivenhoe Dam during the Brisbane floods. The court found that the operators were negligent in their handling of the dam, which exacerbated the flooding.

As adaptation is an emerging obligation, there haven't been prominent cases specifically on the obligation to provide equitable adaptation in Victoria. As the Federation's submission outlines at page 26, equitable adaptation is emerging as a legal obligation with subsequent rights and will become stronger as evidence of climate harm increase with the risks.

Potential future cases

The Climate Change Act imposes a duty on the Victorian Government to

consider climate change impacts in its decision-making processes. If the government fails to adequately fulfill these obligations, it could potentially face legal challenges. For example, the Act requires the government to develop and implement VAAPs across various sectors to guide climate resilience efforts. If these plans are not effectively implemented, including being resourced to be effective, it could lead to claims of negligence or failure to protect communities and infrastructure from climate impacts.

The types of legal cases that might arise in relation to the government's obligations in climate change adaptation include:

Civil Law Claims

Negligence: If the Victorian Government fails to adequately plan for or mitigate the impacts of climate change (such as floods), affected individuals or communities might file negligence claims. For example, if inadequate flood defences lead to significant damage, residents could sue the government for failing to protect them.

Public Nuisance: Communities affected by climate change impacts (such as rising sea levels or increased bushfire risks), might file public nuisance claims against the Victorian Government. These claims would argue that the government's inaction has created conditions that harm the public.

Class Action Lawsuits: Large groups of people affected by climate change impacts might come together to file class action lawsuits against the Victorian Government. These cases could seek compensation for damages or demand stronger adaptation measures.

Breach of Statutory Duty

Cases could arise if the Victorian Government fails to comply with specific statutory obligations related to climate change adaptation such as those under the Climate Change Act. Breach of statutory duty in relation to climate change adaptation involves the failure of a government or organisation to comply with specific legal obligations set out in legislation, such as those within the Act. If a government fails to fulfill its statutory duties, it can be held accountable through judicial review or other legal mechanisms. This can result in court orders to take corrective action or compensate affected parties.

Human Rights Violations

There could be cases where individuals or groups claim that the Victorian Government's failure to address climate change adaptation infringes on their human rights. For example, inadequate measures to protect against extreme heat could be argued as a violation of the right to life and health. The risk of litigation and accountability lies with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) which sets out the basic rights, freedoms, and responsibilities of all Victorians. These could be used to ground civil claims, including several provisions that are relevant to climate change and adaptation planning, such as the right to life and the right to property.

Administrative Law Challenges

Individuals or organisations might challenge Victorian Government decisions related to climate change adaptation through administrative law. This could involve questioning the adequacy of environmental impact assessments or the legality of planning approvals for developments in vulnerable or inappropriate areas, such as greenfields.

These types of cases highlight the importance of proactive and comprehensive climate change adaptation planning by the government to mitigate potential legal liabilities.

Conclusion

The Federation is grateful to the Inquiry members for the opportunity to expand on our submission and represent the concerns of community legal centres across Victoria. We are also grateful for the seriousness and diligent approach taken by the inquiry to this very complex but essential issue that will determine Victoria's future climate resilience.