

## **NSWCCL SUBMISSION**

**Call for Inputs from the  
Special Rapporteur on the  
promotion of human rights in  
the context of climate change**

**“Enhancing climate change  
legislation, support for  
climate change litigation and  
advancement of the principle  
of intergenerational justice”**

**24 May 2023**

## **Acknowledgement of Country**

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

## **About NSW Council for Civil Liberties**

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

## **Contact NSW Council for Civil Liberties**

<http://www.nswccl.org.au>

[office@nswccl.org.au](mailto:office@nswccl.org.au)

Correspondence to: PO Box A1386, Sydney South, NSW 1235

The NSW Council for Civil Liberties (**NSWCCL**) welcomes the opportunity to make a submission to Special Rapporteur on the promotion of human rights in the context of climate change.

We adopt the headings and numbering in the call for inputs, and only respond to matters that fall within our knowledge and expertise.

### **Enhancing Climate Change Legislation:**

#### **Can you provide examples of climate change legislation that incorporates human rights elements, or a reference to obligations relating to loss and damage?**

Australia has dedicated climate legislation at a federal level and in four of its subnational jurisdictions (Victoria, Tasmania, South Australia and the Australian Capital Territory (ACT)). This legislation is focused primarily on emissions mitigation and does not address loss and damage or adaptation more broadly.

Australia does not have a tradition of integrating substantive human rights into legislation, relying mostly on the limited rights protections offered by the common law. At the federal level, legislation is required by the *Human Rights (Parliamentary Scrutiny) Act 2011* to be accompanied by a Statement of Compatibility with Human Rights (**SCHR**). This is a procedural measure that requires the relevant government minister to explain why, in their opinion, the legislation is compatible with human rights. The SCHR does not alter the content of the legislation and is not binding on a court. There is also no guarantee that the proponent Minister has properly construed the provisions of international or domestic human rights law. This SCHR is a purely procedural measure which appears to have little impact on aligning climate legislation with human rights.

For example, the *Climate Change Act 2022* (Cth) was legislated with a SCHR. This is despite the emissions targets legislated being incompatible with the 1.5C temperature target,<sup>1</sup> a temperature rise beyond which will have considerable human rights impacts.

Three subnational jurisdictions (Victoria, Queensland and the ACT) have dedicated human rights legislation, and while these may be relevant to climate related administrative decisions they do not specifically address climate change.

NSWCCL is engaged in ongoing campaigns for charters of human rights in NSW and at the Commonwealth level which implement all of Australia's existing international human rights obligations and provide appropriate recourse for remedies to individuals.

#### **How to you think climate change legislation should frame a connection to human rights obligations?**

To be effective, climate change legislation needs to centre consistency with human rights (including a right to a healthy environment) as a core and binding obligation upon administrative decision makers. Such an obligation needs to be enforceable, with the ability for judicial review to both ensure its enforcement and provide case law to define its scope.

Such an obligation should be cross cutting across all administrative decisions that may impact the climate (for example planning approvals, procurement decisions, the allocation of government funds) to direct the whole of government to actions consistent with responding to climate change and its consequent effect on the enjoyment of human rights.

---

<sup>1</sup> Climate Action Tracker, 'Australia' (2 August 2022) <<https://climateactiontracker.org/countries/australia/targets/>>.

## **How do you think climate change legislation should engage the concept of loss and damage?**

Liability for civil harms inflicted upon others is generally dealt with through the law of torts in Australia. Tort law is a largely common law doctrine that has historically evolved in a manner that is widely recognised as being ill equipped to deal with the nature of climate harms, and indeed there has been no successful use of tort law to claim climate change related loss and damage in Australia. This clearly denies victims of climate loss and damage recourse to justice and shields emitters from the consequences of their actions.

Legislative reform to state based civil liability acts is required to bridge gaps in tort law to ensure those impacted by climate related loss and damage are able to seek legal recourse to compensation.

### **Supporting Climate Change Litigation:**

## **How are human rights considerations being incorporated into climate change litigation?**

The first domestic climate litigation case in Australia to engage human rights considerations is *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21 under the then newly legislated *Human Rights Act 2019* (Qld)(**Youth Verdict**).

In this case in which the Court was tasked with considering the environmental approval of the mine on its merits, the impacts of a coal mine's approval on human rights was considered alongside other, more traditional legal paths to considering climate change. These included environmental impacts and the public interest. While it cannot be said for certain that the finding the mine would unjustifiably limit the human rights of individuals in that state was determinative, it appeared to be a persuasive factor in informing the judge's decision to recommend refusal of the mine.<sup>2</sup> This demonstrates the potential for human rights legislation being used where it exists to complement and enhance traditional environmental arguments against fossil fuel infrastructure.

## **Are there issues with making the link between human rights and climate change litigation?**

The main issue in Australia is a woefully inadequate lack of human rights protections in domestic law. Outside the three jurisdictions with human rights acts (Queensland, Victoria and ACT), there is no ability for plaintiffs to make human rights-based arguments in most Australian courts including at a federal level.

The lack of available domestic remedies for climate change related human rights harms, for example, led to the complaint to the UN Human Rights committee in *Daniel Billy and others v Australia*.<sup>3</sup> In this case the UN Human Rights Committee found Australia had failed to protect from climate impacts the rights of Torres Strait Islander communities to culture, and freedom from arbitrary interferences with private life, family and home.<sup>4</sup>

---

<sup>2</sup> See *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21, [1603].

<sup>3</sup> Human Rights Committee, Views: Communication No 3624/2019, 135th sess, UN Doc CCPR/C/135/D/3624/2019 (21 July 2022).

<sup>4</sup> Human Rights Committee, Views: Communication No 3624/2019, 135th sess, UN Doc CCPR/C/135/D/3624/2019 (21 July 2022) [8.12].

**What do you think are the major barriers to initiating climate change litigation? And are there particular issues with getting access to the courts?**

The main barrier to initiating climate litigation in Australia is cost. In Australia such public interest litigation is generally carried on by two community legal centres, Environmental Justice Australia in Victoria and the Environmental Defenders Office for the remainder of the country. Litigation work is funded mainly by donations and resources are limited.

**Is the judiciary in your country well equipped to understand the connection between human rights and climate change?**

In *Youth Verdict*, the judge demonstrated the ability to properly grapple with the connection between human rights and climate change. This was particularly noteworthy as it was the first time this area of law (human rights law) was heard in the particular court (the Queensland Land Court). However, given there has only been a single case on the subject, it is too early to judge the Court's ability to understand the connection.

**Advancement of the principle of intergenerational justice:**

**What examples do you have of how intergenerational justice, as it applies to climate change and human rights, has been incorporated into international law, national constitutions or domestic law?**

Intergenerational justice is incorporated into Australian environmental law through the principle of ecologically sustainable development (ESD). In this context, it is referred to as "intergenerational equity".<sup>5</sup> It is said to be that inter-generational equity provides that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for future generations.<sup>6</sup> This has allowed the consideration of intergenerational justice and climate change outside the human rights context. For example, in *Gloucester Resources Ltd v Minister for Planning*,<sup>7</sup> an Australian court found that the economic benefits of a coal mine would be enjoyed only by present generations while environmental impacts, including climate impacts would burden future generations.<sup>8</sup>

**How would you best define intergenerational justice in the context of climate change and human rights?**

We consider that intergenerational justice in the context of climate change and human rights means ensuring the Earth System is kept in a state conducive to the equal enjoyment of human rights. This is necessary because all human rights are dependent upon the continued ecological conditions which have existed over the time period known as the Holocene. Those that have benefited from Holocene ecological conditions do not have the right to destabilise the Earth System in full knowledge that it will lead to ecological conditions incompatible with the equal enjoyment of human rights in the future.

**Has the concept of intergenerational justice been incorporated into climate change litigation?**

In *Youth Verdict* the principle of intergenerational equity was applied to climate change in the context of human rights in that the rights of children, both living and future generations, needed to be taken into account. On this point, the Court found that the climate impact on present and

<sup>5</sup> See for example, *Protection of the Environment Administration Act 1991* s 6(2)(b).

<sup>6</sup> *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257, [398]-[399].

<sup>7</sup> (2019) 234 LGERA 257.

<sup>8</sup> *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257, [415].

future generations of children weighed against approving the mine.<sup>9</sup>

## **Intergenerational justice appears**

**How can States incorporate the concept of intergenerational justice in their national constitutions and legislation? What are some good practices in that respect?**

The concept of intergenerational justice has entered Australian law through the common law as part of the principle of ESD.<sup>10</sup>

In some jurisdictions such as NSW, ESD has been enshrined in legislation. For example the *Protection of the Environment Administration Act 1991* provides that the NSW Environmental Protection Agency (**EPA**) should have regard, when carrying out its regulatory functions, to the need to maintain ESD, including by taking into account the principle of intergenerational equity.<sup>11</sup> Intergenerational equity is defined in this legislation as:

that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations

In *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority*,<sup>12</sup> the court found that the EPA's objects to maintain ESD necessarily includes protecting the environment from climate change.<sup>13</sup> This formed part of the reasoning that led the Court to order that the EPA implement policies to protect the NSW environment from climate change.

This submission was prepared by Jay Gillieatt. We trust that it assists.

Yours sincerely,

**Josh Pallas**  
**President**  
**NSW Council for Civil Liberties**

---

<sup>9</sup> *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257, [1603].

<sup>10</sup> *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133, [183].

<sup>11</sup> *Protection of the Environment Administration Act 1991* s 6.

<sup>12</sup> [2021] NSWLEC 92.

<sup>13</sup> [2021] NSWLEC 92, [61].