

A need for a new legal climate: within climate change, human rights and discrimination law

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"We have not inherited this land from our ancestors; rather we have borrowed it from our children"
Kenyan Proverb

I Introducing a humane climate

From denial to dawning, climate change has become the major issue of global discourse. Scientists disagree on the extent to which climate change will cause harm, however the bare facts state that without intervention, climate change will drastically affect the survival of humans on earth. No one person in the next fifty years will escape the effects of climate change.² As within every facet of human life and interest there are rules, codes and laws, so too will there be a need for laws on arguably the most global issue of all, climate change.

A. The global issue of them all

Climate change has been labelled the earth's impending apocalypse unless human beings take drastic actions to reverse global warming. Solutions ranging from trading schemes to renewable energy and to carbon sequestration have been put forward as a means of solving the world's man made crisis. One area that is a source of both problems and solutions is climate change's human rights implications, which have not been addressed within Australian law.³ In terms of human rights, civil rights and anti-discrimination law Australia has, traditionally, followed other more progressive countries.⁴ This paper looks at how climate change can be viewed, not simply as an environmental, economic or political issue, but as an issue that encompasses all of these a human rights issue that requires recognition under its own area of law.

This paper brings together international human rights and climate change law to argue how climate change is relevant to discrimination law. By looking at how climate change violates human rights this essay hopes to argue the moral imperative for viewing climate change as a human rights and discrimination issue. Part II shows how there is an increasing trend in international environmental law to accept environmental harm as a legal issue that can be redressed under human rights law. The Inuit petition and other recent legal actions referred to in Part II illustrate how human rights are adapting to climate change issues.

Part III then argues that climate change policy like the Kyoto Protocol can negatively affect human rights and discriminate against people, demonstrating why other mechanisms must be available to prevent such discriminatory actions. This action would be supplied in the form of an act of legislation, whereby climate change discrimination would be a recognised area of anti-discrimination law.

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2 J. David Allan, Margaret Palmer and N. Leroy Poff, 'Climate Change and Freshwater Ecosystems' in Thomas E. Lovejoy, Lee Jay Hannah (eds), *Climate Change and Biodiversity* (2005) Michigan: Yale University Press, 274, 284.

3 Human Rights and Equal Opportunity Commission (HREOC), *Background Paper : Human Rights and Climate Change*, (2008) 24.

4 See, eg., Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) Melbourne: Oxford University Press, 6. These humanitarian leaders include, but are not exclusive to, the United States of America, Canada, England and New Zealand.

Part IV suggests that such a transition would be natural in light of sex discrimination law's introduction and evolution in Australia. Therefore climate change discrimination could be introduced along analogous lines to the *Sex Discrimination Act 1984* (Cth). The essay discusses two international cases and one domestic case that demonstrate the possibility for a trend towards climate change discrimination law.

Part V further urges towards the need for climate change discrimination law it concludes by viewing discrimination law cautiously because of the problems with current legislation. It ends by suggesting the need for a combined market and human rights based approach. This new hybrid law could provide both the financial incentive to motivate people towards resolving climate change in a non-discriminative and human manner.

B. Introducing climate change

1. What is climate change?

This section serves as a brief introduction to climate change. Climate change is the rapid warming of the earth's atmosphere due to the release of greenhouse gases (GHGs) into the earth's atmosphere. They create a blanket that traps and prevents the sun's rays from being reflected back into space. These gases range from methane, sulphur dioxide, ozone and most significantly water vapour to carbon dioxide.⁵ Carbon dioxide emissions are, after water, the second largest contributor to all emissions according to the International Panel on Climate Change (IPCC).⁶ The increase in carbon emissions has been attributed to energy, petrol and industry demands requiring increasingly larger amounts of fossil fuels to be burnt.⁷ The current focus has been towards reducing carbon emissions through emissions trading schemes and lowering carbon usage through alternative technologies.

2. What does this mean?

A warmer atmosphere affects not only the atmosphere but land, sea and river systems.⁸ The most notable effects are: raised sea levels due to melting glaciers and ice caps and changes in weather patterns leading to natural disasters in areas that either have not experienced them before or increased severity and frequency in places that usually experience natural disasters.⁹ However, concerns in the developed world have been centred on the increase in day-to-day energy costs, which translates itself into increased living expenses.

II Climate change - violating fundamental human rights

A. The human dimension of climate change

Climate change will affect almost every person on this planet, however the people most affected by climate change are the Inuit people and Pacific islanders because of their geographic location.¹⁰ Sheila Watt-Cloutier, who filed a petition to the Inter-American Commission on Human Rights on behalf of the Inuit People, notes the problems felt by people in geographically vulnerable sites are only the tip of the climate change iceberg with the wider effects increasing daily.¹¹ This section first looks at the United Nations Declarations and Conventions on Human Rights to

⁵ Peter Read, *Responding to Global Warming: The Technology, Economics and Politics of Sustainable Energy* (1994) London and New Jersey: Zed Books, 33-37.

⁶ Tim Flannery, *The Weather Makers: The Story of Global Warming* (2006) Melbourne: Text Publishing Australia, 22.

⁷ Intergovernmental Panel on Climate Change, *Climate Change 2007: Mitigation of Climate Change* (2007) New York: Cambridge University Press, 621.

⁸ Flannery, above n 6, 11-14.

⁹ Ibid, 6-7.

¹⁰ Ibid, 211-213.

¹¹ Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (submitted 7 December 2005), available at <earthjustice.org/library/reports/ICC_Human_Rights_Petition.pdf> here in after, the Inuit petition.

identify the source of human rights in international law. It then looks at just two of the more significant human rights that are threatened by climate change. It then highlights two international cases that found companies and governments liable for breaches of human rights on the basis of environmental harm. The section then turns to the Inuit petition to illustrate that human rights and climate change are beginning to align under international law.

B. *Canaries in a goldmine - human rights violations*

1. *The source of human rights*

Australia's human right obligations stem from the 1948 *Universal Declaration of Human Rights* (UDHR), along with several other related treaties such as the *International Covenant of Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Right* (ICESCR). Australia ratified these International agreements in 1980 and 1975 respectively and although the UDHR is not a treaty it has become an integrated part of international customary law.¹² All together they constitute the *International Bill of Human Rights* (IBHR). The rights identified below are two of, but not all of the rights that will be affected by global warming.¹³ They serve to demonstrate some of the far-reaching effects of climate change on not only human rights but also humanity's existence on earth.

2. *Some rights in jeopardy*

(a) Right to Life

The 'right to life' is protected under art 3 of the UDHR and art 6(1) of the ICCPR. B G Ramacharan argues that this right should be the 'imperative norm of international law which should inspire and influence all other international rights.'¹⁴ He views it as an integral and basic aspect of all other rights. Climate change may have an immediate effect upon the right to life; for example, extreme climate-change induced weather events may cause deaths (as in the recent Victorian bushfires). More commonly, climate change imposes a risk on the right to life in the way that it directly threatened other human rights, from the right to health, to the right to adequate food, the right to property and so on. An example of climate change's affect on the right to life is the way it threatens the lives of Pacific Islanders. The existence of Tuvaluans of the Pacific nation of Tuvalu on nine islands that amass to twenty-six square kilometres is threatened by coastal erosion, increased frequency and ferocity of tropical cyclones and drought due to rising sea levels.¹⁵ They have begun to consider themselves as 'climate change refugees'.¹⁶

(b) Right to water

Australia is the world's most arid inhabited country, causing our environment to be one of the most affected by climate change with regard to serious droughts and flooding.¹⁷ Peter Gleick contends that the right to water is implicitly and explicitly supported by international law and declarations.¹⁸ As noted above, the right to water is linked with the right to life and Peter Gleick argues that the right to water should be akin to other rights such as the right to food, health and human well-being.¹⁹ Therefore, once our water resources start to decline the rest of our rights begin to deteriorate as well. Even though the right to water is not mentioned in the IBHR, it was

12 See, eg, HREOC, *Human Rights Explained Fact sheet 5: The International Bill of Rights* (2008), HREOC <http://www.hreoc.gov.au/education/hr_explained/5_international.html> 4 June 2008.

13 See, above n 3 and Sara Aminzadeh, 'A Moral Imperative: The Human Rights Implications of Climate Change' (2007) 30 *Hastings International and Comparative Law Review* 231.

14 B G Ramcharan, *The Right to Life in International Law* (1985) Netherlands: Martinus Nijhoff Publishers, 6.

15 Tuvalu Government, *Tuvalu Islands and Global Warming* (2008) Tuvalu Online <<http://www.tuvaluislands.com/warming.htm>> at 2 June 2008.

16 Ibid.

17 Rory Sullivan, 'Australia Country Study' (Human Development Report Office Occasional Paper, United Nations Human Development Report 2007) 1.

18 Peter H. Gleick, *Water Policy* 1 (1998) 497-503.

19 Ibid p 490

recognised as an independent right in 2002 by the UN Committee on Economic, Social and Cultural Rights.²⁰ The HREOC background paper on Human Rights and Climate change identifies that Australia is already experiencing more competitive activity for water.²¹ The recent water policies on the Murray-Darling catchment system illustrate the increased scarcity of water within Australia.²²

3. Environmental based violations of human rights claims

The human rights based approach to environmental problems is becoming more common worldwide. The below cases are some of the more well-known cases that demonstrate how human rights can provide a means for redressing environmental harm. However, the Inuit petition elucidates the potential for human rights based approaches to remedy some of the harms caused by climate change, even though this claim failed. The need for a human rights based approach is argued by Justin Sherrard and Alan Tate, who state that climate change 'demands an urgent response that should encompass action that is local, national and global in nature.'²³ According to them, this can be achieved through looking at and treating its effects on people.²⁴

(a) The Right to Privacy and Family Life

*Lopez Ostra v Spain*²⁵ - In *Lopez Ostra v Spain* the European Court of Human Rights held that Spanish government breached art 8 of the European Convention, which provided a right to privacy and family life. The government run waste treatment plant caused health problems for a Spanish national who lived nearby to the plant. She argued that noxious fumes and effluents were being emitted from the plant.²⁶ The case established that a government could be held liable for serious environmental degradation that affects an individual's human rights.²⁷ This case established a positive duty that a government has to ensure that their citizens' human rights are not jeopardised by environmental harm.

(b) The Right to Health

*Social and Economic Rights Action Center for Economic and Rights v Nigeria*²⁸- In 2001 the Nigerian government was held accountable for violating the right to health. Curtis Doebbler asserts that *Social and Economic Rights Action Center for Economic and Rights v Nigeria* (the *Nigeria Case*) established the 'ability of groups to claim human rights before international tribunals' on the basis of environmental harm.²⁹ The African Commission on Human and Peoples' Rights held that the military government of Nigeria had been involved with an oil operation that caused environmental problems and resulted in health problems for the Ogoni people. Under the African Charter on Human and Peoples' Rights the government had breached several rights, in particular art 16, which provided the right to health that according to the Commission was held to be 'massively and systemically violated.'³⁰

(c) Human rights based approach to climate change

The Inuit Petition - The recognition of preventing environmental harm through human rights is a growing area of international law. However, the recent iconic petition by the Inuit people to link harm caused by climate change with

20 UN Committee on Economic, Social and Cultural Rights, *General Comments No.15 – the Right to Water* (2002) UN Doc E/C.12/2002/11.

21 HREOC, above n 3, 6.

22 John Archer, *Twenty Thirst Century : the future of water in Australia* (2005) Australia: Pure Water Press, 11.

23 Justin Sherrard and Alan Tate, *Equity in response to climate change roundtable: An Australian snapshot* (2007) Australia: Cambiar, 2.

24 Ibid, 3.

25 20 Eur. Ct H.R. 277 (1995).

26 Ibid.

27 Ibid.

28 ACHPR, Comm, 155/96, 30th Ord. Sess., Banjul, Gambia (October 2001).

29 Curtis Francis Doebbler, *International Human Rights Law: Cases and Materials* (2004) Washington DC: CD Publishing, 685.

30 *Social and Economic Rights Action Center for Economic and Rights v Nigeria* ACHPR, Comm, 155/96, 30th Ord. Sess., Banjul, Gambia (October 2001), 25.

human rights reveals that climate change has yet to be legally recognised as an issue for human rights. The non-governmental organization (NGO), the Inuit Circumpolar Conference (the Inuit people of Alaska, Canada, Greenland and Russia), filed a petition on 7 December 2005 to the Inter-American Commission on Human Rights (the IACHR) claiming that the United States acts and omissions with regard to their climate change policy violated the Inuit's human rights.³¹

The Inuit argued that as the world's largest producers of carbon emissions per capita and a nation who had failed to implement climate change policies they were liable under the American Declaration of Rights and Duties of Man.³² The petition claimed that several rights had been violated, some of which included, the right to enjoy the benefits of their culture, the right to use and enjoy their personal property and the lands they have traditionally used and occupied and the right to the preservation of health.³³ They cited many scientifically backed studies of how climate change was affecting weather patterns, increasing thinning of the ice which directly impeded their ability to live off the environment.³⁴

The IACHR declined to review the petition because the petition did not contain the required information needed to establish 'whether the alleged facts would tend to characterize [sic] a violation of rights protected by the American Declaration.'³⁵ Nevertheless, as Sara Aminzadeh expresses, even though the IACHR refused to 'review the Inuit petition, the filing of the petition has garnered international media attention and sparked legal discourse.'³⁶ The case demonstrates that a human rights based approach maybe a means of defending the entire Inuit way of life against climate change, elucidating the profound importance of human rights law.

III The hidden climate of law - The Kyoto Protocol

A. Climate law's ingrained discrimination

This section serves to articulate the need for discrimination law to prevent discriminatory processes from occurring two-fold. It looks at the Kyoto Protocol (the Protocol) and the way in which it works to reduce carbon emissions. It then looks at the scheme more critically, teasing out the ways in which it discriminates against those who are most affected and who are the least to blame for climate change. By focusing on the Protocol this section is able to illuminate how current measures implemented to combat climate change are, in fact, perpetuating some of these human rights violations and explores the discriminatory effect of these schemes.

B. The Kyoto Protocol – towards the road to recovery

Many governments have sought to reduce their GHG emissions in an attempt to slow down the effects of global warming; after all, recognising that there is a problem is the first step to recovery. These governments have sought reduce emissions through carbon emission trading schemes. These range from state level to inter-continental. The current global scheme is the Kyoto Protocol (the Protocol).³⁷ Parties who become signatories to the treaty are required to implement climate change policies geared towards reducing their emissions. The treaty 'create[s] a clear, mandatory set of targets that... ensure that parties [do] not exceed their assigned carbon allowance.'³⁸ Countries are

31 Inuit Petition, above n, 11.

32 Ibid, 103 -110.

33 Ibid, 74-95.

34 Ibid, 15-20, 23-26.

35 Letter from the Commission is excerpted in an article by Jane George, Nunatsiaq News, ICC climate change petition rejected, (2006), at <www.nunatsiaq.com/news/nunavut/61215_02.html> visited 28 May 2008.

36 Above n 13, 241.

37 Peter G.G. Davies, 'Global Warming and the Kyoto Protocol' (1998) 47(2) *The International and Comparative Law Quarterly* 446, 446.

38 Clare Breidenich et al, 'The Kyoto Protocol to the United Nations Framework Convention on Climate Change' (1998) 92(2) *American Society of International Law* 315, 320.

given a time frame by which they have to reduce their emissions, however criticism of the Protocol has led to the implementation of flexible mechanisms.³⁹

There are three main 'flexible' mechanisms, generally referred to as 'emissions trading' that are used by the Protocol and which are supposedly designed to reduce carbon emissions amongst developed industrialised nations.⁴⁰ First of all, the Joint Implementation mechanisms enable quotas for emissions to be transferable amongst signatory countries. Second, the 'Clean Development Mechanisms' permits the development of industries and projects that reduce emissions in developing countries.⁴¹ The final mechanism enables for a cap and trade scheme, where carbon units become transferable internationally.⁴²

C. Inegalitarian solutions and discriminatory methods

However, Larry Lohmann from the British NGO Corner House criticises the Protocol arguing that the mechanisms do not work because they privatise carbon credits, turning them into a proprietary right to pollute.⁴³ This is because owners of carbon credits seek to maximise their profits over minimising the effects of climate change on the environment and on people.⁴⁴ Lohmann further contends that the Kyoto Protocol is 'wildly inegalitarian' because it gives away millions of dollars worth of carbon credit free 'to rich corporations and governments while the world has been looking away.'⁴⁵ In essence the very corporations who have been doing the damage and polluting in the first place are being rewarded for it monetarily. By contrast those such as the Inuit who emit little to no carbon in comparison are neglected by the protocol, even though they are the ones who have felt the real day to day effects of climate change.

Not only does the Protocol fail to help those who are most affected by climate change, but the methods used to trap carbon emission often work discriminately against less developed countries and people who are already affected by climate change. The Clean Development Mechanisms, such as carbon sequestration works to capture carbon emissions and 'trap' them back into the earth so as to reduce the effect of climate change.⁴⁶ The Durban Group submits that sequestration methods 'create transferable rights to dump carbon in the air, oceans, soil and vegetation far in excess of the capacity of these systems to do so.'⁴⁷ As explored earlier the Inuit's human rights are violated by climate change. Secondly, initiatives to sequester carbon by 'injecting' carbon dioxide deep into the ocean is claimed to have the negative effects that disturb the chemistry of the marine ecosystem.⁴⁸ Carbon dioxide rich areas of the sea can render an entire area lifeless. This in turn affects the Inuits who rely on sea life for all their food and living resources.

The Protocol demonstrates how climate discrimination is becoming ingrained within the world both by continual practices that promote climate change and by practices aimed at reducing climate change. This is because approaches so far have been market based approaches, wherein the world economy for fossil fuel or the Protocol, which use carbon credits that function as a proprietary right to pollute, both work on the basis of market based

39 Martin Frost, *Trading in the Right to Pollute* (2006) <http://www.martinfrost.ws/htmlfiles/sept2006/pollution_trading.html> at 2 November 2007

40 Ibid.

41 Carbontrading.com, *Glossary of Keywords* (2007) <www.carbontrading.com/ct/glossary.htm#C> at 19 October 2007.

42 Ibid.

43 Larry Lohmann, 'Democracy or Carbocracy? Intellectual Corruption and the Future of the Climate Debate' (The CornerHouse, 2001) 5.

44 Daniel Brook, 'The Ongoing Tragedy of the Commons' (2001) 38(4) *The Social Science Journal*

45 Larry Lohmann, *The Kyoto Protocol: Neocolonialism and Fraud* (2002) The Corner House <<http://www.thecornerhouse.org.uk/item.shtml?x=52199#index-01-00-00-00>> at 19 October 2007.

46 Above n 41.

47 'Climate Justice Now! The Durban Declaration on Carbon Trading' (2004) *Durban Group for Climate Justice* <<http://www.carbontradewatch.org/durban/durbandec.html>> at 18 November 2007.

48 P M Haugan and H Drange, 'Sequestration of CO₂ in the deep ocean by shallow injection' (1992) 357 *Nature* 318.

future profits through owning rather than looking towards resolving the environmental problem of climate change. This demonstrates the gap in the market for a human rights and anti-discrimination driven approach.

IV Discrimination law and climate change

A. Viewing climate change discriminately

Peter Bailey writes that a fundamental factor of the United Nations Charters and Conventions is 'the respect of human rights without any element of discrimination or distinction.'⁴⁹ From part II the essay has demonstrated that climate change constitutes a serious and real violation of human rights. Part III illustrated the discriminatory effects of the Kyoto Protocol. They served to show the need for these many elements of discrimination and distinction to be redressed by a human rights and anti-discrimination based approach to climate change. This section explores how climate change's future legal trajectory can be predicted and aided from prior civil rights movements paths into anti-discriminations law.

First it looks at past anti-discrimination movements as an analogy for how climate change can develop in the future. In particular it canvases how sex discrimination came to be recognised legally in Australia. Second it looks at how analogous steps can be and have been taken in order to legally recognise climate change litigation. For example the way that climate change is being litigated through tort law and pre-existing legislation, in the same way that sex discrimination was first heard under a right to work in the Commonwealth. These cases are not only analogous to the early sex discrimination cases, but they highlight the niche in the market for a climate change discrimination act. It serves to demonstrate Australia's potential for climate change discrimination legislation and for human rights based approaches to climate change.

1. What is anti-discrimination law

Anti-discrimination law works towards achieving equality, which according to Peter Bailey requires 'treating equals equally, but unequals unequally.'⁵⁰ In order to do this, a society must determine of means of 'distinguishing between what is acceptable and what is unacceptable.'⁵¹ In Australia legislation seeks to define discrimination by what is 'unlawful.' Discrimination is defined under s 3 of the *Human Rights and Equal Opportunity Act 1986* (Cth), which is the mother act for the various pieces of anti-discrimination law in Australia. Acts of 'unlawful discrimination' are 'any acts, omissions or practices that are unlawful under' any of the Australian anti-discrimination acts, for example the *Sex Discrimination Act 1984* (Cth) (SDA). In the context of climate change this would mean creating a climate change discrimination act that would outline and factor in potential inequalities caused both by climate change and the policies seeking to reduce global warmings effects.

2. How the ball got rolling – sex discrimination

Taking for example Australia's *Sex Discrimination Act*, which came in to effect in on 1 August 1984. The Act will be used to illustrate the way in which a human rights issue can become to be understood as an issue of equality and discrimination making way for anti-discrimination legislation within Australia.

(a) Origins of Sex Discrimination Law in United States case law

Prior to the recognition of sex discrimination, cases for sex discrimination were recognised internationally under other areas of the law. Discrimination law is recognised in the United States through their Bill of Rights and Constitution. The first US Supreme Court case on sex discrimination was in 1872. In *Bradwell v Illinois*, Mrs Bradwell was refused entry into the bar because it would destroy her femineity [sic].⁵² She argued under the Fourteenth Amendment, however the Court held that the right to practise a profession was not a privilege under this amendment and so she

⁴⁹ Peter Bailey, *Human Rights : Australia in an International Context* (1990) Sydney: Butterworths, 28.

⁵⁰ Ibid 30.

⁵¹ Ibid.

⁵² 83 U.S. 130 (1872).

was denied a licence to practise law. It was not until 1963 when the federal government introduced the *Equal Pay Act of 1963*⁵³ that a legislation prohibited discrimination in the form of different jobs. This followed with many more pieces of anti-discrimination legislation, such as the inclusion of a prohibition against gender-based discrimination in title VII of the *Civil Rights Act of 1964*.⁵⁴

(b) The recognition of gender inequality in Australian case law

there were no constitutional, legislative or common law frameworks within Australia to establish federal sex discrimination laws prior to the introduction of the *SDA*. Therefore when the English case *Nagle v Feilden*⁵⁵ came before the English Court of Appeal in 1966 the case had to be argued under the right to work not under sex discrimination. Florence Nagle was repeatedly denied a licence to train at the Jockey Club solely on the basis that she was a woman. The Court of Appeal reasoned from that she had a right to work and so she was granted a training license. This case set legal precedence for future sex discrimination work cases in Australia and England.⁵⁶ Significantly, this case also demonstrates that women had to rely on other areas of law, such as the right to work in order to establish their rights to equality.

(c) The *Sex Discrimination Act*

The *SDA* was drafted in Australia due to an increased public awareness of gender inequalities. The United Nations decade of women brought to light the need for legislation preventing discrimination of this kind in Australia, with New South Wales, Victoria, South Australia and New Zealand having already enacted sex discrimination legislation.⁵⁷ The *SDA* set out grounds of sex discrimination for both men and women.⁵⁸ The legislation was a symbolic and formative development in sex discrimination law, as it recognised it a legal wrong which needed to be addressed by legal action.

B. The foot in the door - climate change law

Climate change law is a very new area of law, which is still being developed domestically and internationally. As noted in part II, climate change litigation has had limited success under human rights law. However, climate change cases have been increasing, albeit, in different areas of law ranging from tort and nuisance law to freedom of information. The below cases are akin to *Nagle v Feilden* in that they get the foot in the door for future cases on climate change. They signal and identify climate change as a global issue with discriminatory implications. They are just three of the many cases occurring throughout the world as people begin to feel the real effects of climate change and turn to the courts under any area of law available in order to hold governments and corporations accountable for the harm caused by climate change.⁵⁹

1. Climate change and public nuisance law

In the United States 2005 *Connecticut v American Electric Power Company*⁶⁰, several states and NGOs came together against five major electrical utility providers. The states argued that the carbon dioxide emissions that caused sea levels to rise, which will flood New York City and increase health problems (amongst other things) constituted an ongoing public nuisance under both Federal and state common law.⁶¹ The case was heard by the Southern District of New York and was dismissed on 15 September 2005 on the grounds that 'political questions are not the proper

53 29 U.S.C.A. § 206(d).

54 42 U.S.C.A. §§ 2000e-2(a) & (d), 2000e-3(a) & (b).

55 [1966] 2 QB 633.

56 R. W. Rideout, 'Upon Training an Unruly Horse' (1966) 29 *The Modern Law Review* 424.

57 Bailey 151.

58 *Ibid* 153.

59 For more cases see especially, Climate Justice Law (2008) *Climate Law* <<http://www.climatelaw.org/cases>> at 1 May 2008.

60 406 F. Supp. 2d. 265 (S.D.N.Y. 2005) (No. 04 Civ 5669).

61 *Ibid*, 30-41.

domain of judges.⁶² This is an identical response to a later case, *Massachusetts v EPA*, which was the first climate change case to reach the US Supreme Court on the issues of standing and climate change.⁶³ David Grossman argues that in these early stages of climate change litigation, before a specific climate change legal framework has been developed, US tort law provides the best avenue for redressing climate change due to the harm that it causes.⁶⁴ However, he fails to address the causation requirement of tort law, which is particularly hard to establish in climate change cases when there are so many parties contributing to global warming.

2. Climate change and access to information

In 2006 two German NGOs, with international links in other countries filed a request for information under the *Environmental Information Act 1994* (Germany) against the Ministry of Economics and Labour.⁶⁵ They requested information on which coal and petrol companies from developing and transitional countries Germany funded from taxpayer's money. The plaintiffs were awarded an order for such information to be disclosed to the public. This case demonstrates how freedom of access to information can enable transparency within climate change law. For David Hunter, cases such as this one can then compel governments to act in a socially responsible manner.⁶⁶ This forces them to first consider their accountability and act towards preventing climate change as opposed to promoting their political and economic interests.

3. Climate change and Environmental Impact Assessment

The 2004 Australian case, *Australian Conservation Foundation v Minister for Planning*,⁶⁷ applied s 39 of the *Planning and Environment Act 1987* (Vic) to require the Minister for Planning, Latrobe City Council and the panel to consider GHG issues before constructing a brown coal power station. From the Victorian Civil and Administrative Tribunal, Morris J held that the panel had not considered the effects of GHGs when approving the plant and further more did not consider any submissions put forward on its effects.⁶⁸ Peter Roderick, Director of the Climate Justice Programme, views this decision as a 'commonsense understanding that climate change is a relevant consideration' when building new infrastructure and industries.⁶⁹ Furthermore, Barnaby McIlrath of the Environmental Defenders' Office, celebrates this case because it 'sets the scene for a more integrated approach to environmental impact assessments at both State and Federal level.'⁷⁰ Here, the Australian Tribunals are relying on and creatively using pre-existing statutes to enforce legal considerations of the negative implication of climate change within Australia.

C. A Field of its own? - Climate change discrimination

1. Moving towards a human rights based approach to climate change

Many areas of law will be affected by climate change and the above cases demonstrate this. They illustrate that even when there are no specific avenues for redressing climate change, applicants will still use other areas of the law to

62 Ibid, 1.

63 *Massachusetts v EPA* 2006 WL 558353

64 David A. Grossman, 'Warming up to a not-so-radical idea: tort-based climate change litigation' [2003] 28 *Columbia Journal of Environmental Law* 1, 3.

65 GermanWatch & BUND, German Government Sued Over Climate Change (June 15, 2004), available at <<http://www.climatelaw.org/media/german.suit/press.release.pdf>> at 10 June 2008.

66 David B. Hunter, "The Implications of Climate Change Litigation for International Environmental Law-Making" (WCL Research Paper No. 2008-14 American University 2007) 4.

67 [2004] VCAT 2029 (29 October 2004).

68 *Australian Conservation Foundation v Minister for Planning* [2004] VCAT 2029, 35.

69 Peter Roderick, *Australia can't ignore its greenhouse gas emissions* (2004) World Wildlife Fund : Climate Change <http://www.panda.org/about_wwf/what_we_do/climate_change/news/index.cfm?uNewsID=16330> at 13 June 2008.

70 Barnaby McIlrath, 'Victoria : Greenhouse Gas Emissions of Coal Mine Emissions of Coal Mine Expansion Relevant Planning Scheme Amendment' (2005)*The Australian Network of Environmental Defenders' Office*, 12.

provide a basis for their claims.⁷¹ Women's rights required a human rights based approach for people to begin to realise the inequalities occurring within Australia. As noted above sex discrimination came to be legally recognised in Australia through legislation. In terms of breaches of human rights due to climate change it seems reasonable to adopt a human rights based approach, and by viewing it as analogous to sex discrimination it will require anti-discrimination law of its own. It is becoming increasingly important for discrimination and the inequalities caused by climate change to be addressed through legislation that specifically enables equal opportunity for those affected by climate change. As Justin Sherrard and Alan Tate argue, the inequality gaps are only going to grow wider in every facet of life as climate change continues to take its course.⁷² They further contend that climate change discrimination law should be used as an opportunity to improve already existing disadvantage.⁷³

2. *The elephant in the room - Australia's potential Climate Change Discrimination Act (20??)*

Right now, we are skirting around the real issues of climate change. The social justice implications of climate change could be addressed through anti-discrimination law. This is because, as Peter Bailey states, the 'purpose of anti-discrimination law is to provide some form of protection and assistance to members of groups, which, taken as a whole are disadvantaged by comparison with the mainstream population.'⁷⁴ The United Kingdom's first sex discrimination case *Nagle v Feilden* demonstrates that until legislation specifically addresses an issue then it cannot be defined under the law as a social norm we wish to deter.

If indeed Australia has a positive duty to protect the UDHR and international convention rights, then Australia must base its response to climate change around a human rights approach. Such an approach would lend itself to a climate change discrimination act. This act would identify areas of direct and indirect discrimination caused by acts, omissions or practices, which contribute to or perpetuate the effects of climate change. This act would set a standard not only for all areas of industry to improve their policies with regard to climate change but it would also require positive action towards preventing increased discriminatory practices.

V A hybrid law - Marketing human rights and anti-discrimination law

For all the benefits that anti-discrimination law can bring to a society in the way that it works towards equal opportunity, legal scholarship has identified many shortfalls within the legislation that require redress. For example Margaret Thornton argues that even with the legislation a systemic discrimination still exists in which women must be brave and courageous enough to speak out.⁷⁵ Also, Beth Gaze argues that the complex theories and discourses on anti-discrimination law have little impact on judicial reasoning and understanding of anti-discrimination law, pleading instead for a more nuanced understanding of the law by judges, who will then be able to make more informed decisions.⁷⁶

While no piece of legislation is perfect, it would seem that a piece of legislation required to factor in all the matrixes of climate change would encounter greater complications and problems logistically than most - not only in drafting these laws but also in implementation and enforcement of them as well. Conversely, the market driven approaches such as the Kyoto Protocol have fewer problems of implementation due to the financial incentive that encourages people to participate in the scheme. Therefore, this essay concludes by suggesting the possibility for the future.

71 Madhusree Mukerjee, 'Greenhouse Suits: Litigation becomes a tool against global warming' (2003) 288(2) *Scientific American* 14.

72 Above n 23, 2.

73 Ibid, 10.

74 Ibid, 33.

75 Margaret Thornton, 'Sexual Harassment Losing Sight Of Sex Discrimination' [2002] 26 *Melbourne University Law Review* 422.

76 Beth Gaze, 'Context and Interpretation in Anti- Discrimination Law [2002] 26 *Melbourne University Law Review* 325.

NELR articles

A hybrid model, whereby the market based mechanisms and the human rights based approaches are combined to create an equitable means of reducing carbon emissions while at the same time protecting human rights and preventing discrimination against those most affected by climate change.

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