

GREENPRINT FOR A CLIMATE JUSTICE CLINIC:

LAW SCHOOLS' MOST SIGNIFICANT ACCESS TO JUSTICE CHALLENGE

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Introduction

The obvious existential challenge posed by global warming is also an access to justice challenge. As natural resource pressures caused by larger populations are exacerbated by climate catastrophes, corruption increases, law and legal systems lose impact and respect for the rule of law heads downhill. Arguably, as this descent becomes established, more individuals and more groups turn away from law and legitimate enterprise and towards terrorism, organised crime and populist or angry self-interest.

Despite the Paris Accords of 2015¹, there is little prospect of willing government action in defence of climate, at least in the limited time available. Global emissions are continuing to rise absolutely and per capita, year by year.² Australia is among the 'leaders' here,³ with no unconditional commitment in either major party to make the necessary and profound cuts to emissions, significantly beyond those agreed to in Paris.⁴ Populist and conservative forces are still in a position to frustrate and delay and remain unconvinced by or hostile to broad

¹ The *United Nations Framework Convention on Climate Change* (UNFCCC) received its strongest affirmation in the Paris Agreement of 2015. See <https://unfccc.int/process-and-meetings/the-paris-agreement/what-is-the-paris-agreement>

² Peter Hannam and Nicole Hasham "'Next decade critical' to save a warming planet', *The Age*, 9 Oct 2018, p5.

³ Lisa Cox, 'Australia on track to miss Paris climate targets as emissions hit record highs', *The Guardian* Australia, 14 September 2018 at <https://www.theguardian.com/australia-news/2018/sep/14/australia-on-track-to-miss-paris-climate-targets-as-emissions-hit-record-highs>

⁴ David Crowe, 'There is no will to find a way', *The Age*, 9 Oct 2018, p 5.

and penetrating concepts of sustainability. Those who hold these opinions are strong in both centrist Australian parties have a deep-seated confidence in the fundamental neo-liberal passion for unrestricted economic growth; and they may also just be more excited or even thrilled, by the images of expansion, for their own sake.

Nevertheless, resistance to such growth is, or needs to be, a major part of the socially responsible law school's mission and profile, especially through its clinical programs. Individuals and communities who are increasingly damaged by steadily rising temperatures, drought and flood have few straightforward means of legal redress. Even if those who suffer most from our deteriorating climate have some funds, they are often blocked in seeking climate justice because the causes of action are still in embryonic form and the costs involved in developing such actions have been seen as too high.

Seeking climate justice is not straightforward. Larger private law firm engagement with climate defence is often conflicted out because the short-term profit interests of their large corporate clients often dominate the thinking of both lawyer and client. Even those few private lawyers who do want to take action are intimidated by the need for considerable funding for disbursements and likely defendant arguments about the supposed need for security for costs. So far, no one in Australia has been able to locate a wealthy benefactor, foundation or not-for-profit prepared to meet these costs.

Some law schools are nevertheless in a position to fill this access to justice void and assist in the effort to combat climate change by designing and developing a climate defence or climate justice clinic. There *are* potential causes of action in the areas of nuisance, negligence and

public trust, as well as specific statutory and general regulatory arguments that can be developed in some jurisdictions.

This paper discusses and proposes a greenprint for such a clinic, not just to assist access to justice and climate defence, but to play a part in strengthening the political and social consciousness of the law students who pass through it. The discussion draws on the clinic design principles set out in *Australian Clinical Legal Education*⁵ and proposes a specific partnership model that leverages existing private lawyer goodwill and harnesses law school alumni beneficence.

What a law school clinic can do that a private law firm and barristers have not

Australia is not a large CO₂ emitter by volume, but it is among the largest on a per capita basis.⁶ In consequence, there is arguably a moral and pragmatic obligation on well-resourced Australian law schools with moral activist clinicians, to contribute to the concept of climate justice,⁷ just as many already do to address criminal law and numerous conventional, civil access to justice issues.

Law schools with well-developed clinical traditions tend to have access to a steady supply of motivated and skilled student researchers. Some of these are looking for opportunities to

⁵ Evans *et al*, *Australian Clinical Legal Education*, ANU Press, Canberra, 2017. Available at <https://press.anu.edu.au/publications/australian-clinical-legal-education>

⁶ Information provided by the Climate Council in 2015. See <https://www.climatecouncil.org.au/2015/05/20/new-report-reveals-that-australia-is-among-the-worst-emitters-in-the-world/>

⁷ There is a specific *ClientEarth* legal practice in the United Kingdom – see <https://www.clientearth.org/>, a firm which seeks to represent the earth as *the* client, utilising the concepts popularised in Cormac Cullinan’s *Wild Law: A manifesto for earth justice* (Green Books, London, 2003). There is also an *Australian Earth Laws Alliance*, at <https://www.earthlaws.org.au>.

pursue graduate research and many of these are capable of investigating, under supervision, likely causes of action. Law schools with sufficient staff depth can also provide the necessary academic and practitioner supervision for those students, linked to now commonplace multi-disciplinary sustainability resources of their University. Finally and most importantly, strong law schools are increasingly able to access high net worth clinical alumni and carefully recruit them to provide the relatively high levels of necessary funding for operating costs, and to meet potential security for costs' orders.

The key element in such recruitment is an alert attitude to possible sources of limited start-up funding and slow, careful engagement with potential long term donors to the ongoing operating costs of law school clinics. Often, these will be clinical alumni. Some will be known personally to clinic directors, others to dedicated alumni managers of the University. Not to put too fine a point on it, these people need to be *recruited* to a cause, and then sustained in their involvement in clinic priorities and direction, consistent with appropriate governance mechanisms.

Governance and control - identifying key partners

Governance of a climate defence clinic is an especially important task, something that cannot be fudged or rushed. The potential for political and financial missteps is real and accordingly, a strong, unified and specialised advisory board is justified, separate from any pre-existing and overarching clinical program advisory group that will lack a close knowledge of climate law and climate networks.

Ideally, this purpose-constructed climate defence advisory group will consist of five people with gender diversity: a managing partner of a significant mid-tier commercial law firm (which will be prepared to support climate litigation and clinical supervision pro bono, and which is unlikely to be conflicted out because of the commercial interests that are almost certain to be a problem with the largest firms), a major relevant NGO from the environmental law sector (which will provide relevant environmental network expertise and advice), a law school environmental law/ climate law academic and fourthly, a representative of the University's own sustainability network, institute or centre. The fifth member will be its nominal chair, and ideally, this person will be the overall director of the law school's clinical programs. Note that three of the five members of this body, which is advisory not determinative, are University employed, ensuring that effective control rests with the law school,⁸ in order to protect the educational objective of the clinic and ensure the same is pursued alongside the access to justice objective, and not relegated behind same.

A role for the donor(s), consistent with advice, but not control

Major alumni and other donors to the clinic are also likely to want a seat at the management table, consistent with the ownership they may feel that arises from their status as significant donors. It is essential to be clear with donors that donation does not equate to control, but does come with an expectation to be consulted. Accordingly, if any particular donor is

⁸ Note however that universities are not omniscient and can also misstep, particularly if they think their marketing is threatened. See for example the ANU law case in March 2018, where an ANU law student was removed from marketing publicity by the University because she wanted to include a statement about the plight of refugees. See Emily Baker, 'ANU removes law student from marketing booklet in aim for 'political neutrality'', *Sydney Morning Herald*, 19 March 2018, at <https://www.smh.com.au/education/anu-removes-law-student-from-marketing-booklet-in-aim-for-political-neutrality-20180316-h0xklf.html>.

insistent on a veto of clinic litigation decisions, their donation ought to be clarified and if necessary, respectfully declined with the above reasons given. This position is in any event, very likely to be consistent with general University attitudes to donors' conditions. But donors' trust must be respected and they must be regularly consulted and listened to. And for this reason, it is also important to regularly invite donors to be observers at advisory board meetings, and to make presentations on the issues that they think are important. It is best practice that each of the clinic's partners is consulted on and has provided informed agreement with the clinic's objectives.⁹ It is not recommended that a donor or donors be formulated into a separate donor advisory group for the clinic, as this can set up structurally-entrenched and competing advisory groups that will tie the hands of the clinic director.

Clinic Design

Clinic design - if this does not state the obvious - must occur before a clinic is in operation and begins with identifying and stating the desired course learning outcomes.¹⁰ Such identification is harder than it sounds, but can be begun by simply phrased, high level statements. In this clinic, learning outcomes might be stated as:

- Capacity in each student to understand the scale of climate deterioration and the key human contributions to same
- A willingness and capacity to critically analyse the existing law of climate preservation and anticipate areas where it might be extended

⁹ See Evans *et al*, *Australian Clinical Legal Education*, ANU Press, Canberra, 2017, Ch 4 Course Design for Clinical Teaching.

¹⁰ Evans *et al*, Note 7, pp 67-98.

- An ability to describe the different legal approaches to defending the climate and the factors and strategies to be taken into account in judging which approaches are best in what circumstances
- Adequate capacity to reflect on their experience in the clinic.

In addition to defining learning outcomes, there will be a range of best practices to take into account, as specified in *Australian n Clinical Legal Education*.¹¹ These typically include specifying necessary pre-reading and its assessment, in-course materials if any, clinic attendance times and other required activities. In addition, suitable pre-clinic observation (for example, with prior clinic students showing new students the ropes), is desirable. Classroom components are commonly seen as mandatory, to allow students to share and understand their clinic experience having regard to published documents and cases, while necessary reflection is often also a class room group activity, mediated through individual student journals. While clinics can be online and remotely delivered to suitable clients, the efficacy of this clinic is likely to depend on meaningful professional relationships that are best developed face to face over a reasonable period. Clinic length should therefore be at least a semester and ideally, a whole year, to allow consolidation of relationships, reflection and stronger learning outcomes.

Student selection into this clinic will be contested, not always for ideal reasons. The selection process should be negotiated with key partners and not just left to any default university procedures, even if the latter, should they exist, appear rigid. It is strongly suggested that:

¹¹ See generally, Evans *et al*, Note 7.

*The selection process is transparent and non-discriminatory. The prerequisites for selection are clearly articulated. The reasons for choosing particular methods of selection (which can include ballot, interview, stage of study or completion of a prior clinic) are articulated. There is no presumption that access to CLE courses and clinical experiences should be limited to later-year students.*¹²

Education and causes of action – strategic litigation against climate change

Education and compliance around the Task Force on Climate Related Financial Disclosure

There is powerful utility in a clinic design that engages law student-education and research strengths by building on the global *Task Force on Climate Related Financial Disclosures* (TCFD).¹³

TCFD is an initiative of the UK *Financial Stability Board*¹⁴ which has signed up many global corporations to a commitment to review their own climate preparedness. The incentive for corporations to cooperate with the TCFD protocols is financial: if their shareholders understand and can see that they are actively preparing for future climate impacts by disclosing their climate-related financial risk, they are likely to be persuaded to remain as shareholders rather than exit when their balance sheets are affected by recurring major climate shocks. Agriculture, fishing, superannuation and insurance are among the most directly affected activities, but the TCFD now includes nearly all major production sectors across the world. Properly supervised, some law students are capable of assisting such

¹² Best Practice 10 of *Best Practices in Australian Clinical Legal Education, Final Report, Clinic Design*, 2012, p 13 at <https://cald.asn.au/wp-content/uploads/2017/11/Best-Practices-Australian-Clinical-Legal-Education-Sept-2012.pdf>.

¹³ See <https://www.fsb-tcfid.org>

¹⁴ The Financial Stability Board is an international organisation headquartered in the UK, with a global responsibility to build resilience into financial organisations. Established in the aftermath of the 2008-09 global financial crisis, its mission has since broadened to include the wider and deeper threat posed to financial stability by climate change. See <http://www.fsb.org/what-we-do>

corporations in their preparations for such disclosure. For example, Monash and the major Asian firm *King Wood Mallesons* run a specialised climate-preparedness audit for the large corporate clients of that firm, with law students examining each client's business and developing the details for the audit.¹⁵

Superannuation litigation

This educative approach does not directly challenge emitters in a litigious way, but there are other related approaches to achieve a similar strategic impact. Superannuation is particularly fertile ground for climate litigation. One example concerns a young Australian landscape ecologist who in 2017 '...used the Market Forces website to ask his superannuation fund, REST, whether it was considering climate risks when making investment decisions.'¹⁶ When the fund repeatedly refused to answer his query, he commenced Federal Court of Australia action with the assistance of the major NGO in the sector, Environmental Justice Australia. This litigation highlights that corporations which have super fund shareholders - and that is virtually every major company - will be under increasingly negative public scrutiny if they are not adopting TCFD protocols for disclosure of their preparations for climate adversity.

Negligence and Failure to Act – Civil Law and specific constitutional protections

To date, the case launched by environmental rights group *Urgenda Foundation* in the

¹⁵ This concept was the brainchild of a Monash Professorial Fellow, Dr Bruce Dyer who, well before the TCFD emerged in 2016, persuaded his then firm Ashworths, to develop an environmental audit as a pro bono service to its own clients, in the interests of their own corporate social responsibility. This clinic continues now as an externship partnership with King & Wood Mallesons. See <https://www.monash.edu/law/home/cle/types-of-clinics>.

¹⁶ Julien Vincent, 'It's Time Super Funds Came Clean', *Business, The Age*, 2 August 2018, pp23-24.

Netherlands is the most significant example of successful climate action, essentially on the basis of negligence or a deliberate failure to act.¹⁷

In a letter to Urgenda, the Dutch government acknowledged that its actions are insufficient to prevent dangerous climate change. Urgenda concluded that The Netherlands is knowingly exposing its own citizens to danger. In legal terms, that is a wrongful act of the State. The Dutch Supreme Court has consistently upheld the principle that the government can be held legally accountable for not taking sufficient action to prevent foreseeable harm. Urgenda argues that this is also the case with climate change.¹⁸

The Dutch Government was ordered at first instance - and affirmed in the Hague Court of Appeals¹⁹ - to take affective action against climate change by lowering emissions, but may appeal to the Netherlands Supreme Court.

Where a particular legal system allows, similar fundamental approaches are possible. In the US State of Oregon, 21 teenagers have received US Supreme Court permission to proceed in a case which challenges the Federal government for an alleged failure to protect their constitutional rights. They allege that the government has failed to take meaningful action

¹⁷ Mark Loth, 'Too Big to Trial?: Lessons from the Urgenda case,' Tilburg Private Law Working Paper Series, No. 02/2018, at <https://ssrn.com/abstract=3130614>.

¹⁸ See Climate Case Explained, at <http://www.urgenda.nl/en/themas/climate-case/climate-case-explained>.

¹⁹ Arthur Neslen, 'Dutch appeals court upholds landmark climate change ruling', The Guardian, 10 October 2018, at <https://www.theguardian.com/environment/2018/oct/09/dutch-appeals-court-upholds-landmark-climate-change-ruling>. See also *Urgenda Foundation v The State of the Netherlands*, C/09/456689/HA ZA 13-1396 (24 June 2015), at <https://www.elaw.org/nl.urgenda.15>

against climate change and in so doing, has challenged their ‘...rights to life, liberty and property.’²⁰ A trial in this case is also pending.

Finding plaintiffs, finding regulatory failure

While *Urgenda* and the Oregon case do not represent obvious precedents for jurisdictions such as Australia - because the Netherlands is a civil law system with specific constitutional protections for the environment and the US appears to permit similar direct constitutional approaches - both are enabling actions in the sense that they have encouraged and stimulated similar efforts elsewhere. A sub-page of the foundation (‘Global Climate Litigation’) lists current developments in similar litigation in Ireland, New Zealand, Switzerland, Belgium and India.²¹

In countries without specific constitutional or regulatory protections, or obvious causes of action in negligence or nuisance, the challenge to create a convincing skein of argument continues. Fortunately, the current law in Australia²² accepts that ‘climate science is acceptable in evidentiary terms; that single construction or extraction projects can contribute to global warming; and that emissions are cumulative.’²³ So the challenge may be principally about finding the right factual situation and the right plaintiff.

²⁰ Malcolm Sutton, ‘Climate change litigation rising with the seas as victims revert to ‘Plan B’’, ABC Radio Adelaide, 10 April 2018, at <http://www.abc.net.au/news/2018-04-10/climate-change-litigation-rising-with-the-seas-plan-b/9627870>. The action is listed for late 2018 and is listed as *United States v. U.S. District Court for the District of Oregon*, 18A65.

²¹ See <http://www.urgenda.nl/en/themas/climate-case/global-climate-litigation>.

²² The state of play of global climate change law is increasingly accessible. See for example Daniel A. Farber and Marjan Peeters (eds), *Climate Change Law*, Edward Elgar, 2016.

²³ See Adrian Evans, ‘The Climate for Whistle Blowing’, Winter 2017, 27(2) *The Australian Corporate Lawyer* 34, citing Anita Foerster, Hari Osofsky and Jacqueline Peel, *Shaping the Next Generation of Australian Climate Litigation*, Report on a Melbourne Law School Workshop, 17 November, 2016 (unpublished).

For example, in the Australian context, a plaintiff such as a Great Barrier Reef tour operator might be able to successfully assert that the concerted failure of government (State and Federal) to sufficiently lower existing national emissions which contribute to destabilising the Reef – already the highest per capita on the planet - combined with their positive acts of endorsement of new major coal mine(s), broad scale land clearing and the methane leakages associated with unconventional gas extraction, are all inconsistent with general principles underlying existing environmental protection legislation. Other possible plaintiffs might be the national farmers' federation, especially in the major drought years which are becoming more frequent; fisheries organisations concerned with diminished inshore fish stocks due to increased current and temperature variability; and at local community levels, residents groups that experience property losses due to flash flooding from major, sudden climate events. It is not impossible also, that a major national insurer (supported by their international reinsurers) and cognisant of the worsening effects on their balance sheets of any of these groups and their burgeoning property losses, would fund a test case organised by a prepared and strongly-partnered climate defence clinic, to try out these and other causes of action.

It is of course, not easy to commence climate litigation anywhere and that reality must not be understated. And it may be suggested that a University clinic is least prepared for such major work; but Universities are one of the lightning conductors for major social change and they can have better antennae for conflicts of interest than private corporations. They are also adept at collaboration because of their research cultures, and their law schools, especially

those with strong clinical histories, are experienced in cooperating with significant not-for-profit interest groups. The ‘right’ law school can seize this opportunity.

The supervising clinician/ clinic director role

A small specialised clinic of this nature can be supported administratively through the wider clinical program, but the need to effectively recruit into the key role of supervising clinician cannot be underestimated.²⁴ This is a difficult position, given the governance and remuneration constraints on the role. However, the open legal recruitment market is now mature enough to contain a number of suitable environmental lawyers with the conventionally necessary characteristics: enough relevant experience, technical competence, enthusiasm, personal skills and judgment.

But the right appointee must fit other more exacting criteria as well: they must be an inherently capable teacher and be tolerant and accepting of university bureaucracy (especially around inflexible assessment rules and cautious academic hierarchies). Even more constraining is the question of salary and career advancement for this clinician. Law schools’ budgets are notoriously tight compared to private law firms and their general reluctance to employ a full time clinician for a small single-purpose clinic can be expected. Australian law schools are perhaps overdue to experience declining enrolments and declining revenues. It might almost be taken for granted that a law school dean will be reluctant to embark on a climate justice clinic if they must find the necessary supervisor salary solely from law school resources. Nevertheless, some of these deans will be willing to

²⁴ See Evans *et al*, Note7, Ch 9 Resourcing live client clinics, pp 203-207.

engage the 'right person' on a fractional appointment, say at 2-3 days per week, particularly if that expense is factored into the approach to major donors that ought to precede the establishment of the clinic.

Failing success in securing a direct law school appointment, it is also possible (with some safeguards) and perhaps desirable to ask the mid-tier firm which partners with the law school, to second one of its lawyers to the role of supervising clinician, ideally for a minimum period of two years. There are many examples of law firms successfully seconding lawyers to community legal services and clinical programs,²⁵ so the concept is hardly novel. The key safeguard would be the law firm's agreement to a strong and *published* conflict of interest protocol, developed in conjunction with the law school's legal ethicists, which would identify areas where the law firms' interests could diverge from those of potential clients or the law school, and refer decisions on those issues to an independent third party. A secondary provision would require that student assessment be decided by a law school academic, in consultation with the clinic director. Providing such safeguards are in place and such a person is available and willing to be seconded for that period to the role of clinic supervisor/director, then they can supervise and direct such clinics with confidence. Such a collaboration helps to tie in the firm to the law school, with numerous relationship benefits that can add to the sustainability of the clinic.

The last major issue with the supervising clinician is their reporting line. Whether they are a seconded lawyer or employed directly by the law school, they ought to be responsible to the

²⁵ Kingsford Legal Centre-UNSW for example, has a staff solicitor position seconded from Herbert Smith Freehills. See <http://www.klc.unsw.edu.au/about-us/klc-staff>.

overall clinical program director, not to the advisory board. Any other arrangement will blur the governance process and impede clinic progress.

Conclusion - the value proposition for university fund raisers and alumni

A concluding point is to recognise that climate litigation will be opposed not just by individual defendant corporations and various levels of government, but also by entrenched power groups within some industry sectors. Some of these groups may apply pressure through University councils. These cases will be quickly politicised. But the politicisation is now not so one sided as it would have been even five years ago. Community frustration with government inaction is intense. Law schools/ partner law firms and donors are not isolated and need not fear broad longer-term public opposition to their activism in this area, not least because younger people are more concerned than their parents and opponents' demographic is naturally withering. The 'right' judge or judges, capable of understanding and accepting the science, listening to the 'right' advocates and possessed of some courage, will inevitably fit together with the 'right' case and the 'right' plaintiff, for the era. This considerable conjugation of positive factors has occurred before,²⁶ and does so every time the law advances.

A climate defence clinic, partnering with appropriate private pro bono lawyers, not-for-profit legal expertise and significant alumni donors, can be alive to suitable plaintiffs and propose representation when approached.

²⁶ As for example (in the Australian context), in the Mabo litigation of the early 1990s, when the then utterly contentious concept of Native Title was developed by the High Court of Australia. See *Mabo and Others v Queensland* (1992) HCA 175 CLR 1.

Preparation, engagement and relationship management are the keys, and a lengthy lead time is likely while these players are brought into alignment. But of all these factors and players, the most pressing is the need to identify a suitable benefactor-funder. If climate change is among the most profound challenges faced by our species and its affects are fundamentally contributing to the breakdown of justice and the rule of law, then the innovative, socially responsible law school will get on board soon. They will find an alumni-founded or owned business that already sees climate-sensitive business practices as necessary and appropriate for their own sustainability, and persuade them to connect that sensitivity to the need to for climate justice. The value proposition for such alumni is their legacy, personal and financial.