

FOREWORD TO UQLJ SPECIAL EDITION ON CLIMATE CHANGE, THE LAW AND LEGAL EDUCATION

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Few people reading this will need reminding of the challenge that climate change poses. As this Special Issue was being prepared, however, the Intergovernmental Panel on Climate Change ('IPCC') issued the first instalment of its Sixth Assessment Report.¹ This report framed the situation that we face in stark terms. Carbon dioxide concentrations in the atmosphere are now higher than any time in at least two million years; the changes that this causes have accelerated in recent decades; the damage that will result from exceeding the internationally-agreed target (limiting warming to 1.5, or well -below 2.0, degrees Celsius) is both more serious and more certain; and the pathways to avoiding this are increasingly narrow.

But the dice are not yet cast: within the lifetime of a child born today, the IPCC report calculates that the low emissions scenarios will likely result in 1.4 or 1.8 degrees Celsius of warming (meeting international targets); the intermediate scenario leads to a sustained 2.7 degree Celsius rise in temperatures (exceeding anything seen on earth for over three million years); and the highest emissions scenario raises temperatures by 4.4 degrees Celsius (the impact of which is almost incomprehensible).

The need for urgent action to address climate change is thus clear. While law cannot solve the climate crisis, lawyers can and must play an important part in our response. There are lawyers working to force governments to enhance and accelerate their decarbonization plans, suing corporations that continue to drive emissions, seeking justice for communities affected by the current and future impacts of climate change, and pushing investors to stop financing climate-destructive activities. Such climate litigation is growing, with the total number of cases globally doubling since 2015 and the number of 'strategic' cases that aim to

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¹ Richard P Allan et al, 'Summary for Policymakers' in Valérie Masson-Delmotte et al (eds), *Climate Change 2021: The Physical Science Basis* (IPCC, 2021).

bring about broader societal shifts is rising ‘dramatically’.² The Australian legal community is playing an important part in this.³

These efforts to push for more ambitious climate action may garner most of the public attention, but lawyers also play an important role behind the scenes as enablers of climate action. Law is an important tool for turning policy commitments into the real-world change that we so urgently need. Lawyers are working with new industries to navigate the regulatory and licencing requirements for renewable energy, carbon capture and restorative agriculture projects. They are integral to developing new climate-friendly regulations and the framework of international agreements that are essential to any effective effort to address this global crisis.

Law students see the scale of the challenge. They feel the importance of this moment. They are already demanding that the legal profession respond and signalling that they wish to be part of the solution. And there is thus a hunger, a demand, from the current generation of law students for a legal education which equips them with the skills to participate in tackling the defining challenge of their generation⁴ (which, as Danielle Ireland-Piper and Nick James point out, is also likely to be an increasingly important area of legal practice).⁵

However, the obligation on law schools to address climate change and its implications for their curriculum goes beyond serving those students who want to use the law to help address climate change. Indeed, as Ireland-Piper and James set out in this volume, if law schools limit themselves to training their students on how the law can advance climate action — to teaching the law of climate change — they will have failed to grasp the full implications of climate change and to rise to the challenge that it poses.

First, law schools have a wider obligation to prepare all of their students for practice. In addition to the demand for law graduates with expertise in climate change law, there will also be a much larger need for lawyers in other fields that are aware of the implications of climate change — ‘climate literate’ or ‘climate conscious’ lawyers. The law students of today are likely to be in practice in 2050 (when the IPCC and many national governments are targeting net-zero

² Joana Setzer and Catherine Higham, *Global Trends in Climate Litigation: 2021 Snapshot* (Policy Report, 2 July 2021) 5.

³ Australia has the second-most climate cases globally, with over one quarter of the cases filed outside the USA (115 of 454 cases outside the USA). See ‘Climate Change Laws of the World’, *Grantham Research Institute on Climate Change and the Environment* (Web Page, 2022) <<https://climate-laws.org/>>; see also Sabin Center for Climate Change Law, ‘Australia’, *Climate Change Litigation Databases* (Web Page, 2022) <<http://climatecasechart.com/climate-change-litigation/non-us-jurisdiction/australia/>>.

⁴ Although, as Taylor cautions in her contribution, we need to be conscious of the impacts that both climate change and legal education can have on those students’ mental health. See Monica Taylor, ‘Climate Crisis, Legal Education and Law Student Well-Being: Pedagogical Strategies for Action’ (2021) 40(3) *University of Queensland Law Journal* 459.

⁵ See Danielle Ireland-Piper and Nick James, ‘The Obligation of Law Schools to Teach Climate Change Law’ (2021) 40(3) *University of Queensland Law Journal* 319, 330.

emissions), 2060 and beyond. The effects of climate change will be felt well before that. And many areas of law will be called upon to determine the legal consequences of those effects, attempts to adapt to them, and efforts to mitigate further climate damage.

While it seems obvious that those with an interest in environmental regulation or energy law should think about climate change, it cannot be so neatly confined to a handful of discrete practice areas. Just in this volume, Margaret Young outlines the ways that climate change will impact torts, corporations law, trade law, human rights, and law of the sea; and Ireland-Piper and James note the impact that it will have on constitutional law, administrative law, and dispute resolution. Climate change will also impact property law, town planning, investment arbitration, securities law, migration and refugee law, and more. Commercial lawyers are already seeing climate change arise in their work, from due diligence through to transaction execution. The Chancery Lane Project has mobilized hundreds of corporate lawyers to develop and use contract clauses that address climate risks and embed climate solutions. Few areas of practice will be unaffected — as the U.S. Special Presidential Envoy for Climate, John Kerry, recently put it to the American Bar Association, ‘[y]ou are all climate lawyers now, whether you want to be or not’.⁶ This means that if you are a prospective lawyer today and you are not thinking about how climate change may impact the branch of law that you intend to practice, you are not thinking long term about your career in the law.

Second, beyond equipping individual lawyers to advise clients on the full range of legal questions and disputes that climate change will raise, there is also a broader obligation to consider systemically how law will influence the way in which society experiences and responds to climate change. One key role that law plays in society is allocating risk and cost, responsibility and authority. As the impacts of climate change accelerate in range and scale over the coming years, this allocation function will influence where the responsibility and authority for decisions on mitigation and adaption are located; who bears the risks of action or inaction; who bears the costs of climate impacts and our responses; and how the (inevitably) competing interests are balanced.

Legal principles will thus inevitably affect the calculus of decision makers, potentially limiting our options or preferencing certain interests. Yet, the principles that will determine all of this have been built up over decades, well before the reality of climate change became widely known or was being felt. Given the magnitude of the changes and challenges that climate change poses,

⁶ Karen Sloan, “‘You Are All Climate Lawyers Now,’ John Kerry Tells ABA”, *Reuters* (online, 6 August 2021) <<https://www.reuters.com/legal/litigation/you-are-all-climate-lawyers-now-john-kerry-tells-aba-2021-08-05/>>. Professor Young has made a similar point in an international law context: see Margaret A Young, ‘We Are All Climate Change Lawyers Now’ (2021) 115 *American Society of International Law Proceedings*, doi:10.1017/amp.2021.123 (forthcoming).

examining what will happen when existing legal principles are applied to the effects of climate change would allow us to identify the public policy choices that this implies, interrogate whether they are appropriate, and explore what the alternatives might be. We must identify the choices that law implicitly makes when its current rules are applied to the risks and costs of climate change, and the extent to which they favour or preclude particular responses; highlight the ways in which the costs of climate change are already being felt and allocated by existing principles; and make a proactive and informed assessment the options for how the law *should* address these effects moving forward.

Law schools can and should take a leading role in this endeavour: through research and scholarship, and by training the new generation of legal professionals to be attentive to these questions. Universities and law schools have an obligation to society and to the public good, as a number of contributors to this volume identify. This includes, as Young eloquently reminds us, to ‘guide the student to pay attention “to the ends which law serves, the ideas and wants out of which law develops”’, and that as a part of this ‘it is imperative to understand how law might support climate change mitigation and adaptation or impede it’.⁷

Finally, law schools have an obligation to the institution of the law itself, which compels them to work with their students to understand and consider how climate change will impact and challenge each legal discipline. Climate change will shape the law, just as surely as the law will shape our response to climate change. We need to ask the same questions as Bonython asks regarding tort — not just “what can tort law do for climate change”, but “what can climate change do for tort law” (or even, what *will* climate change do *to* tort law) — across the legal spectrum and across the law school curriculum.⁸

They say that hard cases make bad law. Climate change is going to present a lot of hard cases, across many legal disciplines. Indeed, it is doing so already. If lawyers and policy makers are not thinking systematically and proactively about how the law should respond to climate change, then the chance of these hard cases creating bad law rises dramatically. And that thinking starts with law schools teaching future lawyers and policy makers to identify where and how the law intersects with climate change — both its causes and its effects — and considering how the law should respond in a systematic rather than ad-hoc way.

⁷ Margaret A Young, ‘Climate Change and Law: A Global Challenge for Legal Education’ (2021) 40(3) *University of Queensland Law Journal* 351, 352, citing O M Roe, ‘Jethro Brown: The First Teacher of Law and History in the University of Tasmania’ (1977) 5 *University of Tasmania Law Review* 209, 221, in turn citing W Jethro Brown, *The Study of the Law* (1902) 36.

⁸ Wendy Bonython, ‘Tort Law and Climate Change’ (2021) 40(3) *University of Queensland Law Journal* 421, 427. And Professor Kysar before her: see Douglas A Kysar, ‘What Climate Change Can Do About Tort Law’ (2011) 41(1) *Environmental Law* 1.