

# A climate conscious approach



**INCREASINGLY, ALL LAWYERS WILL BE REQUIRED TO ADVISE, CONSIDER AND ADDRESS ETHICAL OBLIGATIONS GIVEN THE EXISTENTIAL CRISIS POSED BY CLIMATE CHANGE FOR HUMANITY. BY DR LEONIE KELLEHER**

Every lawyer must review their professional obligations and ethical duties in the face of climate change – in whatever field they practice and wherever they work. Climate change deeply impacts young people and young lawyers, but all lawyers have an obligation to provide competent legal advice. They must keep abreast of fast-moving regulation and be knowledgeable in changes to the general law occurring as a result of climate change. In 2018, it was reported that the number of domestic climate change laws rose from 72 in 1997 to 1500<sup>1</sup> and it continues to increase.

As climate change threatens the very existence of humanity, and vast numbers of other species, this existential crisis triggered recent high-level discussion of legal ethical duties. There is need for a broad conversation within the legal profession and this article reviews some of the ideas being expressed.

## SNAPSHOT

- All practitioners are required to provide competent legal advice so must address fast-moving caselaw and legislative changes due to climate change.
- Industry-specific sectors and high-risk geographical areas require deliberate and localised attention.
- Careful initial instructions and ongoing disclosure need to be watched, even where a client's instructions do not seek climate change advice.



## Keeping up

The Law Council of Australia recently adopted a national climate change policy recognising the law’s role in supporting effective climate change action, including new opportunity development and mitigating transition risks. It sets principles including implementing Australia’s international law obligations and giving effect to rule of law principles, with fair and equitable responses to promote public confidence. It also recognises that lawyers should advise clients on climate change implications in accordance with professional standards and legal ethics and be encouraged to consider how they can contribute to efforts to address climate change.

Environment is “hot” law, rapidly changing and evolving.<sup>2</sup> Established foundational legal principles such as causation, duty of care, burden of proof<sup>3</sup> and statutory interpretation are being rethought through “test” case climate change litigation. Environmental problems are frequently legally disruptive and create novel law. Environmental law tends to be legislatively based but entwined in policy and often impacted by political settings. Victoria’s *Climate Change Act 2017*, following the Victorian

government’s commitment to be a climate change leader, seeks to facilitate consideration of climate change issues in specified areas of government decision-making. This Act binds the Crown.

Ministers and governments are increasingly required by the courts to address climate change inaction.<sup>4</sup> Corporations and business law are undergoing rapid change in response to climate change risks. Examples include directors’ duties, ASIC rules and guidelines, advertising law and the more subtle elements of corporate social responsibility. Laws impacting vast areas of Victorian community and business activity are becoming aligned with climate change. For example, all Victorian town planning schemes require a climate change response, including risks to water supply, agriculture and settlement. These requirements alone call on all lawyers to consider climate change in their advice to clients, who may include financiers, property purchasers (and sellers), developers, testators, taxpayers, ratepayers and farmers, as well as their advisers, including architects, accountants, builders and planners. Water and coastal authorities along with fire, health and emergency services need climate change oriented legal advice, as do local, state and federal governments across all departments. The same sweep of environment-driven change is occurring within the law of taxation, superannuation, charities, commercial and personal litigation, employment and insurance, affecting not only private law firms and barristers but also community legal services and legal practice management. Lawyers providing advice in particular geographical locations, such as rural, remote, coastal, bushfire-prone and water-scarce areas, need to pay regard to local consequences of climate change and environmental law.

Lawyers are obliged to deliver legal services competently and diligently. They owe a duty of care to their clients to apply the standard of care and skill expected of a qualified and ordinarily competent and careful lawyer in the exercise of their profession. Failure in performance of that duty amounts to professional negligence. It is possible that potentially all litigation, even small or mundane disputes, should be conceived of as happening in the context of climate change.<sup>5</sup> Lawyers for Climate Change, a network of lawyers, barristers, legal academics and law students exploring ways in which the legal system can be harnessed to address climate change, comment:

“[Lawyers] are under an obligation to deliver proper advice. That may be a challenge – for which they get paid well – but they do not have a choice. If they do not have a clue or prefer to stay ignorant, they would be best advised to refer their client to better equipped law firms”.<sup>6</sup>

## Ethics

Lawyers practise within a setting of human and societal values. Former Federal Court Chief Justice Allsop explained:

“Assessing how power should be controlled and exercised in society . . . is the daily task of the law . . . Law is not built and defined solely by rule making, by formulae or by inexorable command, but rather it is organised around, and derived from, inhering values (human values) and serves as an expression or manifestation of natural human and societal bonds of conduct”.<sup>7</sup>

Upholding these values facilitates the achievement of justice, which underpins the legal system. The values underlie forms of moral association, such as the Rule of Law<sup>8</sup> which has been called the inner morality of the law.<sup>9</sup> It is from the social context that the law gains meaning and changes over time.

Environmental law thought-leader Chief Justice Brian Preston of the Land and Environment Court of NSW strongly argues for a rethink of professional obligations and legal ethics in the face of the existential justice issues arising from climate change.<sup>10</sup> (See Opinion, p23)

### Administration of justice – paramount duty

General ethical obligations place the lawyer's paramount duty as the duty to the court and the administration of justice. Justice can have both a narrow and wide meaning. In the narrow meaning, justice is done when the rules of law are applied fairly, impartially and correctly to the legal problem or dispute. However, in the wide sense, justice explores whether the legally prescribed result is itself right and asks evaluative, normative and moralistic questions not about what the legal result is, but about what the legal result ought to be.<sup>11</sup>

At the broader moral level, the lawyer's duties could generally be framed as a discourse between two broad approaches.<sup>12</sup> The first is rights-based (Kantian) (ie, that each client is entitled to a lawyer) and, to some extent, consequentialism (ie, that the legal system will break down if lawyers are free to pick and choose their clients). The second is virtue-based (Aristotelian) (ie, that personal conscience must underpin everything).

Twentieth century thinkers emphasise relationships – entangled connectivities, interweaving paths and footprints – noting difference and interdependence, with symbiosis underlying human co-evolution on earth. At a time when species extinction is somewhere between 1000 and 10,000 times the background rate from fossil records, how does the individual lawyer live ethically amid the ruination of others? Luce Irigaray views erasure of the specificity of others as a silencing, withering the fullness of the self.<sup>13</sup> Aldo Leopold distinguishes good and bad in terms of the biotic community, ie, a thing is right when it tends to preserve the integrity, stability and beauty of the biotic community and wrong when it tends otherwise.<sup>14</sup> Indifference or inaction on one's personal beliefs may seem passive or neutral, but in the context of suffering, it is best understood as the refusal of an ethical call.<sup>15</sup>

A major theme of legal ethics scholarship over recent decades has concerned ethics underlying and legitimising rules. Christine Parker uses the term “responsible lawyering”, with the lawyer as guardian of the legal system in the public interest, taking the administration of justice into account in both personal decision-making and when advising clients.<sup>16</sup>

Chief Justice Preston's view, consistent with this evolving scholarship, is that legal ethics must address climate justice because the alternative of relying on a blind confidence that the rules are fair and administered fairly reflecting ecological relationships, perpetuates gross injustice. He argues that environmental values are inextricably linked with justice and, thereby, underpin the legal system. He prefers the wider meaning of justice that questions what the result should be. He notes United Nations Sustainable Development Goal 16 to promote peaceful and inclusive societies for sustainable development and access to justice for all, including people who have suffered and

will suffer harm due to climate change. Australians forced from their homes by bushfires, coastal land slippage and sea rise in the Torres Straits may already be said to have suffered injustice due to climate change.

Community legal centre lawyers assisting climate change activists are more strident:

“Where we are threatened with mass extinction, including of the human race, lawyers have no claim to ‘moral neutrality’ in its traditional form. The climate crisis will impact those who already experience disadvantage, vulnerability and state-sanctioned violence first and hardest”.<sup>17</sup>

### Other duties

Practitioners must act in the best interests of the client, delivering legal services competently and diligently. Climate change and its diverse consequences are leading to changes in what is to be expected of a competent and diligent lawyer. The lawyer must provide advice to assist the client not only to understand the relevant law, but also to make informed choices about their future action in the course of the matter in both the initial costs agreement and in meeting ongoing disclosure obligations. Finally, a lawyer must be honest and courteous in all dealings in the course of legal practice.

### Legal profession regulation

In understanding the potential practical implications of climate change on professional obligations, including ethical duties, one returns to current regulation of the Australian legal profession. This regulatory framework governs ethics, professional obligations, billing, discipline procedures and complaints handling deriving from the *Australian Solicitors' Conduct Rules 2015* (Solicitors' Rules), *Legal Profession Uniform Law* (Schedule 1 *Legal Profession Uniform Law Application Act 2014* (LPUL) and *Legal Profession Uniform Conduct Barristers' Rules 2015* (Barristers Rules).

The Legal Services Council and Commissioner for Uniform Legal Services Regulation provide national coordination and oversight. Victoria is co-regulated by the Victorian Legal Services Board (including the LIV and the Victorian Bar) and the Victorian Legal Services Commissioner.

The Solicitors' Rules do not prohibit the approach by Chief Justice Preston, indeed they prioritise personal integrity and the administration of justice (rls3.1 and 4.1.4). It is legitimate, within the Rules, for any lawyer to hold a conscientious debate with themselves or others as to whose interest should prevail in any particular case. The conscientiously held moral and ethical beliefs of a young lawyer directly facing existential climate change consequences in their lifetime may differ fundamentally from the approach of a senior legal practice director. Young lawyers at large law firms have and may continue to refuse to work on certain cases for reasons related to climate change. Solicitors are under no legal professional obligation to act for any particular client. This is an individual ethical issue, although it may impact access to justice and employment arrangements. Barristers face the “cab-rank” principle requiring that they “must accept briefs to appear regardless of their personal beliefs (and) must not refuse briefs to appear except on proper professional grounds” (Barristers Rules, r4).

Professional and ethical duties arising from climate change will likely require response by regulators and professional bodies.

## Conclusion

Each individual lawyer connects with the vast inexorable planetary kaleidoscope of change yet is one small being who years ago swore a personal oath that shines light on a lifetime of professional work. As seas rise, the Himalayan snows and polar ice melt, bushfires rage spreading unbreathable air, water evaporates and land floods, each lawyer must not forget this oath: to uphold the administration of justice – including climate justice. ■

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