

To: The Minister for Climate Change, the Minister of Justice and the Attorney-General.

cc: National Spokesperson for Climate Change (Scott Simpson); and
Shadow Attorney-General (Tim Macindoe).

Proposal to amend the New Zealand Bill of Rights Act 1990 by recognising the right to a sustainable environment

Introduction

1. Lawyers for Climate Action NZ Inc is a group of over 200 lawyers from a range of practice areas and backgrounds who seek to:
 - 1.1. raise public awareness and understanding of the threat of climate change, based on the accepted scientific evidence; and
 - 1.2. advocate for legislation and policies to ensure New Zealand meets or exceeds its commitment under the Paris Agreement and to achieve net zero carbon emissions as soon as possible and no later than 2050.
2. In order to ensure New Zealand meets its obligations to achieve these climate goals, as well as its obligations to present and future generations, we call on the Government to introduce legislation to formally recognise the right to a sustainable environment.
3. Our proposal is to add a right to a sustainable environment to the New Zealand Bill of Rights Act 1990 in the following terms:

Right to a sustainable environment

Everyone has the right to a sustainable environment that is protected for the benefit of present and future generations.

4. While the right to a sustainable environment is broader than climate change issues, the proposed amendment would be consistent with New Zealand's international obligations in relation to climate change, including under the United Nations Framework Convention on Climate Change and the Paris Agreement.¹ The Paris Agreement explicitly recognises that

¹ As a signatory to the Paris Agreement, New Zealand has committed to developing and implementing clear and stable climate change policies that contribute to the collective global effort to: (i) limit the global average temperature increase to 1.5°C above pre-industrial levels; and (ii) hold the increase in global average temperature to well below 2°C above pre-industrial levels.

Parties should, when taking action to address climate change, respect, promote, and consider their obligations on human rights.²

5. Our view is that the right would also support the development of a legal approach to the environment that is more aligned with kaitiakitanga and the principles of Te Tiriti o Waitangi.³ However, we recognise that there will need to be a process of consultation with Māori, as tangata whenua and partners of the Crown under Te Tiriti o Waitangi, before any proposed legislation is put before Parliament.
6. We consider this would be an important change to our legal framework that would promote Government action consistent with a sustainable environment and facilitate New Zealand's transition to a low emissions economy.
7. This proposal letter first explains the role of the New Zealand Bill of Rights Act, and why the Bill of Rights is the obvious home for a right to a sustainable environment. Second, we explain why the recognition of such a right is in step with international environmental and human rights law. Third, we indicate why it is appropriate that the right be framed by reference to the concept of sustainability. Finally, we describe how including a right to a sustainable environment in the Bill of Rights will lead to positive outcomes.

Context

8. The Bill of Rights Act became law in New Zealand in 1990. It followed a period of perceived excessive exercises of government power and a shift in public attitudes towards human rights.
9. In the mid-1980s, the Labour Government proposed a bill of rights that would be a supreme law that could override legislation. The proposal for a supreme bill of rights was seen as too extreme and handing too much power to the judiciary. The proposal was softened into the current Bill of Rights Act, which is an ordinary statute rather than a supreme entrenched law.⁴
10. The Bill of Rights Act provides for important constitutional rights including freedom of expression, freedom of assembly, voting rights, freedom from discrimination, and minimum standards of criminal procedure. Despite concerns at the time that the Bill of Rights Act would be too weak to have any real effect,⁵ it has become a significant source of human rights protection and an important part of New Zealand's constitutional landscape.
11. The rights affirmed by the Bill of Rights Act have become part of the methodology through which legislative, executive and judicial activity occurs and is evaluated. No one in mainstream politics would now suggest that we would be better off without it.

² Paris Agreement under the United Nations Framework Convention on Climate Change (opened for signature 12 December 2015, entered into force 4 November 2016), preambular paragraph 11.

³ For a discussion of the principle of kaitiakitanga and the Māori relationship with the environment see *Ko Aotearoa Tēnei: Report on the Wai 262 Claim*, Waitangi Tribunal Report 2011 at 3.1-3.9.

⁴ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [2.8.7].

⁵ At [2.9.5].

12. In our view, an express right to a sustainable environment would be an important addition to this collection of rights. The right is arguably implicit in the other rights in the Bill of Rights Act as none of the other rights can be fully realised without a sustainable environment.⁶ If climate change and environmental degradation continue unabated, the ability of humans to live at a level commensurate with minimum standards of human dignity will be at serious risk.

The link between the environment and human rights

13. The link between human rights and the environment is not new or novel.⁷ The connection has been drawn in the United Nations context since the 1960s, when the General Assembly passed a resolution noting its concern about accelerating impairment to the human environment and the consequent effects on the condition of man [sic] and “his enjoyment of basic human rights, in developing as well as developed countries”.⁸
14. The recognition of this connection has grown over time. In December 2013, the UN’s Independent Expert on human rights and the environment concluded that international human rights obligations require states to adopt and implement legal frameworks to protect against environmental harm that may infringe on enjoyment of human rights.⁹ In 2014, the International Bar Association reviewed the emerging links between climate change and human rights and explicitly called on states to recognise free-standing human rights to a healthy environment in domestic constitutions.¹⁰
15. The link has also been made in the International Court of Justice. In his decision in the *Gabcikovo-Nagymaros Project* case, Vice-President Weeramantry called the right to protection of the environment “a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself.”¹¹ The international community has also drawn related connections between environmental protection and children’s rights,¹² and between environmental degradation and human displacement.¹³

⁶ As recognised by Vice President Weeramantry of the International Court of Justice in *Gabcikovo-Nagymaros Project case (Hungary v Slovakia)* [1997] ICJ Rep 7 at 91-92.

⁷ For an overview of this subject see Justice Susan Glazebrook: *Human Rights and the Environment* (2009) 40 VUWLR 293.

⁸ *Problems of the Human Environment* GA Res 2398, XXIII (1968), preamble. The General Assembly resolved to hold a Conference on the Human Environment in order to develop a framework for focussing the attention of Governments on environmental issues and ways of resolving them through international co-operation.

⁹ John Knox *Report of the UN Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (Mapping Report)* (30 December 2013) A/HR/25/53 at [46].

¹⁰ International Bar Association “Achieving Justice and Human Rights in an Era of Climate Disruption” (July 2014) at 124. See also International Law Association “Declaration on Legal Principles Relating to Climate Change” (Resolution 2/2014) at article 3.1.

¹¹ *Gabcikovo-Nagymaros Project case (Hungary v Slovakia)* [1997] ICJ Rep 7 at 91-92.

¹² Environmental damage affects children disproportionately, and can have irreversible, lifelong and intergenerational consequences for young people and future generations. See John H Knox *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* A/HRC/37/58 (2018) at [10]. The World Health Organisation estimates that 26% of deaths among children under 5 are attributable to the environment. See A Prüss-Ustün et al, *Preventing Disease Through Healthy Environments: A global assessment of the burden of disease from environmental risks*, WHO (2016) at p. VIII. Climate change poses an immediate and far-reaching threat to the enjoyment of many of the rights enshrined in the United Nations Convention on the Rights of a Child.

16. What has changed, since the link between human rights and the environment first began to be drawn, is the urgency to fully protect this right, both in New Zealand and globally. When our international human rights laws were devised, climate change was not seen as an imminent or extreme threat, or at least not by many. Environmental concerns over clean water and air were not then at the forefront of public discourse.
17. There is now a pressing need for intensive action at the national and international levels in order to limit further degradation of the environment. Environmental concerns are now at the forefront of politics and social debate, striking a particular chord with the younger generation. This can be seen from the recent “school strike” protests that took place on 27 September 2019, which attracted 170,000 people nationwide. This was one of the biggest protests in New Zealand’s history. Climate change is a significant, validated and urgent threat to the rights and freedoms of New Zealanders.
18. The Intergovernmental Panel on Climate Change (IPCC) has described the broad impact climate change could have on our life and security:¹⁴ “Climate-related risks to health, livelihoods, food security, water supply, human security and economic growth are projected to increase with global warming of 1.5°C and increase further with 2°C”. In the absence of urgent and dramatic action to reduce emissions, there is likely to be at least 3°C of warming by 2100, in which case the IPCC anticipates that the world will experience more heatwaves, droughts, flooding, ecosystems being destroyed, a decrease in global crop production, with an increase in starvation, high levels of political destabilisation and conflict, mass migration, high extinction rates and an overall substantial decline in health and wellbeing. It is no overstatement to say that these are existential risks to the environment that human life depends on.
19. Other countries are adapting their constitutional settings as a result of the threat of climate change. For example, in the United States, Judge Ann Aiken considering a challenge to the US Government’s climate change policy ruled that a right to a climate capable of sustaining human life follows as a matter of logic from other constitutional rights. The Judge said “I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society” and “a stable climate system is quite literally the foundation of society without which there would be neither civilization nor progress”.¹⁵

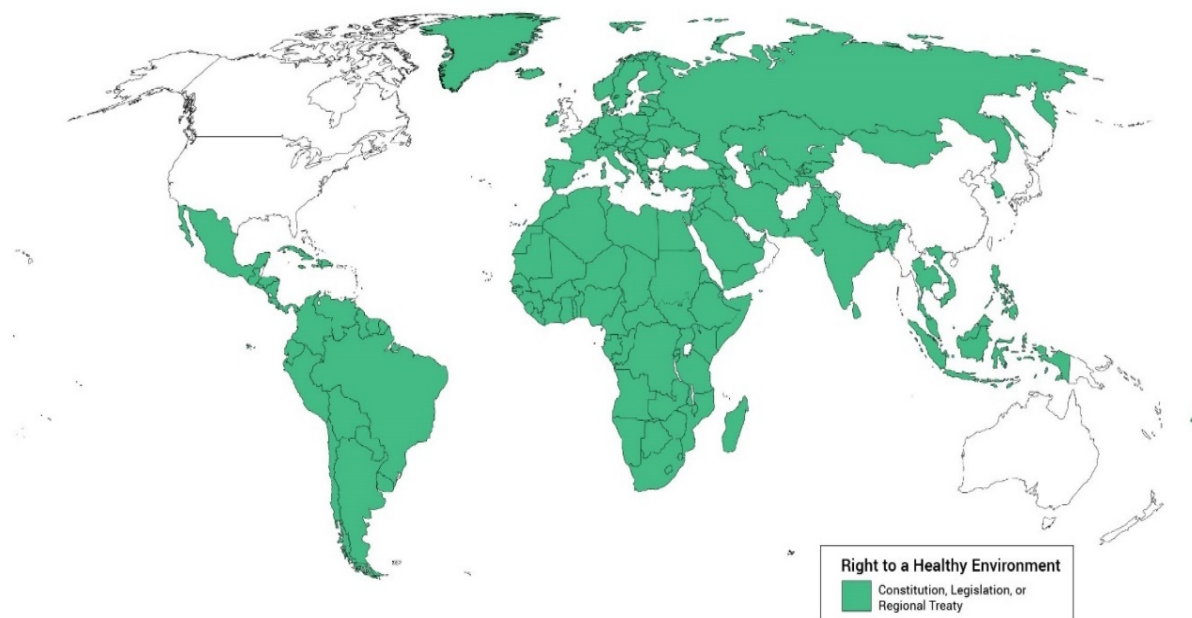
Articles 4 and 24 of the Convention refer expressly to a child’s right to live, enjoy, grow and develop in a safe environment, and to a government’s responsibility to provide such an environment.

¹³ The phrase “environmental refugee” was first coined in Essam El-Hinnawi *Environmental Refugees* (UN Environmental Programme, Nairobi, 1985). Since 2008, an average of 21.7 million people have been displaced each year by extreme weather-related disasters. See Environmental Justice Foundation “Beyond Borders – Our changing climate – its role in conflict and displacement” (2017) at 4. Rising sea levels and extreme weather events will displace ever greater numbers of people, including from the South Pacific islands of Kiribati, Tuvalu and Vanuatu. Environmental refugees from the South Pacific islands pose a real responsibility and challenge to New Zealand.

¹⁴ Intergovernmental Panel on Climate Change *Special Report: Global Warming of 1.5°C* (October 2018) at [B.5].

¹⁵ *Juliana v United States of America* No 15-cv-01517-TC US District Court Oregon 10 November 2016 at 32. This decision was an interim decision declining the government’s motion to dismiss the case on a summary (without trial) basis. The case is awaiting delivery of an appeal judgment from the 9th Circuit Court of Appeals heard on 6 April 2019. See also article 28

20. Today, more than three quarters of the world's national constitutions (149 out of 193) include explicit references to environmental rights and/or environmental responsibilities, as indicated in green in the following map.¹⁶



21. While the constitutionalising of environmental protection began in the 1970s, the trend has accelerated. For example, since 1996, South Africa has guaranteed its citizens a right in the constitution to an environment that is not harmful to health and wellbeing. New constitutions enacted in 2010 in Kenya and the Dominican Republic include the right to a healthy environment and extensive provisions related to environmental protection. Jamaica's new Charter of Rights and Freedoms (2011) includes the right to a healthy environment, as do new constitutions in Fiji, Iceland, Morocco, Zambia and Zimbabwe.¹⁷ These sorts of constitutional protections of the environment can be a powerful and potentially transformative step towards ecological sustainability.

of the Universal Declaration of Human Rights, and *Case Concerning the Gabčíkovo–Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7 at 91–92 per Judge Weeramantry.

¹⁶ David R. Boyd "The Status of Constitutional Protection for the Environment in Other Nations" (David Suzuki Foundation, Executive Summary, 2013) at <<https://david Suzuki.org/wp-content/uploads/2013/11/status-constitutional-protection-environment-other-nations.pdf>>.

¹⁷ David R Boyd *The Environmental Revolution: A Global Study of Constitutions, Human rights and the Environment* (UBC Press, Vancouver, 2012). The right to a satisfactory environment is also recognised in the art 24 of the African Charter on Human and Peoples Rights (opened for signature June 1981, entered into force October 1986).

22. Our proposal for a constitutional protection for the environment brings New Zealand into line with similar protections in international human rights law and in a large number of other countries.

The concept of sustainability

23. Our proposed right for New Zealand refers to a “sustainable environment”. Sustainability is a concept used in a range of legal contexts, and it is appropriate that it is used as the standard for our proposed right.
24. A useful starting point in understanding the concept of sustainability is the 1987 Report of the World Commission on Environment and Development (the *Brundtland Report*) which defined “sustainable development” as development that “meet[s] the needs of the present without compromising the ability of future generations to meet their own needs.”¹⁸ By identifying the need to balance human needs against environmental limits, the definition points to the core understanding which underpins the concept of sustainability, namely, that environmental resources are finite and the capacities of ecosystems are limited.
25. Since 1987 the concepts of sustainable development and sustainability have been widely used in international legal instruments, including numerous environmental texts and declarations.¹⁹ The International Court of Justice recognised them as part of international law in the *Gabcikovo-Nagymaros Project case (Hungary v Slovakia)* in which the majority of the Court spoke of the “need to reconcile economic development with the protection of the environment ... aptly expressed in the concept of sustainable development.”²⁰
26. The concept of sustainability is also well established in domestic law and appears in a number of existing statutes in New Zealand.²¹ In particular, the Resource Management Act 1991 (RMA) has as its purpose “to promote the sustainable management of natural and physical resources” (s5(1)). It then goes on to define the concept of “sustainable management” as follows (s5(1)):

managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—

- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

¹⁸ For a full discussion and analysis of the concept of sustainability and its history and use in current law see Peter Salmon and David Grinlinton (eds) *Environmental Law in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2018).

¹⁹ For example, Principle 1 of the *Rio Declaration on Environment and Development* (1992) states: “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.” Similarly, Principle 1 of the *UNHRC Framework Principles on Human Rights and the Environment* proposed in March 2018 by the UN Special Rapporteur on human rights and the environment, John H. Knox, states “States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights.”

²⁰ *Gabcikovo-Nagymaros Project case (Hungary v Slovakia)* [1997] ICJ Rep 7.

²¹ For example, Forests Act 1949, Civil Aviation Act 1990, Ngāi Tahu Claims Settlement Act 1998, Fisheries Act 1996, and Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

27. The leading authority on this provision is the Supreme Court's decision in *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd*. The Supreme Court recognised that implementing sustainable management may mean that environmental protection trumps development in some circumstances:²²

s5(2) contemplates that particular environments may need to be protected from the adverse effects of activities in order to implement the policy of sustainable management; that is, sustainable management of natural and physical resources involves protection of the environment as well as its use and development. The definition indicates that environmental protection is a core element of sustainable management, so that a policy of preventing the adverse effects of development on particular areas is consistent with sustainable management.

28. As this passage highlights, achieving or maintaining a sustainable environment may conflict with economic and development interests. Incorporating the right to a sustainable environment in the Bill of Rights Act will make it clear that sustainability has priority over competing interests, subject to any reasonable limitation that can be demonstrably justified in a free and democratic society, or any express legislative provision to the contrary.

An environmental right should be included in the Bill of Rights Act

29. Sustainability is already a concept used in some New Zealand legislation, and it might be argued that the right to a sustainable environment can be implied into existing rights in the Bill of Rights Act. However, the right should be recognised expressly, both to reflect its importance and to remove uncertainty as to its status.
30. As set out in the introduction to this letter, we propose a new right should be introduced into the Bill of Rights Act with the following wording:²³

Right to a sustainable environment

Everyone has the right to a sustainable environment that is protected for the benefit of present and future generations.

²² *Environmental Defence Society Incorporated v New Zealand King Salmon Company Limited* [2014] NZSC 38, [2014] 1 NZLR 593 at [24].

²³ This is a simplified version of other proposals, to reflect the drafting style of the Bill of Rights Act. See South African Constitution, art 24; Geoffrey Palmer and Andrew Butler *Towards Democratic Renewal* (Victoria University Press, Wellington, 2018) at 163–166; House of Lords and House of Commons Joint Committee on Human Rights “A Bill of Rights for the UK?” (29th Report of Session 2007-08, 21 July 2008) at [199]–[210].

31. This wording draws on the existing concept of sustainability, which, as described above, is well recognised in national and international law and is the subject of extensive legal and scientific scholarship.²⁴
32. In our view, the question of whether a decision or activity is compatible with the right to a sustainable environment is something which is able to be addressed by scientific evidence (albeit with a greater or lesser degree of confidence, depending on the particular issues raised). We therefore consider that this is an issue which both decision-makers and the Courts are capable of assessing and determining as necessary.
33. Including the right to a sustainable environment in the Bill of Rights Act would embed protection of the natural environment alongside other fundamental rights and freedoms.
34. Without interfering with Parliamentary sovereignty, the inclusion of this right would have three important consequences.
35. First, it would lead to greater Parliamentary scrutiny of new legislation with environmental impacts through the requirement for the Attorney-General to vet all new legislation for compliance with the Bill of Rights Act, including the right to a sustainable environment. This is likely to lead to an increased awareness by Members of Parliament and officials of the impact that legislation on a broad range of subjects may have on the environment, and better identification of areas where there is work to be done to protect the environment.
36. Secondly, the existing body of New Zealand's statutes would be required to be interpreted in a way that supports and promotes a sustainable environment. This will immediately improve the way the current body of law is applied in relation to the environment.
37. Thirdly, the right to a sustainable environment would become an element of administrative decision-making by all government bodies, in the same way that the current rights in the Bill of Rights Act are required to be given due weight in Government decisions. Decision-makers will be required to consider the implications of their decisions on the right to a sustainable environment. If a decision is going to impede on the right to a sustainable environment, then there would need to be analysis of the justification for doing so.
38. Recognition of the right to a sustainable environment will not prevent further development of legal responsibilities towards the environment, including steps to further recognise the rights of Māori under Te Tiriti and to develop frameworks more aligned with the principles of tikanga Māori. Indeed, in our view it is a basic first step that will guide the evolution and strengthening of New Zealand's environmental laws in the 21st Century.

²⁴ We have also had regard to the wording proposed in March 2018 by the UN Special Rapporteur on human rights and the environment, John H. Knox. Principle 1 of his *Framework Principles on Human Rights and the Environment* is: "States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights." While we endorse the need for a safe, clean and healthy environment, we have chosen to focus on the right to a sustainable environment as the most fundamental base-line requirement for the continuation of life. In addition, the concepts of "safe, clean and healthy" arguably require a greater degree of subjective judgment than the issue of whether something is "sustainable".

Conclusion

39. The life supporting environment within which New Zealanders live is under threat from climate change and other environmental degradation. It needs to be recognised that the existence of a sustainable environment is a human right that needs to be promoted and safeguarded. It should not be left to implication.
40. We strongly urge the Government to introduce legislation to recognise this right in the Bill of Rights Act as soon as possible, and call on the opposition to support such legislation in recognition of the overwhelming public interest.

Yours sincerely

Lawyers for Climate Action NZ Inc
25 November 2019

Not to be published until 8pm 25 November