

Implementing a climate conscious approach in daily legal practice*

Brian J Preston**

Climate change is often seen as a global problem, one that is removed from the daily practice of lawyers and courts. In reality, climate change is a multiscale problem¹; it is as much a small scale, local and immediate issue as it is a global issue. Climate change is also a cumulative problem and the combined effect of many small-scale and individual actions is significant. The climate change problem will not be solved in one fell swoop, but by a series of small, incremental responses across all levels of governance: global, regional, national, subnational, local and individual scales.

The potential for interaction between scales helps us appreciate that local and individual action (including litigation) has potential to impact on subnational, national, regional and global climate change policy and law. While climate change issues may have been considered relevant only to environmental lawyers in the past, many areas of legal practice now require knowledge and skills relevant to climate change.² Climate change issues may be as relevant in small scale or mundane disputes as in mass liability claims.³ As Bouwer explains, instead of focusing on litigation which

* This article is based on the paper first given at the Australian & New Zealand Legal Ethics Colloquium Fifth Bi-Annual Meeting: Sustainable Legal Ethics as part of the public symposium 'Should Lawyers Challenge Emitters?', 4 December 2015, Monash University Law Chambers, Melbourne and substantially revised for the public seminar on 11 February 2020 at the Faculty of Laws, University of College London, London.

** Chief Judge of the Land and Environment Court of New South Wales.

¹ See Hari M. Osofsky, 'Is Climate Change 'International'? Litigation's Diagonal Regulatory Role,' (2009) 49 *Virginia Journal of International Law* 3.

² Warren G Lavey, 'Toolkit for Integrating Climate Change into Ten High-Enrolment Law School Courses' (2019) 49 *Environmental Law* 513, 516-517.

³ Kim Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30 *Journal of Environmental Law* 483, 486.

directly tackles climate change, 'it might be more helpful, now, to conceive of (potentially all) litigation as happening *in the context* of climate change'.⁴

Recognising that addressing climate change depends on responses on a small scale, and that any legal action which involves climate change issues will impact on climate change policy, gives rise to a responsibility on lawyers to be aware of climate change issues in daily legal practice. It calls for a climate conscious approach rather than a climate blind approach. A climate blind approach is where the outcome of the legal problem or dispute will have some impact on climate change issues, but legal advice is given or the dispute is litigated or resolved without any attention to climate change issues.⁵ A climate conscious approach requires an active awareness of the reality of climate change and how it interacts with daily legal problems. A climate conscious approach demands, first, actively identifying the intersections between the issues of the legal problem or dispute and climate change issues and, secondly, giving advice and litigating or resolving the legal problem or dispute in ways that meaningfully address the climate change issues.

How can lawyers implement a climate conscious approach in their daily legal practice? I suggest that there are at least five ways, consistent with legal ethics.

Each of these ways challenges common conceptions, in fact misconceptions, about the role and duties of a lawyer.

1. Holistic legal advice

⁴ Ibid 502.

⁵ Kim Bouwer, 'Climate Consciousness in Daily Legal Practice' *OUP Blog* (22 May 2015) <<https://blog.oup.com/2015/05/climate-consciousness-daily-legal-practice/>> accessed 15 October 2019.

First, a commonly held view is that lawyers should give advice only about the law; the law is a lawyer's area of expertise and they should confine themselves to that expertise. The problem with this view is that legal problems and disputes are never only about the law. Providing clients with sound advice to solve a legal problem or dispute requires addressing not merely the legal issues but also the financial, the emotional and psychological, the relational and social, the environmental, and the ethical consequences of different courses of action. Clients can thereby understand the consequences, costs and uncertainties associated with alternative courses of action and make an informed choice. This holistic advice is given by lawyers to clients in many areas of the law on a daily basis. Adding the climate change consequences as a consideration is a natural extension of this everyday practice.

The need for lawyers to provide such holistic legal advice is regularly acknowledged by law associations. For example, the role of lawyers in upholding human rights is often recognised. As the Law Association for Asia and the Pacific (LAWASIA), a regional association of legal professionals, recently noted, "lawyers are often at the centre of issues of business, human rights and the environment and are increasingly expected to address these issues in their practices".⁶ LAWASIA has also noted the role that legal professional associations may play in providing support and guidance to lawyers addressing these issues.⁷ Professional associations may also play an active role in commenting on legislative changes or advocating the need for reform.⁸

In August 2019, the American Bar Association (ABA) adopted a resolution calling on 'federal, state, local, territorial, and tribal governments, and the private sector, to

⁶ LAWASIA, *Toolkit on Business and Human Rights: A Guide for Lawyers in the Asia Pacific* (2019) 8.

⁷ *Ibid* 43.

⁸ *Ibid*.

recognize their obligation to address climate change'.⁹ Additionally, the ABA resolution urges lawyers to take a climate conscious approach to legal advice, by advising their clients of the risks and opportunities that climate change provides.¹⁰ One of the authors of the resolution, John Dernbach, noted that 'if every sector in society is going to play a role in addressing climate change, that necessarily includes lawyers'.¹¹

Adopting a climate conscious approach will involve identifying the climate change issues and consequences of different courses of action and incorporating these into the preferred solution to the legal problem or dispute.

For example, in relation to businesses and activities that have social and environmental impacts, such as climate change consequences, merely having a legal licence to carry out the business or activity may be insufficient; a social licence may also be required. A social licence refers to the latitude or freedom that society allows a business to use land and its resources without interference by society. It is a notional licence that society gives the business to carry out its activities. In the climate change context, businesses that contribute to climate change, such as significant carbon extractors or carbon emitters, might have legal licences but not a social licence and are thereby exposed to significant business risk by society seeking to protest against and interfere with the business and its activities.¹² A

⁹ American Bar Association, Resolution 111, adopted at the Annual Meeting of the House of Delegates (2019). A copy of the resolution is available online at: <<https://www.americanbar.org/content/dam/aba/images/news/2019/08/am-hod-resolutions/111.pdf>>.

¹⁰ Ibid.

¹¹ John Dernbach, quoted in Jennifer Hijazi, 'American Bar Association pushes lawyers to act on warming', *E&E News* (online), 14 August 2019 <<https://www.eenews.net/climatewire/2019/08/14/stories/1060942861>> accessed 15 October 2019.

¹² Brian J Preston, 'The adequacy of the law in satisfying society's expectations for major projects' (2015) 32 *Environmental and Planning Law Journal* 182, 182-184.

climate conscious lawyer would provide advice about such business risks and the need to earn a social licence.

There is increasing recognition that climate change poses not only reputational risks to businesses seen to be damaging the environment, but also direct financial risks to businesses.¹³ These risks generally fall into three categories: physical risks, transition risks, and liability risks.¹⁴ Physical risks refer to those risks that physically impact the business, such as the risk of extreme weather events damaging business assets or affecting supply routes. Transition risks are risks to a company 'associated with developments that may (or may not) occur in the process of adjusting to a lower-carbon economy'.¹⁵ For example, with the Paris Agreement and national laws and policies increasingly calling for a reduction in greenhouse gas emissions, the current carbon intensive economy will require wide-reaching transition. Finally, liability risk is the risk of being held to account for contributing to, or failing to adapt to, climate change. This includes costs associated with climate change litigation, which is increasing worldwide. At least 1300 climate cases have been brought across 28 countries,¹⁶ a trend that seems likely to continue.

¹³ Sophie Marjanac and Lindene Patton, 'Extreme weather event attribution science and climate change litigation: an essential step in the casual chain' (2018) 36(3) *Journal of Energy & Natural Resources Law* 265, 293.

¹⁴ See, for example, M Carney, 'Breaking the Tragedy of the Horizon – climate change and financial stability' (Speech, Lloyd's of London, 29 September 2015); Brian Preston, 'Mapping Climate Change Litigation' (2018) 92 *Australian Law Journal* 774, 788.

¹⁵ Noel Hutley SC and Sebastian Hartford-Davis, 'Climate Change and Directors' Duties' (Memorandum of Opinion, Centre for Policy Development and Business Council, 7 October 2016), 3. See also, Noel Hutley SC and Sebastian Hartford Davis, 'Climate Change and Directors' Duties: Supplementary Memorandum' (Supplementary Memorandum of Opinion, Centre for Policy Development, 26 March 2019).

¹⁶ Joana Setzer and Rebecca Byrnes, *Global trends in climate change litigation: 2019 snapshot* (Policy Report, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 4 July

Academics, lawyers and commentators are increasingly acknowledging the financial risks posed by climate change and the duties of directors to assess, manage and disclose these risks. At a roundtable on climate risk disclosures held in November 2019, former Australian High Court Judge Kenneth Hayne commented that under Australian law: “a director acting in the best interests of the company must take account of, and the board must report publicly on, climate-related risks and issues relevant to the entity.”¹⁷ Lawyers need to be aware of the shifting understanding of climate change risks to businesses and advise businesses of their legal obligations to assess, manage and report on these risks.

Lawyers need to advise clients of the potential risks, liability and reputational damage arising from activity that negatively contributes to the climate crisis. Lawyers also need to advise clients of the wisdom of disclosing (and the risks, liability and reputational damage of not disclosing) the climate-related risks to the corporations entire business operation (including supply chains) when reporting to regulators, investors, financiers and shareholders.

Incorporating the climate change consequences of actions in legal advice is a necessary corollary of the lawyer’s duties to their clients. Under professional rules, lawyers are tasked to deliver legal services competently and diligently.¹⁸ In tort, lawyers also owe a duty of care to their clients. They must exercise the standard of

2019) <http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf>.

¹⁷ Kenneth Hayne, ‘Remarks to Centre for Policy Development climate roundtable’ (Sydney, 21 November 2019)<<https://cpd.org.au/2019/12/full-text-of-kenneth-hayne-ac-qc-remarks-to-cpd-climate-roundtable/>>.

¹⁸ See, for example, Legal Services Council, *Australian Solicitors’ Conduct Rules*, r 4.1.3. The Australian Solicitors’ Conduct Rules are made pursuant to Part 9.2 of the *Legal Profession Uniform Law* (NSW), which is a law of NSW pursuant to s 4 of the *Legal Profession Uniform Law Application Act 2014* (NSW).

care and skill expected of a qualified and ordinarily competent and careful lawyer in the exercise of their profession.¹⁹ Climate change and its consequences are leading to changes in what is to be expected of a competent and careful lawyer. Changing laws and policies relating to climate change and its consequences are altering the legal responsibilities of government and enterprises. The number of domestic climate change laws and policies has risen from 72 to over 1,500 since 1997.²⁰ Already, an ordinarily competent and careful lawyer should be aware of climate change issues and laws as relevant to legal disputes and advise accordingly. If the failure to provide advice on the relevant climate change issues meant that the advice was not to the standard expected of a reasonably competent lawyer, this may amount to professional negligence.²¹

2. Identification, Interpretation and Application of Legal Rules

The law that is applicable to a legal problem or dispute is rarely clear cut. There are at least four reasons. First, the process of identifying, interpreting and applying the law is attended with doubt, making it difficult to advise unqualifiedly as to what the law is. Secondly, environmental law, including climate law, is “hot law”, ever evolving, making it difficult to ascertain the law at any particular time. Thirdly, courts pronounce in their decisions what is the law at the time when the impugned action or inaction occurred, not at the time when the court decision is delivered. Lawyers in giving legal advice must predict what the courts will say the law is, not merely look to what the courts in the past have said the law was. Fourthly, in planning and

¹⁹ *Hawkins v Clayton* (1988) 164 CLR 539.

²⁰ Michael Nachmany and Joana Setzer, *Global trends in climate change legislation and litigation: 2018 snapshot* (Policy Brief, Grantham Research Institute on Climate Change and the Environment, May 2018) 2.

²¹ *Thorpe v Lochel* (2005) 31 WAR 500.

environmental laws there are commonly merit appeals, where law, policy and fact interact to obscure any bright distinction between what is and what is not the law. I will deal with each of these factors.

First, there is a common belief amongst lawyers, some politicians and sections of the media, consonant with Blackstone's declaratory theory of judicial decision-making, that judges do not and cannot make law; they merely discover it and declare it.²² So too, the argument goes, lawyers in providing advice to clients should act likewise; they should merely discover the law that is applicable and provide advice as to its declared meaning and its application to the facts of the legal problem or dispute. Indeed, many lawyers take this legal positivist view.²³

However, this declaratory theory of legal decision-making has been trenchantly criticised as a fiction or myth.²⁴ The explicit legal rules may not readily apply to the legal problem or dispute and new rules may need to be supplied; there may be competing legal rules, necessitating selection of the appropriate rule; the meaning of the legal rules may be unclear; and there may be doubt as to how to apply the legal rules.

The reality is that the processes of identification, interpretation and application of the law to a particular legal problem or dispute are rarely clear cut and will require

²² William Blackstone, *Commentaries on the Laws of England*, Book 1 (first published 1765, reprinted in The Legal Classics Library, 1983) 69–70.

²³ HLA Hart is the legal philosopher often credited with developing a contemporary theory of legal positivism. Hart proposed that there is no necessary connection between law and morality. H.L.A. Hart, *The Concept of Law*, (Oxford University Press, 1961).

²⁴ See, for example, E. W. Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, 2005) 25-27; John Austin, *Lectures on Jurisprudence* (edited by R Campbell, 4th ed, 1879) vol 2, 655; Lord Reid, 'The Judge as Law Maker' (1972) 12 *Journal of the Society of Public Teachers of Law* 22, 22; Sir Anthony Mason, 'The Role of the Judge at the Turn of the Century' in Geoffrey Lindell (ed), *The Mason Papers* (2007) 55; Sir Anthony Mason, 'Legislative and Judicial Law-Making: Can We Locate an Identifiable Boundary?' in Geoffrey Lindell (ed), *The Mason Papers* (2007) 62–3; Jeremy Waldron, *The Law* (Routledge, 1990) 124, 129-130.

choices to be made. As Thomas explains, “judges cannot exercise the choice or choices that make law and at the same time be declaring a pre-existing law”.²⁵ In making these choices, lawyers and judges can be aware of the climate change consequences of each choice. Let me expand briefly on the steps in the process of legal decision-making to illustrate where these choices arise.²⁶

The first step is identification of the applicable legal rule. The problem may be that there is more than one legal rule that is potentially applicable or that none of the existing legal rules may be appropriate and a new one needs to be selected. Choices may need to be made as to what is or should be the legal rule to be applied to the legal problem or dispute. Cardozo suggested different methods to choose or develop the legal rule to be applied to the case at hand. The legal rule may be developed along the line of logical progression (what Cardozo called the rule of analogy or the method of philosophy), the line of historical development (called the method of evolution), the line of customs of the community (called the method of tradition) or the line of justice, morals and social welfare (called the method of sociology).²⁷ Choices are involved in selecting the method and in applying the selected method.

Having identified the legal rule to be applied, its meaning and scope needs to be determined. Here too choices need to be made. All legal rules require interpretation. There will be some clear cases where a rule certainly applies but many where there

²⁵ E. W. Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, 2005) 25.

²⁶ A fuller explanation of the process of legal decision-making is given in Brian J Preston, ‘The Art of Judging Environmental Disputes’ (2008) 13 *Southern Cross University Law Review* 103.

²⁷ Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) 30-31.

is doubt as to when and how the rule applies.²⁸ The language in which legal rules are expressed is often indeterminate and open textured.²⁹ Rules can never in advance govern every case. It is impossible to have a complete legislative provision in advance covering every case, and authoritative extra-judicial interpretation.³⁰ There is thereby uncertainty in the applicability of a rule to the circumstances at hand. Rules may use very general standards, such as reasonableness, fairness or what is just and equitable, thereby incorporating extra legal norms into the law. These standards are predicated on “fact-value complexes, not on mere facts”.³¹ The use of these standards enables changes in society’s values to be incorporated into the law,³² and thereby, for the law to be relative and attuned to the time and place.³³

Legal rules will also be interpreted in accordance with forms of moral association such the rule of law.³⁴ Fuller proposed eight desiderata of the rule of law. The quest of laws and legal systems to achieve these desiderata gives rise to the inner morality of the law.³⁵ As Waldron observes, judges will hold the values associated with the rule of law and these are bound up with a particular outlook on politics, society and freedom.³⁶ Judges will draw on these values in interpreting laws. Interpreting laws to be consonant with, rather than discordant with, the rule of law may result in the laws bearing a meaning different to the literal meaning of the words in the text of the law.

²⁸ HLA Hart, *The Concept of Law* (Oxford University Press, 2nd ed, 1994) 123.

²⁹ Ibid 128.

³⁰ Roscoe Pound, *The Spirit of the Common Law* (Transaction Publishers, 1999) 179 and see 174.

See also, Roscoe Pound, *An Introduction to the Philosophy of Law* (Yale University Press, 1922) 51.

³¹ Julius Stone, *Legal System and Lawyers’ Reasoning* (Maitland Publications, 1964) 264.

³² Julius Stone, *The Province and Function of Law* (Associated General Publications, 1947) 144.

³³ Roscoe Pound, *The Spirit of the Common Law* (Transaction Publishers, 1999) 172.

³⁴ Nigel Simmonds, *Law as a Moral Idea* (Oxford University Press) 152.

³⁵ Lon Fuller, *The Morality of Law* (revised edition, Yale University Press, 1969).

³⁶ Jeremy Waldron, *The Law* (Routledge, 1990) 123.

The same desire for an interpretation that is consonant with the rule of law may lead the judge to look beyond the particular statute to the rest of the law. Dworkin argues that, where there are two or more interpretations of a statutory provision, judges should favour the one that allows the provisions to sit most comfortably with the rest of the law as a whole and with the principles and ideals of law and legality in general.³⁷

The need for interpretation of legal rules creates opportunities for climate conscious lawyers and judges to adopt an interpretation of legal rules that promotes or better implements climate change goals, provided that doing so is consonant with and required by the principles of genuine interpretation. Genuine or proper interpretation includes determining which of two or more co-ordinate rules to apply and what the law-maker intended to prescribe by a given rule. Genuine interpretation is to be contrasted with spurious or improper interpretation. Spurious interpretation includes meeting deficiencies or excesses in rules imperfectly conceived or enacted.³⁸

Spigelman has explored the ramifications of legitimate and spurious interpretation in the context of statutory interpretation and human rights.³⁹ This analysis has relevance to climate change. Longstanding human rights laws are being invoked as a basis for many legal actions concerning climate change.⁴⁰ In these cases, plaintiffs

³⁷ Ronald Dworkin, *Law Empire* (Fontana, 1986).

³⁸ See Roscoe Pound, 'Spurious Interpretation' (1907) 6 *Columbia Law Review* 379, 381.

³⁹ James Spigelman, 'Legitimate and Spurious Interpretation' in James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008) 143.

⁴⁰ See, Brian J Preston, 'The Evolving Role of Environmental Rights in Climate Change Litigation' (2018) 2 *Chinese Journal of Environmental Law* 131; Jacqueline Peel & Hari M. Osofsky, 'A Rights Turn in Climate Change Litigation,' (2017) 7 *Transnational Environmental Law* 1.

creatively argue that climate change and its impacts are jeopardizing and violating their existing rights to life, health, property and access to a healthy environment.⁴¹

Having found and identified the law, the lawyer or judge needs to apply it to the relevant facts in order to resolve the legal problem or dispute. At this stage, there will often be discretion as to the course of action, remedy or relief that ought to be pursued or granted. A range of considerations will be relevant, pertaining to the private interests of the client, the parties to the dispute or third parties, as well as the public interest. Moral considerations may be as relevant as legal ones. The duty of the court, in matters of judicial discretion as to what remedy, relief or punishment, if any, is to be granted if breach of the law be found by the court, is to exercise its moral judgment as to what is right, just, equitable or reasonable in the case.⁴² The Court's moral judgment will evolve over time in response to changes in society and in the environment. A climate conscious approach will identify and consider the climate change consequences of different courses of action, remedies and relief.

The upshot is that lawyers cannot give unqualified legal advice in binary terms, that an action is lawful or not lawful, because identifying, interpreting and applying the law is attended with doubt.

The second factor is that this problem of identifying, interpreting and applying the law is made more acute in areas of law that are rapidly evolving. While some areas of law may remain fairly static, environmental law, since its inception, has remained in a constant state of evolution. Elizabeth Fisher observes that environmental law is "hot law", as it is concerned with "'hot situations' in which the agreed frames, legal and

⁴¹ See *Netherlands v Urgenda Foundation* (The Hague Court of Appeal, 200.178.245/01, 9 October 2018); and Supreme Court of Netherlands decision *Juliana v USA* 217 F Supp 3d 1224 (D Or, 2016).

⁴² P J Fitzgerald, *Salmond on Jurisprudence* (Sweet & Maxwell, 12th ed, 1966) 68-69, 70-71.

otherwise, for how we understand and act in the world are in a constant state of flux and contestation”.⁴³ Environmental problems are often legally disruptive⁴⁴ leading to law that is novel, scientifically uncertain, legislatively based and entwined in policy. Principles and policies interact and merge with environmental law, blurring the line between law and policy. Indeed, the development of environmental principles in law is often dependent on the surrounding political context.⁴⁵

The law relating to climate change and its consequences is one area that is rapidly evolving. What are the legal responsibilities of governments and enterprises in relation to climate change? The view that they have no or very few legal responsibilities has been challenged by litigation throughout the world.

In relation to the legal responsibilities of governments, The Hague District Court decision in *Urgenda v The Netherlands*⁴⁶ holding that the Dutch government acted negligently in breach of its duty of care to Dutch citizens and ordering it to reduce the country’s greenhouse gas emissions is a recent illustration of how quickly the law can change. On appeal, The Hague Court of Appeal upheld the District Court’s decision based on different reasons.⁴⁷ The Court of Appeal upheld Urgenda’s cause of action in human rights law, which had previously been dismissed in the District Court. Professor John Knox, the United Nations Special Rapporteur on human rights and the environment at the time, described the Court of Appeal’s decision as

⁴³ Elizabeth Fisher, ‘Environmental law as “Hot” law’ (2013) 25 *Journal of Environmental Law* 347, 347-348.

⁴⁴ Elizabeth Fisher, Eloise Scotford and Emily Barritt, ‘The Legally Disruptive Nature of Climate Change’ (2017) 80 *Modern Law Review* 173.

⁴⁵ Eloise Scotford, *Environmental Principles and the Evolution of Environmental Law* (Hart Publishing 2016) 115.

⁴⁶ *Urgenda Foundation v Netherlands* (The Hague District Court, C/09/456689/HA ZA 13-1396, 24 June 2015).

⁴⁷ *Netherlands v Urgenda Foundation* (The Hague Court of Appeal, 200.178.245/01, 9 October 2018).

“the most important judicial decision yet on the application of human rights law to climate change”. The Supreme Court of the Netherlands has upheld The Court of Appeal’s decision, affirming that the Dutch government has breached human rights by not taking ambitious action to reduce emissions. This is another example of how quickly the law can appear to change.

In relation to the legal responsibilities of enterprises, although to date there has been limited litigation on the obligations of a company or company directors to consider and disclose the impacts of climate-related risks on the company’s business, this is likely to change with greater awareness of the responsibilities of enterprises to account for their climate-related risks.⁴⁸ Indeed, there has been a recent upsurge in interest in climate change litigation aimed at private companies and businesses.⁴⁹

Companies and company directors have obligations, such as the statutory duty of care and due diligence under s 180(1) of the *Corporations Act 2001* (Cth), to consider climate-related risks for the company.⁵⁰ Prudent companies must account for their climate-related risks and take proactive measures to address them.⁵¹ Company directors who fail to consider climate-related risks now could be found liable for breaching their duty of care and diligence in the future.⁵²

⁴⁸ See Expert Group on Climate Obligations of Enterprises, *Principles on Climate Obligations of Enterprises* (Eleven International Publishing, 2018), principles 18, 19 and 23 and associated commentary on pages 166-183 and 187-192.

⁴⁹ Geetanjali Ganguly et al, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38(4) *Oxford Journal of Legal Studies* 841, 844.

⁵⁰ Brian J Preston, “Mapping Climate Change Litigation”, (2018) 92(10) *Australian Law Journal* 774; Noel Hutley SC and Sebastian Hartford-Davis (n 15).

⁵¹ Stephanie Venuti and Martijn Wilder, “Obligations on Australian Companies to Address Climate Change” (2018) 92(10) *Australian Law Journal* 789.

⁵² Noel Hutley SC and Sebastian Hartford-Davis (n 15) 3.

Companies are already under duties to disclose climate-related risks. For example, Australian Stock Exchange (ASX) Listing Rules Guidance Notice 9 recommends a listed entity “disclose whether it has any material exposure to economic, environmental and social sustainability risks and, if it does, how it manages or intends to manage those risks”.⁵³ A recent study by the Australian Securities and Investment Commission (ASIC) found that 17% of ASX listed companies identified climate risk as a material risk in their operating and financial reviews.⁵⁴

The *Corporations Act 2001* also requires public companies and large proprietary companies to disclose relevant financial risks. Chapter 2M of the *Corporations Act* requires annual directors’ reports to detail circumstances that may significantly affect the company’s operations and state of affairs in future years.⁵⁵ Financial statements and notes for a financial year must give a true and fair view of the financial position and performance of the company.⁵⁶ As our understanding of the risks that climate change poses increases, these Corporations Act obligations may ground a finding that disclosure of any relevant climate risks by Australian companies is already required at law.⁵⁷ Indeed, global understanding and recognition of these risks has increased exponentially in recent years. The 2019 Global Risks Perception Survey conducted by the World Economic Forum identified the risk of extreme weather

⁵³ ASX Listing Rules Guidance Note 9 (19 December 2016), 9, 19.

⁵⁴ ASIC, “Climate risk disclosure by Australia’s listed companies” (Report No 593, September 2018), 4.

⁵⁵ *Corporations Act 2001* (Cth) s 299.

⁵⁶ *Corporations Act 2001* (Cth) s 297.

⁵⁷ See Elisa de Wit et al., ‘The time is now – climate risk a mandatory issue for all boards’ (26 November 2019) < <https://www.nortonrosefulbright.com/en-au/knowledge/publications/c528fde6/the-time-is-now---climate-risk-a-mandatory-issue-for-all-boards>>.

events, failure of climate change mitigation and adaptation, and natural disasters as the three highest risks in terms of likelihood.⁵⁸

In October 2019, the New Zealand Government released a discussion paper outlining mandatory climate-risk disclosure requirements for all companies.⁵⁹ The discussion paper makes clear that New Zealand companies are, at a minimum, expected to follow the voluntary framework outlined in the final report of the G20 Financial Stability Board's Taskforce on Climate-related Financial Disclosures (TCFD).⁶⁰ Norton Rose Fulbright Australia, a law firm, commenting on the response of industry in Australia to the New Zealand paper clarifies that "directors of *all* companies in Australia *already* have an obligation to consider, disclose and effectively manage the unique climate risks impacting on their businesses. Failure to do so will expose the company and individual directors to significant civil and criminal liability and compensation orders."⁶¹

A number of cases have commenced across the world concerning these obligations. In Australia, a suit brought by Commonwealth Bank shareholders alleged that the company's 2016 report had violated its disclosure obligations under the *Corporations Act* as it failed to disclose climate-related financial risks.⁶² The proceedings were discontinued, however, after the Commonwealth Bank issued a climate change

⁵⁸ World Economic Forum, 'The Global Risks Report 2019' (Insight Report, 2019) 5, 14.

⁵⁹ Ministry for the Environment and Ministry of Business, Innovation & Employment, 'Climate-related financial disclosures – Understanding your business risks and opportunities related to climate change' (Discussion document, 2019)

<<https://www.mfe.govt.nz/sites/default/files/media/Climate%20Change/Climate-related-financial-disclosures-discussion-document.pdf>> accessed 4 December 2019.

⁶⁰ See, Taskforce on Climate-related Financial Disclosures, "Recommendations of the Taskforce on Climate-related Financial Disclosures" (Final Report, 15 June 2017).

⁶¹ Elisa se Wit et al (n 53).

⁶² *Abrahams v Commonwealth Bank of Australia* (FCA, VID879/2017, Concise Statement filed 8 August 2017).

policy statement, announced it would not fund the controversial Carmichael coal project and released its 2017 annual report outlining the risks to the company from climate change.⁶³ In 2018, a superfund member commenced proceedings against his superfund, REST, for failing to adequately disclose climate related business risks and strategies.⁶⁴

The third factor affecting identification of what the law is and what are the legal responsibilities of governments and enterprises is that courts' decisions pronounce the law and legal responsibilities after the action or inaction of government or enterprises has occurred. When advising on the legal responsibilities of governments and enterprises in relation to climate change, there is a need for lawyers to predict what courts are likely to pronounce to be the legal responsibilities in future litigation, rather than look backwards to what courts have held to be legal responsibilities in past judgments. The courts of the future will be asked to determine the legality of present action and inaction of governments and enterprises in relation to climate change. In making its decision, the court may make choices in its identification, interpretation and application of the law that accord with the facts and values of the community at the time. When the court makes a pronouncement, it says what the law was at the time of the impugned action or inaction. In effect, the court's pronouncement of the law operates retrospectively, to deem past action or inaction of governments and enterprises to be lawful or unlawful.

⁶³ Gareth Hutchens, 'Commonwealth Bank shareholders drop suit over nondisclosure of climate risks', *The Guardian* (online, 21 September 2017)

<<https://www.theguardian.com/australianews/2017/sep/21/commonwealth-bank-shareholders-drop-suit-over-non-disclosure-of-climate-risks>>.

⁶⁴ *McVeigh v Retail Employees Superannuation Pty Limited* (Federal Court of Australia, NSD1333/2018, 24 July 2018). A copy of the complaint is available online at:

<http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180724_NSD13332018_complaint.pdf>.

For example, in the Urgenda case referred to earlier, The Hague Court of Appeal's decision of 2018 reversed The Hague District Court's decision of 2015, deeming the Dutch Government's past conduct in failing to take precautionary measures to mitigate dangerous climate change unlawful on human rights grounds. This demonstrates that in an area of law that is rapidly evolving like climate change law, what the law is now is yet to be judicially determined.

To advise on the responsibilities of corporations and company directors relating to climate change, lawyers must consider that the courts of the future will hold the law is today. Leading climate change lawyer, Martijn Wilder, notes that widely publicised commentary on climate risks has meant that directors are now on notice: "if you were in court in the future you could not say – looking back to this year, 2019 – that you did not take climate change risk seriously."⁶⁵

The fourth factor obscuring the boundary between what is and what is not the law concerns the interaction between law, policy and fact in merit appeals. In environmental law, proposed activities to exploit or develop the environment need governmental approval. Decisions to grant or refuse approval may be appealed to a court or tribunal, which reviews the primary decision on the merits. Although there has been a tendency for merits review "to be understood not to have legal content", this has been refuted.⁶⁶ Courts and tribunals engaged in merits review do not operate outside the law but within it, they are legal constructions concerned with

⁶⁵ See, Michael Pelly, 'Global Warming excuses a no go in court: lawyers' *Australian Financial Review* (10 December 2019).

⁶⁶ Elizabeth Fisher, 'Administrative Law, Pluralism and the Legal Construction of Merits Review in Australian Environmental Courts and Tribunals' in Linda Pearson, Carol Harlow and Michael Taggart (eds) *Administrative Law in a Changing State* (Hart Publishing, 2008) 345.

legal processes.⁶⁷ The court or tribunal in these cases is finding and applying law and policy and may undertake extensive fact-finding. Lawyers advising clients who are parties to merit review proceedings cannot simply say what the law is and thus anticipate a result; the court's decision will be influenced by more than a strict view of "the law", including policy and the court's findings of fact.

3. Ethical duties of lawyers

Thirdly, all lawyers are subject to ethical obligations. These arise not only by the particular laws and rules governing legal practice but also from the legal profession's special status as a profession. The practice of a profession is more than the carrying out of an occupation or a business. A profession has been described as a group "pursuing a learned art as a common calling in the spirit of public service".⁶⁸ The legal profession avows obligations of service to the community, including a commitment to equal justice under law.⁶⁹ The legal profession's claim to its special status as a profession in our society involves an obligation to abide by moral and ethical principles.⁷⁰ The general ethical obligations of the legal profession are distilled into distinct duties in legal professional rules. For example, the duties to act in the best interests of a client,⁷¹ to avoid conflicts of interest⁷² and to be honest and courteous in all dealings in the course of legal practice.⁷³ However, mere compliance

⁶⁷ Ibid.

⁶⁸ Roscoe Pound, *The Lawyer from Antiquity to Modern Times* (West Publishing Co, 1953) 5.

⁶⁹ Paula Baron and Lillian Corbin, *Ethics and Legal Professionalism in Australia* (Oxford University Press, 2nd ed, 2017) 12.

⁷⁰ John McKenzie, 'Legal Ethics - What Are They Today' (Paper delivered at Holding Redlich, 16 February 2017) 1-2. See also, James Allsop, 'Professionalism and commercialism: Conflict of harmony in modern legal practice' (2010) 84 *Australian Law Journal* 765, 766.

⁷¹ Legal Services Council, *Australian Solicitors' Conduct Rules* r 4.1.1.

⁷² Legal Services Council, *Australian Solicitors' Conduct Rules* rr 10-12.

⁷³ Legal Services Council, *Australian Solicitors' Conduct Rules* r 4.1.2.

with such rules does not discharge the obligation to abide by moral and ethical principles. Chief Justice Bathurst of the Supreme Court of NSW identifies that:

“ethical thinking does, and if not, then it should, pervade all aspects of legal practice, from the relatively mundane task of providing advice about a contract for the sale of land to the conduct of a defence to a murder charge. Indeed... I would have gone so far as to say that obedience to a comprehensive code of ethics was the defining characteristic of the profession of a lawyer.”⁷⁴

Similarly, Spigelman emphasised that the legal profession “has an ethical dimension and values justice, truth and fairness.”⁷⁵

This ethical dimension of legal practice is not always appreciated. A study by Moorhead and Vaughan examined how in-house lawyers viewed the ethical dimension of legal risk management.⁷⁶ About a third of those interviewed viewed the giving of legal advice in binary terms: either an action was lawful or it was not. The lawyer’s role was to present technical legal advice, devoid of an ethical dimension. Where the law was ambiguous, ethical decisions were purely for the business and not for them as lawyers.⁷⁷ Moorhead and Vaughan suggested this view was

⁷⁴ The Hon T F Bathurst AC, 'Ethical Legal Practice and Professional Conduct' (Speech delivered at the book launch of Francisco Esparraga, 'Ethical Legal Practice and Professional Conduct', 27 June 2019)

<www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2019%20Speeches/Chief%20Justice/Bathurst_20190627.pdf>.

⁷⁵ James Spigelman, 'The Value of an Independent Bench and Bar' (1998) 7 *Australian Bar Review* 105, 106.

⁷⁶ Richard Moorhead and Steven Vaughan, 'The ethical dimensions', *Law Gazette* (online), 19 June 2019, <<https://www.lawgazette.co.uk/features/the-ethical-dimension/5061576.article>> accessed 30 October 2019. See for a fuller discussion, Richard Moorhead, Steven Vaughan and Cristina Godinho, *In-house Lawyer’s Ethics: Institutional Logic, Legal Risk and the Tournament of Influence* (Hart, 2018).

⁷⁷ *Ibid.*

misguided and involves “a failure to properly engage with the professional obligations to which all regulated lawyers, including those in-house, are subject”.⁷⁸

Lawyers in large corporate law firms are also vulnerable to overlooking the ethical dimensions of legal practice. A study by Oakley and Vaughan found that lawyers in large corporate law firms appeared prone to developing and normalising potentially risky and irresponsible practices. The vulnerability of these corporate lawyers to do so stems from competition from other law firms, the demands of clients, the shift over time from “trusted advisor” to “service provider”, regulatory requirements and pressures to make profit, amongst other reasons.⁷⁹

An Australian study by Bagust of 50 lawyers in major commercial law firms in Melbourne found that the law firms were “(re)forming themselves into the image of the ever-merging, ‘big business’ clients they serve” and operated on the basis that “the client is always right”, thereby diminishing lawyer autonomy.⁸⁰ The study found that “lawyers are likely to find it more difficult to be able to adhere to professional and ethical principles that do not cohere with the client’s objectives.”⁸¹

Although the pressures of modern day legal practice may pose difficulties in maintaining the ethical standards required of the legal profession,⁸² these difficulties must be overcome. Ethical duties should guide and ground the path of a changing profession. Incorporating climate change and its consequences into daily legal

⁷⁸ Ibid.

⁷⁹ Emma Oakley and Steven Vaughan, ‘In Dependence: The Paradox of Professional Independence and Taking Seriously the Vulnerabilities of Lawyers in Large Corporate Law Firms’ (2019) 46 *Journal of Law and Society* 83.

⁸⁰ Joanne Bagust, ‘The Legal Profession and the Business of Law’ (2013) 35 *Sydney Law Review* 27, 29.

⁸¹ Ibid 46.

⁸² See, for example, Baron and Corbin (n 65) 49-52 for a discussion of the strong effects of culture in corporate law firms.

practice is an extension of this ethical thinking. Climate conscious lawyers will appreciate the ethical dimensions of legal practice; ethical thinking about climate change and its consequences should pervade all aspects of legal practice.

4. Overriding duty to the court

Fourthly, lawyers are officers of the court and have a paramount duty to the court and the administration of justice.⁸³ These duties involve supporting the integrity of the legal system. It involves duties not only to uphold the law and to obey the law, but also to ensure the efficient and proper administration of justice.⁸⁴ These duties to the legal system override any particular client interests that are contrary to the duties.⁸⁵

Parker refers to this approach as “responsible lawyering”, which “focuses on the lawyer’s role as officer of the court and guardian of the legal system”.⁸⁶ The responsible lawyer still acts as an advocate for the client but will act against the client’s interests in order to “maintain the justice and integrity of the legal system... in the public interest.”⁸⁷ The responsible lawyer will take the duty to the court and the administration of justice into account both personally in decision-making and in providing advice to clients. Baron and Corbin suggest this approach of responsible lawyering may now be considered deontological, as the Australian Solicitors’

⁸³ See, for example, Legal Services Council, *Australian Solicitors’ Conduct Rules* r 3.1.

⁸⁴ Mackenzie (n 66) 2.

⁸⁵ Legal Services Council, *Australian Solicitors’ Conduct Rules* r 3.1.

⁸⁶ Christine Parker, ‘A Critical Morality for Lawyers: Four Approaches to Lawyers’ Ethics’ (2004) 30(1) *Monash University Law Review* 49, 61.

⁸⁷ *Ibid.*

Conduct Rules explicitly state that the duty to the court and the administration of justice is the lawyer's paramount duty.⁸⁸

As earlier indicated, there are grey areas in the identification, interpretation and application of the law to a legal problem or dispute. Lawyers have obligations to choose in these grey areas ways that contribute to the equity, effectiveness and enforcement of the law and that uphold the fundamental values and integrity of the legal system.

Chief Justice Allsop of the Federal Court of Australia recognised that there are at least five values that inform the understanding and exercise of public law: reasonable certainty; honesty and fidelity to the Constitution; a rejection of unfairness, unreasonableness and arbitrariness; equality; humanity, and the dignity and autonomy of the individual.⁸⁹ He contended that these values are founded in the central concern of public law, being the 'organisation, distribution, exercise and control' of State power, and that the law should be read and understood by reference to these values.⁹⁰

Chief Justice Allsop explained how these values inform the law and its exercise:

“Assessing how power should be controlled and exercised in society (within both private and public law) is the daily task of the law. Law is not value free. 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,

⁸⁸ Baron and Corbin (n 65) 47.

⁸⁹ Chief Justice James Allsop, 'Values in Public Law' (2017) 91 *Australian Law Journal* 118, 121.

⁹⁰ *Ibid* 118, 119.

inhering values (*human* values) and serves as an expression or manifestation of natural human and societal bonds of conduct.”⁹¹

Climate conscious lawyers should act in their legal practice in ways that discharge their duties to the legal system and uphold the values of public law. Upholding these values facilitates the achievement of justice.⁹² Justice, in many senses, underpins the legal system. Climate change has had, is having, and will have justice implications and impacts for people and the planet. Climate justice, like environmental justice generally, has distributive, procedural and recognition justice implications and impacts.⁹³ Climate change threatens the enjoyment of a vast range of human rights and the human rights obligations of governments encompass dealing with climate change and its consequences for human rights.⁹⁴

Climate conscious lawyers should advise and act in ways that uphold and advance the fundamental values and integrity of the legal system, including climate change justice.

Conversely, climate conscious lawyers will not use loopholes, procedural rules or arguments without legal prospects of success to frustrate the substance and spirit of the law and the legal system.⁹⁵ Climate conscious lawyers will not advise and act for

⁹¹ Chief Justice James Allsop, 'Values in Law: How They Influence and Shape Rules and the Application of Law' [2016] *LAWASIA Journal* 125, 135-136.

⁹² Lord Thomas of Cwmgiedd, 'The centrality of justice: its contribution to society, and its delivery' (2017) 13(2) *The Judicial Review* 115.

⁹³ See, Brian J Preston, 'The effectiveness of the law in providing access to environmental justice' in Paul Martin et al. (eds) *The Search for Environmental Justice* (Edward Elgar, 2015); Brian J Preston, 'The adequacy of the law in achieving climate change justice - some preliminary comments' (2015) 34 *Journal of Energy & Natural Resources Law* 45.

⁹⁴ *Netherlands v Urgenda Foundation* (The Hague Court of Appeal, 200.178.245/01, 9 October 2018).

⁹⁵ Lawyers are obliged to responsibly use court process, including avoiding sharp practice and abuse of process: see, Legal Services Council, *Australian Solicitors' Conduct Rules* r 21 and Baron and Corbin (n 65) 104-108.

clients to bring unmeritorious Strategic Litigation Against Public Participation (SLAPP suits) against persons and groups seeking to advance climate justice. To do so goes against the professional standards and expectations of lawyers and may amount to an abuse of process.⁹⁶

5. Personal Ethical Approach

Fifthly, there is a personal ethical approach. Lawyers need to integrate ethical thinking and ethical action into their day to day legal practice. Baron and Corbin quote Aristotle's warning that "one's actions reflect on who one is, as a person."⁹⁷ They advise that "lawyers ought to integrate their personalities into their lawyering role."⁹⁸ Similarly, Hutchinson advocates that:

"Acting ethically is not about adherence to a code that is resorted to in occasional moments of indecision. Rather, it is about the development of a moral way of living and lawyering that encompasses an organic set of attitudes, dispositions and values, and that can be incorporated into each lawyer's daily routines and regimen."⁹⁹

Lawyers may have scope in their daily legal practice to bring into accordance their advice and actions with their moral convictions. One way to do this is through moral counselling with clients, "discussing with the client the rightness or wrongness of her projects."¹⁰⁰

⁹⁶ See, Judith Preston, 'Participation from the deep freeze: "Chilling" by SLAPP suits' (2014) 31 *Environment and Planning Law Journal* 47, 62; and see, Greg Ogle, 'Anti-SLAPP Law Reform in Australia' (2010) 19(1) *Review of European Community and International Environmental Law* 35.

⁹⁷ Baron and Corbin (n 65) 52.

⁹⁸ *Ibid.*

⁹⁹ Allan C Hutchinson, *Legal Ethics and Professional Responsibility* (Irwin Law, 1999) 48.

¹⁰⁰ David Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press, 1988) 173.

Through client counselling, lawyers may be able to discuss with their client the rightness or wrongness of the client's projects or business activities and the impact of those projects or activities on people and the planet, including the climate change consequences of different courses of action. By the lawyer's moral persuasion and negotiation, the client may be prepared to modify its behaviour so as to mitigate the climate change consequences of its projects or activities and promote climate change justice. I know from my own experience as a solicitor and barrister for 25 years that most clients were amenable to such persuasion and were prepared to modify their behaviour to lessen the environmental and social impacts of their projects and activities.

Nersessian advocates for corporate lawyers to play a role in promoting human rights, and in preventing violation of human rights, in global corporate practice.¹⁰¹ The impact of climate change on human rights is increasingly being recognised.¹⁰² Lawyers can achieve moral outcomes in business to uphold human rights.¹⁰³

It may also be appropriate for lawyers to provide pro bono or reduced fee services. The American Bar Association has recognised the importance of pro bono work related to climate change, urging lawyers to 'engage in pro bono activities to aid efforts to reduce greenhouse gas emissions and adapt to climate change'.¹⁰⁴ These cases are often brought by community groups without access to the financial means

¹⁰¹ David Nersessian, 'Business Lawyers as Worldwide Moral Gatekeepers: Legal Ethics and Human Rights in Global Corporate Practice' (2015) 28 *Georgetown Journal of Legal Ethics* 1135.

¹⁰² See, for example, International Bar Association, *Achieving Justice and Human Rights in an Era of Climate Disruption* (IBA, 2014).

¹⁰³ As LAWASIA advocates in its *Toolkit on Business and Human Rights: A Guide for Lawyers in the Asia Pacific* (2019).

¹⁰⁴ American Bar Association, Resolution 111, adopted at the Annual Meeting of the House of Delegates (2019). A copy of the resolution is available online at:

<<https://www.americanbar.org/content/dam/aba/images/news/2019/08/am-hod-resolutions/111.pdf>>.

to support legal action or seek legal advice. Offering pro bono services can promote access to justice, consistent with lawyers' duties to the administration of justice and their personal ethical values.¹⁰⁵

This may be of particular importance in cases where other parties take a climate blind approach to litigation. For example, in *Gloucester Resources v Minister for Planning*,¹⁰⁶ the applicant for a greenfield coal mine appealed the Minister's refusal of consent to the Land and Environment Court. Neither party initially raised the impact of the mine on climate change as an issue in the proceedings. A community organisation sought to be joined to the proceedings to raise the impact of the mine on climate change and further social impacts. On the application for joinder, the project proponent submitted that the raising of the climate issue in a domestic court, if the intervener were to be joined, would not serve the purpose of improving the planning decision; and, instead, would be a "side show and a distraction".¹⁰⁷ The Court did not agree, finding that it was appropriate to order joinder to allow these issues to be raised.¹⁰⁸ The community organisation relied on the legal services of the not-for-profit community legal centre, the Environmental Defender's Office.

Of course, this personal ethical approach requires lawyers to recognise and draw from their personal moral convictions, which may not always conform to the ethical expectations of the legal profession. In a survey of corporate lawyers, Oakley and

¹⁰⁵ See further, Baron and Corbin (n 65) 249-253.

¹⁰⁶ (2019) 234 LGERA 257.

¹⁰⁷ *Gloucester Resources Limited v Minister for Planning and Environment (No 2)* [2018] NSWLEC 1200, [31].

¹⁰⁸ *Gloucester Resources Limited v Minister for Planning and Environment (No 2)* [2018] NSWLEC 1200, [34].

Vaughan found that although 'ethical apathy' among lawyers was prevalent,¹⁰⁹ a number of highly personal ethical boundaries arose:

"It struck us that we have corporate lawyers who strongly feel that it is not for them to judge the actions of their clients, save when those actions confront and contest certain, often very specific, closely held issues for the given lawyer. These sorts of personal redlines were relatively common. If these are forms of conscientious objection, they are very selective indeed and...reflect a rather odd parsing of one client (whose actions are acceptable) from another (whose actions are unacceptable)."¹¹⁰

Lawyers isolated certain areas that they felt morally uncomfortable with, such as gambling, animal testing or destruction of habitat for a threatened species. These tightly held "red lines" did not adhere to general ethical principles that could be applicable across different circumstances. One lawyer, who felt uncomfortable about the prospect of acting for a gambling client, expressed no concern for a client sourcing products from child labour.¹¹¹ With such inconsistency and variability amongst personal ethical approaches, their use may be limited as a means of raising climate conscious approaches in daily legal practice.

Nevertheless, personal ethical approaches may be developed by guidance from legal professional associations, within law firms and as a consequence of developments in the law. First, the ABA resolution referred to earlier is one example of the role that legal professional associations may have in raising such issues.

¹⁰⁹ Stephen Vaughan and Emma Oakley, "'Gorilla exceptions" and the ethically apathetic corporate lawyer' (2016) 19 *Legal Ethics* 50, 74.

¹¹⁰ *Ibid* 67.

¹¹¹ *Ibid*.

Secondly, there has been a growing movement among law firms to increase awareness of climate change issues. For example, the Legal Sustainability Alliance (LSA) in the UK, a group of 300 law firms, have pledged to work collaboratively to improve the environmental sustainability of their own operations and activities, including by reducing their carbon footprint. There is an increasing willingness to raise climate consciousness within firms, by encouraging lawyers to incorporate climate change issues into day to day legal advice.¹¹² The Australian Legal Sector Alliance (AusLSA) and US based Law Firm Sustainability Network similarly promote sustainable practices across the legal sector.¹¹³

Thirdly, as laws develop and expand, this will also influence how lawyers engage with and advise on the law. Laws relating to climate change and its consequences are rapidly changing. This is evident not only with laws directly dealing with climate change but also other laws that regulate trade and commerce, contract and tort, and corporations. Climate change policies also influence the law. These changing laws and policies call for a greater acknowledgement of the realities of climate change and its consequences and affect the legal advice and advocacy that lawyers, exercising due care and diligence, need to provide.

Through these means, personal ethical approaches involving climate consciousness may be further developed.

The Path of Climate Consciousness Ahead

¹¹² For example, the membership principles for the LSA include to “integrate awareness of climate change across our business” and “advise our clients on the opportunities and obligations arising from and under climate change law”. See, Legal Sustainability Alliance, ‘LSA Membership Principles’ (2019) <<https://legalsustainabilityalliance.com/about-us-2/principles/>>.

¹¹³ See, Australian Legal Sector Alliance, ‘About AusLSA’ (Web Page) <<http://www.legalsectoralliance.com.au/>> accessed 9/12/2019, and Law Firm Sustainability Network, ‘Mission Statement’ (Web Page) <<https://lfsnetwork.org/about/who-we-are/>> accessed 9/12/2019.

These are five ways in which lawyers can implement a climate conscious approach in their daily legal practice. However, these ways require a general knowledge and understanding of the complex problem that climate change poses. It will be important to promote the teaching of the varied legal areas in which climate change arises to enable lawyers to adopt a climate conscious approach. One way that has been proposed is to increase the salience of climate change issues in the teaching of not only elective environmental courses but also compulsory law courses, such as property law, administrative law, tort law, contract law, and corporations law.¹¹⁴ Opportunities for ongoing professional development will also be necessary to equip the current generation of lawyers with the skills and information to adopt a climate conscious approach. This process of educating the next generation of lawyers may have already begun. Climate consciousness has already achieved a foothold in the public imagination and energised young people around the world.¹¹⁵ In December 2019, the University of Sydney Law School board passed a resolution declaring a climate crisis. Future generations of lawyers may be more likely to adopt a climate conscious approach in their daily legal practice.

¹¹⁴ Lavey (n 2) 513.

¹¹⁵ The recent School Strikes for Climate are one example of increasing youth engagement with climate change issues. There are also an increasing number of youth climate law suits against governments, such as the high profile US litigation, *Juliana v USA* (D Or, 6:15-cv-1517-TC, 8 April 2016).