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Human Rights and Climate Change: The Impacts on People in Vulnerable Situations

Submission to the Office of the High Commissioner for Human Rights

Castan Centre for Human Rights Law

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Part 1: Background

1.1 About the Castan Centre for Human Rights Law

The [Castan Centre for Human Rights Law](#) (**Castan Centre**), is an academic research centre within the Faculty of Law at Monash University in Australia. We undertake research, policy work, student programs and public engagement to ensure that human rights are respected, protected and fulfilled, allowing all people to flourish in freedom and dignity. We welcome the opportunity to provide submissions to the Office of the High Commissioner for Human Rights (**OHCHR**) for its forthcoming report on human rights and climate change (Human Rights Council Resolution 47/23). This submission will address questions 1-6 of the Questionnaire.

Part 2: The Impact of Climate Change on Indigenous Peoples

To preface our responses to the OHCHR's questionnaire (below) the Castan Centre emphasises that climate change has a unique and acute impact on Indigenous peoples in Australia, who have long held and deep connections to the land and waters.¹ Indigenous land is under considerable pressure arising from effects of climate change, climate policies and bids to acquire Indigenous interests in land.² Of particular concern is the environmental damage and rapid erosion of land in the Torres Strait, which has threatened homes, food and water supplies; damaged sacred sites, burial places, and spaces for hunting and gathering; increased the spread of infectious disease; and is in turn affecting Indigenous life, health, cultural heritage, identity and livelihood.³ Flow on impacts of issues such as extreme temperatures include the migration of healthcare workers south, exacerbating barriers to accessing healthcare for Indigenous communities in the Northern Territory.⁴

Indigenous peoples have a 'specialised ecological and traditional knowledge' that is highly relevant to formulating effective responses to climate change.⁵ For example, Indigenous peoples' traditional fire management and 'patch burning' practices have been utilised to offset carbon emissions and protect biodiversity in areas prone to wildfires.⁶

¹ Warwick Baird, 'Climate Change and Indigenous Peoples' (Speech, Native Title Conference 2008, 4 June 2008) <<https://humanrights.gov.au/about/news/speeches/climate-change-and-indigenous-peoples>>.

² Ibid; Emily Gerrard, 'Climate Change and Human Rights: Issues and Opportunities for Indigenous Peoples' (2008) 31(3) *UNSW Law Journal* 941, 941.

³ Gerrard (n 2) 949. See also Nina Lansbury et al, 'Torres Strait Islanders face more than their fair share of health impacts from climate change', *The Conversation* (online, 10 August 2021) <<https://theconversation.com/torres-strait-islanders-face-more-than-their-fair-share-of-health-impacts-from-climate-change-165388>>.

⁴ Simon Quilty and Catherine Pendrey, 'Too hot, heading south: how climate change may drive one-third of doctors out of the NT', *The Conversation* (online, 10 April 2021) <<https://theconversation.com/too-hot-heading-south-how-climate-change-may-drive-one-third-of-doctors-out-of-the-nt-156959>>.

⁵ Gerrard (n 2) 943. See also Karl-Heinz Wyröll, 'How Aboriginal burning changed Australia's climate', *The Conversation* (online, 12 January 2012) <<https://theconversation.com/how-aboriginal-burning-changed-australias-climate-4454>>.

⁶ Gerrard (n 2) 944-946. See also Robert Hales et al, 'Land, culture, livelihood: what Indigenous people stand to lose from climate 'solutions'', *The Conversation* (online, 4 November 2021) <<https://theconversation.com/land-culture-livelihood-what-indigenous-people-stand-to-lose-from-climate-solutions-170083>>; Kamaljit K Sangha, Andrew

Notwithstanding, Indigenous peoples in Australia are often excluded from negotiations around climate change and the development of climate policies and strategies to mitigate and adapt to the effects of climate change.⁷

It is clear that meaningful engagement, which empowers Indigenous peoples to be actively involved in decision-making around climate change, is needed.⁸ It is also critical that the Australian Government recognise the traditional knowledge and experience of Indigenous peoples, and appropriately integrate these practices into climate mitigation and adaptation strategies.

Part 3: The Impacts of Climate Change

3.1 The Adverse Effects of Climate Change in Australia (Q1, Q3)

It is clear that the lives, health and dignity of humans is inextricably linked to the conditions of their homes, cities, nations, and the one planet.⁹ Already, the environmental events triggered by climate change are affecting 'natural processes and humans' interactions ... on all continents and across all the oceans' in varied ways.¹⁰ Indeed, climate change impacts upon the 'fundamental factors for human flourishing',¹¹ and will continue to affect both current and future generations more than any prior generations.¹² This is the 'intergenerational inequity'¹³ of the effects of climate change, which has been 'fairly described as the greatest inter-generational injustice ever inflicted on one generation of humans upon the next'.¹⁴

Australia already feels the impact of climate change. Since 2001 the recorded incidence of extreme heat in Australia has increased, with these hotter temperatures directly attributed to climate change.¹⁵ This has led to more frequent and extreme fire weather,

Edwards and Willie Rioli Sr, 'Indigenous expertise is reducing bushfires in northern Australia. It's time to consider similar approaches for other disasters', *The Conversation* (online, 25 February 2021)

<<https://theconversation.com/indigenous-expertise-is-reducing-bushfires-in-northern-australia-its-time-to-consider-similar-approaches-for-other-disasters-155361>>; *Aboriginal Carbon Foundation* (Web Page)

<<https://www.abcfoundation.org.au/>>; Rohan Fisher and Jon Altman, 'The world's best fire management system is in northern Australia, and it's led by Indigenous land managers', *The Conversation* (online, 10 March 2020)

<<https://theconversation.com/the-worlds-best-fire-management-system-is-in-northern-australia-and-its-led-by-indigenous-land-managers-133071>>.

⁷ Baird (n 1); Gerrard (n 2) 941.

⁸ Zena Cumpston, 'To address the ecological crisis, Aboriginal peoples must be restored as custodians of Country', *The Conversation* (online, 21 January 2020) <<https://theconversation.com/to-address-the-ecological-crisis-aboriginal-peoples-must-be-restored-as-custodians-of-country-108594>>.

⁹ Alexandra L Phelan, 'The Environment, a Changing Climate, and Planetary Health' in Lawrence O Gostin and Benjamin Mason Meier (eds), *Foundations of Global Health & Human Rights* (Oxford University Press, 2020) 417, 417.

¹⁰ Sharon Friel, *Climate Change and the People's Health* (Oxford University Press, 2019) 8.

¹¹ Ibid.

¹² Ibid 23-37.

¹³ See generally *ibid*.

¹⁴ *Sharma v Minister for the Environment* (2021) 291 ALR 1, 72-3 [293] (Bromberg J).

¹⁵ CSIRO, 'Extreme Temperature', *Climate Change in Australia* (Web Page) <<https://www.climatechangeinaustralia.gov.au/en/changing-climate/climate-extremes/extreme-temperature/>>.

a decline in Australia's rainfall and the warming and acidifying of oceans.¹⁶ It is estimated that Australia's future climate will be typified by more intense and heavy rainfall, longer fire seasons and more dangerous fire weather, and warmer average temperatures with more heatwaves and fewer cool days.¹⁷

A powerful illustration of the impact that climate change has had on Australia is the 2019-20 bushfire season (known colloquially as 'Black Summer') which saw unprecedented bushfires across the eastern coast of Australia. 33 lives were lost in the fires, with many more succumbing to smoke inhalation.¹⁸ Over 3,000 homes were destroyed, more than 23 million hectares of land burned,¹⁹ and nearly three billion animals were killed or displaced.²⁰ A government inquiry into these bushfires found that, while Australia has a long history of natural disasters, '[c]limate change has already increased the frequency and intensity of extreme weather and climate systems that influence natural hazards'.²¹

The environmental changes triggered by climate change threaten the lives and wellbeing of individuals and communities around Australia. For example, Australian Academic Claudia Baldwin and colleagues have noted that '[h]eatwaves have killed more Australians than road accidents, fires, floods and all other natural disasters combined'.²²

Some groups have been acutely impacted. For example, older persons are particularly at risk of heat stress, and it is well-acknowledged that deaths of older persons rise during extreme heat events.²³ As it is expected that approximately 23% of the Australian population will be older than 60-years by 2050, older persons will disproportionately bear the impacts of an increase in extreme heat events as a result of climate change.²⁴ Children are also disproportionately impacted, facing both continued exposure to the physical effects of climate change, and trauma in the wake of climate change-fuelled natural disasters.²⁵ Already this group is experiencing worse mental health outcomes as a result of their exposure to these disasters.²⁶ Persons experiencing homelessness, and

¹⁶ CSIRO and Australian Bureau of Meteorology, *State of the Climate 2020* (Report, 2020) 2.

¹⁷ Ibid 22.

¹⁸ *Royal Commission into National Disaster Arrangements* (Final Report, 28 October 2020) 5 ('*Bushfire Royal Commission Final Report*').

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid 55.

²² Claudia Baldwin, Jason Byrne and Tony Matthews, 'How Do We Save Ageing Australians from the Heat? Greening Our Cities is a Good Start', *The Conversation* (online, 1 March 2019) <<https://theconversation.com/how-do-we-save-ageing-australians-from-the-heat-greening-our-cities-is-a-good-start-112613>>.

²³ Ibid.

²⁴ Ibid.

²⁵ Sophie Meixner, 'Children Affected by Black Saturday and Other Bushfires May Experience Trauma Long after the Blaze is Extinguished', *ABC News* (online, 7 February 2021) <<https://www.abc.net.au/news/2021-02-07/black-saturday-bushfires-victoria-kilmore-east-st-andrews-health/12967704>>; Michael Curtin et al, 'The Impact of Bushfire on the Wellbeing of Children Living in Rural and Remote Australia' (2020) 213 *Medical Journal of Australia* S14.

²⁶ Ibid.

particularly those who are sleeping rough, are also heavily impacted by events such as extreme cold, rain and flooding events, which can limit the availability of dry and warm spaces, and can increase the risk of illness.²⁷

Part 4: Remedies and Mitigation for Climate Change and Its Effects (Q2)

4.1 Government Support Payments and Mitigation Strategies

The Federal and State and Territory governments within Australia each have power to provide for government support payments, including social security benefits as a result of natural disasters such as bushfires. Disaster payments and related services provided by the Federal Government are provided by Services Australia on an ad hoc basis and are related to specific natural disasters.²⁸ The recently-established Australian National Recovery and Resilience Agency also has responsibility for the coordination of natural disaster impact reduction and recovery and resilience from natural disasters.²⁹ However, individuals and groups affected by climate change and natural disasters are increasingly looking towards courts to obtain justice and compensation.

4.2 Litigation Regarding the Duties of the Australian Government

There have been a number of recent developments in civil litigation in domestic courts across Australia concerning the duty of governments to adequately consider the impacts of climate change in decision-making and to take reasonable care to avoid the negative impacts of climate change.

In *Sharma v Minister for the Environment*, the Federal Court of Australia found that the Federal Minister for the Environment has 'a duty to take reasonable care to avoid causing personal injury to' young people when exercising the power to grant a proposed coal mine extension, because of the reasonably foreseeable future impacts that the mine will have on climate change and the Australian experience of it.³⁰ The Minister for the Environment is currently appealing this decision.

In *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* the New South Wales Land and Environment Court held that the NSW Environment Protection Authority has a duty to take serious action on greenhouse gas emissions and climate change.³¹

²⁷ Claire Lindsay, 'More natural disasters are affecting rough sleepers in the city and regions', *ABC News* (online, 17 April 2021) <<https://www.abc.net.au/news/2021-04-17/homeless-rough-sleeping-in-disaster-zones/100069526>>.

²⁸ Services Australia, 'Help in an Emergency' (Web Page) <<https://www.servicesaustralia.gov.au/individuals/help-emergency>>.

²⁹ Australian Government National Recovery and Resilience Agency, 'About Us' (Web Page) <<https://recovery.gov.au/about-us>>.

³⁰ *Sharma v Minister for the Environment* (2021) 291 ALR 1, 113 [491]. See also Joanna Kyriakakis, 'Torts and Human Rights: Australian Federal Court Paves the Way for Negligence Based Climate Litigation', *Castan Centre for Human Rights Law; Official Blog* (24 June 2021) <<https://castancentre.com/2021/06/24/torts-and-human-rights-australian-federal-court-paves-the-way-for-negligence-based-climate-litigation/>>.

³¹ *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92 (Preston CJ).

Most recently, two Torres Strait Islander Elders have issued civil proceedings against the Australian Government for failing to prevent climate change.³² They argue that the Australian Government has breached a duty of care owed to ensure that Torres Strait Islander peoples are not harmed by climate change.³³

4.3 Litigation for Loss and Damage as a Result of Climate Change

In recent times, there have also been a number of class actions arising from bushfires—including the notorious Black Saturday bushfires (7 February - 14 March 2009)—through which groups of people affected by those disasters have sought to obtain compensation for loss and damage suffered.³⁴ These class actions have been brought against private companies operating electricity services whose services may have sparked bushfires,³⁵ and landholders for alleged misuse of their land resulting in bushfires.³⁶

Dependence on litigation to obtain compensation for loss and damage resulting from natural disasters, has key shortcomings. Firstly, it places the onus on *individuals* to undertake potentially costly, and time-consuming legal action, which may not be possible for many who are vulnerable to climate change. Further, certain groups face disproportionate barriers to accessing justice through litigation, including for example Aboriginal and Torres Strait Islander people, who may face geographic barriers such as access to court facilities, a lack of interpreter services and a lack of culturally appropriate services.³⁷

Part 5: Challenges to the Promotion, Protection, and Fulfilment of the Human Rights of People Vulnerable to Climate Change (Q5)

5.1 The Over-politicisation of Climate Change, and the Absence of Leadership and Political Will

Historically, progress on climate change policy in Australia has been derailed by the over-politicisation of climate policies, dubbed the ‘climate wars’,³⁸ which resulted in ‘no

³² The Australian Climate Case, ‘About the Case’ <https://www.australianclimatecase.org.au/about_the_case>.

³³ Ibid.

³⁴ See, eg, Supreme Court of Victoria, ‘Group Proceedings (Class Actions)’ (Web Page) <<https://www.supremecourt.vic.gov.au/law-and-practice/class-actions>>.

³⁵ See, eg, Supreme Court of Victoria, ‘Gravoc Bushfire Class Action (Francis v Powercor Australia Limited)’ (Web Page) <<https://www.supremecourt.vic.gov.au/court-decisions/case-list/garvoc-bushfire-class-action>>; Supreme Court of Victoria, ‘Terang Bushfire Class Action (Lenahan v Powercor Australia Limited)’ (Web Page) <<https://www.supremecourt.vic.gov.au/court-decisions/case-list/garvoc-bushfire-class-action>>.

³⁶ See, eg, Supreme Court of Victoria, ‘Scotsburn Bushfire Group Proceeding (Class Action) (Schmid v Skimming)’ (Web Page) <<https://www.supremecourt.vic.gov.au/court-decisions/case-list/scotsburn-bushfire-group-proceeding-class-action>>.

³⁷ Senate Standing Committee on Finance and Public Administration, *Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services*, Parliament of the Commonwealth of Australia (Report, 13 October 2016) 25.

³⁸ See overview in Kate Crowley, ‘Climate wars, carbon taxes and toppled leaders: the 30-year history of Australia’s climate response, in brief’, *The Conversation* (online, 15 October 2021) <<https://theconversation.com/climate-wars-carbon-taxes-and-toppled-leaders-the-30-year-history-of-australias-climate-response-in-brief-169545>>.

effective, sustained climate policy mitigation regime' in the country.³⁹ The current Federal Government has only recently committed to net zero emissions by 2050,⁴⁰ and has been extensively criticised for failing to develop a clear and effective climate policy, lagging in its commitment to reduce emissions,⁴¹ failing to participate in key agreements to act on climate change,⁴² and lacking leadership in the face of climate disasters.⁴³

5.3 Lack of Effective Domestic Human Rights Protections

Australia does not have either a stand-alone legislated or constitutionally enshrined national human rights instrument, and while some rights may be protected in a piecemeal manner through legislation, the right to a healthy environment is not recognised in Australia's Federal domestic law. Three of the eight state and territory jurisdictions in Australia do have stand-alone legislated human rights instruments,⁴⁴ but none of these instruments recognise a right to a healthy environment.

However, it is of note that the *Human Rights Act* in Queensland recognises cultural rights generally,⁴⁵ as well as the rights of Aboriginal and Torres Strait Islander peoples specifically.⁴⁶ This includes a recognition that Aboriginal and Torres Strait Islander peoples must not be denied the right to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.⁴⁷ Although it has not been decided by any court or tribunal as to whether this right extends to the impacts of climate change on the cultural rights of Indigenous peoples, the significant impact that climate change has on those rights leads to the possibility that such impacts would be covered by the right.

³⁹ Kate Crowley, 'Fighting the future: The politics of climate policy failure in Australia (2015–2020)' (2021) 12(5) *WIREs Climate Change* 1, 2.

⁴⁰ Georgia Hitch, 'Government Promises to Cut Emissions to Reach Net Zero by 2050 under New Climate Change Plan', *ABC News* (online, 26 October 2021) <<https://www.abc.net.au/news/2021-10-26/government-commits-to-net-zero-by-2050-climate-deal/100565254>>.

⁴¹ See eg, Tim Flannery and Simon Bradshaw, 'Australia, an embarrassing handbrake on COP's nobler ambitions', *The Sydney Morning Herald* (online 12 November 2021) <<https://www.smh.com.au/environment/climate-change/australia-an-embarrassing-handbrake-on-cop-s-nobler-ambitions-20211112-p598aj.html>>; Ollie Millman, 'Australia named 'colossal fossil' of Cop26 for 'appalling performance', *The Guardian* (online, 13 November 2021) <<https://www.theguardian.com/environment/2021/nov/12/australia-named-colossal-fossil-of-cop26-for-appalling-performance>>; Antony Currie, 'Australia's Climate plans amount to a giant COP-out', *Reuters* (online, 26 October, 2021) <<https://www.reuters.com/business/cop/australias-climate-plans-amount-giant-cop-out-2021-10-26/>>.

⁴² Flannery and Bradshaw (n x); Millman (n x).

⁴³ Editorial, 'Morrison's big failure is his lack of leadership on climate change', *Sydney Morning Herald* (online 20 December 2019) <<https://www.smh.com.au/environment/climate-change/morrison-s-big-failure-is-his-lack-of-leadership-on-climate-change-20191220-p53lxz.html>>.

⁴⁴ *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld).

⁴⁵ *Human Rights Act 2019* (Qld) s 27.

⁴⁶ *Ibid* s 28.

⁴⁷ *Ibid* s 38(2)(e).