

IMPLEMENTING THE RIGHT TO A SUSTAINABLE ENVIRONMENT IN NEW ZEALAND

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On 10 April 2024, the New Zealand Parliament decided not to pass the New Zealand Bill of Rights (Right to Sustainable Environment) Amendment Bill 2023. The debate in the House of Representatives contained arguments both for and against introducing the right. One such argument posed a more politically viable means by which to include the right in domestic legislation: placing the right in legislation separate from the New Zealand Bill of Rights Act 1990. This article discusses the benefits of including a right to a sustainable environment in domestic legislation and compares the effects of incorporating the right into the Bill of Rights Act with those of enacting the right in separate legislation. It argues that including the right in the Bill of Rights Act would provide the most effective environmental protection. However, including the right in separate legislation could provide Parliament with greater flexibility to amend the right to a sustainable environment. This could make creating the right more appealing to Parliament despite providing weaker protection for the environment.

I INTRODUCTION

New Zealand is not immune to the impacts of climate change. Not only are global temperatures increasing, but severe weather events are also becoming more frequent, and the global sea level is rising. This would be particularly devastating in New Zealand as two-thirds of New Zealanders live within five kilometres of the coast.¹ As a nation that is revered for its great natural wonders, climate

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¹ Ministry for the Environment & Stats NZ "New Zealand's Environmental Reporting Series: Our atmosphere and climate 2023" (October 2023) Retrieved from environment.govt.nz at 21; "Climate change and possible impacts for New Zealand" (18 May 2023) NIWA <www.niwa.co.nz>; Rebecca Lindsey "Climate Change: Global Sea Level" (22 August 2023) [Climate.gov](https://www.climate.gov) <www.climate.gov>.

change also threatens its tourism industry.² There has been a record of increased extreme weather events, and its glaciers have decreased by 35 per cent.³ The dangers of climate change have been acknowledged in its domestic law. The Climate Change Response Act 2002 is the key to New Zealand's climate change efforts, enabling compliance with the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement.⁴

In 2024, the New Zealand Parliament voted against passing a bill that would secure a right to a sustainable environment in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).⁵ Implementing the right into New Zealand law would not magically solve the climate crisis. However, the right would provide additional protection for the environment if drafted effectively. During the debate in the House of Representatives, multiple members of Parliament discussed whether the right should be introduced into legislation separate from the Bill of Rights Act to negotiate political obstacles.⁶ This article suggests that there are good reasons why the right should be introduced into the Bill of Rights Act as opposed to being introduced in separate legislation. It also discusses which features need to be included for the right to be successful.

The Bill of Rights Act is perfectly equipped to adopt the right to a sustainable environment. This right is multi-faceted, which reflects the complicated nature of the environment.⁷ For the right to a sustainable environment to effectively protect the environment, it cannot simply lower greenhouse gas (GHG) emissions; it must protect all aspects of the environment. This is due to the intertwined nature of the environment, for example, protecting biodiversity simultaneously helps to protect air quality.⁸ For the right to be successful, it would have to be based upon academic literature, international law and domestic law—all informing how the right would be interpreted. Including the right in the Bill of Rights Act would not be unnecessarily complicated, as the process for interpreting

2 The Aotearoa Circle (24 March 2023) "Tourism Sector Climate Change Scenarios" <www.theaotearoacircle.nz>.

3 Ministry for the Environment & Stats NZ "New Zealand's Environmental Reporting Series: Our atmosphere and climate 2023", above n 1, at 32.

4 Climate Change Response Act 2002, s 3(1)(a).

5 (10 April 2024) 775 NZPD (New Zealand Bill of Rights (Right to Sustainable Environment) Amendment Bill — First Reading).

6 (10 April 2024) 775 NZPD (Hon Rachel Brooking, Hon David Parker).

7 Dinah Shelton "Complexities and Uncertainties in Matters of Human Rights and the Environment" in John H Knox and Ramin Pejman *The Human Right to a Healthy Environment* (Cambridge University Press, Cambridge, 2018) 97 at 109; and Sabrina Kirschke and Jens Newig "Addressing Complexity in Environmental Management and Governance" (2017) 9(2) *Sustainability* 983.

8 David J Nowak and others "Biodiversity, air quality and human health" in Cristina Romanelli and others *Connecting Global Priorities: Biodiversity and Human Health* (World Health Organization, Geneva, 2015) 63 at 74.

rights in the Act is well established.⁹ Further, adding the right to a sustainable environment into the Bill of Rights Act would create a powerful tool by which New Zealand can protect the environment. It would not solve all of the problems created or exacerbated by climate change and other key environmental challenges, but it would assist in these issues.

In response to the global effects of climate change, the United Nations General Assembly itself passed a resolution declaring the right to a clean, healthy and sustainable environment as a human right.¹⁰ This was indicative of the growing sentiment from nations across the globe that incorporating the right to a healthy environment into domestic legislation is a meaningful way to protect the environment. Around the world, the right has been asserted as a means by which citizens can force their government to reduce environmental harms, and is particularly useful for those who are predisposed to being affected by such harms as they arise.¹¹ For example, France incorporated the right to a healthy environment into its constitution in 2005.¹² Canada amended its Canadian Environmental Protection Act to include the right to a healthy environment in 2023.¹³ As of 28 July 2022, there are over 150 nations that have adopted the right to a sustainable environment in their domestic legislation.¹⁴ New Zealand is part of a shrinking minority of states, as less than 20 per cent of States Members of the United Nations do not recognise the right in law.¹⁵ Despite New Zealand being a member of the United Nations, the human rights instruments of the United Nations are not automatically binding on New Zealand. For these instruments to be binding, they need to become part of New Zealand's domestic law.¹⁶ This is achieved by passing a bill through the House of Representatives and attaining royal assent from the Governor-General.¹⁷ For the right to a sustainable

9 See *Attorney-General v Smith* [2018] NZCA 24, [2018] 2 NZLR 899; and *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [113].

10 The human right to a clean, healthy and sustainable environment GA Res 76/300 (2022).

11 Robert Mason *Climate Change and the Right to a Healthy Environment: International and Canadian Developments* (online looseleaf ed, Library of Parliament) at 1.

12 Charte de l'Environnement 2005 (France).

13 Canadian Environmental Protection Act SC 1999 c33, s 5.1.

14 Katy Thompson and Pradeep Kurukulasuriya "Historic UN resolution recognizes healthy environment is a human right" (28 July 2022) United Nations Development Programme <www.undp.org>.

15 David R Boyd *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/43/53* (24 February 2020) at 1 and 25.

16 Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019 *Ko tō tatou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019 Volume 1: Parts 1–3* (26 November 2020) at 80.

17 Constitution Act 1986, s 16.

environment to become effective in New Zealand, it would have to be included in an Act through this process.

On 10 April 2024, James Shaw introduced the New Zealand Bill of Rights (Right to Sustainable Environment) Amendment Bill (the Bill), which used the language from the United Nations resolution, for its first reading in Parliament.¹⁸ By legislating the right to a sustainable environment into the Bill of Rights Act, the right would be subject to the benefits and restrictions present in that Act. Two major concerns were raised by those in Parliament who were opposed to the Bill. The issues were the lack of clarity on how the right to a sustainable environment would operate, and whether the Bill of Rights Act was the most suitable vessel for implementing the right.¹⁹

II HUMAN RIGHTS LEGISLATION IN NEW ZEALAND

The Bill of Rights Act is New Zealand's primary means of protecting human rights. It affirms, protects and promotes several civil and political rights.²⁰ There are four ways that the Bill of Rights Act protects New Zealanders.

First, New Zealanders may bring a case to court or appeal a case if they believe that their rights have been limited or breached.²¹ While the Bill of Rights Act does not explicitly allow for the courts to give remedies, the courts have taken it upon themselves to award a wide range of remedies if there has been a violation of a right.²²

Secondly, when a bill is first read in Parliament, the Attorney-General is required to check whether it is consistent with the Bill of Rights Act.²³ If they determine that the right is inconsistent, they must write a report so that Members of Parliament are made aware of where the inconsistency lies.²⁴ Due to parliamentary sovereignty, it is well within Parliament's power to ignore this report and legislate an inconsistency if it so chooses.²⁵

18 New Zealand Bill of Rights (Right to Sustainable Environment) Amendment Bill 2023 (7–1).

19 (10 April 2024) 775 NZPD, above n 5, (Simon Court, David MacLeod, Dr Vanessa Weenink, Tanya Unkovich, David Parker, Rachel Brooking).

20 Bill of Rights Act 1990, long title.

21 *Taiaroa v Minister of Justice* [1995] 1 NZLR 411 (CA); *Morse v Police* [2011] NZSC 45, [2011] 5 LRC 79; *R v Ririnui* [1994] 2 NZLR 439 (CA); and *Gorgus v Chief Executive of the Department of Corrections* [2023] NZHC 2313.

22 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 26.1.2. See for example *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA); and *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

23 Section 7.

24 Section 7.

25 *Ellen Street Estates Ltd v Minister of Health* [1934] All ER Rep 385 (CA) at 390.

Thirdly, the judiciary can make a declaration of inconsistency between legislation and the Bill of Rights Act, following the decision in *Attorney-General v Taylor*.²⁶ After a recent legislative amendment resulting from *Taylor*, the Attorney-General is required to notify the House of Representatives when a senior court makes a declaration of inconsistency.²⁷ Once notice of this inconsistency has been provided to Parliament, the Minister responsible for the Act must issue a report setting out how Parliament should respond to the declaration.²⁸ This system is in place to provide an effective remedy to breaches of human rights.²⁹

Finally, when courts interpret legislation, if that legislation can be interpreted consistently with the Bill of Rights Act, that interpretation shall be preferred.³⁰ While the strength of this interpretative power has been debated, it nevertheless does exist.³¹ It can be a significant protection of the rights New Zealanders have. The power to interpret in favour of fundamental rights must be balanced with the principle of parliamentary sovereignty.³² The courts are provided with the power and responsibility to interpret legislation consistently with the rights in the Bill of Rights Act.

If the right to a sustainable environment were to be included in the Bill of Rights Act, it would be imbued with a very different status than if it were solely legislated within its own statute. There has been much academic debate as to the effectiveness of the Bill of Rights Act as a mechanism for protecting human rights.³³ New Zealand does not have a written constitution. This results in the judiciary not having the power to strike down legislation that is inconsistent with its constitution,³⁴ since New Zealand's Parliament does not find its power from a singular written constitution as, for instance, Congress does in the United States.³⁵ This gives the United States Supreme Court the power

26 Bill of Rights Act, s 7A(1).

27 New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022, s 4.

28 Human Rights Act 1993, s 92WB(1).

29 *Attorney-General v Taylor* [2018] NZSC 104 at [41].

30 Bill of Rights Act, above n 20, s 6; *R v Hansen* [2007] NZSC, [2007] 3 NZLR 1 at [179]; and *AMM and KJO* [2010] NZFLR 629 (HC) at [25].

31 *R v Hansen*, above n 30, at [179].

32 *AMM and KJO*, above n 30, at [32].

33 Geoffrey Palmer "What the New Zealand Bill of Rights Act Aimed To Do, Why it Did Not Succeed and How It Can Be Repaired" (2016) 14 NZJPIL 169; Stephen Gardbaum "A Comparative Perspective on Reforming the New Zealand Bill of Rights Act" (2014) 10(4) Policy Quarterly 33; and Hon Justice Geoffrey Venning "From Toupee to Tooth Decay: Recent Bill of Rights cases in New Zealand" (paper presented to Supreme and Federal Courts Judges' Conference Hobart, 2019).

34 Bill of Rights Act, s 4.

35 "What is Parliament?" (27 January 2016) New Zealand Parliament <www.parliament.nz>.

to declare laws that are inconsistent with the Constitution as unconstitutional and strike them down.³⁶ Despite this, the rights found in the Bill of Rights Act are still viewed as superior law.

There is no special majority required to modify or overturn the Bill of Rights Act as there is in nations with a written constitution like the United States.³⁷ However, given that the Bill of Rights Act itself states that the interpretation of other Acts should not be inconsistent with the Bill of Rights Act without justified limitation,³⁸ it is apparent that Parliament would rather not be found to be outright breaching the rights contained in the Bill of Rights Act. When drafting legislation, Parliament should stay within the "navigation lights" that the Bill of Rights Act was intended to provide.³⁹ According to the Legislation Design and Advisory Committee, when developing policy, s 4 of the Bill of Rights Act should not be used to protect inconsistent legislation.⁴⁰ While there is no rule preventing a law that overrides the rights in the Bill of Rights Act, it is unlikely that Parliament would outright ignore those rights when legislating. There has only ever been one explicit overriding of the Bill of Rights Act.⁴¹ This set a dangerous precedent that has not been repeated in the 21 years since.⁴² In that case, the section that breached the Bill of Rights Act allowed the banning of advertisements for prostitution. This breach was essentially universally popular.⁴³ If Parliament were to override an environmental right, it would not be as universally appraised. Not only would there likely be legal action taken through the courts, but there would also be consequences for the current government in the next electoral cycle. Thus, Parliament likely does not want to be found in breach of the Bill of Rights Act.

The right to a sustainable environment tends to be more difficult to protect than other rights. This right is a vaguer concept than the other rights contained in the Bill of Rights Act such as the right to freedom of movement or the right to not be subject to unreasonable search or seizure. The environmental right protects an intertwining system that can be affected by a variety of actions and, importantly, inaction. The environment, while directly related to each individual and society as a whole, can be affected by many factors, both directly and indirectly. This creates a whole layer of interactions which may obscure the source of a limitation on someone's enjoyment of the right to a

36 *Marbury v Madison* (1803) 5 US 137 at 179.

37 United States Constitution, Art V.

38 Bill of Rights Act, ss 5 and 6.

39 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at 6.

40 Paul Rishworth "The Making of Quality Legislation: Some External Constraints and Constitutional Principles" (paper presented to The University of Auckland, Auckland, 11 July 2012) at 8–9 (there are no official page numbers) accessed from <www.ldac.org.nz>.

41 At 7.

42 At 7, referencing the passing of Prostitution Reform Act 2003, s 13(2), which allowed the passing of bylaws that are inconsistent with the Bill of Rights Act.

43 Rishworth, above n 40.

sustainable environment, so the right may be harder to interpret in line with the pre-existing case law. This creates a potential issue that may arise with the introduction of a right to a sustainable environment.

It is difficult to determine whether there has or has not been an inconsistency with an environmental right. The environment and its sustainability are affected by many factors. More evidence is required compared with other rights to determine whether someone's right to a sustainable environment has been breached. For example, determining whether the right to freedom of expression has been breached does include a value judgement and some fact-finding on the potential breach. The right to a sustainable environment is more complex, as it has to take into account factors that are hard to define, such as the needs of future generations and scientific uncertainty.⁴⁴ The right to a sustainable environment may be breached by actions that merely indirectly affect the environment.⁴⁵

Scientific uncertainty is a particular problem, as decision-makers will have to be educated on the dangers of refusing to make decisions where there is a lack of understanding of the negative impacts that could result from a particular action or inaction.⁴⁶ This is potentially the biggest challenge for the right to a sustainable environment. The judiciary will have to make decisions as to whether they can accept cases where there is uncertainty on future harm and balance factors that are completely unknown.⁴⁷ This makes analysis difficult and may lead to adverse results, which may explain some of the hesitancy to implement the right into the Bill of Rights Act. Parliament may not want to impose restrictions on its ability to legislate on issues that concern the environment without being certain of the extent of those restrictions.⁴⁸ For this very reason, the option to introduce the right through separate legislation may be appealing to Parliament. While this would lead to a weaker right for New Zealanders, it would be preferable to a situation where there is no protection through rights-based legislation.

Other scholars have argued that the right to life is capable of protecting the environment without implementing the right to a sustainable environment.⁴⁹ It has been shown that the environment cannot

44 Shelton "Complexities and Uncertainties in Matters of Human Rights and the Environment", above n 7, at 105.

45 Adam Tipper *Approaches to measuring New Zealand's greenhouse gas emissions* (Stats NZ, 27 August 2020) retrieved from <www.stats.govt.nz>.

46 Geoffrey Heal and Anthony Millner "Reflections: Uncertainty and Decision Making in Climate Change Economics" (2014) 8(1) *Review of Environmental Economics and Policy* 120 at 132.

47 At 117.

48 (10 April 2024) 775 NZPD, above n 5 (Tanya Unkovich).

49 Grace Holden "Climate Litigation and an Implicit Right to a Healthy Environment: Proposing a rights-based approach to climate litigation in Aotearoa" (LLB (Hons) Dissertation, Victoria University of Wellington, 2022) at 20.

be effectively protected by other rights contained in the Bill of Rights Act. Glazebrook J has written extrajudicially that the key issue with protecting the environment through a right, such as the right to not be deprived of life, is that such rights are not solely focused on protecting the environment.⁵⁰ Moreover, the right to not be deprived of life would not be sufficient to protect applicants who do not have an imminent risk to their life. These two issues were demonstrated in *Smith v Attorney-General*.⁵¹ The High Court ruled in that case that there would have to be a "real and identifiable" risk to the life of a specified individual or even a class of individuals for the right to not be deprived of life to be triggered.⁵² Climate change is not analogous to the situation in *Wallace*, where the police created a dangerous situation, involving an identifiable class of people, which required positive protective intervention.⁵³ Rights currently in the Bill of Rights Act require a distinct and current threat to the person's right.

The only human right which has been added to New Zealand law since the inception of the Bill of Rights Act is the right to education. This right was written into the law in separate legislation and has been somewhat successful in managing New Zealanders' right to a free primary and secondary school education. It successfully creates the general obligation to provide education, but the quality of this education has been debated, in particular for students with special educational needs.⁵⁴

There are merits to enacting the right to a sustainable environment in separate legislation, as this would provide the ability for Parliament to legislate clearly without adhering to the structure of the Bill of Rights Act. However, if Parliament were to implement the right in separate legislation, it would not create the same obligations that implementation in the Bill of Rights Act would. It would still create rights that could bind the executive and the judiciary. The right to an education creates rights that are "specifically established by and under the legislation".⁵⁵ In *Attorney-General v Daniels*, the Court of Appeal held that the Education Act 1989 (now the Education and Training Act 2020) created a right that arose only in the sole context that was provided for in the legislation and existed to the extent provided for by the wording of the legislation. Such rights are not subject to the interpretative liberty that the rights within the Bill of Rights Act are. Therefore, the right to an education is not a

50 Susan Glazebrook "Human Rights and the Environment" (2009) 40 VUWLR 293 at 22.

51 *Smith v Attorney-General* [2022] NZHC 1693, upheld in *Smith v Attorney-General* [2024] NZCA 692, [2025] 2 NZLR 1.

52 At [193].

53 At [193], citing *Wallace v Commissioner of Police* [2016] NZHC 1338; and New Zealand government is not solely responsible for all the negative impacts of climate change.

54 Human Rights Measurement Initiative "New Zealand at a glance" <<https://rightstracker.org/>>; Dubby Henry "IHC court claim: Government 'breaching disabled children's right to education'" *The New Zealand Herald* (online ed, Auckland, 17 June 2021); and Human Rights Commission *Human Rights in New Zealand 2010 – Nga Tika Tangata O Aotearoa 2010* (10 December 2010) at 169 and 179.

55 *Attorney-General v Daniels* [2003] 2 NZLR 742 (CA) at [83] per Keith J.

"free-standing general right".⁵⁶ There is a right to enjoy the benefits of the system as it has been established. This provides for very little judicial interference with Parliament's intention.

On the one hand, legislating a right in separate legislation restricts the ability of the judiciary to hold Parliament accountable to maintain the rights New Zealanders are entitled to. On the other hand, this allows Parliament to create legislation that will not be undermined by the courts and gives effect to the intent of the government that New Zealanders voted into power. While the right to a sustainable environment legislated for in this manner may create lesser obligations on the government and weaker rights for New Zealanders, it would be a preferable choice for a government that still wants flexibility in legislating on environmental issues. This makes it more likely to be introduced into domestic legislation at all, and some protection is preferable to no protection.

The explanatory note to the Education and Training Bill 2019 (which became the Education and Training Act 2020) explicitly stated that much of the law keeps the effect of the previous legislation and only updates the language used in it.⁵⁷ The Education and Training Act updated the right to an education to ensure that enrolled students have the right to attend school for all of the hours that school is open for.⁵⁸ This demonstrates a key benefit of implementing the right to a sustainable environment in separate legislation: the right can be updated by Parliament as it sees fit. If the right is being interpreted in an unexpected way, then Parliament can easily rectify this via legislation that amends the Act. Due to the constitutional significance of the Bill of Rights Act, there is likely to be more hesitation to tamper with that Act than there is with separate legislation.

Compared to the right to an education, the rights that exist in the Bill of Rights Act apply far more generally. They are interpreted with a purpose-based interpretation, meaning that they give more interpretative power to the judiciary. In other words, a separate right is enforceable as it is set out under the separate Act,⁵⁹ whereas the Bill of Rights Act may allow for a more "aggressive" interpretation of the same right to enforce compliance with the Bill of Rights Act in general.⁶⁰ Moreover, the Bill of Rights Act has the same purpose-based interpretation as all other acts.⁶¹ When the courts interpret the Bill of Rights Act, the purposes of the rights it establishes must be considered.⁶²

56 At [83].

57 Education and Training Bill 2019 (193–2), Commentary.

58 Education and Training Act 2020, s33.

59 Education Act 1989, s 3; now the Education and Training Act 2020, ss 33–34 and 62–89.

60 *AMM and KJO*, above n 30, at [27]–[28]; citing P A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at [27.4.6].

61 Legislation Act 2019, s 10(1).

62 *Ministry of Transport v Noort*; and *Police v Curran* [1992] 3 NZLR 260 (CA) at 278.

III DRAFTING THE RIGHT TO A SUSTAINABLE ENVIRONMENT

On its own, drafting legislation is a difficult task.⁶³ It requires balancing the objective of a new bill with the cost of enforcing the bill, the views of the general population, economic prosperity and much more. There is also the cost of passing the bill through the House of Representatives.⁶⁴ A large cost for bills that involve environmental protection is that after Parliament sets environmental standards, it also must create policies that ensure that these standards are met. These costs add even more reason for the New Zealand government to choose not to legislate for an environmental right in the first place. When attempting to draft the right to a sustainable environment into law, the ideal version of the right looks very different depending on political views and investments, among many other factors. However, from an economic standpoint, taking swift action and prioritising environmental protection will help relieve some of the impending costs of climate change.

As mentioned earlier, climate change and other environmental harm are already affecting New Zealand.⁶⁵ The issue with predicting the effects of climate change is that there is limited knowledge of the effects of these unprecedented conditions. However, what is known is that without further (and swifter) action now, the costs in the future will be even higher.⁶⁶ Therefore, committing to governmental protection of the environment will lead to a reduction of these costs. Whether or not the administrative costs of implementing the right would outweigh this reduction is going to remain uncertain. Either way, it would assist in protecting an environment that can be enjoyed by all.

It would be helpful to start the drafting process by looking at the United Nations' definition of the right to a healthy environment. The Bill of Rights Act was established to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights (ICCPR).⁶⁷ As the ICCPR established the United Nations Human Rights Council,⁶⁸ the views of the Council should be informative on rights interpretation. However, the judiciary does not regularly consult the Human

63 Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) at 10.

64 Nick Wilson and others "Estimating the cost of new public health legislation" (2012) 90(7) *Bull World Health Organ* 532 at 536.

65 Dave Frame and others *Estimating financial costs of climate change in New Zealand* (New Zealand Climate Change Research Institute, and NIWA, 25 September 2018) at 2.

66 Rebecca Newman and Ilan Noy "The global costs of extreme weather that are attributable to climate change" (2023) 14 *Nat Commun* 1; Maximilian Kotz, Anders Levermann and Leonie Wenz "The economic commitment of climate change" (2024) 628 *Nature* 551 at 552; and Nicholas Stern *The Economics of Climate Change: The Stern Review* (Cambridge University Press, Cambridge (Eng), 2007) at xv.

67 Bill of Rights Act, long title.

68 International Covenant on Civil and Political Rights 999 UNTS 171 (open for signature 16 December 1966, entry into force 23 March 1976), art 28(1).

Rights Council's findings,⁶⁹ and are even more rarely used.⁷⁰ The resolution that established the international right to a "healthy environment" divided the right into substantive elements and procedural elements.⁷¹ The substantive rights provide the basis of the right. The substantive elements include clean air; a safe and stable climate; access to safe water and adequate sanitation; healthy and sustainably produced food; non-toxic environments in which to live, work, study and play; and healthy biodiversity and ecosystems.⁷² The procedural elements are the right to access information on the environment, to participate in environmental decision-making and to access the courts to uphold these rights.⁷³ These elements are intertwined and without both of them, the right is less effective.

It can be argued that the Bill proposed by James Shaw was far too vague. Although it was derived from the United Nation's definition of the right,⁷⁴ it did not include any of the further detail included in the United Nations Resolution on the right to a healthy environment. The preferable base upon which New Zealand should define the ideal right to a sustainable environment is the right proposed in Geoffrey Palmer's updated Constitution Aotearoa.⁷⁵ The right is set out as follows (with my additions underlined and numbering amended accordingly):⁷⁶

Environmental right

- (1) Everyone has the right—
- (a) to an environment that is not harmful to their health or well-being; and
 - (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
 - (i) prevent pollution and ecological degradation;
 - (ii) secure access to clean air;
 - (iii) secure access to safe drinking water;
 - (iv) promote reduction of emissions to achieve net-zero emissions;

69 A S Butler and P Butler "The Judicial Use of International Human Rights Law in New Zealand" (1999) 29 VUWLR 173.

70 *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA) at 691; and *Miller v New Zealand Parole Board* [2010] NZCA 600 at [39]–[40].

71 The human right to a clean, healthy and sustainable environment, above n 10, at 2 and 3.

72 At 2.

73 At 3.

74 New Zealand Bill of Rights (Right to Sustainable Environment) Amendment Bill, above n 18.

75 Geoffrey Palmer and Andrew Butler *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand* (Victoria University Press, Wellington, 2018) at 304.

76 At 304.

- (v) promote conservation and biodiversity;
 - (vi) secure ecologically sustainable development and the use of natural resources in a manner that is managed to maintain the equilibrium of the environment;
 - (vii) secure adequate access to information regarding environmental issues.^[77]
 - (viii) include kaitiakitanga, which is the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources.
- (2) The Commissioner for the Environment may, if the Commissioner considers it appropriate to do so,—
- (a) conduct litigation to safeguard the rights contained in this section:
 - (b) intervene in litigation in which issues relating to those rights are raised.

This wording is preferable to that in the Bill as it reduces the extent to which judicial interpretation decides the scope of the right's protection of the environment. People should not be subject to an environment that is harmful to their health. The right is centred around people, but it also sets out that the protection of the environment does not have to be directly linked to harm to people. The Parliamentary Commissioner for the Environment can take action to protect the environment where there is serious harm posed to environmental rights.⁷⁸ Subsection (1)(b) states this: the protection of the environment is a right so long as it is for the benefit of present and future generations. This sets out the intertemporal nature of the right to a sustainable environment.⁷⁹ It is beneficial for both present and future generations for the environment to be well maintained. The word "benefit" is a vague term that can allow judicial interpretation to extend beyond issues that just affect the health of people. There are public good qualities to a healthy environment.⁸⁰ It also strikes a balance between nature rights such as that of the Whanganui River and anthropocentric rights.⁸¹ Protection of the environment should not only occur where there is direct harm to people.

Subsections (1)(b)(i), (1)(b)(v), (1)(b)(vi) and (1)(b)(viii) were drafted by Palmer and Butler and set out the substantive rights well but should have been more specific. Pollution should be defined further, separated into air quality and water quality to meet the minimum substantive rights according

77 John 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" (24 January 2018) UN Doc A/HRC/37/59.

78 Palmer and Butler, above n 75, at 165.

79 The human right to a clean, healthy and sustainable environment, above n 10, at 3.

80 Horst Siebert *Economics of the Environment: Theory and Policy* (7th ed, Springer Berlin, Heidelberg, 2008) at 62.

81 Palmer and Butler, above n 75, at 164–165.

to Preston.⁸² The right should explicitly protect air quality and water quality. The underlined sections in the draft above attempt to show how that could potentially look. It is beneficial to explicitly state rights in the Bill of Rights Act that seem implicit to ensure they are abided by and not forgotten or minimised. For example, in Palmer and Butler's draft constitution for Aotearoa New Zealand, the right to not be enslaved is included, despite such a right being readily assumed and essentially guaranteed in a liberal democracy.⁸³ A non-toxic environment to live in could also be included but is more easily protected under subsection (1)(a). The right to healthy and sustainably produced food could be included too. Yet including this right could have severe economic impacts as New Zealand's highest export industry has historically been—and continues to be—dairy product manufacturing.⁸⁴ It is highly unlikely that enforcing sustainably produced food at this point would be popular given how enforcing sustainable production would increase the costs for this industry.⁸⁵ It should therefore be left out at this point to assist with political viability.

It is important to maintain a commitment to the fight against climate change despite the Climate Change Response Act already setting out New Zealand's emission reduction plan. It is also important to include procedural protections. Judicial review can be a successful means by which the courts can ensure a decision is made properly. By including rights to information about environmental issues under subsection (1)(b)(vii), New Zealand empowers its citizens to be informed and to understand why decisions are being made and query them if need be. This requires the government to actively share environmental information.⁸⁶ It is important to recognise kaitiakitanga within the right as tikanga Māori is a source of New Zealand law.⁸⁷ Moreover, it helps to protect Māori, seeing as indigenous people historically have been most affected by climate change.⁸⁸ It is in New Zealand's

82 Brian J. Preston "The Nature, Content and Realisation of the Right to a Clean, Healthy and Sustainable Environment" (2024) 36(2) JEL 159 at 165–166.

83 Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016) at 167.

84 Hugh Stringleman and Frank Scrimgeour "Dairying and dairy products – Dairy exports" (24 November 2008) Te Ara – the Encyclopedia of New Zealand <www.teara.govt.nz>; and Infometrics "Exports – New Zealand – Regional Economic Profile" (2023) <<https://reps.infometrics.co.nz>>.

85 Jamie Morton "Special Report: The tragedy of our environment in four dismal figures" *The New Zealand Herald* (online ed, Auckland, 18 April 2019); and Farah Hancock "Can NZ really meet its methane emissions targets?" *Radio New Zealand* (online ed, New Zealand, 26 July 2021).

86 Preston, above n 82, at 168.

87 Williams J "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 WkoLawRw 1 at 16; and *Peter Ellis v R* [2022] NZSC 114 at [19].

88 Aarti Lila Ram and Eric Shahzar "Land, loss and liberation: Indigenous struggles amid the climate crisis" (9 February 2024) World Economic Forum <www.weforum.org>; and Dr Eric L Kwa "Climate Change and Indigenous People in the South Pacific" (paper presented to IUCN Academy of Environmental Law

interest to seek the knowledge of iwi when dealing with environmental issues. Therefore, incorporating the definition of kaitiakitanga from the Resource Management Act 1991 into the right to a sustainable environment would be preferable to uphold Māori values and would ensure Māori perspectives on environmental decisions are considered.⁸⁹

There is an abundance of case law on the interpretation of rights contained in the Bill of Rights Act that would assist in the interpretation of the right to a sustainable environment. Interpretation of the right to a healthy environment largely depends on purpose. How the right to a sustainable environment would be determined would be largely based on context. Rights from the Bill of Rights Act are generally interpreted within the context in which they arise.⁹⁰ The courts would consider whichever elements of the right to a sustainable environment were affected by the context of the case before them.

Assuming the right is drafted effectively, the New Zealand government would then have to meet certain environmental standards when it makes decisions and creates secondary legislation. Moreover, if primary legislation that would breach the right to a sustainable environment was created, Parliament would need to justify the breach. This would hold the government accountable when making decisions and draws a connection between goal-orientated legislation such as the Climate Change Response Act and how decision-makers would achieve these goals.⁹¹

If the right were to be drafted into separate legislation, drafters would have to establish clear definitions for terms such as "clean" and "safe". This is because separate legislation does not typically provide the judiciary with the same power and responsibility to interpret as the Bill of Rights Act does.⁹² Setting distinct environmental limits would make clear parliamentary intent and reduce the burden on the judiciary. At the extreme end, these limits could be explicit, for example, referencing precise quality standards such as those found in the National Environmental Standards for Air Quality.⁹³ The less precise the definition of standards, the more uncertain the standards that the judiciary is to enforce become. Drafting precise legislation is extremely important when attempting to change how the executive makes environmental decisions. Alternatively, they could delegate this responsibility to the executive, which would arguably be better placed to tie such terms to technical

Conference on "Climate Law in Developing Countries post-2012: North and South Perspectives", Faculty of Law, Ottawa, Canada 26-28 September 2008).

89 Resource Management Act 1991, s 2 definition of "kaitiakitanga".

90 *R v Te Kira* [1993] 3 NZLR 257 (CA) at 271 per Richardson J.

91 Eloise Scotford "Legislation and the Stress of Environmental Problems" (2021) 74 CLP 299 at 313–314.

92 Bill of Rights Act, ss 5–6.

93 Resource Management (National Environmental Standards for Air Quality) Regulations 2004, sch 1.

standards. These standards could change over time. The executive can amend standards to respond to such changes with less administrative cost and with greater speed.⁹⁴

IV THE BILL OF RIGHTS ACT AND EXECUTIVE DECISIONS

When the executive has to make discretionary decisions, it must consider the potential effects that its decision will have on human rights, specifically within the Bill of Rights Act.⁹⁵ It does not have to completely avoid limiting these rights. But if it does limit these rights, the limitations must be justified.⁹⁶ This advantage of adding the right to a sustainable environment to the Bill of Rights Act can be demonstrated in the case of *Trans-Tasman Resources*.⁹⁷ The introduction of the right into the Bill of Rights Act may not lead to substantive change in executive or court decisions, but would change the procedure in which decisions are made. The embedding of the right into the Bill of Rights Act would mean that, when making decisions regarding the environment, the executive has to place weight on how the decision will affect people's right to a sustainable environment.

In this case, Trans-Tasman Resources Ltd sought marine consents to mine the seabed within New Zealand's exclusive economic zone.⁹⁸ Consents were given by the executive through the decision-making committee (DMC) of the Environmental Protection Authority.⁹⁹ The Supreme Court found that the DMC decision did not take proper account of the requirement to favour caution and environmental protection when the information available is uncertain.¹⁰⁰ This requirement was found in the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 which set out the factors that needed to be considered when making their decision.¹⁰¹ This meant that the decision was quashed and referred back to the DMC for consideration.¹⁰² Incorporating the right to a sustainable environment into the Bill of Rights Act would add weight to the objective of protecting the environment compared to other potential objectives that a decision-making body could prioritise instead. For example, the economic benefits for the company that were considered in *Trans-Tasman Resources* would have to be considered with slightly less weight given the added protection of a

94 Legislation Design and Advisory Committee, above n 63, at 67–68.

95 Crown Law *Te Pouārahi The Judge Over Your Shoulder* (3rd ed, 1988) retrieved from www.crownlaw.govt.nz at 17.

96 Bill of Rights Act, s 5.

97 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801.

98 At [1].

99 At [1].

100 At [130]; and Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 61(2).

101 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 97, at [11].

102 At [12].

sustainable environment. While the addition of the right to the Bill of Rights Act would not have changed the outcome in this particular case, it would reinforce the decision and would add further weight to the environmental interests considered.

The right being added to the Bill of Rights Act would mean that any discretionary decisions made by the government would have to consider the effect of its decision on the right to a sustainable environment.¹⁰³ Given that there is discretion in this kind of decision, and the decision to mine the seabed would affect biodiversity, the DMC would be obligated to consider the Bill of Rights Act. If the right to the environment was legislated in separate legislation, the right would still likely add a layer of protection for the environment in the making of the *Trans-Tasman Resources* decision. However, the right (as drafted above) would not become an automatic mandatory relevant consideration for discretionary decisions of the executive that concern the environment.

In *Trans-Tasman Resources*, the DMC was required to consider "other applicable law" when making its decision under the Environmental Effects Act.¹⁰⁴ When considering this other applicable law, if the decision-making process did not include consideration of the right to a sustainable environment, then the DMC would have neglected another mandatory relevant consideration. Whether in the Bill of Rights Act or not, the environmental right would be relevant here as seabed mining influences the sustainability of the environment. Mining the seabed is known to affect biodiversity.¹⁰⁵ In this case, where there is a provision that mandates consideration of other relevant legislation, a right to a sustainable environment in separate legislation would be sufficient to affect a decision-maker's process. However, where legislation does not mandate consideration of other relevant legislation, there is an inherent disadvantage to deciding to place the right in separate legislation. In separate legislation, the right (as drafted above) would not be a mandatory relevant consideration for the executive. However, the discretionary decision made in this case would have affected the health of the environment. An environmental right would have been a relevant factor for consideration, assuming the right protects biodiversity.

As established, unlike the Bill of Rights Act, most other Acts do not automatically create generally applicable rights as the rights arise in the context contemplated by the particular statute (apart from acts such as the Human Rights Act 1993). So, for the Act to apply to a certain case, the rights in the Act must be affected by what occurs in the case in ways that are anticipated by the scope of the legislation. This is not necessarily an issue, as separate legislation can be wide in scope. However, it does require the right in separate legislation to be drafted in a way that recognises this distinction and

103 Crown Law *Te Pouārahi The Judge Over Your Shoulder*, above n 95, at 17.

104 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 97, at [162]; and Environmental Effects Act, above n 100, s 59(2)(1).

105 Jessica Battle "Deep seabed mining would destroy biodiversity — and we don't need it" *The Circle* (online ed, Sweden, December 2021) at 17.

ensures the scope is wide enough to successfully protect the environment as intended. Otherwise, this piece of legislation would not have to be considered at all. That is unless the legislation which provides the power to the decision-maker has a section like the Environmental Effects Act which requires them to consider any other relevant legislation.¹⁰⁶ For example, the Fast-track Approvals Act 2024 allows consideration of applications to use the fast-track approval process without making environmental considerations a mandatory relevant consideration.¹⁰⁷ For these reasons, it is preferable to have the right in the Bill of Rights Act in order to protect the environment. To see the impact of having the right to a sustainable environment in constitutional legislation, one can look to the French Charter for the Environment.

V THE FRENCH CHARTER FOR THE ENVIRONMENT

Case law in France demonstrates that the right to a sustainable environment is useful in establishing the general obligation to combat climate change. In December 2018, four non-profit organisations sent a formal letter to the French government to alert it of its insufficient action on climate change.¹⁰⁸ The Minister of Ecological Transition replied to this letter and denied the authors' request.¹⁰⁹ The authors then took the case to the Administrative Court of Paris. There, amongst other claims, they alleged that the French government had not taken all necessary measures to achieve France's targets for reducing GHG emissions and had ignored their obligation to combat climate change.¹¹⁰ They demonstrated that there were real threats of ecological damage as a result of climate change, specifically the emission of GHG and temperature rise.¹¹¹ They established that the French government did not keep within the carbon budget that was established by decree of the Prime Minister in 2015.¹¹² France exceeded the first carbon budget by 3.5 per cent and only maintained average reductions of 1.1 per cent per year compared to the required 1.9 per cent.¹¹³ The government had failed to meet its own targets to reduce GHG emissions. The government had failed to take the actions it had claimed would reduce GHG emissions.¹¹⁴

106 Environmental Effects Act, s 59(2)(l).

107 Fast-track Approvals Act 2024, s 22(2)(a)(ix).

108 *Notre Affaire à Tous and Others v France* (2021) n°1904967, 1904968, 1904972, 1904976/4-1 (Administrative Court of Paris); unofficial English translation available at <www.climatecasechart.com> [Pinpoint references will refer to English translation] at 1.

109 At 5.

110 At 1–5.

111 At 26.

112 At 30.

113 At 30.

114 At 30.

This is what led activists in France to be able to successfully protect their environment in *Notre Affaire à Tous and Others v France*.¹¹⁵ For this case, the Charter for the Environment was considered due to its clause that compels all people in France to prevent, or at least limit, damage to the environment.¹¹⁶ The constitutional value of the Environment Charter was acknowledged in the decision.¹¹⁷ The fact that France is a party to the United Nations Framework Convention on Climate Change and the Paris Agreement was also important in establishing the general obligation. The Convention acknowledges the responsibility of parties to preserve the climate system for future generations.¹¹⁸ The Paris Agreement acknowledged the need to achieve the global limit on GHG emissions.¹¹⁹ France is also bound by the decisions of the European Union to reduce its GHG emissions under separate Climate Energy Packages for 2020 and 2030.¹²⁰ These commitments to the European Union strengthen the Charter for the Environment and vice versa. By committing to these Climate Packages, the French government has recognised its ability to act upon GHG emissions in line with France's protection of the environment under the Charter for the Environment.¹²¹

The Administrative Court decided that the French government had to take all measures to ensure that all the objectives that France had set itself were met.¹²² The Court was able to make this decision because the French government had recognised its capacity to effectively carry them out. It recognised its capacity to do so by first being party to international environmental treaties with specific obligations.¹²³ Secondly, the government implemented public policy to reduce GHG emissions and undertook specific deadlines for multiple objectives for the preservation of the environment.¹²⁴ This demonstrates the key benefit of integrating the right to a sustainable environment into domestic law. It does not change the pre-existing obligations of the government. It recognises the fact that the government has decided to commit generally to the preservation of the environment. It adds another layer of protection that would otherwise not be present. Without supporting legislation, regardless of

115 Article 1.

116 Charte de l'Environnement, above n 12, art 3.

117 *Notre Affaire à Tous and Others v France*, above n 108, at 27.

118 United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994), art 3(1).

119 The Paris Agreement (opened for signature 22 April 2016, entered into force 4 November 2016), art 4(1).

120 Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 [2009] OJ L140/52; and Regulation 2018/842 [2018] OJ L156/61.

121 *Notre Affaire à Tous and Others v France*, above n 108, at 29.

122 Article 4.

123 At 21.

124 Code de l'environnement 2015 (France), art L221-1 A.

whether it is in the Bill of Rights Act or separate legislation, the right to a sustainable environment would be weak. However, when combined with existing government commitments to protecting the environment, the right would solidify these commitments and demonstrate the purpose and necessity of specific commitments.

In New Zealand, if Parliament legislated the right to a sustainable environment into the Bill of Rights Act as it stands currently, it would not create the same protections that the French Charter for the Environment does. There are two key differences: France has an entrenched constitution, of which the Charter for the Environment is a part; and the French constitution creates active obligations on all citizens of France, including the government.¹²⁵ While these differences do arise, the decision in *Notre Affaire à Tous* was not solely based on the fact that the French Charter was entrenched or that there were positive duties within the Charter.¹²⁶ The importance was establishing that steps had been taken domestically that demonstrate that the French government had accepted a general obligation to protect the nation from climate change.¹²⁷ This would still be achieved by establishing a right to a sustainable environment for all people of New Zealand to enjoy.

The New Zealand government has undertaken to achieve net zero emissions of GHG other than methane by 2050 under the Climate Change Response Act.¹²⁸ This target is achieved by the setting of emissions budgets which set out the maximum emissions allowed within a five-year period.¹²⁹ These targets are advised by the Climate Change Commission who give independent advice and reviews on the government's progress on emissions reduction.¹³⁰ It is still the government's responsibility to take on this advice and ensure that it is maintaining its commitments to emissions reduction and mitigating climate change. One of the measures implemented by the government is the emissions trading scheme (ETS).

A similar case to *Notre Affaire à Tous* arose in New Zealand following the implementation of the Climate Change Amendment Regulations in late 2022. The Regulations set out the unit limits of GHG and price control settings for the purposes of the ETS for the period 2023 to 2027. The regulations were made under the Climate Change Response Act by the Governor-General. The Governor-General makes regulations under the Act based on recommendations from the Minister for Climate Change. The Act provides strict criteria that the Minister must consider when making recommendations to the

125 David Marrani and Stephen J Turner "The French Charter of the Environment and Standards of Environmental Protection" in Stephen J Turner and others *Environmental Rights: The Development of Standards* (Cambridge University Press, Cambridge (Eng), 2022) 309 at 313-314.

126 *Notre Affaire à Tous and Others v France*, above n 108, at 18–21.

127 At 21.

128 Climate Change Response Act, above n 4, s 5Q.

129 Section 5X(3).

130 Section 5B.

Governor-General.¹³¹ These regulations were claimed to be ultra vires by the organisation Lawyers for Climate Action NZ Inc (LCANZI).¹³² LCANZI claimed that the Minister for Climate Change did not have reasonable grounds to believe that the settings were consistent with section 30GC of the Climate Change Response Act.¹³³ For the regulations to be consistent with the Act, the unit limits and price control settings would have to be such that they ensured that New Zealand would meet the 2050 target. The Minister of Climate Change admitted that he had fallen short of this requirement and that he had been in error prior to the hearing.¹³⁴ This meant that the parties were able to agree on the error and on the relief that was required to remedy it. They decided that the Minister was to reconsider the unit limit and price control settings. The High Court agreed with the relief chosen. Therefore, the court declared that the Amendment Regulations were ultra vires.

This case is distinguishable from *Notre Affaire à Tous* in multiple ways. In *Notre Affaire*, there was no procedural error in the setting of the targets that France committed to. In *Lawyers for Climate Action*, there was an error in the decision-making process of the carbon budget.¹³⁵ This allowed the decision to be remade and the carbon budget to be reconsidered. If there is no fault in the procedural process, in New Zealand, there can be no action taken against the executive once the decision has been made with the correct process. If the situation in *Notre Affaire* occurred in New Zealand, it is unlikely that the government would ignore claims that it was not on track to meet the goals it set. However, legally, the government would be under no obligation to remedy the situation; it would only be bound by procedure when it went on to create the next carbon budget. There is no means by which New Zealanders can hold Parliament or the executive to account through substantial limits, even if these are set by Parliament. There is no set way in New Zealand to remedy ecological damage to the environment caused by a failure of the government to meet targets.

In comparison, all of France's citizens are compelled to remedy the damage they do to the environment. The Environmental Charter in France creates positive obligations on all of its citizens, which includes their Parliament. Everyone in France, including the government, is under a duty to prevent damage to the environment and, where this is impossible, limit the consequences of that damage. If someone damages the environment, they will contribute to the making good of said damage.¹³⁶ In France, these obligations create stronger powers for the courts to hold decision-makers accountable when they are not making appropriate progress towards the commitments they have made. There is an underlying constitutional tool that underpins the other legislation that specifies how

131 Sections 3A, 3B, 30GB, 30GC, and sch 1AA, cl 7.

132 *Lawyers for Climate Action NZ Inc v Minister of Climate Change* [2023] NZHC 1835.

133 At [1].

134 At [47].

135 At [36].

136 Charte de l'Environnement, above n 12, art 4.

these obligations should be handled and remedied when not met. The remedy is set out in the Civil Code and declares how ecological damage is to be repaired.¹³⁷

In New Zealand, there are no positive obligations on the government to prevent damage to the environment or limit it. Even if the New Zealand government commits to certain ecological goals, it is not bound by these commitments. The Climate Change Response Act clearly states that if the government does not meet the 2050 goal or an emissions budget, there is no remedy or relief available in a court of law. The only available option is that a court may make a declaration that the goal or budget has not been met, along with a costs award.¹³⁸ The Act requires the Minister for Climate Change to present the House of Representatives with a document that notifies the House of any such declaration and contains advice on the government's response, but there is no requirement to follow this advice.¹³⁹

VI WEIGHING UP ENVIRONMENTAL PROTECTION AND PARLIAMENTARY SOVEREIGNTY

The 2023 National-led coalition government was formed with the aim of alleviating the "cost-of-living crisis" which New Zealand was facing.¹⁴⁰ As of March 2024, the New Zealand economy is technically out of the recession it faced when the 2023 government formed.¹⁴¹ Yet there is still a cost-of-living crisis.¹⁴² The 2023 government has made a series of decisions that highlight its focus on restoring New Zealand's economic growth, which may have led to unintended consequences for environmental protection. These decisions have been subject to criticism in the media.¹⁴³ Without a right to a sustainable environment implemented into the Bill of Rights Act, there is no obligation for the impact of these decisions on the environment to be considered by the government. Moreover, with the right implemented, such decisions could trigger the Attorney-General's obligation to inform the House of Representatives of any potential breach of the rights guaranteed in the Bill of Rights Act.

137 LOI n°2016-1087 du 8 août 2016 pour la reconquête de la biodiversité, de la nature et des paysages (1), arts 1246-1252.

138 Climate Change Response Act, s 5ZM.

139 Section 5ZM(3).

140 The National Party "National Party Fiscal Plan" (29 September 2023) National <www.national.org.nz> at 2.

141 Stats NZ "GDP increases 0.2 per cent in the March 2024 quarter" (20 June 2024) <www.stats.govt.nz> cited in Liam Dann "GDP: NZ out of recession but 'don't pop the champagne just yet'" *The New Zealand Herald* (online ed, Auckland, 20 June 2024).

142 NZ Herald "Editorial: Cost-of-living crisis deepens, no solutions in sight" *The New Zealand Herald* (online ed, New Zealand, 29 June 2024); Susan Edmunds "Here's how cost-of-living crunch has really hit" *Stuff* (online ed, New Zealand, 6 March 2024); and Alka Prasad "Cost of living crisis: Families opt for Kiwisaver cashouts, cut back on food" *Radio New Zealand* (online ed, New Zealand, 29 April 2024).

143 Rebekah White "New Zealand's environmental credentials on the line as coalition takes power" *The Guardian* (online ed, New Zealand, 8 December 2023).

However, the government is currently making decisions that could lead to worse environmental conditions.¹⁴⁴

The current government is not prioritising environmental protection. Even the least restrictive version of the right to a sustainable environment is unlikely to be created. This is highlighted by two recent bills dealing with the environment that have been submitted through the House of Representatives. The Resource Management (Freshwater and Other Matters) Amendment Act passed into law on 24 October 2024. As part of this scheme, the current hierarchy of obligations in the National Policy Statement for Freshwater Management is suspended from consideration during the resource consent process.¹⁴⁵ The hierarchy of obligations is based on Te Mana o te Wai. Through the principles of Te Mana o te Wai, the hierarchy prioritises the health of water bodies and freshwater ecosystems, then the health needs of people, and finally the ability to provide for economic, social and cultural wellbeing.¹⁴⁶ By excluding this hierarchy, resource applicants do not need to prioritise the wellbeing of water bodies and freshwater ecosystems when applying for resource consent until the National Policy Statement is replaced. This alone shows that the current government is willing to make decisions that could be seen as neglecting environmental welfare.

Furthermore, in 2024 Parliament passed the Fast-track Approvals Act which reinforces the current government's inclination to prioritise economic prosperity over environmental protection.¹⁴⁷ There are no mandatory environmental considerations in the criteria for eligibility for the fast-track approval process.¹⁴⁸ This will lead to infrastructure and development projects being approved more quickly. However, this fast-tracking will lead to less investigation into environmental matters.¹⁴⁹ As the Parliamentary Commissioner for the Environment noted in his submission on this bill, allowing private projects to be eligible for fast-tracking detracts from environmental protection.¹⁵⁰ Private projects that exploit natural resources are associated with more risks as the environmental impacts of such activity are less known.¹⁵¹ Equally importantly, these private projects do not have long-term public benefits to justify the exploitation of the environment; they are profit-driven and prioritise

144 Kate Green and Niva Chittock "Government's freshwater bill will result in more polluted waterways, critics say" *Radio New Zealand* (online ed, Wellington, 1 June 2024); and White, above n 143.

145 Resource Management (Freshwater and Other Matters) Amendment Act 2024, s 23, amending Resource Management Act, s 104.

146 National Policy Statement for Freshwater Management 2020 at 1.3.

147 Green and Chittock, above n 144; and White, above n 143.

148 Fast-track Approvals Act, s 22(2).

149 Parliamentary Commissioner for the Environment, Rt Hon Simon Upton "Submission on: Fast-track Approvals Bill" at 2.

150 At 5.

151 At 5.

short-term economic welfare over environmental welfare.¹⁵² The environment does not appear in the purpose provision of the Act, but it did in the Act's predecessor, the COVID-19 Recovery (Fast-track Consenting) Act 2020.¹⁵³ This demonstrates a straying away from the protection of the environment as a key ideal when fast-tracking approvals, and means that environmental concerns will be given less weight. This is another example of the current government's intent to reduce the importance of the environment in favour of economic growth. Both of these Acts have been met with criticism based on their lack of environmental protection.¹⁵⁴

These two examples show the importance of implementing the right to a sustainable environment. By including the right in domestic legislation through the Bill of Rights Act or separate legislation, there would be added protection to the environment, and importantly, more awareness of breaches of that right. Awareness of environmental issues is instantly raised by intertwining such issues with human rights. As acknowledged earlier, the ability of the courts to declare acts or sections of acts in breach of the Bill of Rights Act raises public awareness. Moreover, the Governor-General will alert the House of Representatives during the drafting stage if a bill is in breach of the Bill of Rights Act. If the right to a sustainable environment was included in the Bill of Rights Act, there would be more general awareness amongst the public of issues surrounding the environment. Increased information and constitutional barriers that restrict legislation that damages the environment combine to strengthen the protection of the environment.

It is in this respect that placing the right in separate legislation may be quite appealing to Parliament and the general public. Separate legislation would allow Parliament the freedom to legislate without having to worry about inconsistencies or being held liable for not reaching standards. It would be far easier for Parliament to legislate itself out of obligations in separate legislation than those in the Bill of Rights Act. There are benefits to either. The Bill of Rights Act allows for a barrier between the will of Parliament and unfair results on the general population through the impeding of their rights. Separate legislation, on the other hand, allows Parliament to exercise its will more easily. Separate legislation would be easier to amend or repeal than the Bill of Rights Act. It would be easier to amend or repeal due to the lack of status it carries compared to the Bill of Rights Act. Moreover, Parliament would place itself in better stead to understand the extent of the restriction that the legislation would impose on the government. The scope of judicial interference is reduced for rights included in separate legislation, due to s 6 of the Bill of Rights Act not applying. This makes cost

152 At 5.

153 Contrast Fast-track Approvals Act, s 3; and COVID-19 Recovery (Fast-track Consenting) Act 2020, s 4.

154 Marnie Prickett and others "The policy bonfire of environment protection: 10 examples that threaten public health" *The Briefing* (online ed, New Zealand, 15 December 2023) <www.phcc.org.nz>; and WWF "New Law Puts NZ on Fast-track to Environmental Destruction (7 March 2024) <www.wwf.org.nz>.

analysis easier as the judiciary is not empowered to align subsequent legislation with the legislation containing the right to a sustainable environment unless intended or explicitly stated.

VII CONCLUSION

The current government has demonstrated that it does not prioritise environmental protection. It is suggested that there is a need for additional environmental protections to be included in our law to ensure that economic benefits and environmental concerns are adequately balanced when new laws are made. The right to a sustainable environment being placed in the Bill of Rights Act is the optimal way to do this through rights-based legislation. If the government is sceptical of the right's impact on the economy, or it being too strong in general, placing it in separate legislation might be a preferable alternative. This would still protect the environment to some extent but would give Parliament more power to implement its will.

This article has not discussed the economic effects that this right could potentially have by limiting projects, compared with the impact it could have on the economy by actually protecting the environment. Parliament would have a monumental cost/benefit analysis to consider before introducing the right. Whichever way the right may be included in domestic legislation, it should ideally be supplemented with a clear policy that sets out how the government will achieve the desired outcomes. By doing so, the costs of achieving the standards set in the legislation would become clearer.