25 May 2023

**Submission to the UN Special Rapporteur**

Ecostream Consulting Pte Ltd is a DEI based micro-enterprise that welcomes the inclusion of business enterprises to submit written information following the call for inputs due on 25 May 2023 on how to enhance climate change legislation, how to support climate change litigation, and how to advance the principle of intergenerational justice; to be presented to the UN General Assembly in October 2023.

These submissions are focused on the Fiji jurisdiction and will hopefully provide some insight into the experiences and challenges faced by a country that has had little impact on climate change, but has been severely impacted and likely irreparably changed because of inequity and the inability of polluter nations to curb their greed and apathy. These submissions are made as outlined in the Questionnaire and the accompanying instructions of the Special Rapporteur as follows:

**Enhancing Climate Change Legislation:**

1. **Can you provide examples of climate change legislation that incorporates human rights elements, or a reference to obligations relating to loss and damage?**

Yes, in Fiji the Climate Change Act 2021 (**the Act**) requires that the Act be implemented according to certain principles that includes obligations relating to loss of livelihoods and mitigation of that loss by the Government (s.5(f)). It also provides for mitigation of loss and damage of the effects of climate change on the country acknowledging its acute vulnerability (s.5(h)). It also acknowledges the importance of gender equity, etc and upholding the pledge of the sustainable development goals (s.5(i)).

Section 54 of the Act covers loss of carbon stocks and when remedial action is necessary. S.79(c) recognizes various risks of climate change to the oceans including the loss of marine biodiversity. S.94(1) of the Act cross references the Companies Act 2015 and requires directors of a company to "consider and evaluate climate change risks” then outlines what those risks entail, but specifically in relation to “economic or financial loss”. S.107 allows a person to bring a civil claim for damages if they suffer loss because of a breach of the Act. S.105(2) of the Act outlines what the Court needs to take into consideration when convicting anyone of a breach of the Act, including when ordering remedial action.

1. **How to you think climate change legislation should frame a connection to human rights obligations?**

It should start with very basic and intrinsic human rights like the right to life, food, water and shelter. Cultural protection and their direct entanglement to the environment are also important contextual considerations. Diversity, equity and inclusion frameworks should be used in climate change legislation as it is the most effective way to ensure the advancement of human rights and should be included as an obligation. Most importantly, rather than just empty rhetoric there should be a clear correlation between recognizing the connection of human rights to climate change and outlining effective and practical enforcement mechanisms to show the seriousness of the connection of human rights to climate change.

1. **How do you think climate change legislation should engage the concept of loss and damage?**

Not just in terms of immediate loss, but of consequential and even indeterminable loss. For example, where development results in loss that cannot simply be remedied by financial compensation the developer should be responsible for restoration of the site and have ongoing obligations for reparations to any locals and especially indigenous groups from that point onwards. The onus should be on those conducting any form of development, including local and national governments, to properly assess the potential loss and damage beforehand. Criminal sanctions including imprisonment for failure to do so should be included. Fines alone have not had any relevant deterrent effect.

1. **Should climate change legislation that incorporates loss and damage be different for major greenhouse gas emitting countries to those that are mostly affected by climate change? What would this difference look like?**

Yes, reparations to those most affected by climate change and preparing to take on climate change refugees without exception or too much fussing as they've had more than enough time to get their act together. Like any toddler is taught, you misbehave, you must face the consequences. There's also no reason (other than corruption and spineless "leaders") that financial sanctions can't be levied on the commercial development, mining, oil and fossil fuel industry, etc to cover the irreparable harm they cause especially in failing to take any meaningful steps towards implementing sustainable options. Their politicians should be open to impeachment and/or suitable criminal sanction, including imprisonment, for causing harm to the environment or failing to take steps to protect it and the human rights of those affected.

**Supporting Climate Change Litigation:**

1. **How are human rights considerations being incorporated into climate change litigation?**

Most notably by various legal actions to hold governments accountable for their failure to protect their citizens from commercial developments that negatively impacted them or the various actions to recognize that future generations have a right to a clean and healthy environment as well. It's essentially recognizing the various rights to life, a clean and healthy environment, food, etc.

1. **Are there issues with making the link between human rights and climate change litigation?**

In my opinion, no, and most of the recent cases I've seen have backed the belief that people's rights are being violated and need protection. However, if you look at climate change litigation from the perspective of slap suits, injunctions against protests and criminal litigation against environmental defenders then there certainly is a huge issue with the link between human rights and climate change litigation. Essentially placing economic and commercial interests above the best interests of people and their basic human rights. Despite ignorant rhetoric this is not only practiced in "third world countries”.

1. **What do you think are the major barriers to initiating climate change litigation?**
	1. Awareness of human rights in general and then how it relates to climate change;
	2. Awareness of legal remedies available within countries to protect a person's human rights;
	3. Financial resources to be able to engage in litigation;
	4. Financial resources to be able to collect and preserve the necessary evidence – also knowledge of what could be pertinent evidence;
	5. Resources to be able to protect environmental defenders, their families, etc from nefarious government officials, developers, etc;
	6. Expertise of judicial officers on the subject matter as well as their ability (lack of resources/huge backlog of cases) to process the litigation in a timely manner;
	7. Awareness of the extent of the loss either not recognizing the extent of the damage or the lack of compensation for future/ongoing/irreparable damage;
	8. Of course, corruption and people being targeted and blocked from bringing actions to protect political and financial interests;
	9. Use of greenwashing to confuse and diminish the true effect on the environment including carbon offsetting mechanisms.
2. **Are the barriers different in different parts of the world? What are they?**

There is certainly variation, for example, in availability of personal wealth/resources, but that really exists everywhere. The real barrier is the apathy shown by those in developed or exponentially developing countries and their refusal to act to protect the environment in any meaningful way.

1. **Is the judiciary in your country well equipped to understand the connection between human rights and climate change?**

There has been some positive development in Fiji case law regarding civil and criminal prosecutions. That was pursuant to existing legislation. To my knowledge there has not been any specific cases to do with litigation based on a violation of human rights. However, there is certainly understanding of the irreparable harm private development has on the environment. However, Fiji is a country that has not enforced or protected human rights on a consistently broad basis, so it is unlikely our courts are equipped to do so. Many members of the Judiciary have been more than happy to go along with our former governing regime's violation of various human rights and using the judiciary as a weapon to do so. This is likely to reflect in a lack of ability to properly apply the connection between human rights and climate change.

1. **How could this be improved?**

Not having a corrupt and anti-human rights government is necessary. Having an independent judiciary free from corruption is necessary. How to go about ensuring both of those are in place requires more words than are available for this submission, but an active and democratically leaning citizenry that values and upholds human rights would be a good start.

1. **Are there particular issues with getting access to the courts?**

Yes, the aforementioned corruption has been a huge issue. Misogyny and bigotry by members of the judiciary has prevented access to justice if not literal access to the courts. Many cases are derailed or unnecessarily prolonged simply because the solicitor didn't pander to the ego of the judicial officer. An attitude check and reminder of what their roles are, is long overdue. They whine about not being respected, but don't think about the harm they've persistently done to earn any disrespect aimed at them. There are also unqualified members of the judiciary who for obvious reasons make it clear that corruption is still thriving here. Importantly though, the courts are not the best way to address climate change or the harmful effects of developmental greed. It is a reactionary approach and a proactive approach that stops harmful development or anything that exacerbates climate change or negatively impacts the environment should be stopped or managed at its preliminary stages. For example, governments continuing to approve environmentally harmful developments like the hotel proposed for the Nasese foreshore that will irreparably harm our already limited mangroves should not happen or get to the stage of requiring civil or criminal sanctions.

**Advancement of the principle of intergenerational justice**

1. **What examples do you have of how intergenerational justice, as it applies to climate change and human rights, has been incorporated into international law, national constitutions or domestic law?**

*International law:* please see the 2017 submission from CIEL **attached**. Annex 2, page 16 of that document lists the international laws that specifically reference intergenerational equity.

*National constitutions:* here in Fiji section 40(1) of our constitution enshrines the right to a “clean and healthy environment” for "...present and future generations through legislative and other measures." However, it is not absolute and does allow for limitations to be placed either by legislation or an administrative action (see section 40(2)).

*Domestic Law*: section 5(c) of the Act referred to at question 1 above specifically requires that the Act be implemented by considering intergenerational equity.

1. **How would you best define intergenerational justice in the context of climate change and human rights?**

It's ensuring that existing generations preserve the environment and take the necessary measures, dedicating all necessary resources, to undo any harm where possible to ensure future generations are not deprived of a clean and healthy environment in which to flourish free from the burden of persistently having to fight for their basic human rights including to a clean and healthy environment.

1. **Has the concept of intergenerational justice been incorporated into climate change litigation?**

Not that I am aware of in the Fiji context. The focus has mainly been to safeguard cultural and health effects of the local population as well as any immediate damage suffered as well as impose sanctions for violation of regulatory requirements such as EIA reports.

1. **What options are available for enshrining the principle of intergenerational justice in international law?**

Based on the aforementioned CIEL submissions there is already quite an extensive incorporation of the principle in international law. The issue is usually what happens in practice and enforcing those provisions or holding (especially larger countries) accountable for failing to do so.

1. **How can States incorporate the concept of intergenerational justice in their national constitutions and legislation? What are some good practices in that respect?**

As far as Fiji is concerned, we have done this both with our constitution and local legislation. This could possibly provide a guide or example for other States that want to do so. However, consistent application and enforcement is what is most important and Fiji is still working on that.

Best practice would be to ensure the provisions are drafted in a way that is inclusive and forward thinking. Driven by a willingness to preserve human rights and preferably in consultation with marginalized groups and those affected by climate change, including children.

There also needs to be repercussions, not just political, for those in power who work against such provisions to ensure adherence. The consequences are too great and too far reaching for any ministerial or other privileges to apply and allow criminal conduct to go unpunished.

1. **Can you share some good practices that allow youth to be represented in courts and to have their views and concerns properly expressed in the judicial process?**

As the term youth varies from jurisdiction to jurisdiction and in many cases includes adults over the ages of thirty, I've used the reference “child litigant” to refer to a younger person, 18 and under, who may wish to pursue redress through the judicial process. Personally, I believe many of the best practices below should extend to other groups, but I'll limit my response for the purposes of this submission. Please also note that I have not opted to use the term juvenile as it is synonymous with criminal conduct in most legal systems I am aware of. The best practices I recommend are:

* 1. First and foremost, it is necessary to have judicial officers and legal practitioners that themselves know how to abide by the law, apply it and do so in a consistent and fair manner;
	2. Have judicial officers and legal practitioners that are well trained to deal with younger litigants in a professional and just manner;
	3. Have the same judicial officers and legal practitioners trained on the correlation between intergenerational justice, human rights and climate change;
	4. Less rigid or formal locations for the court processes to allow the younger litigants to feel comfortable. Included in the training mentioned above, should be the understanding that hearing from the litigants and gaining their perspectives is what is paramount as opposed to pandering to the judge's preference for formality or the usual decorum. Of course, giving due regard to security and the safety of the child litigant;
	5. It should be paramount to observe and protect the access to justice by child litigants and the protection of their human rights, which the judiciary is bound to uphold and for whatever reason if it is not then it should be;
	6. Child litigants should be properly briefed before a court appearance including on how to ask for a break;
	7. Judges should not allow for child litigants to be bullied, harassed or otherwise treated in a demeaning or improper manner in their courts;
	8. Child litigants should have a confidant or representative in court to either intervene or ensure they are properly represented and treated throughout the proceedings;
	9. There should be clear recourse and sanctions against any legal practitioner or judge that fails to adhere to the aforementioned best practices. This should be outlined to the child litigant beforehand and stated in open court so that they know everyone is aware of how they should behave;
	10. Most importantly is to prepare the child litigant for litigation. Not just in terms of pre-court appearance prep, but understanding the overall process, what unacceptable conduct may happen and what to do if it does, what resources are available to protect their mental health and overall wellbeing as well as how to access those services. That should be extended to the family or close support network of the child litigant as well;
	11. It is also very important to respect the child litigant and clarify at the outset of proceedings what they would like to be referred to as. Even if that is something as random as their favourite superhero or cartoon character. Irrespective of the views of other courtroom participants this should be adhered to in a respectful, non-mocking, manner. This could help acclimate particularly young child litigants and make the proceedings less intimidating and inclusive for them.

This concludes my submissions; however, I will be happy to lend further clarification, insight or opinion should the need arise. My contact details are provided at the footnotes to this document. The Fiji legislation referred to in this submission may be found at <https://www.laws.gov.fj/> under the “Consolidated Legislation” section of the website.

Yours sincerely,

Kristel Whippy

DEI Consultant & Advocate and Legal practitioner

Fiji

Word limit: 2,500

Word count: 2,429