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CLIMATE CHANGE, INEQUALITY AND DISCRIMINATION LAW: THE EXAMPLE OF SWIMMING POOL ACCESS IN MOREE

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I INTRODUCTION

Climate change and inequality are closely connected. Climate variability and change alongside climate-related disasters are already affecting health outcomes by exacerbating disease burdens, malnutrition and heat stress on those least able to manage these. Loss of livelihood and food insecurity caused by climate change are experienced most severely by the poor and in particular by children, women, Indigenous peoples and the elderly.[1] Mitigation and adaptation measures in response to climate change thus require equality-informed approaches. This aligns with the goals of climate justice which emphasise the rights of the most vulnerable, equality and fairness. The idea of climate justice has emerged from a global movement aimed at exposing 'how social and economic inequality has led to, and perpetuates patterns of climate change, but also how climate change deepens inequality by disproportionately affecting those members of society who already face higher levels of vulnerability'.[2] Referred to in the Preamble to the Paris Agreement to the United Nations Framework Convention on Climate Change,[3] climate justice is based on the following principles:[4]

> [It] links human rights and development to achieve a human-centred approach, safeguarding the rights of the most vulnerable people and sharing the burdens and benefits of climate change and its impacts equitably and fairly. Climate justice is informed by science, responds to science and acknowledges the need for equitable stewardship of the world's resources.

[1] Lennart Olsson, Maggie Opondo, Petra Tschakert, Arun Agrawal, Siri Eriksen, Shiming Ma, Leisa Perch, and Sumaya Zakieldeen, 'Livelihoods and poverty' in Christopher Fields et al (eds), *Climate Change 2014 Impacts, Adaptation, and Vulnerability Part A: Global and Sectoral Aspects Working Group II Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014) 793-832.

[2] Cinnamon Carlarne 'Environmental Law and Feminism' in Deborah Brake, Martha Chamallas, and Verna Williams (eds), *The Oxford Handbook of Feminism and Law in The United States* (Oxford University Press, forthcoming).

[3] The term was referred to somewhat reservedly in the Preamble which notes 'the importance for some of the concept of climate justice, when taking action to address climate change': *Paris Agreement to the United Nations Framework Convention on Climate Change*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016).

[4] 'Principles of Climate Justice,' *Mary Robinson Foundation* (Webpage) <https://www.mrfcj.org/principles-of-climate-justice/>. While there are important elements of this definition including the focus on vulnerability and fairness, the idea of a human-centred approach should be critically considered if we are to understand how our species fits within its ecological context and its responsibilities to the planet.

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Climate law and strategic litigation in pursuit of climate justice are rapidly evolving areas with a growing resort to human rights in which equality is often central. While acknowledging that human rights law is only one part of the response to climate change, Philip Alston, former United Nations' Special Rapporteur on extreme poverty and human rights said that 'much more needs to be done to fill in significant gaps and uncertainties about the obligations of States'.[5] He called for greater urgency in tackling climate change which he described as 'among other things, an unconscionable assault on the poor'.[6] While international human rights frameworks are gradually being developed to meet the challenge of climate change,[7] domestic rights frameworks are already proving important in local struggles.[8]

This article aims to fill a gap in scholarship and action on climate justice by proposing that discrimination law be considered, alongside other human rights-based laws and broader legal strategies, in supporting creative responses to the challenge of climate-related inequality. In Australia, encouraging the use of discrimination laws, present in all states and territories alongside federal laws, expands the community of legal scholars with skills relevant to our climate future. It encourages discrimination lawyers to engage with climate and environmental issues and laws and to make connections between climate change impacts and protected attributes, while understanding that the goal of equality that discrimination law seeks must encompass climate justice. The article recognises that discrimination law is limited in its capacity to challenge systemic inequality[9] and acknowledges the limits of law in general in tackling the global causes of climate injustice that must urgently be confronted.[10] It nevertheless sees value in orienting discrimination law towards the unequal impacts of climate change in pursuit of climate justice. This is motivated by strategic recourse to law as well as the goal of developing relevant discrimination law that is focused on humans within our ecological context and underpinned by an approach to equality that is transformative.

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[5] Human Rights Council, *Climate Change and Poverty: Report of the Special Rapporteur on extreme poverty and human rights*, 41st sess, UN Doc A/HRC/41/39 (24 June–12 July 2019) 71.
[6] Ibid 88.
[7] See, eg, Committee on the Elimination of Discrimination against Women, *General Recommendation No. 37 on Gender-related dimensions of disaster risk reduction in the context of climate change*, UN Doc CEDAW/C/GC/37 (7 February 2018); Committee on Economic, Social and Cultural Rights, *Climate change and the International Covenant on Economic, Social and Cultural Rights* (8 October 2018) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E>; Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child, Committee on the Rights of Persons with Disabilities*, Joint Statement on 'Human Rights and Climate Change'* (16 September 2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998>; Office of the United Nations High Commissioner for Human Rights, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment,* UN Doc A/HRC/31/52 (1 February 2016).
[8] Jacqueline Peel and Jolene Lin 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113(4) *American Journal of International Law* 679-726; César Rodríguez-Garavito, 'Human Rights: The Global South's Route to Climate Litigation' (2020) 114 *American Journal of International Law Unbound* 40-44.
[9] Margaret Thornton, *The Liberal Promise: Anti-discrimination Legislation in Australia* (Oxford University Press, 1990); Margaret Thornton 'Equality and Anti-Discrimination Legislation: An Uneasy Relationship' (2021) *Law in Context* 37(2) 12-26.
[10] Some examples of critical legal scholarship regarding the role of law and human rights in advancing climate and environmental justice include: Angela P. Harris, 'Vulnerability and Power in the Age of the Anthropocene,' (2015) 6(1) *Washington and Lee Journal of Energy, Climate & Environment* 98-161; Anna Grear 'Human rights and the environment: a tale of ambivalence and hope' in Douglas Fisher (ed), *Research Handbook on Fundamental Concepts of Environmental Law* (Edward Elgar Publishing, 2016) 146-167; Sam Adelman, 'A legal paradigm shift towards climate justice in the Anthropocene' (2021) 11(1) *Oñati Socio-Legal Series* 44–68.

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The article brings together concepts of transformative adaptation, substantive equality and climate justice to frame an approach to the law dealing with climate change that draws on discrimination law. The article recommends that 1) human rights and discrimination law experts give greater attention to the impacts of climate change on inequality in using existing law and proposing development of the law to support climate adaptation and mitigation; and that 2) those working on climate-related matters consider how discrimination-based claims might strengthen their arguments. While these recommendations are not limited to Australia, the article draws on the example of access to a public aquatic facility in the regional New South Wales town of Moree to consider how discrimination law might support transformative, equitable adaptation in pursuit of climate justice. Access to the pool in Moree has been restricted for those who find it difficult to pay the high entry fees, including many Aboriginal residents of the town. The pool, an important symbol of the struggle against segregation in Australia, is now seen as a site of racial and economic exclusion in an area of the country that is facing extreme climate warming, and where facilities to escape the heat will be needed more than ever. Discrimination law, as illustrated through this example, may offer some possibilities for addressing the interlinked harms of inequality and climate injustice.

II CLIMATE CHANGE AND INEQUALITY

Increasing temperatures caused by climate change are having, and will increasingly have, a significant impact on human and non-human life and health.[11] Climate change and the urban heat island effect are together threatening the sustainability of urban settlements around the world and most harshly impacting the urban poor.[12] Heatwaves have 'caused more loss of life than any other natural hazard in Australia over the past 100 years'.[13] Temperatures here have risen in the last century with the hottest 10 years occurring since 2005.[14] Temperature rises have recognised health dangers for people, particularly vulnerable groups including the elderly, children, certain types of workers and people with existing health problems.[15] Social disadvantage increases exposure to climate risks with a growing recognition of the links between poverty and climate change.[16]

Research and discussion of within-country climate effects have moved from a focus on the impacts of climate change on nature to its human impact, with an emphasis on poverty and livelihood, to a more recent consideration of its impact on social inequalities.[17] According to Islam and Winkel, the relationship between climate change and social inequality is 'characterized by a vicious cycle, whereby *initial* inequality makes disadvantaged groups suffer *disproportionately* from the adverse effects of

[11] Intergovernmental Panel on Climate Change, 'Climate Change 2021: The Physical Science Basis' in Valérie Masson-Delmotte et al (eds), *Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2021).
[12] Cascade Tuholske, Kelly Caylor, Chris Funk, Andrew Verdin, Stuart Sweeney, Kathryn Grace, Pete Peterson, Tom Evans, 'Global urban population exposure to extreme heat' (Oct 2021) 118 (41) *Proceedings of the National Academy of Sciences*, 1.
[13] Department of Agriculture, Water and the Environment, *National Climate Resilience and Adaptation Strategy* (2015) <https://webarchive.nla.gov.au/awa/20191108101148/https://www.environment.gov.au/climate-change/adaptation/publications/national-climate-resilience-and-adaptation-strategy > 58.
[14] Commonwealth Scientific and Industrial Research Organisation, 'Australia's changing climate,' *State of the Climate Report 2018* (Webpage, 2018) <https://www.csiro.au/en/research/environmental-impacts/climate-change/state-of-the-climate/previous/state-of-the-climate-2018/australias-changing-climate>.
[15] Department of Agriculture, Water and the Environment (n12) 59; for a global study on over 65 year olds see Jonathan Chambers, 'Global and cross-country analysis of exposure of vulnerable populations to heatwaves from 1980 to 2018' (2020) 163 *Climatic Change* 539–558.
[16] Stephane Hallegatte, Marianne Fay, and Edward Barbier, 'Poverty and climate change: introduction' (2018) 23 *Environment and Development Economics* 217–233.
[17] S. Nazrul Islam and John Winkel, 'Climate Change and Social Inequality' (Working Paper No. 152, ST/ESA/2017/DWP/152, UN Department of Economic and Social Affairs, October 2017) 1.

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climate change, resulting in greater *subsequent* inequality'.[18] Inequality has three main impacts: 1) It increases the *exposure* of already disadvantaged social groups to 'climate hazards'; 2) It affects their *susceptibility* to damages caused by climate hazards; and; 3) It decreases their relative *ability* to cope with and recover from these damages.[19] All of these deepen income and asset inequality (physical, financial, human, and social). While the authors focus on economic measures of inequality they also recognise that inequality is multidimensional (political, economic and status-based).[20]

Biological characteristics, such as age, determine the nature and level of climate change impacts which interact with social characteristics such as economic disadvantage, meaning older people who are less able to afford to live in cooler parts of a city or pay for air conditioning may be more vulnerable to harms. Similarly, many people with underlying health conditions that expose them to greater risks from heatwaves may also be members of disadvantaged communities, since health status is often linked, for example, to income and race.[21] This inequality-informed understanding of the impacts of climate change must shape mitigation and adaptation responses. The article now centres on climate adaptation, equality and human rights, however equality and discrimination law may be as important, in relation to mitigation measures; and adaptation and mitigation are, in many respects, closely interrelated.[22]

III CLIMATE ADAPTATION AND EQUALITY

Adaptation to existing and future impacts of climate change cannot be approached as a purely technical or neutral matter. The Paris Climate Agreement requires States Parties to acknowledge that:[23]

> … adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems, with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions, where appropriate.

Clark and Mitchell show that adaptation has been incorrectly conceived as 'adjustment' to a foreseeable climate future through 'climate-proofing'.[24] They note the arguments that this is unrealistic given the range of unpredictable climate scenarios and the human element including 'culture, values and community' in response to adaptation measures.[25] Instead, adaptation must be understood as a process - not towards an end-state but towards building adaptive capacity.[26] They stress that an incremental or adjustment approach can lead to technocratic, top-down and inappropriate plans further reinforcing inequalities of power and resources.[27] Clark and Mitchell give an example of a maladaptive approach where public housing is retrofitted with air conditioning, leading to cost burdens on residents and further emissions, instead of improving insulation or rebuilding inadequate housing.[28] This illustrates that transforming housing policy with climate in mind and the views and rights of residents at the forefront

[18] Ibid 2.
[19] Ibid 6.
[20] Ibid 2.
[21] World Health Organisation, *Closing the gap in a generation: health equity through action on the social determinants of health* (Final Report of the Commission on Social Determinants of Health, 2008).
[22] Paris Climate Agreement (n 3) art 7(4).
[23] Paris Climate Agreement (n 3) art 7(5).
[24] Cristy Clark and Paul Mitchell, 'Avoiding climate Apartheid: Climate Justice as a Necessary Condition for Equitable Transformational Adaptation' in Ronert Brears (ed), *The Palgrave Handbook of Climate Resilient Societies* (Palgrave Macmillan, 2020) 9.
[25] Ibid.
[26] Ibid 10.
[27] Ibid.
[28] Ibid 13.

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will lead to more effective and equitable adaptation. If the 'implicit aim' of adaptation is to 'protect the status quo against the projected impacts of climate change', then existing social, economic and political inequalities will remain unaltered.[29] Not only is this approach unlikely to succeed but it will reinforce climate injustice.[30] There is a growing recognition that 'transformational adaptation', including far-reaching structural changes and new forms of participation, is now required.[31] The Intergovernmental Panel on Climate Change (IPCC) in 2018 defined transformational adaptation as:[32]

> actions aiming at adapting to climate change resulting in significant changes in structure or function that go beyond adjusting existing practices, including approaches that enable new ways of decision-making on adaptation.

Clark and Mitchell argue that transformational adaptation must incorporate a human rights approach to ensure climate justice. This approach informs the argument for centring equality in adapting to climate change.

The Australian federal government recognised that adaptation measures are needed to address climate-related impacts. In defining adaptation in its 2015 *National Climate Resilience and Adaptation Strategy* the government said: [33]

> Climate change adaptation helps individuals, communities, organisations and natural systems deal with those consequences of climate change that emissions reduction cannot help us avoid. Adaptation can involve gradual transformation with many small steps over time, or major transformation with rapid change.

While this statement did not commit the government to what it termed 'major transformation' it is significant that the strategy recognised that incremental adaptation may not be the only or best way of responding to climate change, and that transformation is needed. The government also recognised the link between disadvantage and adaptation in noting that: [34]

> Actions directly related to other developmental or economic goals, including alleviating poverty or supporting sustainable livelihoods, could also be effective in reducing the effects of climate change.

This statement, while important, could be stronger in directly linking adaption to broader social and economic transformation. The updated *National Climate Resilience and Adaptation Strategy 2021-2025* remains vague in this regard but does recognise that adaptation 'must be inclusive and account for the underlying factors that contribute to vulnerability' and says the government's 'consideration of adaptation issues will seek to improve equality and fairness for vulnerable communities'.[35]

If government is to orient its adaptation approach towards climate justice in line with the Paris Agreement this requires a commitment to human rights. The detailed development of the international human rights framework on climate change still has some way to go, however the centrality of equality

[29] Ibid 11-12.
[30] Ibid 12.
[31] Ibid 14.
[32] See Intergovernmental Panel on Climate Change, *Global warming of 1.5°C* (Report, 2018) 322 for discussion on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty.
[33] Department of Agriculture, Water and the Environment (n13) 15.
[34] Ibid.
[35] Department of Agriculture, Water and the Environment, *National Climate Resilience and Adaptation Strategy 2021-2025* (2021) < https://www.awe.gov.au/science-research/climate-change/adaptation/strategy/ncras-2021-25 >, 43.

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to the project of transformational adaption is clear. The joint statement on climate change and human rights prepared by five UN human rights treaty bodies stressed that:[36]

> When reducing emissions and adapting to climate impacts, States must seek to address all forms of discrimination and inequality, including advancing substantive gender equality, protecting the rights of indigenous peoples and of persons with disabilities, and taking into consideration the best interests of the child.

One of these treaty bodies, the Committee on the Elimination of Discrimination against Women, in its General Recommendation 37, elaborated:[37]

> Any mitigation or adaptation measures should be designed and implemented in accordance with the human rights principles of substantive equality and non-discrimination, participation and empowerment, accountability and access to justice, transparency and the rule of law.

This human rights-based approach, with its emphasis on substantive equality that requires far reaching structural change, is intermeshed with transformative understandings of adaptation. Equality advocates and scholars have persistently promoted the idea of substantive equality within the international and domestic human rights frameworks.[38] This emerged from a critique of more limited understandings of equality that provide formal and superficial measures that fail to unseat the deep roots of complex inequality. Various UN treaty bodies have acknowledged this critical concern and adopted the idea of substantive equality. The Committee on the Rights of Persons with Disabilities, in its General Comment 6, using the term 'inclusive equality', explained the need for a multidimensional understanding of equality as follows:[39]

> It embraces a substantive model of equality and extends and elaborates on the content of equality in: (a) a fair redistributive dimension to address socioeconomic disadvantages; (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and (d) an accommodating dimension to make space for difference as a matter of human dignity.

The need for a form of equality that is transformative in requiring deep structural social change was recognised by the Committee on the Elimination of Discrimination against Women, in its General Recommendation 25, which noted, in relation to inequality between men and women, that:[40]

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[36] Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child, Committee on the Rights of Persons with Disabilities, (n 7) para 4. For a discussion of the value of the human rights framework and the particular role of social rights see, Siobhán McInerney-Lankford, 'Climate change and social rights: perspectives on legal obligations' in Christina Binder, Jane Hofbauer, and Flávia Piovesan (eds), *Research handbook on international law and social rights* (Edward Elgar Publishing, 2020) 495-518.

[37] CEDAW Committee, *General Recommendation No. 37* (n 7) para 14.

[38] See, eg, Colleen Sheppard, *Inclusive Equality - The Relational Dimensions of Systemic Discrimination in Canada* (McGill-Queen's University Press, 2010); Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011); Catherine Albertyn, 'Substantive equality and transformation in South Africa' (2007) 23(2) *South African Journal on Human Rights* 253; Catherine Albertyn and Beth Goldblatt, 'Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* 248.

[39] The Committee on the Rights of Persons with Disabilities, *General comment No. 6 (2018) on equality and non-discrimination*, 19th sess, UN Doc CRPD/C/GC/6 (26 April 2018) para 11.

[40] UN Committee on the Elimination of Discrimination Against Women, *General recommendation No. 25, on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 30th sess, UN Doc A/59/38 (2004) annex I para 10.

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> The position of women will not be improved as long as the underlying causes of discrimination against women, and of their inequality, are not effectively addressed. The lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.

This understanding of equality that is transformative, in requiring profound social, political and economic reshaping of our world is consistent with, and central to, the idea of transformational adaptation in pursuit of climate justice. It is clear that without altering the fundamental underpinnings of our economies, ways of living, and structures of power and participation our response to climate change will fall short of what is necessary and just.

This human rights approach to transformational adaptation should inform government responses to climate change. It should also shape civil society actions aimed at achieving climate justice, including through the courts.

IV CLIMATE LITIGATION

The Australian government has a poor record in relation to international efforts to address climate change and is one of the countries already worst effected by climate change and disasters associated with it.[41] In response to this, climate advocates, trying to use all available strategies, have become increasing active in climate change litigation,[42] the second most active in the world.[43] This is despite the limited environmental rights framework and the constraints on asserting human rights through the courts.[44] Court challenges have involved many fields of law including constitutional law, administrative law, corporations and consumer law, and tort law as demonstrated in the recent significant decision in *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560 where the Federal Court found that the government owed a duty of care to children in relation to climate change.[45] There is also a novel class action pending against government failure to disclose climate risks associated with sovereign bonds.[46] The recent decision in *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92 saw the court

[41] Kate Crowley, 'Fighting the future: The politics of climate policy failure in Australia (2015–2020)' (2021) 12(5) *Wiley Interdisciplinary Reviews Climate Change*. This was dismally reinforced at the recent Conference of the Parties meeting in Glasgow: Robyn Eckersley, ''The Australian way': how Morrison trashed brand Australia at COP26' *The Conversation*, 12 November 2021 < https://theconversation.com/the-australian-way-how-morrison-trashed-brand-australia-at-cop26-171670 >

[42] Jacqueline Peel, Hari Osofsky and Anita Foerster, 'Shaping the 'next generation' of climate change litigation in Australia' (2017) 41(2) *Melbourne University Law Review* 793-844; Laura Schuijers and Margaret Young, 'Climate Change Litigation in Australia: Law and Practice in the Sunburnt Country ' in Ivano Alogna, Christine Bakker, and Jean-Pierre Gauci (eds) *Climate Change Litigation: Global Perspectives* (BRILL Pulishing, forthcoming). Also note a complaint by a group of eight Torres Strait Islanders against Australia for failing to address climate change to the Human Rights Committee in terms of the International Covenant on Civil and Political Rights: Marian Faa, 'Torres Strait 8 could set 'global precedent' with United Nations human rights fight linked to climate change,' *ABC News* (Queensland, 30 September2020) <https://www.abc.net.au/news/2020-09-30/torres-strait-islanders-fight-government-over-climate-change/12714644>.

[43] Siri Gloppen and Catalina Vallejo, 'The climate crisis: litigation and economic, social and cultural rights' in Jackie Dugard, Bruce Porter and Daniella Ikawa (eds), *Research handbook on economic, social and cultural rights as human rights* (Edward Elgar Publishing, 2020) 404.

[44] Rachel Pepper and Harry Hobbs, 'The Environment is All Rights: Human Rights, Constitutional Rights and Environmental Rights' (2020) 44(2) *Melbourne University Law Review* 634.

[45] *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* (2021) ALR 560. The Minister is appealing the decision.

[46] *Kathleen O'Donnell v Commonwealth of Australia & Ors*, Federal Court File No: VID482/2020, 22 July 2020; discussed in Schuijers and Young (n40) 24-5.

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order a NSW government agency to address greenhouse gas emissions more effectively.[47] While the three human rights Acts in Australian states and territories are being, or are likely to be applied, in human rights challenges related to climate change,[48] it seems that discrimination law (federal as well as state and territory) has not yet been used in climate related litigation.[49]

This article suggests that discrimination law should be considered in climate matters and that climate issues should be highlighted in discrimination cases in pursuit of climate justice. It recognises that discrimination law, at least as it is currently framed and interpreted in Australia, is limited in its capacity to produce the transformative equality outlined above. It is nevertheless a potential mechanism for legal challenge that can encourage engagement with ideas of equality, justice, and climate adaptation and mitigation. The article now discusses, by way of illustration, the situation of access to swimming facilities in the New South Wales town of Moree to think about how discrimination law might be used, as one form of strategic recourse to the law, to achieve rights-informed, transformational climate adaptation measures.

V DISCRIMINATION LAW, CLIMATE ADAPTATION AND THE EXAMPLE OF THE MOREE SWIMMING POOL

A Public swimming pools, climate adaptation and inequality of access

Public swimming pools are an important feature of community life in Australia providing opportunities for recreation, health and exercise, swim safety education, and community.[50] While pools, ponds and newer water-based technologies are used in cities to reduce ambient temperatures,[51] public aquatic facilities have been identified as valuable in urban resilience to heatwaves and climate warming.[52] Public pools are identified as 'cool spots' that provide 'respite for the community during heat waves' alongside other facilities such as libraries and community centres.[53] Pilot projects to extend the opening hours of pools have been considered in heat waves planning.[54] Western Sydney, which suffers greater economic disadvantage than other parts of the city, is hotter and more vulnerable to increasing

[47] *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92.
[48] Justine Bell-James and Briana Collins, 'Queensland's Human Rights Act: A New Frontier for Australian Climate Change Litigation?' (2020) 43(1) *UNSWLJ* 3.
[49] The author would be pleased to be corrected on this point. For a discussion of the possibilities of age discrimination law in climate matters see Refia Kaya 'Environmental vulnerability, age and the promises of anti-age discrimination law' (2019) 28(2) *Review of European, comparative and international environmental law* 162; Refia Kaya, 'On Challenging the Disparate Impacts of Climate Change through European Discrimination Law,' *Blogdroiteuropéen* (Blog Post, 22 January 2020) <https://blogdroiteuropeen.com/2020/01/22/on-challenging-the-disparate-impacts-of-climate-change-through-european-discrimination-law-by-refia-kaya/>.
[50] PwC and Royal Life Saving Australia, *The Social, Health and Economic Value of the Australian National Aquatic Industry* (Report, July 2021).
[51] M. Santamouris, L. Ding, F. Fiorito, P. Oldfield, Paul Osmond, R. Paolini, D. Prasad, A. Synnefa, 'Passive and active cooling for the outdoor built environment – Analysis and assessment of the cooling potential of mitigation technologies using performance data from 220 large scale projects', (2017) 154 *Solar Energy*, 14, 15-17.
[52] NSW Office of Environment and Heritage, *Towards a Resilient Sydney - Urban Adaptation Research Synthesis* (Report, December 2014), 21.
[53] Hunter & Central Coast regional Environmental Management Strategy, *Heatwave Planning Template for Lake Macquarie and the Central Coast* (Report, 2014) 27.
[54] Victorian Government Department of Human Services, *Heatwave Planning Guide: Development of heatwave plans in local councils in Victoria* (Report, 2009) <https://www2.health.vic.gov.au/about/publications/policiesandguidelines/Heatwave-Planning-Guide-Development-of-heatwave-plans-in-local-councils-in-Victoria>.

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temperatures and heatwaves.[55] A study on adaptive responses to increasing heat of socially vulnerable urban communities in Western Sydney gave the example of a local council providing shuttle buses to 'connect different suburbs to key cooling stations, including the swimming pool and museums'.[56] The study noted that public pools, like libraries, were identified as 'cooling spots' by members of low income communities.[57] It found however, that local council actions such as providing free access to pools to vulnerable populations during heatwaves reflected an inadequate all-of-government approach to heat adaptation; and that more systemic and distributive measures including urban greening, improved public housing, energy efficiency and other forms of social protection must complement local community-oriented responses that offer 'cooling centres or refuges'.[58] The above examples suggest that due to increasing heat in Australia, public swimming facilities are a potential local resource in climate adaptation, while certainly having to be accompanied by more far-reaching measures to adapt the urban environment. If these facilities are to be part of transformational adaptation they must be fairly and appropriately provided to, and shared by, communities in line with an equality-oriented, participatory approach.

Public swimming pools are generally well distributed across Australia (although certain areas are less well served such as the Northern Territory and Tasmania).[59] In remote and regional areas these facilities provide important social and health benefits, often in very hot locations.[60] Due to lower population density in smaller towns, local councils, government and private industry often need to provide additional funding to meet the operating costs of public pools.[61] In some cases high operating costs may affect user fees rendering some facilities out of the reach of poorer families with impacts on their health and safety. Research on child drowning, points to unequal access to public swimming pools and seasonal facilities (as well as limited instruction and the cost of lessons) as contributing factors.[62] The worst impacted children are those in regional and remote communities and those from low socio-economic backgrounds,[63] while Indigenous children are at greater risk of drowning than non-Indigenous children.[64] Certain health and well-being benefits of swimming pools for remote Aboriginal communities suggest that greater provision of pools might contribute to the 'Closing the Gap' strategy to address Indigenous disadvantage.[65] Migrant women who participated in free swimming classes said they would value further opportunities to access pools and lessons but cost of entry was a barrier.[66] These examples suggest the need for improved provision and equality-oriented measures to increase access to pools for a range of disadvantaged populations for social and health reasons. Addressing

[55] Khan, Hassan S., Riccardo Paolini, Mattheos Santamouris, and Peter Caccetta, 'Exploring the Synergies between Urban Overheating and Heatwaves (HWs) in Western Sydney' (2020) 13(2) *Energies,* 470.
[56] Christos Zografos, Isabelle Anguelovski and Maria Grigorova, 'When exposure to climate change is not enough: Exploring heatwave adaptive capacity of a multi-ethnic, low-income urban community in Australia' (2016) 17 *Urban Climate* 248, 257.
[57] Ibid 260.
[58] Ibid 262.
[59] PwC and Royal Life Saving Australia (n 50) 12.
[60] Ibid, 15.
[61] Ibid.
[62] Amy Peden and Richard Franklin, 'Exploring the Impact of Remoteness and Socio-Economic Status on Child and Adolescent Injury-Related Mortality in Australia' (2020) 8(1) *Children* 5, 12-13.
[63] Ibid 13.
[64] Belinda Wallis, Kerrianne Watt, Richard Franklin, Roy Kimble, 'Drowning in Aboriginal and Torres Strait Islander children and adolescents in Queensland (Australia)' (2015) 15(1) *BMC Public Health* 795.
[65] David Hendrickx, Anna Stephen, Deborah Lehmann, Desiree Silva, Marleen Boelaert, Jonathan Carapetis, and Roz Walker, 'A systematic review of the evidence that swimming pools improve health and wellbeing in remote Aboriginal communities in Australia' (2016) 40(1) *Australia and New Zealand Journal of Public Health* 30.
[66] Stacey Willcox-Pidgeon; Richard Franklin; Sue Devine; Peter Leggat; Justin Scarr; James Smith, 'Reducing inequities among adult female migrants at higher risk for drowning in Australia: The value of swimming and water safety programs' (2021) 32(S1) *Health Promotion Journal of Australia* 49, 57.

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climate injustice through greater access to public pools for vulnerable groups can combine the positive social and health benefits discussed here with beneficial adaptation measures.

Unequal geographic and economic access to public swimming pools has particular meaning for Aboriginal Australians due to the history of segregation of these facilities.[67] Public pools, which replicate natural swimming sites, should be viewed against the loss of access to water following colonisation and destruction of water sources due to mining, agriculture, dams and other causes of environmental damage.[68] Any contemporary efforts to address historical disadvantage and injustice in relation to public aquatic facilities should consider the history, meaning, and knowledge of water resources for Indigenous Australians.[69] Related to this history of harm to water sources and the people who relied on them, contemporary efforts to rethink the nature of public pools should consider their environmental impact in terms of water, chemical and energy use,[70] alongside their possible role in climate adaptation and reparation for historical injustices.

B The Moree Baths

Moree is an inland town in Northern New South Wales with a population, counted in the 2016 Census, of 9,311 of which 21.5 per cent is Aboriginal and/or Torres Strait Islander, much higher than the national figure of 2.8 per cent.[71] Moree sits on the lands of the Gomeroi people with the continuing presence of many strong Aboriginal elders, including environmental activist Polly Cutmore.[72] The Aboriginal community of the town has a lower average household income ($838 per week) than the overall average household income ($1,270 per week), more people per household (2.8 instead of 2.4) and a larger proportion of young people (the median age is 25 as opposed to 38 for the whole town).[73] There is a

[67] Denis Byrne, 'Nervous Landscapes: Race and Space in Australia' in Tracey Banivanua Mar and Penelope Edmonds (eds), *Making Settler Colonial Space* (Palgrave Macmillan, 2010) 121. Racial segregation of public swimming pools occurred elsewhere in the world: Jeff Wiltse, *Contested waters : A social history of swimming pools in America* (The University of North Carolina Press, 2007); Ashwin Desai and Ahmed Veriava, 'Creepy crawlies, portapools and the dam(n)s of swimming transformation' in Ashwin Desai (ed), *The Race to Transform Sport in post-apartheid South Africa* (HSRC Press, 2010).

[68] In this sense pools can be understood as a symbol of colonial and/or capitalist enclosure of common space: Silvia Federici and George Caffentzis, 'Commons against and beyond Capitalism' in Silvia Federici, *Re-enchanting the World : Feminism and the Politics of the Commons* (PM Press, 2018) 85, 87-8; Cristy Clark and John Page, 'Of Protest, the Commons, and Customary Public Rights: An Ancient Tale of the Lawful Forest' (2021) 42(1) *UNSW Law Journal* 26. In some ways, the swimming pool is also symbolic of the broader problems of access to clean and affordable water facing Indigenous and racialized communities all over the world. In the town of Walgett, close to Moree, water shortages have been condemned by the local Aboriginal community: Caitlin Furlong and Jen McCutcheon, 'Walgett in western NSW running out of food, Indigenous bodies tell inquiry', *ABC News* (Western Plains, 12 August 2020) <https://www.abc.net.au/news/2020-08-12/water-coronavirus-fire-causes-of-walgett-food-shortage/12546668>. Similar crises have shaped battles over water elsewhere in the world, for example in the US city of Flint, Michigan and in Soweto, South Africa: Cristy Clark, 'Water justice struggles as a process of commoning' (2019) 54(1) *Community Development Journal* 80.

[69] 'Water sites have been sites of segregation but also of resistance, sites of massacres and exclusion but also of learning and social regeneration': Heather Goodall, 'Riding the Tide: Indigenous Knowledge, History and Water in a Changing Australia' (2008) 14(3) *Environment and History* 355, 374.

[70] This is being considered in contemporary renovation of older pools in Australia, for example by the Wollongong Council: Wollongong City Council, *The Future Of Our Pools Strategy 2014-2024* (Report, 2014) 13.

[71] Australian Bureau of Statistics, *2016 Census QuickStats* (23 October 2017) <https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/SSC12722>. See also Rachel Olding, 'The towns we left behind,' *The Sydney Morning Herald* (6 September 2014) <https://www.smh.com.au/national/nsw/the-towns-we-left-behind-20140905-10cqs2.html>.

[72] Jessica Hromas and Aiesha Saunders, 'Moree elders: proud, strong and always resilient,' *The Guardian* (14 February 2021) <https://www.theguardian.com/australia-news/2021/feb/14/moree-elders-proud-strong-and-always-resilient>.

[73] Australian Bureau of Statistics (n 71).

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geographic divide in the town with most Aboriginal people living on the south side of the Mehi river, some in poorly maintained public housing, while the north side boasts more affluent residences.

The word 'Moree' is thought to mean 'spring or water-hole' in the Aboriginal language of the area.[74] It is a tourist destination due to its artesian spa baths which are fed, since 1895, by hot springs from the area and promoted as having healing or health-producing qualities.[75] The spa baths are located within the Moree Artesian Aquatic Centre (MAAC), which also houses swimming pools (Olympic, indoor training pool, and splash pool for small children) and a gym, as well as a waterpark. The facility is owned by the Moree Council and its management costs are underwritten by the Council.[76] The MAAC has faced some challenges in the past decade due to structural problems with its Olympic pool and the whole facility is currently closed for a year while repairs are undertaken.[77]

Historically, the Moree baths were a racially segregated facility entrenched in a municipal council ordinance from 1955 that 'prohibited Aboriginal use of council facilities including the swimming pool'.[78] Aboriginal people, born in a separate ward of the hospital, were housed in a fenced-off mission which contained its own mission pool. Aboriginal elder, Polly Cutmore, recalls that 'sometimes they did wash us kids down with DDT before we could swim in the pool. I thought they were trying to turn my skin white'.[79] The Moree Baths became a symbol of Aboriginal protest and resistance in 1965 with the Freedom Ride, led by Charles Perkins, an Aboriginal activist, who travelled with other students on a bus to towns in regional New South Wales to publicise and oppose the racial discrimination experienced by Aboriginal people.[80] In Moree, they protested outside the Council Chambers before attempting to enter the baths with a group of Aboriginal children, and were met with hostility and violence.[81] They had to return to the town when the mayor backed down on his undertaking to open the baths, and were ultimately successful in changing the above policy.[82] The pool was heritage listed in 2013 to recognise its role in highlighting Aboriginal inequality through the Freedom Ride which

[74] W. W. Thorpe and Australian Museum, *List of New South Wales Aboriginal place names and their meanings* (Webpage, 1938) 11 <http://nla.gov.au/nla.obj-52785726>.
[75] AussieTowns, *Moree, NSW* (Webpage) <https://www.aussietowns.com.au/town/moree-nsw>. Also see the Moree Artesian Aquatic Centre description of the history of the water feeding the baths and the centrality of the water source to Aboriginal survival for 40,000 years: Moree Artesian Aquatic Centre, *Artesian Water What makes the water so special?* (Webpage) <https://www.maacltd.com/artesian-water.html>.
[76] In July 2021 the management company that had run the pool for some years was put into liquidation (a 'solvent winding up') and the facility closed while structural repairs take place with an assurance it will reopen in 12 months: Moree Artesian Aquatic Centre, *Brighter future for Moree Artesian Aquatic Centre following closure* (Webpage) <https://www.maacltd.com/>. Feedback expressed online points to significant unhappiness in the town due to the sudden closure of the facility: <https://www.facebook.com/maacltd>.
[77] The Olympic pool, redeveloped in 2012, was decommissioned following detection of structural flaws with health and safety implications, leading to legal action by the Council against the company that redeveloped it. In 2020 the pool was demolished and the Council began the procurement and consultation process for the building of a new pool: Sophie Harris, 'Moree Artesian Aquatic Centre Olympic pool set for reconstruction' *Moree Champion* 3 July 2020 https://www.moreechampion.com.au/story/6817012/maac-olympic-pool-all-set-for-reconstruction/.
[78] Penelope Edmonds, 'Unofficial apartheid, convention and country towns: reflections on Australian history and the New South Wales Freedom Rides of 1965' (2012) 15(2) *Postcolonial Studies* 167, 185.
[79] Hromas & Saunders (n 72).
[80] Edmonds (n 78) 170-171.
[81] Department of Agriculture*, Water and the Environment 'National Heritage Places - Moree Baths and Swimming Pool Complex'* (Webpage) <https://www.environment.gov.au/heritage/places/national/moree-baths>.
[82] Charles Perkins, *A Bastard Like Me* (Ure Smith, 1975) 89-91; Lorena Allam, 'The infamous NSW pool Indigenous people say is pricing them out of its waters,' *The Guardian* (21 February 2020) <https://www.theguardian.com/australia-news/2020/feb/21/moree-australian-swimming-pool-pricing-indigenous-people-from-its-waters>.

Electronic copy available at: https://ssrn.com/abstract=4050181

contributed to broader social and then constitutional change to remove discrimination against Aboriginal people following the 1967 referendum.[83]

Despite this important history, the Moree Baths made the news in early 2020, 55 years after the Freedom Ride. In a meticulous investigative podcast and article, Indigenous Affairs Editor for *The Guardian* Lorena Allam highlighted the contemporary experience of exclusion from the Moree Aquatic Centre by the Aboriginal population of Moree.[84] Her interviewees explained that the entry fee of $9 for an adult and $6.80 for a child, the second highest for a public pool in the State, made it out of the reach of many members of the Aboriginal community, many of whom experience economic disadvantage. This is particularly so for carers of a number of children such as grandmothers and large family groups where an outing to the pool becomes prohibitively expensive.[85] In another article by Jessica Hromas and Aiesha Saunders for *The Guardian* Edna Craigie, a Moree elder, noted that:[86]

> We were always barred from places, we couldn't go to the pool and we would ride our bikes down to the creek next to the mission on a Sunday. After Charles Perkins and the Freedom Rides came through, we can swim in the pool now, but you can't afford it, it is around $50 for us to take the grannies for a day out.

This left one of Allam's interviewees feeling that despite the Freedom Ride 'underneath it hasn't really changed'.[87] Robert Milliken, in a report on *Inside Story*, conducted further interviews with Aboriginal members of the town.[88] One of these, Gomeroi elder Judy Duncan, noted that: 'In the sixties you were excluded if you were black. Now you're excluded unless you're rich.' Milliken wrote that 'Some reckon the two forms of exclusion are connected'. He quoted Lyall Munro saying: 'The attitude lingers from the local government by-law in the 1950s that allowed segregation in this town. Nothing has changed for equality and liberty in Moree. It's as though the Freedom Ride never happened'. Interviewees also talked about the surveillance and sanctioning of Aboriginal children, some of whom have been banned from the pool. In an interview with Milliken the then Mayor of the Moree Plains Shire, Katrina Humphries, defended the price based on the tourist revenue of the baths, the cost of maintaining the three pools in the Shire, and the relatively small fee which she said was 'cheaper than a packet of cigarettes'.[89]

Allam's report also stressed the environmental and climate dimensions of the social inequality in Moree. The town is extremely hot in summer with a mean maximum January temperature of 34.3 degrees.[90] Moree has experienced significant drought in the past decade and the summer of 2019/20 saw unprecedented bushfires, linked to climate change, burn across Australia. This was followed by a devastating flood in March 2021 that cut the town in half. Allam's interviews with local community members including elder Judy Duncan and Chris Binge, CEO of Moree sports health arts and education academy (SHAE), point to these impacts: [91]

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[83] Department of Agriculture, Water and the Environment (n 81).
[84] Allam (n 82); Priced out of the pool: is this modern day segregation?,' *The Guardian Full Story Podcast* (Joe Koning, Ellen Leabeater, and Miles Martignoni, 21 February 2021 <https://www.theguardian.com/australia-news/audio/2020/feb/21/priced-out-of-the-pool-is-this-modern-day-segregation>.
[85] The pool entry fee does not include access to the spa or gym and patrons must pay a further fee of $4 to use the water slide: Moree Artesian Aquatic Centre, *Moree Artesian Aquatic Centre Fees and Charges* (Webpage) <https://www.maacltd.com/fees---charges.html>.
[86] Hromas and Saunders (n 72).
[87] Allam (n 82).
[88] Robert Milliken, 'Finding the Moree way,' *Inside Story* (11 June 2021) <https://insidestory.org.au/finding-the-moree-way/>.
[89] Ibid.
[90] Bureau of Meteorology, *Climate Statistics for Australian Locations* (Webpage) <http://www.bom.gov.au/climate/averages/tables/cw_053115.shtml>.
[91] Allam (n 82).

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> The Gomeroi woman Judy Duncan says kids who can't afford the pool end up swimming in the river. "The water in the river stinks and it's unhealthy," Duncan says. "The water runs off the land. That's agricultural land so there are pesticides and sprays that flow in the river." Binge adds: "A few weeks ago, before the rain, that river was black. I was warning every kid, do not swim in that." Binge says kids "become creative" in finding ways to cool off. "Well, I'm saying creative, other people would say it's misbehaviour. But if it's 39C at 9am in Moree and the council puts the sprinklers on in their parks," he explains, "then you're going to go play in them." Duncan says it's also common for kids to walk the streets at night "because it's the coolest part of the day". "People say, there's kids on the street at all hours. Well, the houses are hot. There's no air conditioning. In south Moree, these houses have been here for god knows how long. Housing has been disregarded."

This testimony highlights that children have no choice but to swim in a river that is polluted and dangerous when the weather is hot because the pool is inaccessible to them. While many wealthier residents would have access to private swimming pools on their properties or at hotels and clubs, less advantaged members of the community are dependent on natural or publicly-provided water resources. The combination of environmental degradation of water resources, unmanageable heat, poor physical infrastructure and lack of access to 'cool spots' like the public pool bring into focus the relationship between race, economic inequality and climate injustice in Moree.[92] The Mayor told *The Guardian* that a NSW government drought-related grant was used to subsidise summer holiday pool activities for young people.[93] This points to some acknowledgment by the Council that climate-related hardship requires government resourcing; and that pools are a public space to cool down in extreme heat as well as a recreational facility not normally available to disadvantaged children. However, the one-off grant did not address the ongoing issues of access and thus cannot be considered an adequate response.

The high price of entry to the aquatic centre has the effect of impairing the equal enjoyment of a public facility by people who are economically disadvantaged. That this disadvantage is disproportionately felt by people who are Aboriginal means that this is an issue of race inequality. The economic disadvantages experienced by Indigenous Australians are causally linked to the history of colonial violence and displacement, discrimination and the legacy of systemic racism and multi-generational harm. This history is also responsible for many Indigenous Australians having significantly poorer health outcomes than non-Indigenous Australians. Failure to ensure that members of this community have access to the Moree pool limits their capacity to manage the health and other impacts of heatwaves. As discussed, swimming pools are a site of escape from heat and can be an element of climate adaptation. Adaptation that is transformational must take account of human rights which requires an equality-oriented approach. The exclusion of Aboriginal community members of Moree from the aquatic facility can be understood as a form of race-based discrimination that overlaps with discrimination based on economic disadvantage, and that contributes to climate-related inequality. Situating this discrimination in the context of climate change can result in legal responses that both advance equality and climate justice. The article now considers how the situation in Moree might illustrate the possible uses of discrimination law in advancing transformational adaptation.

VI DISCRIMINATION IN ACCESS TO THE POOL

[92] At the same time, the Council has partnered with the Moree Water Ski Club to build a water park 10kms outside of the town drawing on the discharged water from the MAAC's artesian pools:
Moree Water Park, *Moree Water Ski Club* (Webpage) <https://moreewaterskiclub.wordpress.com/>.
The club member fees allowing entry along with the need to own a boat and equipment put this out of reach of many in the town, creating another effectively segregated aquatic facility.

[93] Ibid. The grant was used to extend the operating hours of the waterslide however the price for this facility was increased to $5 on top of the entrance fee.

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Access to the pool does not directly discriminate against Aboriginal people as it did when segregation existed in the 1960s since no official policy or rule expressly prevents Aboriginal people from entering the facility. However, the high price of entry impacts unfairly against many Aboriginal members of the town who are disproportionately more economically disadvantaged than the majority of the non-indigenous townsfolk, as a result of historic and structural racism and social and economic exclusion. Discrimination law recognises that discrimination can be indirect where a seemingly neutral measure has a less favourable impact on a particular group that is seen as deserving of protection.[94] The focus is not on the intention of the maker of the measure but on the effect on the members of the disadvantaged group. Addressing indirect discrimination can result in substantive equality by acknowledging structural and historical barriers and striving for equal results rather than equal treatment.[95] While not always termed indirect discrimination, this concept forms part of Australian legislation although it is described and defined differently across the various federal, state and territory anti-discrimination laws.[96] Generally, an indirect discrimination claim involves the complainant proving disparate impact and the respondent arguing that the measure is nevertheless justifiable because it is reasonable in the circumstances. A discrimination complaint in Australia is first dealt with through mandatory conciliation and it is during this stage that the parties, in this case the local council and an individual complainant or members of a class, would have the opportunity to discuss the concerns about access to the pool. This could provide an opportunity for creative and community-informed solutions to be developed by the parties and might facilitate a discussion of the complex issues implicated here – the race discrimination concerns, the economic inequalities involved, and the environmental dimensions of the dispute that require adaptation to address climate vulnerability. Before considering the possible innovative solutions that could be generated through conciliation, the arguments that might form the basis for a discrimination complaint are broadly outlined.

The discrimination claim

The claim of indirect race-based discrimination (intersecting with socio-economic disadvantage) would challenge the high fees charged by the aquatic facility. The argument that the fees are not reasonable could be based on the size of the fees relative to similar facilities elsewhere in NSW. The complainants could show that the town's lack of other recreational facilities means that excluding less advantaged members of the community from the aquatic facility is unreasonable. The fact that some facilities, such as the public library, can be entered without charge to the community (and where membership is available at a much more reasonable rate)[97] could be used to suggest that the charging of high fees at the aquatic facility is not reasonable, and demonstrates flawed policy logic.[98] The historical reasons for Aboriginal disadvantage, in Moree and elsewhere in Australia, could be provided to explain the link

[94] For discussion of the origins of this concept and the way it operates in Australian law see Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2016) chapter 3; Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) chapter 3.

[95] Although it does not redress disadvantage or require institutional change so is not fully transformative: Fredman (n 38) 181-3. For comparative and conceptual examination of indirect discrimination see Hugh Collins & Tarunabh Khaitan (eds), *Foundations of indirect discrimination law* (Hart Publishing, 2018).

[96] Rees, Rice and Allen (n 94) chapter 3.

[97] The library service provider charges $25 for annual membership: Big Sky Libraries, *Fees & Chargers* (Webpage) <https://bsl.nsw.gov.au/fees-charges/>. For the list of council fees and charges see: Moree Plains Shire Council, *Fees & Charges 2021-2022* (Report, 24 June 2021) <https://www.mpsc.nsw.gov.au/hot-topics/docman/fees-and-charges/1896-fees-and-charges-2021-2022/file>. This list includes entry to pools in other towns in the Moree Shire where pool entry is considerably less than in Moree.

[98] There is limited case law in Australia on access to premises and facilities other than in relation to disability discrimination, and none that deals with high fees as a barrier to access, to the best of the author's knowledge.

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between race and poverty. This would support the argument that the impact of economic exclusion in this case is experienced as racial discrimination and is therefore not reasonable.

Further contextual factors including the racial history of the pool and its meaning to the community could be used to argue that the fees preventing most Aboriginal members of the town from accessing the facility are unreasonable in the circumstances. This unreasonableness is heightened since colonisation led to loss of land and spatial exclusion resulting in reliance on public spaces and facilities controlled by the Council. The climate and environmental evidence could be used to show that pollution of the river and drought mean there is nowhere else for people to swim and the lack of 'cool spots' in high temperatures increases the need for fairer access to the facility.[99] This contextual framing is a central feature of discrimination law and would contribute to exposing the links between race, economic and environmental disadvantage.

The complainants (Aboriginal adults and children residents of Moree) would need to show that they cannot comply with the requirements of entry to the facility because the entry fees are unaffordable for them. This would involve evidence of relative income and expenditure in Moree such as the average household income of Aboriginal residents of Moree and non-Aboriginal residents. Average household size would also be important to show that a relatively large number of people per household must survive on this income. The average accommodation, transport and food costs would assist to demonstrate the small amount of disposable household income left to individuals to spend on sport, recreation and entertainment. Household size would also inform this calculation since trips to the facility may involve a relatively large group of householders leading to greater expense in using the facility.[100] The climate-related evidence concerning the increasing temperature in the town and the inadequacy of the housing and unaffordable energy costs associated with cooling homes would go towards showing why many Aboriginal residents cannot afford the aquatic facility fees, but also why access is so necessary.

The discrimination arguments could be supported with reference to domestic and international human rights. In relation to race discrimination the International Convention on the Elimination of All Forms of Racial Discrimination is relevant here.[101] Article 5 of the Convention requires states to prohibit and eliminate racial discrimination and to guarantee equality before the law in relation to a number of rights that include, of particular relevance here, the following economic, social and cultural rights:[102]

> (iv) The right to public health, medical care, social security and social services;
> (v) The right to education and training;
> (vi) The right to equal participation in cultural activities;
> (f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks.

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[99] This is a similar conclusion to the one reached by the Michigan Civil Rights Commission in relation to the Flint water crisis that government actions were 'environmental racism': Michigan Civil Rights Commission, *The Flint Water Crisis: Systematic Racism Through the Lens of Flint* (Report, 2017) <https://www.michigan.gov/documents/mdcr/VFlintCrisisRep-F-Edited3-13-17_554317_7.pdf> 93. Thanks to Cristy Clark for alerting me to this comparison.

[100] Interestingly, access to Boomi bore baths, a pool elsewhere in the Shire, is charged at a family rate where family is defined as ' .. two (2) adults and all the children living at the one address'. This differs from the MAAC family rate which is for '2 adults & 3 children': Moree Artesian Aquatic Centre, *Moree Artesian Aquatic Centre - Fees & Charges Terms and Conditions – November 2013* (Webpage) <https://www.maacltd.com/fees---charges---terms---conditions.html>.

[101] *International Convention on the Elimination of All Forms of Racial Discrimination*, open for signatures 21 December 1965, [1975] ATS 40 (entered into force 4 January 1969) 195 ('ICERD'). The ICERD is also directly incorporated into Australia's federal race discrimination legislation, the *Racial Discrimination Act 1975 (Cth)*.

[102] Ibid, Article 5(e).

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Arguably, the equal right to access a public place such as Moree's aquatic centre is similar to a park since it is used for recreation and exercise. It might also be considered a cultural activity in the sense that public swimming is a regular feature of cultural life in Australia. Accessing the facility for swim lessons could be seen as a component of education and training while such lessons as well as exercise within the facility contribute to public health in preventing drowning and disease. Access to the pool also relates to the right to public health in so far as it provides access to swimming and cooling facilities during very hot temperatures. This access is necessitated by the loss of natural swimming spots effectively destroyed through colonisation and environmental degradation.

It could be argued that the high entry fees have the effect of impairing the enjoyment of these rights of the people unable to afford entry (primarily Aboriginal people) on an equal footing with others seeking entry (non-Aboriginal people). Non-Aboriginal members of the Moree community who are generally more economically advantaged are able to access the pool and its facilities rendering what is a public facility a largely racially segregated space. What appears to be a distinction on the basis of economic status is effectively a distinction on the basis of race since the economic and racial fault lines of the community are closely overlapping and intersecting. The Moree aquatic facility example highlights the situation where (permissible) distinctions on the basis of economic status may in fact be indirect discrimination on the basis of race, worsening the burden of climate change impacts on disadvantaged communities.

Conciliation - a route to community-oriented and climate adaptation solutions

The arguments outlined above inform the conciliation of the complaint. Conciliation could prove important in a situation such as the one in Moree where community members may have concerns about proceeding with a claim through the courts. Aboriginal communities are understandably wary of the courts because of their often bitter past and current experience with the justice system, including in relation to discrimination claims.[103] They may fear, justifiably, that conservative courts might prove unwilling to acknowledge structural inequalities in dealing with their claim.[104] They may also fear recriminations or the deepening of mistrust between the Council and the community. Such a claim, in highlighting economic disadvantage, may also evoke feelings of shame for a community proud of its resilience in the face of a brutal past. In addition, cases such as this require significant resourcing, effort and resilience on the part of those involved and their legal support.

The conciliation might provide a valuable opportunity for dialogue and greater understanding of the issues facing the town. The climate arguments raised in conjunction with the race issues may focus the discussion on a shared threat and the shared benefit to be gained from creative approaches to climate adaptation. The conciliation might include discussion of alternative approaches the Council could take to overcome the current discriminatory fees. These could involve: a) charging free or lower entry fees for all users of the facility; b) providing more generous concessions for children, families and pensioners; c) charging a higher rate for tourists and a lower rate for residents; d) introducing a special rate for people of Aboriginal heritage (as a special measure, allowed in terms of discrimination law to protect the needs of a disadvantaged group); or, e) building a more modest pool in the south of the town rather than undertaking expensive renovations to the MAAC.[105] The conciliation would require the

[103] Fiona Allison, 'A Limited Right to Equality: Evaluating the Effectiveness of Racial Discrimination Law for Indigenous Australians Through an Access to Justice Lens' (2013) 17(2) *Australian Indigenous Law Reporter* 3, 11; Fiona Allison, 'Cause for Hope or Despair? Evaluating Race Discrimination Law as an Access to Justice Mechanism for Aboriginal and Torres Strait Islander People' (PhD Thesis, University of Sydney, 2019).
[104] Larissa Behrendt, Chris Cunneen and Terri Libesman, *Aboriginal and Torres Strait islander legal relations* (Oxford University Press, 2nd ed, 2019).
[105] Hetti Perkins, daughter of the late Charles Perkins, writing about the National Centre for Indigenous Excellence (NCIE) pool in Redfern, Sydney, noted, 'A lot of my mob are a bit shy about going to a white fella

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complainants to acknowledge the costs to the Council of these alternatives while the Council would need to engage transparently around the policy and resourcing considerations involved in addressing the problem. The conciliation might lead to creative approaches that do not add too heavily to the cost burden such as staggered entry times for different groups, voluntary contributions by the community to staff the pool, or use of other facilities in the town like irrigation sprinklers for water play on hot days.

While the narrow issue of access to the aquatic facility might prompt this dialogue, more far-reaching solutions might result in ideas for transformational adaptation related to the health of the river, improvements to public housing and cool spaces for recreation in the town. Greater sharing of public facilities, including the historically significant Moree Baths of which the town is rightfully proud, might unite a community that needs to stand together in response to the further changes that climate warming is to bring.

The conciliation might also serve as a form of community consultation involving participatory approaches, drawing on Indigenous and local knowledge, as required by the Paris Agreement.[106] Adaptive urban development involving community participation can lead to more appropriate, equal and climate-positive solutions. Internationally, there is a growing move away from expert-led approaches to urban adaptation that have deepened inequality and injustice including through unequal distribution of natural and financial resources.[107] Valuing place-based knowledge and recognising alternative knowledge systems including Indigenous worldviews in formulating ecologically and culturally sensitive responses is shaping the approach of cities such as Barcelona.[108] The Aboriginal community of Moree should be key to the formulation of transformational adaptation responses that might involve altering existing use of the pool, building new recreational facilities that contribute to climate cooling and community resilience, and reclaiming polluted waterways. Using discrimination law to prompt such discussions could be an effective strategy in developing equality and rights-informed adaptation.

Limits of discrimination law

Australian discrimination law does not recognise economic status discrimination.[109] Other jurisdictions have been more willing to acknowledge the relationship between race and economic inequality. A recent South African Equality Court decision determined that poverty was a ground of discrimination in terms of South African anti-discrimination legislation.[110] In this case, the court found that the system of allocation of police personnel which resulted in disproportionately lower numbers of police in poor, Black areas than in wealthier, largely White areas, was both race and poverty discrimination.[111] The

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place. They are wary of going to places that don't feel like an Aboriginal place. The NCIE is our asset and we invite others to use it. It turned the tables. The ripple effect of the pool has made a big difference to Redfern': 'Contested Spaces' in *The Pool*, (Australian Institute of Architects, 2016) 129.

[106] Carlarne (n 2). As noted, Gomeroi elder Polly Cutmore is already engaged in environmental and climate related advocacy: Hromas and Saunders (n 72).

[107] Ana T. Amorim-Maia, Isabelle Anguelovski, Eric Chu, James Connolly, 'Intersectional climate justice: A conceptual pathway for bridging adaptation planning, transformative action, and social equity' (2022) 41 *Urban Climate*, forthcoming, 11.

[108] Ibid.

[109] Other terms for this form of discrimination include class, poverty, social status and socio-economic status. For an elaboration of this gap in Australian law see, Margaret Thornton, 'Social Status: The Last Bastion of Discrimination' (2018) 1 *Anti-Discrimination Law Review* 5-26. Although the ACT Discrimination Act (1991) recognises accommodation status and employment status as protected attributes: *Discrimination Act 1991* (ACT) s 7. For a comparative discussion see Geraldine Van Bueren, 'Inclusivity and the law: do we need to prohibit class discrimination?' (2021) 3 *European Human Rights Law Review* 274.

[110] *Social Justice Coalition and Others v Minister of Police and Others* [2018] ZAWCHC 181, [65]

[111] Ibid [90].

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case demonstrates that resource decisions, particularly in relation to public services, should not be allowed to perpetuate racial inequality. While the setting of fees, such as for entry to the Moree Artesian Aquatic Centre, may seem to be a simple matter of budgeting, the policy that frames the choice of budget decisions must be attentive to its possible discriminatory impact. The social and economic dimensions of climate change, themselves overlaid by race, age, disability, gender and other forms of discrimination should also be carefully considered in the policy process.

The current structure of separate federal legislation based on grounds of discrimination also fails to lend itself to consideration of intersectional inequality.[112] Climate change adaptation necessitates an intersectional lens that allows policy makers to appreciate the complex and overlapping 'social-environmental injustices' and to address these through transformational, equality-informed adaptation.[113] Developing legal frameworks that can comprehend and respond to the deep connections between recognised grounds of discrimination and climate inequality will assist in achieving justice.

VII CONCLUSION

The example of a race discrimination challenge to unequal access to a resource needed to adapt to hotter temperatures is the starting point for further consideration of legal responses to climate change. Combining efforts to overcome discrimination, particularly through more equal distribution, with adaptation approaches that are attentive to structural inequalities might contribute to climate justice. This example is a provocation to discrimination lawyers to consider the equality dimensions of climate change. While race discrimination was the focus here, other grounds of discrimination should be explored. For example, higher temperatures impact more severely on the elderly, the very young, and people with disabilities and certain illnesses. These forms of vulnerability to climate injustice often intersect with economic disadvantage. The example used here concerns adaptation, but discrimination law may also be important in relation to mitigation such as where a mine being built or damage to a forest leads to unequal impacts on groups deserving of protection. The example in this article is also directed at encouraging climate change and environmental lawyers to look to discrimination law as a means of contributing to litigation and advocacy in this area. Law has certainly served and continues to serve those who have damaged our planet. Our task is to search for new ways of using it, as part of broader strategies, to advance climate justice.

[112] For international and comparative law discussions of poverty and intersectionality see Beth Goldblatt, 'Intersectionality in international anti-discrimination law: addressing poverty in its complexity'(2015) 21(1) *Australian Journal of Human Rights* 47; Shreya Atrey, 'The Intersectional Case of Poverty in Discrimination Law' (2018) 18 *Human Rights Law Review* 411.
[113] Amorim-Maia et al (n 107).

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