



New South Wales
Council for Civil Liberties

NSWCCL SUBMISSION

HOUSE STANDING COMMITTEE ON ENVIRONMENT AND ENERGY

INQUIRY INTO THE CLIMATE CHANGE (NATIONAL FRAMEWORK FOR ADAPTATION AND MITIGATION) BILL 2020

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About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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**SUBMISSION TO THE HOUSE STANDING COMMITTEE ON ENVIRONMENT AND ENERGY
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MITIGATION) BILL 2020**

Introduction

1. The New South Wales Council for Civil Liberties (NSWCCL) welcomes the opportunity to make a submission to the House Standing Committee on Environment and Energy Inquiry into the Climate Change (National Framework For Adaptation And Mitigation) Bill 2020.
2. The NSWCCL was founded in 1963 with the aim of protecting the civil liberties and human rights of those in NSW and across Australia. Until 2019, we were not involved in climate activism at all, as this seemed a largely distinct question of science, ecology, engineering and economics. Yet, in 2019, our Annual General Meeting recognised that climate change poses an increasing risk to the enjoyment of human rights and civil liberties of Australians.
3. We have consistently strived to hold draconian, ill-informed or negligent lawmakers to account. In our view, Australia’s lawmakers are exhibiting a gross negligence in failing to confront the substantial and increasing risks posed by anthropogenic climate change.
4. Moreover, climate change *is a vital human rights and civil liberties issue*. In a general sense, a healthy and functional climate is an essential prerequisite to the enjoyment of all human rights and civil liberties. Climate change is already having profound effects on human life – from increased incidence of extreme weather events to sea level rises - which endanger human rights today. A Joint Declaration of UN Human Rights Treaty bodies recently stated that “climate change poses significant risks to the enjoyment” of human rights.¹ Failure to act on climate change violates key human rights treaties to which Australia is a signatory. For example:
 - i. The primary international human rights treaty concerning civil liberties is the International Covenant on Civil and Political Rights 1966. This treaty guarantees, *inter alia*, the right to life (Article 6), the right to privacy, family and a home life (Article 17(1)) and the right to minority cultural identity and practice (Article 27). By failing to take real action on emissions reduction, Australia may breach all three provisions (and others). In 2018, the Human Rights Committee, which can hear complaints about breaches of the ICCPR, commented that Article 6 requires States to take action against conditions that may prevent individuals from living in dignity which includes allowing the degradation of the environment, the deprivation of land, resources and territories of indigenous peoples, and increases the frequency natural disasters.² The Committee also stated that

¹ <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E>

² Human Rights Committee, ‘General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life’ (CCPR/C/GC/36, 30th October 2018), at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf, 6.

“implementation of the obligation ...depends, inter alia, on measures taken by State parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors.”³ The Committee has reiterated that States’ obligations create an *active* duty to protect rights from abuse by others.⁴

- ii. In relation to the right to culture, there may be several minority groups in Australia whose rights are being violated, especially Torres Strait Islanders, who are seeing their cultural practices threatened by rising sea levels and increased extreme weather events.⁵ Australia is violating the rights of citizens to not be subjected to arbitrary or unlawful interference, with their rights to privacy, family and the home, by acts and omissions perpetrated by the State.⁶ A case arguing such breaches of the ICCPR on behalf of a group of Torres Strait Islanders is currently before the UNHRC.⁷
- iii. Moreover, given the UNHRC has commented previously that the right to freedom of movement (Article 12) engenders an obligation on states to prevent internal displacement,⁸ the ICCPR may be breached by Australia when groups are internally displaced by climate change.⁹ Australia is home to a plethora of diverse climates from low lying coastal areas to some of the most arid deserts, inevitably, people will be displaced within Australia if government continue in their failure to act appropriately in relation to climate change.
- iv. Furthermore, the human rights of children will also be at risk from climate change. On September 24th 2019, a group of 18 child plaintiffs from around the world filed a complaint under the Convention on the Rights of the Child (the most widely ratified human rights treaty) to the UN Committee tasked with overseeing compliance with that treaty. This complaint alleges, specifically, that their rights to life, health and culture have been violated.¹⁰ As children will bear the burden of successive governments’ failures to act in respect of climate change, it is their rights, over the long term, that will be most affected by unchecked climate change.

³ Ibid 15.

⁴ Ibid 5.

⁵ Owen Cordes Holland, ‘The Sinking of the Strait: The Implications of Climate Change for Torres Strait Islanders’ Human Rights Protected by the ICCPR’ (2008) 9 Melbourne Journal of International Law 405, 424-5.

⁶ ICCPR Article 17(1).

⁷ Client Earth, *Torres Strait Islander group submits response in historic climate case* (2020)

<<https://www.clientearth.org/latest/latest-updates/news/torres-strait-islander-group-submits-response-in-historic-climate-case/>>

⁸ HRC, Addendum: General Comment No 27 (67): Freedom of Movement (Art 12), UN Doc CCPR/C/21/Rev.1/Add.9 (1 November 1999) [7].

⁹ Owen Cordes Holland, ‘The Sinking of the Strait: The Implications of Climate Change for Torres Strait Islanders’ Human Rights Protected by the ICCPR’ (2008) 9 Melbourne Journal of International Law 405 427.

¹⁰ <https://theconversation.com/with-15-other-children-greta-thunberg-has-filed-a-un-complaint-against-5-countries-heres-what-itll-achieve-124090>

5. The case of *Youth Verdict v Waratah Coal*, currently before the Queensland Land Court, underscores the potential human rights violations already occurring in Australia.¹¹ The plaintiffs - entities representing children concerned about the impacts of climate change - objected to the applications made by the defendant coal company for a mining lease on the basis that the grant would be incompatible with their human rights and therefore unlawful under s58(1) of the Human Rights Act 2019 (Qld). The rights alleged to be infringed include the right to recognition and equality before the law, the right to life, property rights, the right to privacy, the right to protection of children and the cultural rights of Aboriginal and Torres Strait Islander Peoples.¹²
6. This short summary does not fully consider, but recognises that further possible violations of the Covenant for Economic, Social and Cultural Rights 1966 arise from inaction on climate change which go beyond the remit of NSWCCCL's core focus. This is evident from the Explanatory Memorandum of the Bill, including the Human Rights Compatibility Statement.¹³ However, some core violations must not go unmentioned, such as
- i. The right to physical health (Article 12 ICESCR). Natural disasters are hitting us with increasing rate and the biological world protecting us from them is quickly dying out. The bushfire season 2019/20 has given us a vivid taste of what higher average temperatures could mean in the long run for Australia. Across the entire east coast air was heavily polluted, to the extent that people had to protect themselves whenever they stepped outside. The right to clean air must be protected, just as much as we would protect the right to clean food and water, in order to safeguard our physical health.
 - ii. The right to mental health (Article 12 ICESCR). Not only is mental health negatively affected by climate change induced events such as displacement, loss of loved ones, or loss of nature, but climate change in itself poses a mental health challenge to our society: ecoanxiety describes the phenomenon where an increasing amount of people are deeply worried watching the "slow and seemingly irrevocable impacts of climate change unfold"¹⁴, and are "affected by feelings of loss, helplessness, and frustration due to their inability to feel like they are making a difference in stopping climate change"¹⁵. While the physical affects of climate change are obvious to many, secondary effects like mental health issues tend to stay hidden for longer, but are by no means less severe.
 - iii. The right to an adequate standard of living (Article 11 ICESCR). While job losses and a declining economy may seem far fetched at the moment, Australia's economy will

¹¹ *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33

¹² *Ibid.*

¹³ https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6617_ems_ecbcd917-d2f3-4860-b8d2-748f2f2a3d57/upload_pdf/20145EMSteggall.pdf;fileType=application%2Fpdf

¹⁴ <https://www.apa.org/news/press/releases/2017/03/mental-health-climate.pdf>, p.27

¹⁵ *Ibid.*

suffer, and jobs will be lost, if government policy and investment does not allow private investors to create true momentum behind green policies and infrastructure projects.

7. NSWCCCL realises that we cannot shirk our responsibilities towards future generations. The Council has always seen its *raison d'être* as defending the rights of the vulnerable. In this case, young people, the poor and homeless, as well as Aboriginal and Torres Strait Islanders are all vulnerable minorities within society, whose vulnerability will be exacerbated by governments' failure to adapt to the significant risks posed by climate change. This in turn will increase social inequality in Australia.
8. Thus, NSWCCCL has joined a growing number of human rights organisations in recognising that in striving for justice, climate justice necessarily falls within our remit. With this objective, we make our submission on the current Bill.
9. Limiting the worst effects of climate change necessitates the reduction of greenhouse gas emissions to keep global warming below 1.5 to 2 degrees Celsius in about 11 years.¹⁶ Australia legally committed to reaching that target in the 2015 Paris Treaty, along with almost every other state inhabiting the Earth.
10. NSWCCCL does not endorse any partisan policy prescriptions to achieve this. Nevertheless, it is disappointed with current policy settings, which have allowed Australia's total emissions to rise annually under the Coalition government.¹⁷ Lower than expected emissions over the last decade, which saw Australia meet its 2020 Kyoto Protocol obligations, are not a consequence of Coalition policies.¹⁸ Experts have argued that current policies are insufficient to ensure that Australia meets its Paris target of 26 and 28 per cent reductions to greenhouse gas emissions below 2005 levels by 2030.¹⁹ The government continues to refuse to commit to a net zero increase in greenhouse gas emissions by 2050, despite Australia's increasing international isolation on the issue.²⁰ All States and Territories have zero net emissions targets to reach by 2050, as do many leading overseas jurisdictions, including many of Australia's trading partners.²¹
11. Our views are fortified by last summer's catastrophic bushfire season which caused great destruction throughout Australia. Such bushfire activity was foreseen by climate scientists as a likely result of a warming planet. This stark indicator of a changing climate with increasingly dangerous natural disasters, only emphasises the urgent need for climate justice.

The Climate Change (National Framework for Adaptation and Mitigation) Bill 2020 ("the Bill")

¹⁶ <https://www.theguardian.com/environment/2018/oct/08/global-warming-must-not-exceed-15c-warns-landmark-un-report>

¹⁷ <https://www.abc.net.au/news/2019-04-11/fact-check-coalition-emissions-reduction-angus-taylor/10936652>

¹⁸ <https://www.abc.net.au/news/2019-04-11/fact-check-coalition-emissions-reduction-angus-taylor/10936652>

¹⁹ <https://www.theguardian.com/environment/2019/jul/02/australia-wont-reach-paris-target-without-action-on-transport-lng-and-coal-expert-says>

²⁰ <https://www.theguardian.com/environment/2020/nov/08/australia-warned-it-could-be-isolated-over-climate-inaction-after-joe-biden-victory> <https://www.afr.com/chanticleer/australia-is-a-net-zero-embarrassment-20201124-p56hg6>

²¹ <https://www.sbs.com.au/news/scott-morrison-accused-of-climate-inaction-as-new-poll-shows-support-for-stronger-emissions-targets>

12. NSWCCCL demands purposeful and powerful action to be taken by the Federal Parliament to set clear legal targets for emissions reduction in accordance with Australia's Paris obligations. If the government will not move to the net zero by 2050 target on its own, then they should be forced to comply with Australia's internal obligations by Australia's elected lawmakers in Parliament. If Australia is to reach its Paris target of limiting warming to 1.5°C and thus play its part in averting the worst consequences of climate change, our government's policies and decision-making must at least assist in meeting of a target of zero net accounting emissions by around 2050.²²
13. The Bill is a positive intervention in climate change policy in Australia for the following reasons:
- i. By setting a clear and legally binding emissions reduction target, complemented by public, evidence-based risk assessments, emissions reduction and adaptation plans, and progress reporting, the Bill would codify the political consensus, policy stability and transparency demanded by all Australians, including the business community. This will in turn catalyse the introduction of more ambitious future proposals to reduce greenhouse gas emissions.
 - ii. The Bill sets a statutory emissions reduction target of zero net emissions by 2050 which can only be varied through legislative amendment and can only be moved forward in time by the Minister, not postponed. Changing the target is rightly a matter for Parliament given the significant negative impacts of climate change. Substantial changes in policy should be given the democratic legitimacy afforded by the Parliamentary process, to ensure that the people's voices are heard on this issue. Given the significance of the existential threat posed to Australia and Australians by climate change, statutory enshrinement of such a target is required to ensure that the government remains accountable to the Parliament for its progress in meeting its international obligations under the Paris Agreement and moral obligations to its people.
 - iii. The Bill institutes whole-of-economy emissions budgets of five-year intervals set by the Minister. It is a good idea to place a statutory duty to set emissions reduction budgets on the Minister,²³ since this creates a legally enforceable obligation but allows flexibility in government policy in the near term. The duty to "ensure that the net accounting emissions for an emissions budget period do not exceed the emissions budget for the period",²⁴ is legally enforceable on its face, and binds the government to its considered and expressed policy under the Bill. These budgets cannot take into account emissions credits earned under previous international agreements,²⁵ which would finally put an end to the government's plan to use Kyoto 'carryover credits', which undermined its emissions reduction goals by allowing

²² <https://www.ipcc.ch/2018/10/08/summary-for-policymakers-of-ipcc-special-report-on-global-warming-of-1-5c-approved-by-governments/>

²³ CI 26(1).

²⁴ CI 26(5).

²⁵ CI 26(9).

emissions in 2030 to remain higher than they otherwise would be.²⁶ Moreover, the government's short term emissions reduction targets, which will be dictated by their emissions budget, will be shaped by a set of sound legal considerations in clause 28.

- iv. The Bill provides the infrastructure which will provide the government with the means to plan for mitigation and adaption to climate change based on a considered, science-based approach (through the independent Climate Change Commission). There are sound oversight mechanisms for the Commission through the proposed new Parliamentary Committee.
- v. The Bill does not dictate any climate policy to the government. As framework legislation, it recognises that the executive may require flexibility and choice in formulating and implementing climate policy. Yet, the Bill represents the elected Parliament's intention to only permit the development of reasonable, science-based climate policy and decision-making.
- vi. The Bill encourages high quality administrative policy and decision making under the Bill consistent with Australia's climate responsibilities and international legal obligations, including human rights obligations,²⁷ through the mandatory considerations and guiding principles applying throughout the Bill.
- vii. The Bill creates enforceability in relation to the powers, functions and duties it confers, as it allows for judicial review of executive actions. However, the subject matter of the Bill and the limited duties on government to achieve targets (save for cl. 36(5)) seem to greatly limit the prospect of judicial review. Even where a duty is imposed, the courts are unlikely to be willing to impose orders dictating climate policy as this may raise questions of public policy which fall beyond the scope of judicial power.²⁸
- viii. The Bill embeds climate change considerations in all facets of government decision making.
- ix. Finally, the Bill has a welcome focus on adaptation plans, which are underappreciated yet critical to ensuring the ongoing protection of human rights.

14. Ms Steggall's Bill is modelled on similar legislation passed by several developed states which have yielded positive results. For example, the UK introduced its Climate Change Act in 2008. The UK now has a net-zero target by 2050,²⁹ which has achieved bipartisan support. UK emissions fell from 2008-2018 and it met its first two carbon budgets under the Act. It is on track to meet its third, though it may not meet its fourth (2023-2027) and fifth budgets (2028-2032). Moreover, the UK Act crucially provides the media and

²⁶ <https://www.smh.com.au/politics/federal/using-kyoto-credits-to-meet-paris-agreement-misses-the-point-garnaut-20191209-p53ic7.html>

²⁷ Which would be considered wherever 'Australia's obligations under international agreements' is listed as a consideration, e.g. in cl 16(b); 18(c); 28(b)(xiv).

²⁸ See Mark Stallworthy 'Legislating Against Climate Change' (2009) 72(3) *Modern Law Review* 412, 423-427.

²⁹ <https://eciu.net/analysis/briefings/uk-energy-policies-and-prices/how-is-the-uk-tackling-climate-change#:~:text=Britain's%20Climate%20Change%20Act%20contained,to%20cut%20greenhouse%20gas%20emissions.&text=The%20UK%20Act%20requires%20governments,cap%20on%20total%20greenhouse%20emissions.>

civil society with measurable and legislated carbon budgets and targets to hold the UK government to account for their climate policy.³⁰

15. A 2018 study of the UK Climate Change Act by Fankhauser, Averchenkova and Finnegan found that the UK Act “has been instrumental in advancing climate action over the past decade”.³¹ The four standout achievements of the Act are that political debate on climate change has improved, the climate consensus has held, the UK’s international standing has improved, and the power sector has been transformed.³²

Some lessons which the authors take to apply internationally are that:

- i. “A comprehensive framework law is an essential tool to coordinate and advance climate action with respect to both reducing greenhouse gas emissions and climate resilience.
- ii. A good climate law contains statutory targets, assigns clear duties and responsibilities and provides clarity about the long-term direction of travel.
- iii. Economy-wide, multi-year targets, set well in advance, help to define a clear, yet flexible path towards the long-term climate objective.
- iv. A strong independent body is critically important to ensure consistent policy delivery and evidence-based decision-making.”³³

16. The Act was found to have helped decrease emissions, particularly in the energy sector, while the UK economy grew.³⁴

17. There are now legislated emissions targets of net-zero emissions by 2050 in New Zealand, Sweden, Denmark, France and Hungary, among other states.³⁵ Canada has recently introduced a net zero by 2050 Bill to its Federal Parliament.³⁶ Australia is increasingly lagging behind other developed states in this regard.

18. NSWCCCL also rejects spurious claims by Coalition Members of Parliament that the Climate Change Authority is already fit to do the job that the Climate Change Commission (CCC) would do.³⁷ As Ms Steggall argues on her website:

The CCC will have stronger powers than the current Climate Change Authority. Firstly, by mandating that the Government consider the advice and recommendations of the CCC on setting climate policy. If the Government rejects the advice of the CCC it will have to

³⁰ See e.g. <https://www.theguardian.com/environment/2020/nov/08/global-experts-question-uks-commitment-to-tackle-climate-crisis>

³¹ Fankhauser, Averchenkova and Finnegan, ‘10 Years of the UK Climate Change Act’ (2018), at https://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2018/03/10-Years-of-the-UK-Climate-Change-Act_Fankhauser-et-al.pdf, 5.

³² Ibid 21-25.

³³ Ibid 5.

³⁴ Ibid.

³⁵ <https://www.nsenergybusiness.com/news/countries-net-zero-emissions/>, <https://qz.com/1653907/the-growing-list-of-countries-committing-to-net-zero-emissions/>

³⁶ <https://www.icis.com/explore/resources/news/2020/11/20/10577817/canada-to-legislate-2050-net-zero-emissions-target-chems-eye-opportunities>

³⁷ <https://www.smh.com.au/politics/federal/steggall-s-climate-change-bill-just-politics-as-usual-20200220-p542u5.html>

provide a statement of reasons clearly outlining why. Secondly, it empowers the CCC to report on and review Government policy with no referral by the Minister.

The CCC will also be less prone to political influence by having a Joint Parliamentary Committee on Climate Change, made up of all sides of politics which will vet appointments to the Commission, and regularly report to Parliament on the functioning of the CCC.³⁸

We endorse Ms Steggall's explanation of positive contribution that the CCC will have to scrutinising the positive development of Australia's climate policy.

Concerns

19. While NSWCCCL supports the objectives of the Bill, it expresses some concern about some aspects of the Bill.
20. Clause 3(2) could be redrafted so as to separate out the functions and the objects of the Bill. As we understand it, the ultimate object of the Bill is to meet Australia's international obligations under climate treaties. This should be expressed in clear terms which avoid doubt not just in terms of the purpose of the Bill, but also so as to clearly link the Bill to the Commonwealth's constitutional power to legislate for external affairs under s. 51(xxix) of the *Australian Constitution*. In our view, the remainder of the contents of clause 3(2) are properly construed as functions of the Bill which operate to carry out the ultimate object of same.
21. Clause 4 (the simplified outline of the Bill) states that "decision makers must have regard to 7 guiding principles when 5 performing functions or duties or exercising powers under this Act 6 or provisions of other prescribed Acts." Yet, Clause 9, the operative provision imposing the obligation to have regard to the guiding principles, limits the application of the guiding principles to the "performance of functions or 4 duties, or exercise of powers, under this Act." The Act therefore displays an inconsistency, likely due to the fact that it has been amended since its original version released in March, and it is now unclear whether it intends to impose obligations to have regard to the principles on decision-makers under other Acts.
22. Relatedly, NSWCCCL is concerned that the current tabled form of the Bill carries a Clause 9 which only applies to functions under the Bill. In the draft Bill Ms Steggall released in March, a Clause 9(b) applied the guiding principles to a provision of another Act prescribed by the rules. This formulation was problematic in that, under cl. 75(1) the rules are made by the relevant Minister, affording considerable discretion to the Minister and government in order to dictate which Acts, if any, the guiding principles are applied to. This could have severely curtailed the effectiveness of the guiding principles and their purpose within the Bill. However, the absence of any application to other acts is also a concern. NSWCCCL strongly

³⁸ https://www.zalisteggall.com.au/climate_change_bill_2020_business_overview

recommends that the guiding principles should be applied to other Acts though such Acts should be enumerated in a Schedule to the Bill which is approved by the Parliament to ensure that Bill is optimally effective. This would accord with the approach adopted by the Victorian Parliament in the *Climate Change Act 2017* (Vic).³⁹

23. The Bill should include a specific timeframe for the preparation of Emissions Reduction Plans, to give maximum certainty to stakeholders well in advance of the beginning of the Emission Budget period to which the reduction plan relates. As the Bill stands to be considered, the plan must only be prepared before the budget period to which it relates.⁴⁰ This may result in unacceptably delayed preparation of reduction plans, as has occurred in the UK.⁴¹ This will decrease certainty for stakeholders who may need to react to the reduction plans.
24. The Bill should ensure that the CCC is funded independently of government so that it can properly perform functions without fear of interference. Independence of funding is crucial to ensuring that the required scrutiny is applied to government actions. This is an existing concern about the UK Committee on Climate Change.⁴²

Conclusion

25. Climate Change is no longer an ‘energy’ or ‘environmental’ issue. We are living in a climate emergency, and our human rights and civil liberties are threatened by successive years of government inaction.
26. As we gradually move out of one global emergency, the COVID-19 pandemic, we should reflect on the value of rapid, high-quality and science-based emergency governance in defeating complex problems. We should ask why we have not seen similarly high-quality governance in Australia with respect to the climate emergency.
27. NSWCCCL stresses that Ms Steggall’s legislative model alone is insufficient to meet the exigencies of our climate emergency. Our governments can, and should, be doing more, including aiming for a target of 45% emissions reduction on 2010 levels by 2030, 100% renewable energy by 2030, not supporting any new coal and gas projects, and funding a just transition to a green economy. These were, of course, the demands of the 2019 climate strikers.
28. Overall, our view is that the costs – in terms of lives, human rights violations and economic opportunity – of not embracing ambitious climate policies are far greater than the cost of doing so. Australia needs a clear path into a low-emissions future. This Bill provides a step in that path.
29. NSWCCCL commends the Bill.

³⁹ S. 17.

⁴⁰ Cl. 30(2)(b).

⁴¹ Fankhauser, Averchenkova and Finnegan, ‘10 Years of the UK Climate Change Act’ (2018), at https://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2018/03/10-Years-of-the-UK-Climate-Change-Act_Fankhauser-et-al.pdf 32.

⁴² *Ibid.*

This submission was prepared by Jared Wilk on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the Committee.

Yours sincerely,


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Secretary

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