Submission to the New Zealand Justice Select Committee on the Climate Change Response (Tort Liability) Amendment Bill

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About this submission

This submission to the New Zealand Parliament responds to a call by the Chairperson of the Justice Committee for submissions on the Climate Change Response (Tort Liability) Amendment Bill.
The bill seeks to confirm that the role of developing, setting and implementing regulatory policy regarding greenhouse gas emissions sits with the Executive and the Legislature. It would do so by amending the Climate Change Response Act 2002 to create a statutory bar on tort liability for emissions-related climate change effects. The bar would apply so that no person (including the Crown) could be found liable in tort for emissions-related climate change effects. This bill responds to the pending trial of the claim in *Smith v. Fonterra Co-operative Group Ltd* [2024] NZSC 5, [2024] 1 NZLR 134.

The version here has been lightly edited since submission on 12 July 2026.

The Chairperson of the Justice Committee's call for submissions can be viewed here:
https://www3.parliament.nz/en/pb/sc/make-a-submission/document/54SCJUST_SCF_93FA87DB-CAAF-43F5-C814-08DED59A19E9/climate-change-response-tort-liability-amendment-bill

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This submission draws on research by the Grantham Research Institute on Climate Change and the Environment on climate change law and governance, primarily the Institute's annual *Global Trends in Climate Change Litigation Snapshot* series, which charts the evolution of climate change litigation over time. We highlight five major concerns about the Bill, putting the legislation into the context of global developments in climate change law.

1. The claim that the Bill is needed to ensure regulatory coherence is misguided. Climate cases against private actors have been brought before courts around the world. Judges have consistently shown deference to the legislative and executive functions in considering how private law applies in the context of climate change.

   - Throughout common law countries, tort law applies in many contexts where there is a need for careful consideration of social, economic and distributional implications. This does not prevent it from playing a critical role in modern governance systems, providing a necessary channel to address questions of interpersonal justice where these are not addressed by a targeted statutory scheme. Here in the UK, for example, the Supreme Court has recently confirmed that the common law of nuisance applies in the context of water pollution, operating alongside a statutory scheme of regulation (see *Manchester Ship Canal Co Ltd v. United Utilities Water Ltd (No 2)* [2024] UKSC 22).

   - Courts around the world are now faced with determining how tort law – or its civil law analogues – should be applied in the context of climate change. There are now more than 60 cases involving claims against companies that claimants allege make a globally or nationally significant contribution to greenhouse gas emissions. The remedy sought in these cases varies. In some cases, claimants take a similar approach to *Smith* and seek an injunction to prevent defendants from continuing to contribute to injuries that they have suffered or are likely to suffer, by restraining greenhouse gas emissions. In others, they seek monetary damages associated with current or anticipated losses connected to climate change.

   - Since 2020, at least 30 of these cases have received a judicial decision on admissibility. Fifty percent of these have survived motions to strike or similar early jurisdictional challenges. Cases have been allowed to proceed by senior appellate courts such as the Italian Court of Cassation, and various State Supreme Courts in the United States. Across this body of cases, judges have acknowledged the challenges associated with applying existing legal principles to climate change, while also acknowledging the need to give a fair hearing to the very real issues that such cases raise.

   - No court anywhere in the world has made an order requiring a quantified reduction in greenhouse gas emissions. However, in Germany, the Netherlands and France courts have established that, in principle, major emitters have some form of legal responsibility towards individuals and communities that suffer harms because of their contributions to greenhouse gas emissions. In all these cases, courts have paid great attention to questions relating to the separation of powers.

   - Questions regarding the proper limits of adjudication in the climate change context have also been addressed in many climate cases against governments. Decisions from apex courts in countries as diverse as Germany, South Korea and Colombia have all confirmed that states have responsibility to mitigate climate change under both international human rights law and domestic constitutional provisions (Jackson and Setzer, 2026). However, they have also shown themselves capable of delivering decisions which give a wide margin of discretion to the legislative and executive branches of government in determining the best policy approaches to address this responsibility.

   - Such cases are of course of no direct relevance in interpreting New Zealand law. However, they illustrate that **courts around the world have taken a nuanced approach to addressing the complex questions raised by climate change litigation, while also showing deference to** the legislative function. There is no reason to assume that the courts in New Zealand would demonstrate themselves to be any less capable of reasoned engagement with these issues than courts elsewhere.

- The final outcome in a case such as *Smith v. Fonterra* may well create political debate about whether legislative intervention is required to modify the application of well-established tort principles in the climate change context (see Bookman, 2026). However, such debate should not take place before it is clearly established whether and how such principles apply. The courts are the appropriate forum to make such an interpretation.

2. **There is no evidence the Bill will create a favourable business environment through increasing regulatory certainty. Instead, it risks undermining investor perception of the rule of law in New Zealand, particularly as it would make New Zealand an outlier in its response to climate litigation.**

   - The second key argument made in favour of the Bill is that it will create legal certainty for businesses and thus encourage greater investment in New Zealand. However, as acknowledged in the briefing materials proactively published alongside the Bill, this argument is speculative. There is no empirical evidence to suggest that eliminating long-standing rights of judicial recourse, in the absence of a clear statutory scheme to replace those rights, will attract investment.

   - On the contrary, we know from empirical research that countries where the rule of law is perceived to be strong are often considered to be favourable environments for investors (Jovanović et al., 2023; Law Society of England and Wales, 2026; Lee and Lemoine, 2025). Governmental intervention in ongoing litigation to remove the right to a remedy (should a violation be found), particularly when it has been documented to be a result of lobbying by one of the parties to the case, will not strengthen the perception that New Zealand has a strong rule of law (Office of the Ombudsman, 2026). Indeed, it may have the opposite effect.

   - At the same time, climate litigation is now a well-documented phenomenon and one which has been incorporated into the practices of investors and lenders (Sato et al., 2024; Gostlow et al., 2026; Beyer and Nobile, 2025). These actors have an increasingly sophisticated understanding of the risk that businesses that contribute to emissions on a domestically or globally significant level may face litigation, which may be disruptive to their current business models. Given that similar cases are progressing in other jurisdictions, allowing *Smith v. Fonterra* to proceed through the courts should not affect perceptions of New Zealand's business environment.

3. **The current draft of the Bill lacks nuance, and creates a bar on multiple forms of climate claims without differentiating between them, risking unintended outcomes.**

   - As documented in our *Snapshot* report series, climate litigation takes multiple forms. Civil regimes comparable to common law torts have been deployed by a range of actors in different settings. For example, in some countries we have also seen cases filed by public authorities such as public prosecutors against those involved in illegal deforestation and other illegal activities leading to greenhouse gas emissions, arguing that the public purse should be compensated for the damage to the climate system sustained as a result of such emissions. We describe these actions in the report as "incidental polluter pays cases" (Setzer and Higham, 2026).

   - Such actions are unlikely to have a direct corollary within the New Zealand legal system. Nonetheless, they highlight the range of potential legal arguments that may arise in the context of climate change that go beyond the arguments made in cases like *Smith v. Fonterra* but which would nevertheless be curtailed by this legislation.

- Similarly, we also see a group of cases which argue that one party has harmed another by failing to adapt physical infrastructure to ensure that it is resilient to climate risks, thereby exacerbating the impacts of climate change-related disasters on the injured party. Such cases, which are known in the literature as "failure to adapt" cases, may play an important role in determining where the cost of climate-related disasters should lie, potentially avoiding such costs falling on public authorities.
- Such cases appear to be beyond the intended scope of the Bill. However, the sweeping way in which the Bill is drafted may encourage some future defendants to argue that claims relating to adaptation failures are also barred. This kind of counterintuitive outcome is exactly what was contemplated in the May 2026 Ministry of Justice briefing note published alongside the legislation, which notes "codifying tort law without a comprehensive review risks unintended outcomes". We believe this risk is particularly pertinent in this case.

4. **The Bill is inconsistent with New Zealand's international obligations in respect of human rights, climate change and the environment.**

    - Firstly, the Bill's retroactive application to ongoing litigation, specifically the *Smith v. Fonterra* case, would violate Mr. Smith's right to a fair trial, as guaranteed under Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) and extinguish his access to environmental justice (Hailes, 2026).
    - Secondly, the Bill generates inconsistencies with New Zealand's obligations to address climate change under international environmental law, which include treaties, such as the Paris Agreement, and universally applicable rules of international law. In July 2025, the International Court of Justice produced an Advisory Opinion (the ICJ AO) on states' obligations to respond to climate change, finding that states have customary and treaty law obligations to exercise strict due diligence in preventing significant harm to the climate system, including harms that result from anthropogenic greenhouse gas emissions. This includes a duty to regulate the activities of private actors that contribute to climate change through their emissions (para. 428). Similar points are also reflected in an Advisory Opinion on climate change obligations from the International Tribunal on the Law of the Sea.
    - When viewed against the backdrop of other revisions and repeals to New Zealand's environmental regime, the Bill may be seen to form parts of a series of 'acts and omissions' that are challenging to square with New Zealand's due diligence obligations under international law, and violate the principle of non-regression under international environmental law. As Hailes (2026) outlines, this may lead to reduced investor confidence in New Zealand's business environment and undermine existing diplomatic and trade relationships with other countries.

5. **The Bill takes a short-term view that is likely to result in shifting the burden of climate-related costs from high-emitting companies onto taxpayers and affected communities.**

    - By preventing climate litigation without introducing an alternative system for accountability, the Bill removes an important avenue for those harmed by climate change in New Zealand not only to seek orders to prevent greenhouse gas emissions, but also compensation for damage (Bookman, 2026). By preventing the use of litigation as a risk transfer mechanism with a critical role to play in distributing the costs of climate change between different actors, the Bill ultimately risks shifting the primary burden of those costs onto the public purse.

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