1. Introduction to *Giving Future Generations a Voice: Normative Frameworks, Institutions and Practice*

Peter Lawrence and Jan Linehan

The interests of young people and future generations (persons born in the future) are under acute threat. Evidence for this threat is increasingly forcing its way into contemporary consciousness, with climate change-related extreme weather events becoming more prevalent around the globe. While scientists tell us that the most severe climate impacts will occur in the long-term future, the increasing pace of unmitigated climate change has already accelerated species loss,¹ with extreme weather events and ice-melting occurring now and projected to get worse. The projected impacts include global food insecurity, extreme poverty, displacement and mass migrations, resource conflicts and increased death and disease, with a diminishing time frame in which to act.² Scientists have argued that we are entering a new era, ‘the Anthropocene’, which involves human beings permanently changing various earth systems, including in relation to climate.³ In spite of these changes, which have been signalled for nearly 40 years, institutions at all levels—both governmental and private—with few exceptions remain mired in short-termism and strongly

¹ The latest assessment report of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) warns that one million plant and animal species are facing extinction, more than ever before in human history. IPBES, ‘Summary for policy makers’ in Sandra Díaz and others (eds), *Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (IPBES secretariat), 12.

² IPCC, ‘Summary for Policy Makers’ in Valery Masson-Delmotte and others (eds), *Global Warming of 1.5°C* (World Meteorological Organisation 2018) www.ipcc.ch/report/sr15/ accessed 8 February 2019; UN Special Rapporteur on Human Rights and the Environment, ‘Climate Change and Poverty: Report of the Special Rapporteur on Extreme Poverty and Human Rights’ (2019) A/HRC/41/39 g.

³ Will Steffen et al, ‘Trajectories of the Earth System in the Anthropocene’ (2018) 115(33) PNAS 8252–9.

biased in favour of present and near-term interests and against the interests of future generations.⁴

This collection grew out of a concern with the need to develop institutions that could play a role in addressing these large-scale threats to future generations. It prompted us to bring together academics from different disciplines and experts with backgrounds in government agencies, with a broad range of expertise in environmental and human rights law and government institutions, to examine existing institutions and reform proposals.⁵

At the time of writing, the COVID-19 pandemic has rightly become a personal, national and global preoccupation and attention is focused on emergency health responses and short-term economic recovery measures. Governments responding to a global pandemic such as COVID-19 must inevitably make many short-term decisions, such as increasing spending on health and social support or economic stimulus. However, certain policy choices may nonetheless negatively impact future generations, such as the increased subsidising of fossil fuels.⁶ At issue here is harmful or wrongful short-termism. After all, not all short-term measures are inherently problematic, as inter-temporal trade-offs are common and unavoidable. However, failure to consider long-term interests or poor policy choices can impose much higher costs on future generations. There are also many examples of governmental failures, such as failing to address soils becoming less fertile and the lack of good disaster preparation, that impose negative financial and other costs on both current and future generations.⁷

⁴ Oxford Martin School, 'Now for the Long-term: The Report of the Oxford Martin Commission for Future Generations' (Oxford Martin School 2013) 46; Jonathan Boston, *Governing for the Future: Designing Democratic Institutions for a Better Tomorrow* (Emerald Publishing 2016); Iñigo González-Ricoy and Axel Gosseries (eds), *Institutions for Future Generations* (OUP 2016); Marcel Szabo, Marie-Claire Cordonier Segger and Alexandra R Harrington (eds), *Intergenerational Equity in Sustainable Development Treaty Implementation* (CUP 2021).

⁵ See Climate Justice Network, www.climatejustice.network accessed 11 December 2020. This book mostly deals with future generations understood as those born in the future, but a number of the chapters address issues affecting young people and children, such as Nicky van Dijk, 'The capability approach as a roadmap for re-thinking intergenerational justice', Chapter 3 in this volume.

⁶ Most short-term recovery policies in the G20 by mid-2020 involved a broad range of subsidies to fossil fuels. See 'G20 countries' (energypolicytracker.org, 9 December 2020) www.energypolicytracker.org/region/g20/ accessed 11 December 2020; Anna Geddes et al, 'Doubling Back and Doubling Down: A G20 Scorecard on Fossil Fuel Funding' (IISD, 9 November 2020) www.iisd.org/publications/g20-scorecard.

⁷ Simon Caney, 'Political Institutions for the Future: A Fivefold Package' in Iñigo González-Ricoy and Axel Gosseries (eds), *Institutions for Future Generations* (OUP 2016) 138–39.

INSTITUTIONS FOR THE FUTURE

Since the 1980s, institutions with an environment or sustainability focus have been created in various countries which *implicitly* address issues of concern for future generations. Since 2001, national institutions with an *explicit* focus on future generations have been created. One of the earliest national institutions in the former category is the New Zealand Parliamentary Commissioner for the Environment established in 1986, which has a mandate relating to the environment that implicitly relates to future generations.⁸ In Finland a parliamentary standing ‘Committee for the Future’ was established in 1993, with a mandate that includes informing the parliament of its response to the government’s Future Report, which must be released once within each term of office.⁹

In 2001 Israel’s parliament created the first Commission for Future Generations, with a judge as a commissioner. The mandate was largely investigative, including the task of reviewing the ramifications of legislation and its effects on future generations. The commission had quite broad powers, including the ability to demand information from state agencies. The delay in collecting data involved in making evaluations meant that the commission could impact the drafting of legislation. In 2007, following a change of government, the parliament disbanded the commission.¹⁰

In 2007, the Hungarian parliament created a Parliamentary Commissioner for Future Generations with a mandate linked to safeguarding the fundamental right of Hungarian citizens ‘to a healthy environment’ enshrined in the Hungarian Constitution. The Commissioner’s mandate included investigating complaints, providing expert advice to parliament, initiating or intervening in judicial reviews and strategic development of research.¹¹ The mandate mostly involved environment-related issues (e.g. protection of air, water and nature; waste management; it also extended to supporting local communities striving

⁸ Environment Act 1986 (New Zealand) s 16; Jonathan Boston, ‘Parliamentary Commissioner for the Environment, New Zealand’ in Marie-Claire Cordonier Segger, Marcel Szabo, and Alexandra R Harrington (eds), *Intergenerational Justice in Sustainable Development Treaty Implementation* (CUP 2021).

⁹ Eduskunta, ‘Committee for the Future’ www.eduskunta.fi/EN/valiokunnat/tu/levaisuusvaliokunta/Pages/default.aspx accessed November 2020.

¹⁰ Shlomo Shoham and Nira Lamay, ‘Commission for Future Generations in the Knesset: Lessons learnt’ in Joerg Chet Trammel (ed), *Handbook of Intergenerational Justice* (Edward Elgar Publishing 2006) 244.

¹¹ World Future Council, ‘The Hungarian Parliamentary Commissioner for FG’ (*Future Policy*) www.futurepolicy.org/guardians/hungarian-parliamentary-commissioner/ accessed November 2020.

for sustainability).¹² Again, following a change of government and constitutional changes in 2012, the office was subsumed into the functions of the main Hungarian Ombudsman.¹³

More recently, in 2015, a Future Generations Commissioner was created under the Well-being of Future Generations (Wales) Act 2015 (WBFGA) with an explicit mandate focused on future generations and promoting the sustainable development principle, as defined in the Act, in the context of seven well-being goals and a remit to advise and monitor public institutions and the Welsh government and to make periodic reports to the Welsh National Assembly.¹⁴ The current Future Generations Commissioner has identified addressing climate change and loss of nature as key challenges.¹⁵

In addition, over the past two decades environment or sustainability-style commissioners have been created at the sub-national level in Australia and the national level in Canada. The purpose of these bodies is twofold: reporting and making non-binding recommendations on systemic or specific environmental issues and undertaking ombudsman-style investigations, with findings that are also non-binding.¹⁶

¹² Sándor Fülöp, 'Comprehensive Summary of the Report of the Parliamentary Commissioner for Future Generations of Hungary 2008–2009' (Gábor Trombitás tr, 2010).

¹³ Ludwig Beckman and Fredrik Ugglä, 'An Ombudsman for Future Generations, Legitimate and Effective?' in Iñigo González-Ricoy and Axel Gosseries (eds), *Institutions for Future Generations* (OUP 2016) 117, 121. For the Hungarian Commissioner and Deputy, see 'About the Office' (Office for the Commissioner for Fundamental Rights in Hungary) www.ajbh.hu/en/web/ajbh-en/about-the-office accessed November 2020.

¹⁴ Well-being of Future Generations (Wales) Act 2015 (anaw 2).

¹⁵ The WBFGA defines sustainable development and requires agencies to pursue it in the context of well-being objectives towards seven goals, including resilience and global responsibility: see sections 2, 3, 4, 5, 18 and 19. Note that the Commissioner is specifically identified as a 'guardian' and empowered to offer advice on climate change: see sections 18 (a) (i) and 19(1) (a). For recent public statements by the Commissioner, see for example the ten-point plan to fund the response to the climate emergency statement, 'Future Generations Commissioner for Wales white paper: detailed report. 10 Point plan to fund Wales' climate emergency' (Future Generations Commissioner for Wales 2019) www.futuregenerations.wales/resources_posts/10-point-plan-to-fund-wales-climate-emergency/; 'The Future Generations Report 2020' (Future Generations Commissioner for Wales 2020) www.futuregenerations.wales/resources_posts/the-future-generations-report-2020/ accessed December 2020. For the history, see Jane Davidson, *#FutureGen, Lessons from a Small Country* (Chelsea Green 2020); Alan Netherwood and Andrew Flynn, 'A shift in public policy for future generations in Wales?', Chapter 8 in this volume.

¹⁶ Beckman and Ugglä (n 13) 121. See the example of the Hungarian Ombudsman for Future Generations above, who has a number of investigative and reporting func-

The various national institutions highlighted above reflect different traditions, including the ombudsman tradition that has its origins in Scandinavia. A key feature of an ombudsman is that it has extensive powers to investigate the actions of bureaucrats and public entities but its findings are normally not binding. Typically, an ombudsman is seen as a representative of citizens' rights vis-à-vis other public institutions.¹⁷ As noted above, many environmental and sustainability commissioners are not styled as ombudsmen but have similar functions alongside their reporting functions, usually with a biodiversity conservation focus and their advice and recommendations are meant to inform, not direct, executive government policy-making.¹⁸

Many institutions have also been created or adapted to protect children's rights in accordance with the 1989 United Nations Rights of the Child Convention.¹⁹ This has seen the normalisation of Commissioners or Ombudsman for Children, with mandates or policies that tend to be forward-looking.²⁰ Various United Nations (UN) documents also emphasise the importance of the participation of young people in decision-making processes as a vital form of intergenerational solidarity, and as a precondition for the achievement of sustainable development.²¹ Recent litigation in several countries and within the UN human rights treaty system has invoked human rights, such as the rights to life, health, food security and a healthy environment, and national human rights institutions have at different times investigated or released reports on the implications of climate change.²² These institutions

tions and can initiate constitutional scrutiny of legislation through cases before higher courts.

¹⁷ Beckman and Uggla (n 13) 119. See Phillipa C McCormack and Cleo Hansen-Lohrey, 'Accountability, government decisions and future generations', Chapter 7 in this volume.

¹⁸ Eg *Commissioner for Sustainability and the Environment Act (ACT) 1993*.

¹⁹ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

²⁰ Eg Commissioner for Children and Young People, 'Listening to Children and Young People in Tasmania 2019' (Commissioner for Children and Young people (Tas) 2020) 17. This report describes efforts by the Commissioner to facilitate Tasmanian young people to have input into the Tasmanian government's climate change action plan.

²¹ Eg Report of the Secretary-General, 'Intergenerational Solidarity and the Needs of Future Generations' (2013) UN Doc A/68/322, 16.

²² *Urgenda Foundation v Netherlands* (Supreme Court of the Netherlands, 20 December 2019) 19/00135; Australian Human Rights Commission, 'Climate Change and Human Rights' humanrights.gov.au/our-work/rights-and-freedoms/projects/climate-change-and-human-rights accessed November 2020; 'CHR Concluded Landmark Inquiry on the Effects of Climate Change to Human Rights; Expects to set the Precedent in Seeking Climate Justice' (Republic of Philippines Commission on

represent some of the ways in which the interests of future generations are factored into current decision-making. There are many other ways to do this, such as constitutional provisions and a variety of what Jonathan Boston terms ‘commitment devices’,²³ such as statutory obligations or procedural triggers to set long-term goals or targets or consider long-term implications of policies.

SUSTAINABLE DEVELOPMENT

Sustainable development has emerged as perhaps the most widely used approach or framing for mandates in these national institutions, particularly since the Brundtland Commission report in 1987. The Brundtland Commission defined sustainable development as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’, thus including a concept of intergenerational justice as integral to the notion of sustainable development.²⁴ References to sustainable development have appeared in national legislation and the UN system for many years, but this framing—with or without reference to future generations—forms the mandates of the few new institutions in this area created in the past ten years and has been central to several reforms.²⁵

The concept of sustainable development has proven a double-edged sword. Versions of this concept that conceive of sustainability as ‘integrating’ or

Human Rights, 13 December 2018) chr.gov.ph/chr-concluded-landmark-inquiry-on-the-effects-of-climate-change-to-human-rights-expects-to-set-the-precedent-in-seeking-climate-justice/ accessed November 2020; UN Human Rights Committee, ‘Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2728/2016 * , ** , ***’ (2020) CCPR C/127/D/2728/2016 (the Ioane Teitiota communication). For innovative Australian litigation using the 2019 Queensland Human Rights Act, see ‘Young Australians in Human Rights Win Over Clive Palmer Mine’ (*Environmental Defenders Office*, 28 August 2020) www.edo.org.au/2020/08/28/young-australians-in-human-rights-win-over-clive-palmer-mine/ accessed November 2020. For the UN Human Rights Committee case by Torres Strait islanders, see ‘Torres Strait Islander Group Submits Response to Historic Climate Case’ (*Client Earth*, 30 September 2020) www.clientearth.org/latest/latest-updates/news/torres-strait-islander-group-submits-response-in-historic-climate-case/ accessed November 2020. See Bridget Lewis, ‘Human rights as a basis for institutions for future generations’, Chapter 4 in this volume.

²³ Jonathan Boston, ‘Protecting long-term interests’, Chapter 5 in this volume.

²⁴ WCED, *Our Common Future* (OUP 1987) 43.

²⁵ See Well-being of Future Generations (Wales) Act 2015 (anaw 2); ‘Parliamentary Advisory Council on Sustainable Development’ (*Deutsche Bundestag*) www.bundestag.de/en/committees/bodies/sustainability accessed December 2020; Discussion paper of the Network of Institutions for Future Generations, ‘Looking to 2030 and Beyond. How Institutions for Future Generations can Assist SDG Implementation’ (NIFG 2019).

‘balancing’ economic and environmental objectives have been problematic, as they have opened the possibility of prioritising economic development at the expense of the environment, with mere lip service paid to the long-term interests of future generations.²⁶ A further difficulty has been finding ways to transform the broader abstract concept of sustainability into practical policy, in a context where policy is extraordinarily complex and assumptions about possible futures are likely to be contested.²⁷

The several different traditions sketched above have various systemic features that may operate as obstacles to achieving effective institutions for future generations. The ombudsman tradition—where it is confined to investigating complaints rather than conducting its own investigations—tends to be reactive and strongly based on accountability ideas, so that it would only be effective to the extent that the legislative framework in question explicitly and sufficiently incorporates the interests of future generations.²⁸ Moreover, an ombudsman can only represent future generations on a proxy basis, unlike an ombudsman for children and young people, who can indirectly represent future generations to the extent that young people and future unborn people have overlapping interests. Similarly, administrative or governmental institutions and parliaments have systemic features that may militate against long-term thinking and planning, such as short electoral cycles and regular political changes leading to reversals of policy. Such institutions remain vulnerable to influence from corporations and interest groups whose interests run counter to those of future generations, such as lobbyists from fossil fuel or carbon-intensive industries, neoliberal influencers and believers in unconstrained short-term economic growth.²⁹

²⁶ See John Dryzek and Jonathan Pickering, *The Politics of the Anthropocene* (OUP 2019).

²⁷ For a developed heuristic to address these challenges, see Beate Fischer, ‘The Stocks Framework as a Heuristic for Sustainability Policies’ in Bernd Klauer et al (eds), *Sustainability and the Art of Long-term Thinking* (Routledge 2017) 177; Dryzek and Pickering (n 26) 18–19, 82–92. For a more optimistic framing of the potential of the SDGs, see Friedrich Soltau, ‘The 2030 Agenda for Sustainable Development’, Chapter 6 in this volume.

²⁸ McCormack and Hansen-Lohrey (n 17).

²⁹ For an exploration of climate denialist influencers in the USA, see Naomi Oreskes and Erik M Conway, *Merchants of Doubt* (Bloomsbury Press 2010). For a recent examination in the Australian context, see Marian Wilkinson, *The Carbon Club* (Allen & Unwin 2020). Examples from Australia and the United Kingdom include incoming governments abolishing, respectively, the UK Sustainable Development Commission and the Australian Climate Commission: see Adam Vaughan, ‘Government Axes UK Sustainability Watchdog’ (*Guardian*, 22 July 2010) www.theguardian.com/environment/2010/jul/22/government-axes-sustainability-watchdog accessed November 2020; Oliver Milman, ‘Coalition Scraps Climate Commission, Dispensing

RIGHTS FOR FUTURE GENERATIONS IN PHILOSOPHY, LAW AND POLITICS

Alongside these institutional developments, philosophers, political scientists and lawyers began to grapple with questions of intergenerational justice and the interests of future generations.³⁰ In these efforts, there have also arguably been significant barriers to progress. In the area of philosophy, one such barrier has been the idea that future generations are incapable of possessing rights and therefore of generating obligations, linked to (i) the concept that human beings only have rights upon being born, and/or (ii) the absence of an identity of persons not yet born. The essence of the latter—the so-called non-identity problem³¹—involves the argument that decisions made now impact who is born in the future and therefore cannot harm future generations, for they do not make them any worse off than they would otherwise have been, given that—as long as one's life is worth living—it is better to have been born rather than not born at all. There have been responses to these concerns. In terms of the first concern, Derek Bell has pointed out that duties owed to persons are not dependent on whether the person owed the duty is alive or not, but rather on the likelihood of harm.³² Similarly, a number of philosophers have contended that there is a duty of justice to ensure that future generations—regardless of the identity of particular individuals—enjoy life above a certain minimum threshold.³³ Undoubtedly, the large amount of attention devoted to these perceived obstacles to establishing responsibility towards future generations has at the very least been a significant distraction.

with Tim Flannery' (*Guardian*, 19 September 2013) www.theguardian.com/world/2013/sep/19/coalition-scraps-climate-commission-flannery accessed November 2020.

³⁰ The literature from philosophers and political scientists is extensive. For a catalogue of the 'resurgence' of ideas and reform proposals to give future generations a voice, see Andre Santos Campos, 'Representing the Future: The Interests of Future Persons in Democratic Institutions' (2020) BJPS 1–2. The 'legal' literature is less extensive, but see Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Transnational Publishers 1989); Peter Lawrence, *Justice For Future Generations: Climate Change and International Law* (Edward Elgar Publishing 2014); Lewis (n 22).

³¹ Derek Parfit, *Reasons and persons* (OUP 1974), 357.

³² Eg Derek Bell, 'Does Anthropogenic Climate Change Violate Human Rights?' (2011) 14(2) CRISPP 99, 109.

³³ Jeffrey Reiman, 'Being Fair to Future People: The Non-identity Problem in the Original Position' (2007) 35(1) PPA 69.

Among law academics, there have been similar objections linked to the concept that persons not yet born cannot possess legal rights.³⁴ There has also perhaps been a reluctance to reconceive human rights law in ways that establish obligations extending into the future. As Bridget Lewis, writing in this collection, points out, the embedded constraints of international law norms, such as imminence of harm, jurisdiction, and the like, are not trivial obstacles. However, Lewis argues that these obstacles are not immutable, and scholarship has begun to emerge which utilises well-established legal concepts such as those of guardianship and trusts to develop human rights law in creative directions aimed at preserving the human rights of future generations.³⁵

Political scientists in their turn have focused on how to reconcile the representation of the interests of future generations with their understandings of democratic legitimacy and pointed out the difficulties in measuring the effectiveness of institutions of future generations owing to the complex causal relationships involved.³⁶ There are currently relatively few institutions but quite a few reform proposals, ranging from new institutions to new forms of representation, including deliberative models.³⁷ As institutions become more common and gain more experience, there will be more opportunities for sustained empirical research seeking to analyse carefully their work and effectiveness. In the meantime, the scarcity of data in this area has certainly created difficulty in terms of arguing for particular institutional models. Jonathan Boston has observed that the design of such institutions is ‘more of an art than a science’.³⁸ He has also pointed out that there are great difficulties in assessing the quality of long-term governmental performance in general, owing to the fact that the future is uncertain and it is only when one arrives at a future point and can look back that one can carefully assess the performance of governance arrangements—a luxury enjoyed by historians but not policy-makers having

³⁴ Eg Ruth Macklin, ‘Can Future Generations Correctly be Said to Have Rights?’ in Ernest Partridge (ed), *Responsibilities to Future Generations: Environmental Ethics* (Prometheus 1981) 152. Certain legal scholars have played a key role in championing the rights of future generations, most notably Brown Weiss (n 30).

³⁵ Eg Peter Lawrence, ‘An Atmospheric Trust to Protect the Environment for Future Generations? Reform Options for Human Rights Law’ in Gerhard Bos and Marcus Düwell (eds), *Human Rights and Sustainability* (Routledge 2016) 25–39.

³⁶ See Boston (n 23); Boston (n 4).

³⁷ For an overview of existing institutions, see Boston (n 4) 171. For reform proposals, see Jan Linehan, ‘Reforming political institutions for the future: New reform proposals for legislatures and citizens’ assemblies’, Chapter 9 in this volume; González-Ricoy and Gosseries (n 4).

³⁸ See Boston (n 23).

to make decisions.³⁹ Notwithstanding these difficulties in measuring effectiveness, new institutions for future generations continue to be proposed.⁴⁰

BUILDING EVEN FAIRER AND MORE EFFECTIVE INSTITUTIONS FOR THE FUTURE

Some scholars from different disciplines and perspectives, sensing the limitations of existing models—including those commissioner-style institutions mentioned above—have begun to suggest more radical reforms, proposing that existing institutions be reformed or built afresh to ensure that the interests of future generations are factored appropriately into contemporary decision-making. John Dryzek, for example, has called for a rethinking of political institutions appropriate for this new era,⁴¹ involving the incorporation into human institutions of better ways of listening to ecological systems with broader participation—taking in both nature and future generations.⁴² Dryzek and Jonathan Pickering have pointed out that such reconceived institutions can play a key role in correcting the path dependency that current economic and political models perpetuate.⁴³ Other scholars have begun to critically evaluate institutions with the aim of improving their long-term planning and representation of the interests of future generations, incorporating insights from law, philosophy and political science, and proposing detailed practical options.⁴⁴

This book aims to make a modest contribution to this burgeoning scholarship.⁴⁵ It is multidisciplinary in approach and reflects contributions from political and social scientists, philosophers, lawyers and practitioners in this area. This book is necessarily selective, and does not attempt to cover all kinds of institutions: omissions include international organisations which play key

³⁹ Jonathan Boston, David Bagnall and Anna Barry, *Foresight, Insight and Oversight: Enhancing Long-term Governance Through Better Parliamentary Scrutiny* (Institute for Governance and Policy Studies, School of Government, Victoria University of Wellington, June 2019) 40.

⁴⁰ See Jan Linehan (n 37) for a discussion of the New Zealand Foresight Report and the UK Future Generations Bills 2020. Note that not all proposals are successful, eg the failure to create a UN Future Generations Commissioner.

⁴¹ John Dryzek, 'Institutions for the Anthropocene: Governance in a Changing Earth System' [2015] *British Journal of Political Science* 1; Dryzek and Pickering (n 26).

⁴² Dryzek and Pickering (n 26).

⁴³ *ibid.*

⁴⁴ Boston (n 4).

⁴⁵ Climate Justice Network (n 5).

roles in norm development and financing decisions, and private sector actors such as corporations and non-governmental organisations (NGOs).⁴⁶

This collection proceeds on the basis of a broad definition of institutions⁴⁷ for future generations (IFGs) to embrace a range of institutions, ranging from dedicated institutions with a specific mandate to promote the interests of future generations—such as commissioners for future generations—through to frameworks that may incorporate the interests of future generations in various ways, such as the UN Sustainable Development Goals (SDGs), and human rights law.

The contributions in this book deal with three central issues related to IFGs. First is the normative basis for such institutions. Put differently: why should such institutions be established? Does intergenerational justice, for example, provide a rationale for such institutions, and if so how is it defined—in terms of human rights, or the capability approach, or what? Second, what principles or framings should guide the operation of such institutions (hereafter referred to as ‘operating or guiding principles’), and how should these principles be reflected in the mandate of such institutions? These principles may, for example, reflect existing concepts such as sustainable development or human rights. Third, what types of IFGs work best in practice or have the most potential to advance the interests of future generations? Here the book draws on analysis of current IFGs and other ideas such as improving accountability more generally in the context of institutions (hereafter referred to as ‘lessons from practice’). In summary, this book addresses issues relating to the normative basis, operating principles and lessons from practice in relation to IFGs. The contributors do not always confine themselves to one theme; they also explore theoretical issues and practical suggestions for change.

Normative Basis

The first part of this book deals with the normative basis for IFGs. Why ought such institutions be established? What normative yardstick should be used to evaluate reform proposals in this area? This book includes several distinctive contributions on these questions.

⁴⁶ John Broome and Duncan K Foley, ‘A World Climate Bank’ in Iñigo González-Ricoy and Axel Gosseries (eds), *Institutions for Future Generations* (OUP 2016); Virginie Pérotin, ‘Democratic Firms: Assets for the Long-term’ in Iñigo González-Ricoy and Axel Gosseries (eds), *Institutions for Future Generations* (OUP 2016); Joakim Sandberg, ‘Pension Funds, Future Generations, and Fiduciary Duty’ in Iñigo González-Ricoy and Axel Gosseries (eds), *Institutions for Future Generations* (OUP 2016).

⁴⁷ For other definitions, see Boston (n 23).

In Chapter 2 Peter Lawrence argues in favour of an overarching normative basis for institutions for future generations based on a concept of intergenerational justice embedded in core human rights. He argues that a key rationale for such institutions is to mitigate the current systematic bias against the interests of future generations. Lawrence argues that this can be done by IFGs mitigating this bias *procedurally*, by giving voice to the interests of future generations by a proxy articulating their interests, and *substantively*, by increasing the possibility of realising intergenerational justice through such proxy institutions fairly factoring in the interests of future generations. He points out that bias assumes a benchmark of non-biased norms and behaviour, which he argues should in this context be based on a subsistence concept of intergenerational justice. Lawrence argues that proxy representation of future generations is further justified by the democratic values of equality and inclusion that in turn maximise the goal of securing intergenerational justice. He notes that underpinning the democratic ideal is the ‘all affected interests principle’ according to which a person affected by a decision should have a say in the making of that decision. Lawrence points out that this principle implies that future generations who are being affected by decisions made now should be given a voice in decision-making through proxy IFGs. He notes that presentist bias implies the negation of the ‘all affected principle’ to the extent that future persons affected by decisions being made now are being denied a voice on the basis of bias or prejudice. This provides a further rationale as to why IFGs are required to redress this bias.

Nicky van Dijk, in Chapter 3, argues for a ‘capability approach’ to intergenerational justice as a normative basis for addressing these questions. She points out that an attraction of this approach is that it acknowledges that future people—including both young people alive now and those yet to be born—are not a homogeneous group, but highly diverse. In her view, resources cannot be used as a proxy for the interests of future people, because people’s opportunities to utilise resources differ markedly according to whether, for example, they are able-bodied or live with a disability, are of a certain gender, or are Indigenous. A key insight in her approach is that in order to protect the capability set of individuals alive in the future, it is necessary to acknowledge that in the future individuals’ opportunities for well-being will be influenced by personal, societal and environmental factors.

Van Dijk generates a capability set for future people by using the self-proclaimed interests of the current generation (e.g. through various UN instruments) as a proxy for future people, combined with empirical research into the physical needs of human beings. Her work develops the Capability

Approach of Amartya Sen⁴⁸ and suggests principles that could guide institutions in this area. Her theoretical approach points in the direction of IFGs being assigned sufficiently broad mandates to ensure they are able to represent the diverse capability set she argues for. She notes that while her chapter uses the ‘capability’ language of the Capability Approach, it could be extrapolated to other approaches, including approaches based on sustainability or human rights.

In Chapter 4 Bridget Lewis argues that human rights—both moral and legal rights—can provide the basis for institutions of future generations in various ways. She points out that existing human rights law and jurisprudence have limitations in establishing obligations towards future generations. These limitations include, for example, the requirement to establish imminent harm as a precondition of liability. But in spite of these limitations, Lewis argues that human rights provide both the language to articulate the rights and duties of future generations to combat short-termism, and a suitable framework for decision-making which minimises inappropriate short-term decision-making. She also contends that human rights approaches highlight shared humanity between contemporaries and future generations and can help put pressure on politicians to justify policies that diminish future generations’ ability to enjoy their human rights. Lewis argues that a focus on ensuring the current generation’s human rights is insufficient to ensure overflow benefits to future generations. She also argues that, rather than focusing on the redesign of existing human rights-related institutions which have inherent limitations of mandate and resources, a preferred strategy would be to create dedicated institutions as a way to enhance the ‘legal opportunity’ structures specifically for future generations. She goes on to explore how different kinds of future-focused institutions—ranging from complaint-hearing to investigatory, supervisory, legislative scrutiny and advisory models—could incorporate the human rights of future generations. Lewis argues that a human rights mandate could strengthen the normative basis of protection by looking at fundamental values and the range of civil and political and economic rights rather than a narrow conception of environmental or economic sustainability. She also explores how such institutions would need to be made more ‘future beneficial’ by developing new standards of performance, rules of standing and evidence, and new approaches to assessment of future risk, as well as rights-related good governance principles (e.g. freedom of information and equality before the law). Finally, Lewis also observes that because the push for a UN Commissioner for Future Generations has stalled, the time is right to look at creating national institutions, and notes that NGOs such as the World Future

⁴⁸ Amartya Sen, *Inequality Reexamined* (Clarendon Press 1992).

Council (WFC) continue to lobby for a ‘connected system of national bodies’ to achieve greater protection of future generations’ interest.

Mandate and Operating Principles

The next part of the book examines the operating principles which would guide the operations of IFGs. Some of the contributions deal both with the rationale for IFGs and with operating principles which could be suitably incorporated in a particular mandate.

In Chapter 5 Jonathan Boston provides a helpful broader framing for these issues, by considering institutions for future generations in the context of ‘commitment devices’, which he defines as devices that ‘seek to bind a person, organisation or government to an agreed course of action or particular norm or rule’. Such devices penalise behaviour deviating from the particular rule and seek to alter individual motives in the direction of ‘rebalancing the scales to protect long-term interest’. Boston defines institutions broadly to include social norms, rules and procedures as well as specific institutions, whether public or private. His chapter addresses policy commitment devices (such as long-term targets) that aim to address ‘dynamic inconsistency’ which occurs when an individual’s goals change over time, creating a clash between long-term goals and short-term desires or preferences.

As noted above, Boston argues that designing effective commitment devices is ‘more an art than a science’ owing to the difficulty of measuring effectiveness. Crucially, he concludes that there is ‘no silver bullet’ in terms of the most effective type of commitment devices, and that a multipronged strategy should be pursued. Such devices are most relevant where sustained political support is required for long-term policy endeavours in a context where policy failure is at risk because a major policy initiative takes a long time to be realised, with costs imposed on and borne by powerful groups.

To be successful, Boston argues that commitment devices must impose genuine constraints which make them costly to override. Independent bodies can increase the political cost of politicians ignoring expert advice and shield decisions involving long-term ramifications from party political factors. He points out that all commitment devices have pros and cons. In a case study involving the New Zealand Child Poverty Act, he shows that an unrealistic target of eliminating child poverty within ten years failed partly because the government lacked the capacity to control various factors linked to achievement of the target. Boston notes that while long-term targets may positively incentivise senior policy-makers and stimulate public debate, they must be designed with care.

Boston’s conclusion is sobering. He considers that ‘overall’ commitment devices have limited capacity to reduce political myopia and counter dynamic

inconsistency, evidenced by the continuing bias against future generations in policy-making in liberal democracies. He observes that commitment devices are not self-generating; they depend on a minimum level of argument and commitment to long-term interests of future generations. Boston's work on institutions here and elsewhere and his engagement with practical reform proposals in the context of the New Zealand Parliament reflect an appreciation of the political theory and dynamics of such bodies and a practical focus on the need for a range of changes to ensure the interests of future generations are protected.⁴⁹

As the mandates of a number of IFGs use the framing of sustainable development, it is key to understand the implications of that framing and related models and issues of implementation. Both issues are taken up by Friedrich Soltau in Chapter 6, at the international level, in relation to the 2015 Sustainable Development Goals. While some have argued that the SDGs, because of the relatively short-term 2030 targets, represent a step back from an emphasis on protecting the interests of future generations, Soltau argues that on closer analysis, this is not the case. He points out that while just under half of the SDGs have targets under 15 years, the achievement of many SDG targets will have flow-on benefits for future generations. Thus, for example, achieving SDG 3.3, which requires an end to various diseases including malaria by 2030, will have a significant positive impact for future generations. Similarly, he argues that ending poverty now (SDG 1) will flow on to future generations given that poverty tends to recur across generations. And the same can be said for SDG 16, involving the aim of more representative and participatory government structures. The SDGs represent a negotiated framework that is time-bound and can be expected to change in the future. The SDGs also reflect an expectation that states will localise the SDGs through national institutions and the existing IFGs have signalled that they see a role for themselves in achieving the SDGs.⁵⁰ It is likely that UN agencies will promote such models as part of 'best practice' in this area.

Soltau notes that in the past, the Achilles' heel of implementation of sustainable development has been its failure to be incorporated in the implementation and participatory structures of government. Soltau points out that the SDG norm (SDG target 4.7) of promoting sustainability education is crucial here. It is only through such education that support for institutions that factor in the interests of future generations can be developed and sustained. Moving forward, education remains crucial for building a bedrock for supporting 'mainstreaming' of future generations' interests in existing institutions as

⁴⁹ Boston, Bagnall and Barry (n 39) 2–19.

⁵⁰ NIFG (n 25).

well as designing effective institutions with a specific mandate to promote the interests of future generations.

Lessons from Practice

In Chapter 7, Phillipa McCormack and Cleo Hansen-Lohrey break new ground in demonstrating how administrative law principles and related institutions can offer important lessons for developing effective IFGs. In a close reading and a thoughtful study of a well-established national institution within the ombudsman tradition, they demonstrate that the democratic, rule of law and individual rights justifications for administrative law accountability review mechanisms can be expanded to accommodate the interests of future generations. One strand of this argument is the focus on ‘effects’ of government decisions as a justification for accountability mechanisms. McCormack and Hansen-Lohrey point out that this rationale can be expanded to accommodate future generations represented by a suitable proxy institution similar to a guardian, with a mandate to hold decision-makers to account. Similarly, ‘legal equality’ as a rationale for accountability can be reinterpreted to balance current and future generations’ interests against the state. Importantly, they point out that this would only be possible if accompanied by law reform, making mandatory governmental decision-makers’ consideration of long-term interests. Accountability mechanisms only work if there are clear benchmarks against which they can operate.

McCormack and Hansen-Lohrey draw lessons for designing IFGs from the experience of the Australian Ombudsman. A key lesson of this experience is the desirability of any future-focused institution having a flexible mandate that defines principles and values rather than (narrow) outcomes. Candidates for such values include, in their view, sustainable development, well-being, intergenerational equity, precautionary principle, interests and rights of future generations, stewardship and intergenerational justice.

They go on to argue that any such IFG will need to be armed with a range of procedural powers (similar to the ombudsman), including powers to investigate, but will also need to have an educative role and a research function. To ensure independence, in their view it is crucial that such a body reports to parliament, with the option to escalate concerns to parliament where recommendations to the executive arm of government are ignored.

Chapter 8 by Alan Netherwood and Andrew Flynn discusses the 2015 Wales Well-being of Future Generations Act (WBFGA), which is often cited as a successful model of a Future Generations Commissioner. The creation of the WBFGA is often seen as representing a successful brokering between different political interests and its work is seen as ground-breaking. The commissioner’s mandate in the Act is framed around the sustainable development principle and

well-being goals identified across seven areas. The commissioner has advisory powers and much of its focus over its relatively short life has been on connecting with local communities and developing modes of working for its primary audience—the Welsh public service boards and the Welsh government. These public bodies are required to use a sustainable development principle—which has embedded in it a notion of intergenerational justice—in their governance and operations. Netherwood and Flynn use existing literature to point to a range of factors being responsible for the short-termism manifest by existing institutions, including short-term political and business cycles and information bias entailing limited information on long-term consequences of policy. The WBFGA has the potential to address these factors through the office of an independent Commissioner for Future Generations, but Netherwood and Flynn, in their analysis of practice during the first five years of the WBFGA, conclude that it has thus far not lived up to its promise. In their view, the public sector has been struggling to adapt to the Act, with a tendency for planning and policy to be limited to long-term impacts on current generations without consideration of future generations' distinctive interests. They find an absence of analysis both of specific outcomes for future generations and of outcomes and trade-offs between generations.

Nonetheless, Netherwood and Flynn conclude on an optimistic note, arguing that the institutional and legal framework in Wales is sufficient to achieve the aim of properly representing the interests of future generations in policy-making. But in their view, this will require political leadership, and more emphasis on policy and planning that focuses explicitly on how different generations' interests will be impacted, as well as the incorporation into the existing structures of mechanisms that explicitly attempt to represent future generations—such as citizens' assemblies.

In Chapter 9 Jan Linehan looks at the creation of IFGs as a 'reform project' and examines several proposals for reform of national parliaments and development of deliberative or citizens' assemblies.⁵¹ She argues that a renewed focus on national and subnational legislatures is timely, given recent reform proposals for parliaments in New Zealand and the United Kingdom (UK) and the turn to deliberative assemblies in a number of countries, including the UK and France. Without suggesting that legislatures should be treated as homogeneous, she notes that they have common scrutiny features and mostly share the systemic problems of seemingly intractable short-termism, based on short electoral cycles, dominance by the executive government, partisan politics

⁵¹ Boston, Bagnall and Barry (n 39); Well-being of Future Generations Bill (2019–21) 8; Climate Assembly UK, 'The Path to Net Zero' (September 2020) www.climateassembly.uk/report/ accessed December 2020.

and susceptibility to influence from pro-development interests and the like. Linehan argues that a focus on reform of legislatures is important for reasons of democratic legitimacy, addressing current failings in their scrutiny role and creating support for passing other reforms, such as creating administrative IFGs or commitment devices. She looks in detail at several proposals which show signs of some renewed momentum towards implementation. However, Linehan cautions against reform of these institutions or creating new IFGs by unthinking use of the lenses of sustainable development or liberal human rights. She argues that reform approaches based on existing models risk failure or unintended, unjust consequences for current and future generations. Instead, we need to pay greater attention to what we can learn from contested issues in the present, explore the implications of proposed normative framings or mandates in different scenarios and consider using deliberative models which reflect a diversity of voices. In Linehan's view, reform proposals face a series of systemic obstacles outlined above, as well as questions of political feasibility, but proposals for independent parliamentary bodies and deliberative assemblies may provide potential voices for the interests of future generations, provided they are sufficiently diverse in the interests they represent. This in an area where there is limited experience and such bodies risk being over-burdened with expectation. Linehan concludes that while the legislative reform route appears lacking in ambition and slow, it is likely to become even more important as a vehicle for inserting the rights of future generations into policy discussions when we come to consider the many difficult decisions involved in climate adaptation, such as disaster preparedness and responses, and possible climate interventions such as geoengineering.

In Chapter 10 Elizabeth Dirth surveys European institutions for future generations. She offers a systematic account of different kinds of institutions and argues for a reimagined conception of justice—'just future-making'—that would be reflected both in how we think about the arguments for IFGs, and in their mandates and operations. She argues that many approaches replicate the systemic failures of existing institutions. Such approaches naturally tend to see the future as isolated, abstract and static, or view it narrowly from a conservationist standpoint, which makes them unlikely to lead to justice or effective action. Instead, she advocates an approach based on a justice framing and focused on integration, participation and imagination. Her chapter explores how these concepts could be incorporated into existing institutions to ensure more dynamic and effective decision-making. Dirth describes a series of characteristics of effective institutions drawing on the literature and her empirical research, including with stakeholder groups. Her contribution expands the discussion by extending the more usual analysis of suggested conditions for effectiveness which focuses on features such as independence, legitimacy, influence and accountability to add concepts such as degrees of 'embed-

dedness' in governance processes, 'inclusion' and 'imaginative capacity' or visioning. She argues that these characteristics can affect influence and effectiveness, but only where the institution has actually operationalised them in its goals and targets. She emphasises that participatory inclusion and imagination and visioning are key to producing more just future-making. Dirth examines a number of European institutions through this framework. Like others in this collection, she argues for much greater attention to be paid to the role of participatory processes and the involvement of young people.

CONCLUSION

Turning back to the themes of this collection, organised around the ideas of 'rationale', 'mandates and operational principles' and 'lessons learned', each of the contributors has engaged in different ways with the key questions in this field, offering insights and ideas for further development. It goes without saying that the interests of future generations cannot be advanced through single institutions alone—there is no silver bullet. Rather, what we need is a range of changes to existing institutions and potentially the development of completely new ones. The contributors in this book have shown that there are a number of normative bases for IFGs which may operate in different contexts and resonate with different audiences, and that there are useful lessons to be learned from existing institutions, including the few current IFGs.

What next? We need to encourage holistic approaches which span not just the climate emergency but other urgent long-term issues (e.g. reducing child poverty). We need further empirical research on existing approaches and innovative institutions. In particular, we should take a more practical turn in our research, test assumptions, develop criteria and try to understand how IFGs would approach their tasks in different scenarios.⁵² We should also look to open dialogues with a range of actors on these ideas, including young people, communities, businesses, politicians and government decision-makers, so we can both learn from them and inform public and political discussions.⁵³ The complexity of the situation we face with climate change, and the many challenges young people and future generations will face, seem daunting.⁵⁴

⁵² Linehan (n 37).

⁵³ Eg the collaboration in Boston, Bagnall and Barry (n 39), and the Voices of the Future Town Hall meeting and Youth meeting (27 June 2019) held in Hobart with the Experts meeting (28 June 2019) that inspired this volume.

⁵⁴ Will Steffen, 'A Truly Complex and Diabolical Policy Problem' in John S Dryzek, Richard B Norgaard and David Schlosberg (eds), *Oxford Handbook of Climate Change and Society* (OUP 2011) 21; Richard J Lazarus, 'Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future' (2009) 94(5) *Cornell*

Nonetheless, designing effective governance models and IFGs to take account of future generations in facing this imperilled future is a modest but important step in protecting their interests. Intergenerational justice requires such a response.

Finally, we owe a huge debt of thanks to the University of Tasmania Faculty of Law and our students and colleagues in the Climate Justice Network for their help with our project and this manuscript, particularly Nicky van Dijk, Salman Shah and latterly Bridget Dunne. We also would like to express our heartfelt gratitude to participants in our research projects and events, and particularly to Jonathan Boston, Jonathan Pickering and Peter Davies. We would also like to acknowledge the grant awarded by the University of Tasmania in November 2018, under the theme area Environment Research and Sustainability.

Law Review 1153; Stephen Gardiner, *A Perfect Moral Storm: The Ethical Tragedy of Climate Change* (OUP 2011).