

# WAIKATO LAW REVIEW

TAUMAURI

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|   |            |
|---|------------|
| <b><i>Law-Making in New Zealand: Is There a Better Way? [Harkness Henry Lecture]</i></b>  | <b>1</b>   |
| Rt Hon Sir Geoffrey Palmer QC   |            |
| <b><i>The Special Tribunal for Lebanon: Work In Progress at the First Tribunal Charged with Terrorist Jurisdiction [Speech]</i></b>               | <b>41</b>  |
| Sir David Baragwanath   |            |
| <b><i>Lessons from Aotearoa – New Zealand: Reconciliatory Justice and Federal Indian Law</i></b>  | <b>51</b>  |
| Dr Torivio A Fodder   |            |
| <b><i>Legislative Judging: Bills of Attainder in New Zealand, Australia, Canada and the United States</i></b>                                     | <b>78</b>  |
| Dr Duane L Ostler   |            |
| <b><i>Limits on Constitutional Authority</i></b>  | <b>87</b>  |
| Edward Willis   |            |
| <b><i>Climate Change Considerations under the Resource Management Act: A Barrier to Carbon Capture and Storage Deployment in New Zealand?</i></b> | <b>117</b> |
| Greg Severinsen   |            |
| <b><i>An (Indigenous) Rights-Based Approach to Deforestation in Papua New Guinea</i></b>  | <b>137</b> |
| Joshua Pietras  |            |
| <b><i>Should Pre-Action Protocols be Adopted by the New Zealand Civil Justice System?</i></b>   | <b>165</b> |
| Shelley Greer   |            |
| <b><i>Case Comment: Re Greenpeace of New Zealand Inc</i></b>  | <b>179</b> |
| Juliet Chevalier-Watts  |            |
| <b><i>Case Note: Holler v Osaki</i></b>   | <b>183</b> |
| Thomas Gibbons  |            |
| <b><i>Book Review: Nevill's Law of Trusts, Wills and Administration</i></b>   | <b>190</b> |
| Sue Tappenden   |            |

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|   |  |
|---|--|
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## EDITOR IN CHIEF'S INTRODUCTION

I would like to welcome you to the 2014 edition of the Waikato Law Review. This year's edition delivers a great diversity of articles and submissions, which reflects the Māori title of the Review, Taumauri, meaning "to think with care and caution, to deliberate on matters constructively and analytically"; this title both encapsulates and symbolises the values and goals of the Review.

The highly respected Harkness Henry Lecture takes centre stage as the lead article in the Review, as always. We were delighted to have Rt Hon Sir Geoffrey Palmer QC give this year's lecture. His Honour undoubtedly needs no introduction, and his lecture, entitled "Law-Making in New Zealand: Is There a Better Way?", was very well received. I would like to extend my gratitude to Harkness Henry for their continued support of Te Piringa and the Review in the sponsorship and organisation of this prestigious annual event.

In addition to the annual Harkness Henry Lecture, I am pleased to share this year a very wide variety of papers that represent work from national and international scholars, experts and practitioners, as well as highlighting work from new and emerging academics. Their submissions are welcomed for their contribution to the continued exploration of the law in theory and context. Thank you to all the contributors for your valuable contributions.

Thanks must also go to the editorial team, and many thanks to Jaimee Paenga as Senior Student Editor for her dedication and efficiency.

Juliet Chevalier-Watts  
Editor in Chief



# THE HARKNESS HENRY LECTURE

## LAW-MAKING IN NEW ZEALAND: IS THERE A BETTER WAY?

BY RT HON SIR GEOFFREY PALMER QC\*

### I. DEFINITION OF THE PROBLEM: THE OVERVIEW

In delivering this lecture I follow a long line of 22 distinguished lawyers, of whom 19 were either judges or became judges. Professor John Burrows QC, Professor Margaret Wilson and I are the only exceptions.<sup>1</sup> Important as judging is in the production of justice according to law, judges are not often directly involved in making our most important laws, those contained in statutes enacted by Parliament. The judicial province involves the development of the New Zealand common law, a species of law that is fast being crowded out by statute. The judges also bear the weighty responsibility of interpreting and applying the laws passed by Parliament.<sup>2</sup> The task of the judges increases in importance as the quality of the statute being construed diminishes.

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\* Distinguished Fellow, Victoria University of Wellington Law Faculty and Centre for Public Law. The author is grateful for comments and assistance on this paper from Professor John Burrows QC, Ross Carter, Parliamentary Counsel, Professor Claudia Geiringer, Sir Kenneth Keith, Rachel Opie, Dr Matthew Palmer QC and Professor Margaret Wilson. They are not to be taken as agreeing with it, however.

1 Professor Burrows' topic was related to the topic of this lecture. It was "Statutes and the Ordinary Person" (2003) 11 Wai L Rev 1. In it he concluded at 12:

There are undoubtedly some traps for the ordinary person in reading statutes, however plainly they may be drafted. Nor will a reading of those statutes automatically solve all that person's problems. But there is no doubt that plain drafting brings the law much closer to the ordinary person. He or she gets from it a better understanding, and a clearer picture of his or her rights and obligations than was ever possible before. Lawyers should be grateful, too, in that plain drafting renders statutes more accessible to them as well. It would be of concern if the courts, in interpreting such legislation, departed too far from the ordinary person's understanding in too many cases or for anything other than the most worthy cause.

2 A number of my previous writings relate to the topic of this lecture: Geoffrey Palmer "The New Zealand legislative machine" (1987) 17 VUWLR 285; "What is Parliament for?" [2011] NZLJ 378; New Zealand Centre for Public Law "Law Reform and the Law Commission in New Zealand after 20 Years: We Need to Try a Little Harder" (Occasional Paper No 18, 2007); "Improving the Quality of Legislation: The Legislation Advisory Committee, the Legislation Design Committee and What Lies Beyond" (2007) 15 Wai L Rev 12; "The Legislative Process and the Police" in Neil Cameron and Warren Young (eds) *Policing at the Crossroads* (Allen and Unwin/Port Nicholson Press, Wellington, 1986) 86; "Innovations in New Zealand Statute Law" in Geoffrey Palmer (ed) *Reflections on the New Zealand Law Commission: papers from the twentieth anniversary seminar* (LexisNexis, Wellington, 2007) 127; "Government and Advice: Reflections on the Wellington Policy Making Culture" in Claudia Geiringer and Dean R Knight (eds) *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) 274; *New Zealand's Constitution in Crisis: Reforming our Political System* (John McIndoe, Dunedin, 1992) at 102–128; *Unbridled Power?— An interpretation of New Zealand's constitution and government* (Oxford University Press, Wellington, 1979) at 77–108 and all subsequent editions make reference to these issues; *Reform: A Memoir* (Victoria University Press, 2013) contains much material legislation issues.

Today I want to focus on how statutes are made, how they are presented to the public and how those two matters could be improved.<sup>3</sup> The statutes passed by Parliament contain the most important laws that we have. Their method of manufacture and their accessibility, while a topic of intense public importance, is little understood by the public.<sup>4</sup> The issue receives little political attention but it matters a great deal. Change can only be achieved with public visibility and public concern about the issue. The methods of making statutes in New Zealand are problematic and need reconsideration.

The values of the rule of law norm are engaged in legislation issues. While the rule of law is both a foundational doctrine of New Zealand's constitution and regarded as "a guiding light of constitutional propriety" it is nonetheless a heavily contested concept.<sup>5</sup> Its core elements, however, stem from the position that statute law occupies in our legal system. The first part of Lord Bingham's now famous formulation of the elements of the rule of law is: "The law must be accessible and so far as possible intelligible, clear and predictable."<sup>6</sup> He suggests that everyone and the authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, which take effect generally in the future and are publicly administered in the courts.<sup>7</sup>

Lord Bingham quotes an English Judge who pointed out:<sup>8</sup>

there is no comprehensive statute law database with hyperlinks which would enable an intelligent person, by using a search engine, to find out all the legislation on a particular topic.

While the situation is substantially better in New Zealand and far better than it has been here in the past, there is no comprehensive website database containing *all* the legislation on a particular

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3 The most useful sources are David McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing, Wellington, 2005); JF Burrows and Ross Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009); Mai Chen *Public Law Toolbox: Solving Problems with Government* (LexisNexis, Wellington, 2012) ch 8; Ryan Malone *Rebalancing the Constitution: The Challenge of Government Law-Making under MMP* (Institute of Policy Studies, Victoria University of Wellington, 2008); Claudia Geiringer, Polly Higbee and Elizabeth McLeay *What's the Hurry? Urgency in the New Zealand Legislative Process 1987–2010* (Victoria University Press, Wellington, 2011); Ross Carter, Jason McHerron and Ryan Malone *Subordinate Legislation in New Zealand* (LexisNexis, Wellington, 2013); Law Commission *Presentation of New Zealand Statute Law* (NZLC R104, 2008) Presentation of New Zealand Statute Law – in conjunction with Parliamentary Counsel (2008) that led to the Legislation Act 2012. Cabinet Office *Cabinet Manual 2008* at 86–106. David McGee "Concerning Legislative Process" (2007) 11 OLR 417.

4 The saying attributed to Chancellor Otto von Bismark sends the wrong message: "What do legislation and sausages have in common? One sleeps better if one does not know how they are made." Quoted by Professor Petra Butler from German sources in Petra Butler "When is an Act of Parliament an Appropriate Form of Regulation? Regulating the Internet as an Example" in Susy Frankel and Deborah Ryder (eds) *Recalibrating Behaviour: Smarter Regulation in a Global World* (LexisNexis, Wellington, 2013) at 489. Transparency is what is needed.

5 Matthew Palmer "Assessing the Strength of the Rule of Law in New Zealand" (paper presented to the New Zealand Centre for Public Law Conference on "Unearthing New Zealand's Constitutional Traditions", Wellington, 30 August 2013).

6 Tom Bingham *The Rule of Law* (Allen Lane, London, 2010) at 37. See also Lord Bingham "What is the Law?" (2009) 40 VUWLR 597 at 600 where he pointed out that since ignorance of the law is no excuse "statutes should be as clear and simple as the subject matter permits".

7 At 8.

8 Bingham, above n 6, at 42; *R v Chambers* [2008] EWCA Crim 2467 at [68].



topic.<sup>9</sup> So the issues being discussed are fundamental to the good operation of our legal system. As one former parliamentary counsel in the United Kingdom put it:<sup>10</sup>

The rule of law matters enormously to society as a whole, and legislation is its backbone. Everyone involved in the process of legislation is therefore able to see themselves as engaged in a process the importance of which transcends considerations of personality or party.

Clearly law-making is a function of utmost importance to society as a whole and it needs to be carried out as carefully and systematically as possible.

We need to improve the quality of the law we pass. Quality can be an elusive idea but it does not, like beauty, lie in the eye of the beholder. Views will assuredly differ according to the angle from which the legislation is viewed; it can easily be demonstrated, as Ross Carter has done, that a minister, a legislator, a judge, a parliamentary counsel and an ordinary user will not look at the statute in the same way. Even so, the law has to be expressed in a clear and accessible form. It should contain carefully designed substantive policy objectives and the means of achieving them. It must be capable of working effectively in the real world. It should not result in unexpected consequences, nor be excessively costly and burdensome in its operation.<sup>11</sup>

Modern statutes in New Zealand have “Purpose” sections designed to explicitly state the legal, social, economic or political objectives the measure aims to achieve. Clarity about what is to be achieved is essential.<sup>12</sup> That in turn depends, in any substantial legislative scheme, upon a rigorous definition of the problem, as every good policy analyst knows. Modern social science research methodologies make it possible to find out whether a statute has achieved its target and whether the objects have been achieved. Yet such work is undertaken infrequently in New Zealand. So while dogmatic attempts to define quality will fail to satisfy, there do exist steps that can be taken to find out whether the test of producing “high quality legislation” set out in the purpose provision of the Legislation Act 2012 is being met.

My favourite quotation about legislation comes from President Woodrow Wilson when he was a Professor of Government at Princeton: “Once begin the dance of legislation, and you must struggle through its mazes as best you can to its breathless end, – if any end there be.”<sup>13</sup> Every Act of Parliament has its own unique history, its own often convoluted and difficult journey through the executive and Parliament. There is no end for another reason. Time and events render most statutes obsolete in the end. Indeed, their shelf life seems to be becoming shorter. In a small country with easy resort to legislation we tend to reorganise ourselves continuously and rather incoherently.<sup>14</sup>

In New Zealand we have a tendency to pass big statutes, find we do not like the results and engage in a constant pattern of amendments whereby the statute risks losing both its principles

9 For the problems concerning the absence of a register of Legislative Instruments, see n 30 below. But the Government Legislation website <[www.legislation.govt.nz](http://www.legislation.govt.nz)> is a great advance on what went before. Free public electronic access to up-to-date comprehensive New Zealand legislation has never been better.

10 Daniel Greenberg *Laying Down the Law – A discussion of the people, processes and problems that shape Acts of Parliament* (Sweet & Maxwell, London, 2011) at 271. For an earlier and more mannered account of the English system, see Harold S Kent *In on the Act: Memoir of a Law Maker* (MacMillan, London, 1970).

11 Ross Carter “‘High Quality’ Legislation: (How) Can Legislative Counsel Facilitate it?” [2011] 4 *The Loophole* 41.

12 Duncan Berry “Purpose Sections: Why they are a good idea for drafters and users” [2011] 2 *The Loophole* 49.

13 Woodrow Wilson *Congressional Government* (15th ed, Meridian Books, New York, 1956) at 397.

14 Some statutes have been remarkably durable over time, for example the Sale of Goods Act 1908 and the Bills of Exchange Act 1908.

and its coherence. For example, the Resource Management Act 1991 is in 2014 much more than twice its original length and neither elegant nor clear.<sup>15</sup> The Social Security Act 1964 has been a convoluted mess for many years, despite its vital importance to many thousands of people.<sup>16</sup> There are reasons why this occurs. The government may not wish to open up too many issues for debate; parliamentary time and drafting resources are limited. The tendency has adverse effects upon the coherence and clarity of the statute book and needs to be curbed. It is often better to start again.

Over the years I looked at these issues from a number of points of view: as an academic constitutional lawyer, as an MP, as Leader of the House, as a minister, as a legal practitioner, as chair of the Legislation Advisory Committee, the Legislation Design Committee and as President of the Law Commission. My rather bleak conclusion is that, judged as whole, the New Zealand system of making and presenting statute law system needs urgent attention if we are to avoid being drowned in a sea of law so extensive as to be unmanageable.<sup>17</sup> Statute law comprises the infrastructure for governance. That infrastructure does need constant maintenance. There are no immutable or agreed constitutional principles that speak to the amount of legislation or its quality. The public knows that Parliament makes the law but probably not much about how it is made and even less about what improvements could be engineered.

The quantity of new law and the demand for it are unlikely to abate in the future. We have 65,000 pages of statute law. The quantity of New Zealand statute law has increased very rapidly over the period of 40 years and it is unrealistic to expect the amount to lessen. Floods of new laws characterise most democracies with which New Zealand compares itself. Policy-makers use law to achieve their ends. In New Zealand they are particularly prone to do so. The welfare state has brought many legislative demands. The need to regulate industries, the economy, education and health care, and provide protection for the environment requires extensive law. Monitoring how all this works seems rational but it is carried out only sporadically.

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15 The Resource Management Act occupied 382 pages of the statute book when it was enacted in 1991. The April 2014 reprint of the same Act has 827 pages. This pattern of continual amendment has caused the vital issue of climate change to be off limits in important ways under New Zealand's most important environmental statute: see *West Coast Ent v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32. According to the Legislation New Zealand website <[www.legislation.govt.nz](http://www.legislation.govt.nz)>, the Resource Management Act 1991 has been amended 36 times since September 2007. The Ministry of the Environment lists 14 amendment Acts passed before 2007: see Ministry for the Environment "Past RMA Amendments" (11 December 2013) <[www.mfe.govt.nz](http://www.mfe.govt.nz)>.

16 This may be the worst statute on the books in New Zealand but at last attempts are being made to revise it. Look at the Social Security Act 1964 as reprinted on 7 July 2014 on the New Zealand Legislation website to see what a poor indicator the statute is of people's legal entitlements.

17 New Zealand does not suffer alone from problems with legislation. The United Kingdom House of Commons Political and Constitutional Reform Committee published a report in May 2013 *Ensuring standards in the quality of legislation* (HC 85, 9 May 2013). A succinct summary of the pressure that led to the inquiry is contained on the website, Commons Select Committee "Ensuring standards in the quality of legislation" (20 May 2013) UK Parliament <[www.parliament.uk](http://www.parliament.uk)>:

There has been repeated criticism in recent years, from a variety of sources, about both the quantity and quality of legislation, despite changes to the legislative process in the House of Commons (Public Bill Committees), initiatives to consult on some legislative provisions in draft before their formal introduction (pre-legislative scrutiny) and the beginnings of a process for evaluating the effectiveness of legislation following its enactment (post-legislative scrutiny). It has also been despite the existence of a Cabinet Committee (Parliamentary Business and Legislation) which is supposed to ensure that Bills are well-prepared before they are presented to Parliament. The Better Government Initiative, Hansard Society and the Leader's Group on House of Lords working practices have all suggested that a parliamentary Legislative Standards Committee could help to improve the quality of legislation.

The first question to ask about any proposed Bill should be: why is this law necessary? The question is not asked with sufficient rigour in New Zealand. Conferring status by legislation or passing Bills for political reasons when there is no need to change the law is a waste of legislative time and it is futile. Either the law needs changing or it does not. The Music Teachers Act 1981 remains my favourite example because anyone can teach music under New Zealand law. So no Act of Parliament is necessary. But there has been one since 1928. Frequently there is no need to legislate for the creation of government departments either but it is usually done.<sup>18</sup> I have trouble understanding why, for example, an Act of Parliament was necessary in order to carry out the objects of the Callaghan Innovation Act 2012. It could have been done by several other legal means not requiring a change in the law.

As I have said many times over the years, New Zealanders tend to exhibit an innocent and misplaced faith in the efficacy of legislation. We seem to be addicted to passing legislation for the sake of it. We seem to believe it will solve our innermost ills. The government must be seen to be acting or reacting. Passing a law is seen to be doing something. As a respected New Zealand judge, Sir Alexander Turner wrote in 1980: “The belief is widely held, that there is no human situation so bad but that legislation properly designed will effectively be able to cure it.”<sup>19</sup> We need to find a cure for our hyperlexis.

New Zealand has an elaborate set of requirements these days for the preparation of regulatory impact statements and analyses before legislation is advanced.<sup>20</sup> These seem to me to have been ineffective at improving the quality of legislation and have become a bureaucratic exercise that deters ministers from their course very little and engages the public not at all. I wonder if a cost-benefit analysis would show that the exercise is worth the effort and resources that it takes. Such issues need to be considered at the beginning and throughout not towards the end of legislative design exercise. The whole process by which legislative proposals are developed for the consideration of Parliament should be changed and made more transparent.

There lies at the heart of this lecture an issue of constitutional balance. In most Westminster Parliaments the executive branch of government controls both the policy content and drafting of legislation through a legislative programme agreed by Cabinet. In New Zealand this programme is not even available to members of Parliament under the Official Information Act.<sup>21</sup> The elements of executive control over legislation have not changed with the introduction of MMP, although the final passage of legislation through the Parliament is much more contestable now since the government has to go hunting in the Parliament for support for its legislative measures. Thus, the executive can propose and Parliament can dispose. Select Committee scrutiny allows for input by MPs and the public. But it does appear that the weight of legislation has adversely affected the quality of scrutiny that Select Committees perform.

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18 State Sector Act 1988, s 30A(1) and (2).

19 Alexander Turner “Steering the Ship of State: Functions of Parliament” (1980) 10 VUWLR 209.

20 The Treasury website contains a vast amount of material on this topic and the requirements are onerous. There have been increasingly specific requirements developed over a period of more than 20 years. A detailed Handbook is available to help officials with the preparation of the reports: Regulatory Treasury “Impact Analysis Handbook” (2 August 2013) The Treasury <[www.treasury.govt.nz](http://www.treasury.govt.nz)>.

21 Palmer “The New Zealand Legislative Machine”, above n 2, at 299, in which I actually published a copy of the 1985 Legislative Programme; I believe this was the first time that a programme had been published. The article described in detail how the legislative process then worked.

With the bifurcated responsibilities for legislation in New Zealand split between the executive and the Parliament, it is not easy to determine which branch of government bears the heaviest responsibility for the lack of quality and coherence that some statute law exhibits. This makes sheeting home accountability for the quality and nature of the laws passed by Parliament difficult. It cannot really be said there is ministerial responsibility for the statutes passed. There can be ministerial responsibility for what is introduced to Parliament but not what is passed. In an MMP Parliament, diverse pressures are at work and ministers cannot get their way on all issues all of the time. Neither should they. In order to sharpen the accountability and make clear who is responsible for what, it is necessary to make transparent what occurs now in the legislative process before a Bill comes to the House of Representatives. More openness should also help improve the quality of legislation and the ease of its scrutiny so long as adequate time is allowed to get big legislative schemes right. A complete reconfiguration of the processes is required to improve quality and make the processes more open and transparent.

The yin and the yang between which the demand for new law in New Zealand oscillates consists on the one hand of legislating too quickly and getting it wrong or on the other hand going too slowly so that important issues lacking political priority remain neglected. We pass legislation in New Zealand quickly because we can and if we could not do so it is likely better law would be fashioned in the first place. It is not necessary to have a second house to put the legislative brakes on; there are other methods of achieving it. It is important to appreciate, however, that while sometimes the system goes too fast and impairs quality, it frequently dawdles and that means that required but usually uncontroversial changes remain unaddressed. The House becomes a bottleneck or choke point for such measures. These two pressures work in opposite directions but both need to be addressed and integrated into a system that is more flexible.

I wrote an article in *The Listener* in 1977 that became quite famous, “The Fastest Lawmakers in the West”, yet despite many reforms since then the situation has remained unsatisfactory.<sup>22</sup> MMP has undoubtedly caused the legislative process to slow down in New Zealand. We are no longer the fastest lawmakers in the West. Indeed, the Parliament has become costive, that it to say it is constipated by the volume of legislation in front of it. When Parliament finished for the year at the end of July 2014, more than 50 government Bills remained on the order paper and more than 70 Bills in all. A big legislative backlog has been a feature of the New Zealand Parliament for many years now but it has become more acute in the MMP era. Changes to the Standing Orders providing for extended sittings have reduced the need for urgency and facilitated the passage of more legislation, but the parliamentary bottleneck problem remains serious.<sup>23</sup>

In sum, big and important Bills containing significant new policies are often rushed because of the three-year term with insufficient efforts to get them right. There is more pressure to get such measures through, than to get them right. On the other hand important but often uncontroversial smaller care and maintenance provisions, that often would be very beneficial, languish on the order paper, sometimes for years. That is the conundrum that any new legislative process must address.

Sir Peter Blanchard, when a Supreme Court Judge, made a most interesting suggestion that relates to his experience as a Law Commissioner who was the lead Commissioner on the

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22 Geoffrey Palmer “The Fastest Law-makers in the West” *New Zealand Listener* (New Zealand, 28 May 1977).

23 Mr Speaker said in the adjournment debate “The 50th Parliament has sat for 227 days – a total of 1,058 hours – and what is pleasing to note is the limited use of urgency, at 79 hours, and the increased use of extended sittings, at 110 hours. This reflects the very successful changes made to the Standing Orders after the last Parliament”: (31 July 2014) 700 NZPD 19807.

report “A New Property Law Act” that was completed by the Commission in June 1994 but took until 2007 to reach the statute book.<sup>24</sup> Part of Sir Peter’s proposal echoes a recommendation Sir Owen Woodhouse made as the foundation President of the Law Commission when we were designing the Act in 1985, that Law Commission reports be accompanied by a draft Bill and the Bill receive an automatic first reading and be sent immediately to a Select Committee. I took the proposal to Cabinet but it was rejected.<sup>25</sup>

The Productivity Commission produced in June 2014 a major report upon New Zealand’s regulatory institutions and practices. It made a recommendation with which I heartily concur and for which in my opinion there has been an obvious need for years:<sup>26</sup>

Government should commission a review into improving and maintaining the quality of new and existing legislation, including:

- processes for producing and vetting the quality of legislative proposals and draft legislation;
- the respective roles of the Parliamentary Counsel Office, the Law Commission, Legislation Advisory Committee and Legislation Design Committee; and
- relevant parliamentary processes.

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24 Peter Blanchard “Judging and Law Reform” (Speech to Auckland University, 5 March 2011) portions of which appear in *Law Talk* No 768 (New Zealand, 25 March 2011) at 8:

What is needed, it seems to me, is a separate Parliamentary process for law reform projects. I appreciate at once that there may well be room for argument about which Bills should receive separate treatment. That difficulty is likely to be exacerbated by the fact that under an MMP system there are usually six or more parties in the House of Representatives seeking to differentiate themselves. This may well mean that objection by just one party could prevent a Bill from proceeding by a separate route. This certainly happens when minor reforms are being considered for inclusion in a Statutes Amendment Bill.

But, putting aside that problem, what I am suggesting is that the Standing Orders of the House should provide for Bills agreed to be law reform measures, in the sense of being what people call “lawyer’s law” and the like – should be able to be placed directly before a specified Select Committee without need unnecessarily to take up the time of the House with a two hour first reading. Then, if approved with or without amendment by the Select Committee, they should proceed directly to a truncated Committee of the Whole House stage and finally a short debate on the third reading. I am suggesting truncating the Committee of the Whole House stage so as to avoid the need for separate consideration of each Part of a Bill, which can make the process very lengthy, even where any remaining contention is quite limited. I am also conscious of the fact that the best layout of legislation may sometimes be compromised because of a wish to reduce the number of Parts and thereby lessen the amount of time before the Committee of the Whole House, which is an encouragement to the Leader of the House to give a Bill priority because it will not take very long to pass it through that stage.

Finally, I see no need for more than a handful of speeches on third reading which is simply a yes/no vote. If a law reform measure reaches that stage there is little likelihood that anyone is going to say anything significantly new at that point in the process.

Conscious of the fact that Judges should not be criticising Parliament, I should emphasise that in making this proposal, born out of the excruciating experience of watching multiple law reform projects stall, some permanently and some for many years, I am merely trying to be helpful. A cynic might say that because specialist law reform is not politically sexy, this proposal for procedural reform will itself not be of much interest to politicians. The point I would make however, is that parliamentary time is precious and expensive. At the moment it can be said that it is being misspent and that parliamentarians could, if procedures are altered, find that their time is freed up for things which are more interesting to them.

25 Geoffrey Palmer *Reform – A Memoir* (Victoria University Press, 2013) at 620.

26 New Zealand Productivity Commission *Regulatory Institutions and Practices* (Wellington, 30 June 2014) at recommendation 16.1 and the analysis contained at 411–435.

The recent changes made to the Standing Orders of the House of Representatives and the proposals contained in the Legislation Amendment Bill that was introduced in May 2014 do contain measures designed to improve the quality of legislation and parliamentary scrutiny of it as well as some changes to the rules of interpretation.<sup>27</sup> In particular, the Legislation Bill should assist in improving technical scrutiny by the House. It contains a set of minimum requirements for disclosure relating to policy background and development of government Bills, in cl 57E(1).<sup>28</sup> There is another provision that sets minimum disclosure requirements that relate to the presence of significant or unusual legislative features, such as the taking of private property, retrospectivity, offences, jurisdiction and the burden of proof, immunities, privacy and delegated legislation. A most welcome addition is a new disclosure requirement relating to the policy background and development of government amendments. This has long been a serious problem. The contents of the Bill in this regard is all that is left of the struggle that raged within government circles for years concerning Rodney Hide's Regulatory Standards Bill. While these changes, if enacted, are welcome they are not major, yet they are a recognition that there are defects in the current processes that need to be fixed. I build

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27 Cabinet Office Circular "Disclosure Requirements for Government Legislation" (4 July 2013) CO 13/3.

28 (1) The disclosure statement or statements for a Government Bill must—

*Background information and policy information*

- (a) identify any inquiry, review, or evaluation reports that have informed the policy that is to be given effect to by the Bill;
- (b) identify any international agreement, or withdrawal from an international agreement, that is to be given effect by the Bill;
- (c) if the Bill gives effect to an international agreement, identify any national interest analysis report relating to that agreement;
- (d) identify any regulatory impact statement prepared by the relevant entity to inform the policy decisions that led to the Bill;

*Testing of legislative content*

- (e) identify any assessment of whether any provisions of the Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990;
- (f) describe the steps taken by, or on behalf of, the relevant entity to assess the consistency of the Bill with New Zealand's international obligations;
- (g) describe the steps taken by, or on behalf of, the relevant entity to assess the consistency of the Bill with the principals of the Treaty of Waitangi;
- (h) describe the nature and extent of external consultation on the policy to be given effect to by the Bill;
- (i) describe the nature and extent of external consultation on a draft of the Bill;
- (j) describe the nature and extent of any testing procedures or techniques (other than consultation) applied to the policy to be given effect to by the Bill that have been carried out by, or on behalf of, the relevant entity to ensure that the policy is workable and complete (for example, scenario testing or trials using practical examples).

on these developments in my proposals for reform. There is also an admission in the *Review of Standing Orders* that there are concerns about whether legislation is “appropriate”. The report states:<sup>29</sup>

We encourage select committees to examine legislative quality issues, with a particular focus on matters of constitutional and administrative law, when preparing their reports on bills. This would encourage policy-makers to give more thought to legislative quality during the policy development process, and would align with the Government’s proposal in the Legislation Amendment Bill for more disclosure of legislative quality matters.

## II. MAKING THE LAW

Three key distinctions are essential to an understanding of the issues regarding law-making. Who makes what law? There are statutes made by Parliament, the highest form of law known to New Zealand. There are regulations, known now as legislative instruments, most of which are made by the Governor-General in Council on advice from ministers. There is also a third category of laws, known as tertiary legislation, that are not made by Parliament or the Executive Council but by an agency or a minister. These can be disallowed by Parliament on a recommendation from

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<sup>29</sup> Report of the Standing Orders Committee *Review of Standing Orders* [2014] AJHR I.18A at 18. The Review at 15 and 18–20 discusses scrutiny of legislation for Bill of Rights consistency and disclosure statements in connection with issues of *legislative quality*. Notably the report acknowledges scrutiny documents and advice might provide a basis for scrutiny, but do not in and of themselves necessarily produce any scrutiny. The report suggests assessing legislation for Bill of Rights consistency should be “mainstreamed” into subject Select Committees and not shut away in a specialist new Human Rights Committee. It also suggests the legal community is guilty of not being accessible enough to laypeople on issues of Bill of Rights consistency. In relation to assessments whether a measure is “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” the issues are often complex and not clear cut (as *reasonableness* is a legal test on which reasonable people often reasonably disagree). The report says (at 19): “We note that the Office of the Clerk has advised us that it is working to enhance its support for scrutiny to improve legislative outcomes, and will provide more analytical support to members in carrying out this work.” Many members need help with legalistic rights-analyses, and some seem to be guided instead or as well by less clearly articulated, more blunt political assessments. It is not for the Clerk’s Office, despite the Clerk’s function of ensuring the staff of her office maintain concern for the public interest (Clerk of the House of Representatives Act 1988, s 3(d)(ii)), to act as an unofficial opposition or to second-guess or steer members’ own assessment of what is or may be demonstrably justified in a free and democratic society.

the Regulations Review Select Committee. Some serious, substantive and technical problems exist concerning this third species of law although they cannot be developed here.<sup>30</sup>

The process for making the policy that lies at the back of legislation is a critical factor in determining its quality as well as the drafting. The process for developing the policy and the legislation implemented are to a degree divorced from one another. They need to be integrated. One of the great reforms of the nineteenth century was the establishment of parliamentary counsel in Westminster Parliaments.<sup>31</sup> They have a monopoly on drafting and that is not a feature of the system I would want to reform, having examined at close quarters the legislative process in the United States, both in Washington and a state legislature. But there is an issue relating to the accountability of parliamentary counsel, namely, whether they should be responsible to the Parliament rather than the executive. The critical variable of law-making resides in the process for designing and drafting Bills. In my view the drafting is a problem only if it is done too quickly or under unsound instructions as to the policy. No drafting can future-proof against unforeseen developments and, obviously, all drafting needs to be vigorously tested before enactment. Legislative design is the

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30 This issue of delegated legislation is a complicating factor and needs to be understood as part of his analysis. We have now, come upon us by a side-wind as a result of the passage of the Regulations Disallowance Act 1989, this new species of legally binding instruments that are neither statutes nor what used to be called regulations but are nevertheless disallowable by Parliament when so recommended by the Regulations Review Committee. For more than 20 years the executive has been making rules that are legally binding in a large number of areas and notably in the area of transport. The quid pro quo was that rules were made disallowable. All these things, whether regulations (Orders in Council), rules or other binding instruments, are now classified as disallowable instruments under the Legislation Act 2012. Whether an instrument has legislative effect and is therefore disallowable under the Act is not an easy test to apply. The safeguard of disallowance was introduced as a protection against abuse. The new species of what amounts to tertiary legislation is now middle aged: that is to say, law that is not contained in statute, not contained in a regulation but is nevertheless law made by a delegate. Given that delegated legislation disallowance has occurred only once in the life of the 1989 Act, it seems rather hollow protection, although it must be acknowledged that not infrequently instruments are changed as a result of the Regulation Review Committee's reports, and those reports contain important lessons for departments framing Orders in Council and the Committee's existence and activities do constitute a deterrent to abuse. It would have been preferable, however, to have designed robust procedures to begin with. I drew attention to the defects in what was then occurring in my article "Deficiencies in New Zealand Delegated Legislation" (1999) 30 VUWLR 1. And some improvements have been made but there continue to exist serious issues concerning the way rules are made, their accessibility in any authoritative form for those whom they affect and their drafting, which is not by Parliamentary Counsel. For an excellent analysis that illustrates the complexity of the present arrangements, see Ross Carter "Disallowable Instruments" [2014] NZLJ 235; see also John Burrows "Legislation: Primary, Secondary and Tertiary" (2011) 42 VUWLR 65. Important issues exist with disallowable instruments that are not legislative instruments. The recent Regulations Review Committee report *Inquiry into Oversight of Disallowable Instruments that are not Legislative Instruments* [2014] AJHR I.16H deserves close attention. The Committee recommended some significant changes, including the important recommendation that a register of delegated legislation similar to the Australian Federal Register of Legislative Instruments be established. It does seem important not to clutter primary statutes with all the detail than they currently contain, for reasons given later.

31 The history of parliamentary counsel and how they can contribute to *high-quality* legislation is discussed by Carter, above n 11. See also Law Commission *Review of the Statutes Drafting and Compilation Act 1920* (NZLC R107, 2009) at [8.13].

Ensuring standards in the quality of legislation: UK HC Committee inquiry and report: The House of Commons Political and Constitutional Reform Committee launched its inquiry into this matter on 20 January 2012. Its report on its inquiry was published on 20 May 2013: Commons Select Committee "Ensuring standards in the quality of legislation" (20 May 2013) Parliamentary business Committees <www.parliament.uk>. William Twining and David Miers *How to Do Things With Rules* (5th ed, Cambridge University Press, 2010) at 176–183 identify 36 *conditions of doubt*. Only some arise from *poor drafting* or indeed from when rules are drafted or enacted. An error in an enactment's drafting is thus not invariably caused (at all or only) by its drafter(s).



critical factor and insufficient thought and effort is given to this element. Parliamentary counsel are involved too late and must draft what the departmental instructions say.

The legislative process as matters stand is authoritatively set out by Professor John Burrows and Ross Carter in *Statute Law in New Zealand*.<sup>32</sup> For my purposes in this lecture the steps can be summarised as follows:

1. Public and parliamentary discussions take place about the need for a new policy, following which policy papers are prepared for Cabinet and agreement by Cabinet about the policy is sought. Most policies require legislation to be implemented. This process can continue for a long time and involve some discussions with individuals and groups that may be interested in the subject matter of the policy.
2. When the policy has been decided by Cabinet, the relevant department prepares instructions for the drafting of a Bill by the Parliamentary Counsel Office.
3. When a Bill has been drafted, it will be scrutinised by officials and ministers within the executive government. It will be re-drafted. There may be further consultations at this stage with interested parties or experts. With complex legislation this can be a prolonged process. There will be inter-departmental discussions, even negotiations. On some occasions an exposure draft of the Bill will be made available publicly and there will be further consultation on that. Such pre-legislative scrutiny of proposals can help greatly in getting it right.<sup>33</sup>
4. A Bill of Rights vetting of the Bill will be conducted within the executive government under s 7 of the New Zealand Bill of Rights Act 1990. Changes may be made to the Bill before it is introduced as a result. Where necessary the Attorney-General will table a report when the Bill is introduced, that the Bill contravenes the Bill of Rights Act. In total 63 such reports have occurred in the life of the Bill of Rights Act, half concerning government Bills and half other Bills. So on 31 occasions Parliament has passed Acts with provisions that contained, in the opinion of an Attorney General, a breach of the Bill of Rights, sometimes under urgency without Select Committee examination. Obviously, there may also be instances of breaches that are not reported upon.<sup>34</sup> An adverse s 7 made by the Attorney-General on the tightening of the law concerning alcohol-impaired driving in the Land Transport Amendment Bill 2013 was never even referred to in the parliamentary debate, nor in the Select Committee Commentary on the Bill.<sup>35</sup>
5. The Bill is examined by the Cabinet Legislation Committee and it may call for further amendments.

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32 JF Burrows and RI Carter *Statute Law in New Zealand* (LexisNexis, Wellington, 2009) at 44.

33 On 20 April 2009 the Reserve Bank released for stakeholder consultation a draft Insurance (Prudential Supervision) Bill reflecting policy approvals provided by Cabinet in December 2007 and 2008. Respondents were invited to focus on legal drafting and operational issues. This has been done on other occasions as well by a number of departments and is particularly useful for large and complex Bills containing complicated legislative schemes: insolvency, patents, insurance supervision, financial markets and health and safety. The practice is not frequent though, and in my view it should become standard for big legislative schemes.

34 The issues are complex, see Claudia Geiringer “Inaugural Lecture: Mr Bulwark and the Protection of Human Rights” (2014) 45 VUWLR 367 at 384.

35 The New Zealand Law Society submission on the Bill concluded in this way: “The Law Society recommends that the Committee give close attention to the Attorney-General’s s 7 report, with a view to adopting amendments to the Bill that fully recognise the right to be presumed innocent. Allowing for those with a breath alcohol reading of 251–400mcg/L to elect a blood test appears to be the simplest option.”

6. The Bill is then approved for introduction by Cabinet. But there will be discussions with parties supporting the government to ensure that they are on board with the Bill before it is introduced. And these could take place early or late in terms of the steps outlined here.
7. The Bill is introduced to the House of Representatives without debate and becomes public at that point.
8. There is some time later a first reading debate of not longer than two hours.
9. The Bill is referred by the House to a Select Committee for scrutiny and public submissions. Reports from the government's advisors are also made to the Committee. Amendments agreed by the Committee are drafted by parliamentary counsel and contained in the Bill reported back to the House.
10. The Bill is reported back to the House usually within six months of it having been referred there.
11. The second reading debate is held on the principles of the Bill in a debate limited to two hours.
12. The Committee of the Whole House then considers the Bill. Amendments are frequently made at this stage by ministerial supplementary order papers.
13. The Third reading of the Bill takes place as to whether to pass the Bill. That debate is also limited to two hours.
14. The Bill receives the royal assent and becomes law. The law is then published as an Act and made publicly available.

The split between those aspects of the legislative process that take place within the executive and remain less transparent than those that take place within the Parliament deserves consideration. In New Zealand each piece of legislation in the official statutes contains a note stating the department that administers it. For example, for the New Zealand Bill of Rights Act 1990, the note states "This Act is administered by the Ministry of Justice." It is not clear what this means or what responsibilities come with it. There is so much law on the books it is likely that many departments do not pay close attention to these responsibilities unless there are continuing administrative steps required to be carried out for the statutory scheme erected. But amendments, revisions or repeals tend to be in their hands often as a result of ministerial direction or political developments that have brought the legislation into question.

I question the close connection between administering departments and the content of the legislation itself. The departmental perspective can be too narrow, too bound up with what is administratively convenient, and too sensitive to the whims of an individual minister. Furthermore in many instances departments have skin in the game and lack detachment because of encounters and difficulties they have had with the legislation or the stakeholders out there who interact with them over it. They sometimes take the opportunity to win battles they have had by using their access to the legislative instrument. Ministers too sometimes wish to do things in a hurry in a way that produces bad legislation and that needs to be revisited.<sup>36</sup> Ministers vary greatly in the amount of influence they exert on the content of legislation. They need to be careful in trying to decide on technical legal matters as contrasted with policy matters. One English authority has characterised the influence of ministers on legislation as being "occasional and peripheral".<sup>37</sup>

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36 The Freedom Camping Act 2011 in its original form, produced in the run up to the Rugby World Cup, was one of most unsatisfactory pieces of legislation of recent years.

37 Daniel Greenberg *Laying Down the Law* (Sweet & Maxwell, London, 2011) at 12.

Major legislative schemes generally are not well designed by departments in many instances. They often have poor processes, many other distractions and an absence of legal skill. I know of one department which did not allow its lawyers to be active in the design of legislation. A major legislative scheme usually requires a range of interdisciplinary skills, many of which may not be available to the department. My own experience suggests to me that legislation is best designed by a carefully chosen team that have nothing else on their plates, the production of a policy and the legislative form it may take need to be developed together, not separately. The parliamentary counsel have to be involved from the beginning. But the team established will be different for each Bill depending on the topic.

The experience I have had suggests that improving Bills via Select Committee scrutiny does not permit some issues that need to be addressed to be dealt with. It is too late, which is why the Legislation Design Committee was established. Rigorous thinking through of the policy options and drafting, both tested by public consultation, should provide the Parliament with a much improved set of proposals through which they can work and decide upon their acceptability. It is not a matter of putting the experts on top, it is a matter of developing legislative proposals in an improved manner before they get to the Parliament for passage into law.

Chairing the Legislation Advisory Committee taught me that by the time the Bill has been introduced or almost so, it is too late to change its basic architecture. I established this Committee when I was Minister of Justice at the same time as I set up the Law Commission. While it has done good work producing guidelines for legislation, too often they are not followed. In essence the Committee has failed to improve the quality of legislation, except at the margins. Technical scrutiny is a weak point in the New Zealand legislative system.

What is needed is better work at the beginning and at present that takes place entirely within the executive branch of government. When I was at the Law Commission we developed with the flair and knowledge of George Tanner QC, a former Chief Parliamentary Counsel, a better way of doing that by persuading the government to establish a Legislation Design Committee.

The Committee was established in recognition by a number of key agencies involved in the legislative process that “some significant or complicated legislative proposals would benefit from high level advice on the framework and design at the early stage of policy development” and that “[s]uch advice could improve the quality of the product.”<sup>38</sup> Made up of representatives of key agencies, its role was to discuss projects with departments during the development of legislation at the stage prior to drafting, such as looking at how to best implement policy objectives through legislation.<sup>39</sup> The views of the Committee were not binding, and it did not “take over” responsibility for promoting the legislation, which remained with the relevant department. It was rather “to try and act as a guide, philosopher and friend to departmental officials generating difficult legislative proposals.”<sup>40</sup> Compared with the Legislation Advisory Committee, the Legislation Design Committee was able to get involved earlier in the legislative process to aid in the production of more principled, coherent and workable proposals.<sup>41</sup> The Committee was established in 2006

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38 Office of the Ministry of Justice, Cabinet Policy Committee “Legislation Design Committee and Law Commission Funding” (Cabinet paper, 2006).

39 Geoffrey Palmer “Improving the Quality of Legislation – The Legislation Advisory Committee, the Legislation Design Committee and What Lies Beyond” (2007) 15 Wai L Rev 12 at 19.

40 At 19.

41 At 20.

and did good work on the Biofuel Bill 2007, the Immigration Bill 2007, the Unit Titles Bill 2008 as well as the rugby World Cup legislation and securities law reform. The Key Government has allowed the Committee to fall into abeyance.

The production of good policy and legislation requires time, particularly for big legislative schemes. A three-year parliamentary term is the enemy of good policy and especially good legislation. It takes time to produce and time to pass. Time runs out. Hurrying reduces the quality. Good law is not politically valued in New Zealand. We would do better if we passed less legislation and made sure it was durable, not requiring amendment soon after it is passed. For this reason I would support a fixed four-year parliamentary term, but only if a superior law Bill of Rights Act was passed first. Checks and balances are important.<sup>42</sup>

### III. INCREASING BULK AND COMPLEXITY OF STATUTE LAW

Complaints about the New Zealand statute book and the legislative process in New Zealand are not new. My former colleague in many things and a previous Harkness Henry lecturer, Sir Kenneth Keith, wrote a prescient essay on the subject in 1978.<sup>43</sup> Among the observations he made that remain relevant were the following:

- the New Zealand statute book is enormous;
- there were more than 600 principal public Acts in force;
- the statute book was difficult to use;
- New Zealand does not have an index to its statute law;
- New Zealand probably has more legislation both in numbers of statutes and in pages than other similar jurisdictions;
- New Zealand statutes may be unnecessarily prolix and undesirably detailed;
- there was inconsistency in drafting and repetition;
- there was a need for more principle and less detail in our statutes; and
- there was a pattern of piecemeal amendments that damages coherence.

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42 Constitutional Advisory Panel “New Zealand’s Constitution: A Report on a Conversation” (report, November 2013) made recommendations in relation to the parliamentary term that:

- noted a reasonable level of support for a longer term;
- set up a process, with public consultation and participation, to explore what additional checks and balances might be desirable if a longer term is implemented; and
- noted any change to a longer term should be accomplished by referendum rather than by way of a special majority in Parliament. Reasons for supporting a longer term included: giving government more time to plan and implement policy, improve the quality of policy and provide better information for voters to make decisions; and reducing the frequency of changes to policy and legislation.

43 Kenneth Keith “A Lawyer looks at Parliament” in John Marshall (ed) *The Reform of Parliament: Contributions by Dr Alan Robinson and Papers Presented in his Memory Concerning the New Zealand Parliament* (New Zealand Institute of Public Administration, Wellington, 1978) 26.

Let me turn first to the issue of quantity and its consequences.

The volume of law has increased exponentially and its sheer bulk raises serious issues both about accessibility to it and compliance with it. No one can read all the law we have. We have now 1,043 principal Acts and 1,793 amending Acts. Here is the material with which the Parliamentary Counsel Office kindly supplied me:

**Table 1**

| <b>Current Public Acts in force<br/>(as at 31 March 2014)</b> |                   |                    |
|---|-------------------|--------------------|
| <b>Type</b>   | <b>No of Acts</b> | <b>No of Pages</b> |
| Principal   | 1,043             | 64,536             |
| Source: Parliamentary Counsel Office                          |                   |                    |

It should be noted that there exist also 1,793 amendment Acts in force covering 24,707 pages, although up-to-date electronic reprints for the most part include the text of the amending Acts in the principal Act. These facts mean, however, that the whole database for statutes amount to 89,707 pages, although there is an element of double counting in that figure.

**Table 2**

| <b>Current Legislative Instruments in force<br/>(as at 31 March 2014)</b> |                  |                    |
|---|------------------|--------------------|
| <b>Type</b>   | <b>No of LIs</b> | <b>No of Pages</b> |
| Principal   | 2,449            | 36,149             |
| Source: Parliamentary Counsel Office                                      |                  |                    |

Similar to the statutes, there are 2,467 amendments to legislative instruments in force covering 17,906 pages.

The actual quantity of law in force is greater than those tables indicate. They exclude local Acts dealing with many local government matters that require parliamentary legislation; private Acts are also excluded, although they are relatively unusual. Provincial ordinances still in force from the days before the Provinces were abolished in 1876 are also excluded, as are imperial Acts in force in New Zealand.

**Table 3**

| <b>Annual Public Acts Passed and Pages Occupied 1994–2013<sup>44</sup></b> |                            |                               |
|--|----------------------------|-------------------------------|
| <b>Year</b>  | <b>Public Acts Enacted</b> | <b>Pages in Annual Volume</b> |
| 2013   | 150                        | 4204                          |
| 2012   | 124                        | 3780                          |
| 2011   | 98                         | 3158                          |
| 2010   | 138                        | 3116                          |
| 2009   | 70                         | 2828                          |
| 2008   | 111                        | 3334                          |
| 2007   | 113                        | 5140                          |
| 2006   | 91                         | 3220                          |
| 2005   | 126                        | 2044                          |
| 2004   | 116                        | 3156                          |
| 2003   | 129                        | 3082                          |
| 2002   | 86                         | 2690                          |
| 2001   | 106                        | 2209                          |
| 2000   | 96                         | 1700                          |
| 1999   | 143                        | 2168                          |
| 1998   | 123                        | 2278                          |
| 1997   | 110                        | 1207                          |
| 1996   | 161                        | 3033                          |
| 1995   | 95                         | 1297                          |
| 1994   | 167                        | 3474                          |
| Source: Parliamentary Counsel Office                                       |                            |                               |

44 The first MMP Parliament was elected in 1996 and MMP is generally thought to have slowed down the legislative process. These figures and those in the previous table need some qualifications and explanations. In most years, although not all, a Statutes Amendment Bill is passed with small uncontroversial amendments to a number of Bills and that adds to the number of Acts.

In 1996, 1995 and 1994, Law Reform Miscellaneous Bills that were omnibus law reform Bills were passed with amendments to a number of statutes increasing the volume for those years. The 1996 Standing Orders generally prohibited such Bills. The Income Tax Act 2007 now occupies 3,809 pages of the statute book. Earlier versions were passed in 2004 and 1994 increasing the volume for those years. The formatting of the statutes was changed beginning in 2000 by moving away from 12 point Baskerville type to 12 point Times New Roman. In the old format the Defamation Act 1992 took 30 pages, the new format it takes 36 pages, a 20 per cent increase. Further in 2012 the Standing Orders provided for extended sittings to allow more House of Representatives time for consideration of legislation without taking urgency. The rules relating to urgency were altered in the 1986 Standing Orders and more recently extended sittings have been introduced removing the need for as much urgency.

**Table 4**

| <b>Annual Public Acts Passed and Pages Occupied 1959–1978</b> |                            |                               |
|---|----------------------------|-------------------------------|
| <b>Year</b>   | <b>Public Acts Enacted</b> | <b>Pages in Annual Volume</b> |
| 1978  | 137                        | 1066                          |
| 1977  | 188                        | 2795                          |
| 1976  | 169                        | 2293                          |
| 1975  | 140                        | 1338                          |
| 1974  | 149                        | 2132                          |
| 1973  | 123                        | 1014                          |
| 1972  | 142                        | 1233                          |
| 1971  | 147                        | 2384                          |
| 1970  | 153                        | 863                           |
| 1969  | 142                        | 1018                          |
| 1968  | 151                        | 1307                          |
| 1967  | 161                        | 1377                          |
| 1966  | 109                        | 1767                          |
| 1965  | 137                        | 1133                          |
| 1964  | 136                        | 1255                          |
| 1963  | 143                        | 1075                          |
| 1962  | 142                        | 1342                          |
| 1961  | 138                        | 2113                          |
| 1960  | 123                        | 720                           |
| 1959  | 105                        | 880                           |
| Source: Parliamentary Counsel Office                          |                            |                               |

If we compare the last 20 years to 2013 with the legislative output for 20 years from 1959 to 1978, we see the average of statutes passed were substantially fewer, an average of 117.7 compared with 142.3. The number of pages occupied has become substantially greater, 2,617 compared with 1,455. This suggests the average length of each statute is increasing. The percentage of average annual statute pages increase is nearly 80 per cent for the second 20-year period compared with the first. There are a variety of reasons why this has occurred but the sheer bulk raises issues both of manageability and access. The smallest number of public statutes recorded in the Tables is 70 in 2009, although these amounted to 2,828 pages, while the smallest number of pages new law occupied was 720 in 1960 and this from 123 public Acts.

There are a number of factors that will influence the variation in number of statutes passed including election years (where the House sittings will be reduced by the election campaign), changes in government resulting from elections where a government with a new agenda has to become settled and determine their legislative priorities, the availability of urgency in the House of Representatives and the amount of time that Parliament actually sits. Furthermore, it appears that

the quantity of legislation enacted is increasing despite the fact that MMP has slowed the system down.

Of course every year statutes are repealed, usually by new legislation replacing the old and also by amending legislation. Thus, pages are dropped from the statute book. It is not easy, indeed it would require very extensive and detailed research, to ascertain precisely the quantity of legislation that, in a particular year, is repealed or revoked and not replaced. But the quantity of legislation that in any year is repealed or revoked (whether it is replaced wholly, in part, or not at all) is substantial. For 2013, which is probably not an unusual year, 24 whole Acts were repealed. These 24 whole Acts included Appropriation and Imprest Supply Acts that, while necessary, do not feature as part of the substantive law in the statute book. In New Zealand, new Acts often also revoke (or save expressly, and so continue) whole regulations. In 2013 much of that was done. In total, including the subordinate legislation revoked by statute, 2,084 pages of whole Acts and whole regulations were repealed or revoked by statute.

But in order to compare like with like, it is necessary to subtract the pages of subordinate legislation (whole regulations) revoked by statute. My own calculation is that the quantity of statute law (whole Acts) repealed amounted to 1,225 pages, the remainder being revoked subordinate legislation (whole regulations). Taking out the budgetary material (repealed whole Appropriation or Imprest Supply Acts) of 170 pages, it can be seen that the amount of substantive statute law (whole Acts) repealed in the year was a little more than 1,000 pages. In the same year 4,204 pages (of amending or new Acts) were added. So it is a fair conclusion that new statute law (although some of it is only machinery for making amendments) is accumulating much more quickly than old law is being removed.

Since the total quantity of regulations or subordinate legislation is significantly less than for statute law, it does seem that there is scope for placing more of the administrative detail and related material into subordinate legislation. If this were done it would have the advantage of making statutes more succinct and less cluttered; people may then feel more able to read them and understand them. The New Zealand tradition has been to put everything in the primary legislation, but that tradition needs to be revisited.

While repeal activity occurs, it needs more emphasis to prevent the problems that come with steady statutory growth. The Financial Markets (Repeals and Amendments) Act 2013 removes five substantial Acts as well as 17 legislative instruments. The Regulatory Reform (Repeals) Act 2012 got rid of 31 Acts, dating back as far as 1885, although 15 of them were simply repeals of amending or dissolution or repeal Acts. And that favourite relic from the First World War, the Military Manoeuvres Act 1915, has thankfully vanished. The Regulatory Reform (Revocations) Order 2011 similarly revoked expressly, via a single omnibus order, over 150 items of spent or no longer required subordinate legislation (some already revoked impliedly). One-off revocations also occur from time to time (for example, the Crown Solicitors Regulations Revocation Order 2013). The Treasury has a Regulatory Reform Work Programme, and departments are on notice to scan their legislation to see what is no longer needed. But it is not enough and other priorities often overtake such efforts.<sup>45</sup> More vigorous efforts to clean out unnecessary and out-of-date laws should be pursued continuously rather than sporadically.

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45 The New Zealand Treasury “Regulatory Review Work Programme” (18 April 2013) Treasury Regulation <[www.treasury.govt.nz](http://www.treasury.govt.nz)> and especially Cabinet Minute of Decision “Regulatory Review Programme: Immediate Removal of Inefficient and Superfluous Regulation” (25 February 2009) CAB Min (09) 6/5B.



So to conclude the analysis of whether things are better now than in 1978, I would say they are in some ways but not in others. The French expression “*Plus ça change, plus c’est la même chose*” (the more things change the more they stay the same) comes to mind. In terms of the criticisms levelled by Sir Kenneth Keith, I believe the New Zealand statute book is in worse shape now than it was then. The volume of statute law is far bigger than it was then. The law is difficult to find and matters could be greatly improved, especially for non-lawyers to whom our statute book should be accessible, if the statute book had an index. The propensity to use amending Acts too freely remains. The failure to weed out old laws and repeal them on a more thorough and systematic basis must be partly responsible for the situation.

The sheer volume of statute law raises the issue of why the law is arranged in terms of statutes passed. It would be better in my view to follow the position common in the United States, both at the federal and state level, to produce codes where the law is arranged under topic headings, so that all the law on a subject can be found in one place. This entails taking the statutes that are passed in Parliament as they are now but rearranging them in a code that is regularly reprinted so that the law on the subject of elections, for example, can all be found in one place. The absence of such a code means that lay people and journalists are discouraged from researching the law because it is so difficult. This is not a proposal for codification in the sense that occurs in Europe but a plea that the New Zealand statute law be arranged in a “logical and ordered form, under subject headings.”<sup>46</sup> It should be given official status and its organisation and numbering system would need to be formalised by law. Amendments to an Act would become amendments to the code itself. Each new Act passed would be located in an appropriate place in and become part of the code. The Law Commission said in 2008 that such an objective was highly desirable and that it may best be done with a “comprehensive revision of the statute book as a whole.”<sup>47</sup> It recommended that codification should be considered at “such time as a programme of revision has been completed or nearly completed.”<sup>48</sup> On this basis I doubt it will ever happen. But it should.

#### IV. MMP, PARLIAMENT AND LEGISLATION

I have characterised MMP as the biggest constitutional change in 100 years because it tamed the unbridled power of the executive in New Zealand. The governing party seldom enjoys a majority in Parliament alone and is dependent upon other parties to get legislation through. For the first time in the 20th century, it became evident after the 1996 election that the executive could not always get its own way. Before that, a decision of the government party caucus meant that the Parliament behaved as the executive wanted it to behave. In legislative terms, the Parliament was a rubber stamp for the government caucus. In a legislature with one House, based on the principle of parliamentary sovereignty, that made the executive government a dangerous beast. MMP allowed New Zealanders for the first time in modern memory to decouple Parliament from the executive. It breathed life into the parliamentary institution. And it changed the nature of the legislative process.

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46 Law Commission, above n 3, at 129.

47 At 131.

48 At 132.

In an analysis published in 2006, and that remains valid, I said:<sup>49</sup>

The effect of MMP on Cabinet Government has been to blunt the hard edge of Cabinet decision-making by adding into the mix increased amounts of political policy pluralism. Power has to be shared more than it used to be. There is more representation within the Cabinet decision-making system of diverse policy views, and politicians of different outlook and philosophy have had to work together more. The primacy of Cabinet and its processes remain under MMP but their dominance is reduced and there is room for more flowers to bloom. The prime minister and his Cabinet colleagues have to convince more than their own party in order to produce change. Particularly noteworthy compared with the classical Westminster model has been the loss of control over legislative outcomes. Cabinet no longer controls the fate of government Bills, although it remains the most significant actor in the legislative process of Parliament.

The government can propose legislation but Parliament disposes of the legislation. The degree to which this occurs is not altogether transparent. I have been involved professionally in situations where the government has drafted a Bill but cannot secure the numbers to advance it and so quietly drops it. In the nature of the negotiations that go on concerning legislation, there is reluctance on all sides to go public about it. As matters stand, however, there is an uneasy relationship between the two stages of the legislative process, those stages that take place within the executive government and those stages that take place in Parliament itself. There are two sub-stages of the parliamentary treatment, the debates in the House and the Select Committee hearings and deliberations. Select Committees are of substantial importance in amending the Bill as a result of deficiencies exposed by public submissions. New Zealand has been a leader in this among the Parliaments of the Commonwealth. It is a beneficial exercise in participatory democracy where citizens can come and tell their elected representatives what is wrong with the proposed law they are examining. It can also be highly effective in pointing out deficiencies and unexpected results in what is proposed so these can be addressed by amendments proposed by the Committee. For reasons given earlier, however, it is difficult to change the basic framework and architecture of a Bill at a Select Committee. It is therefore better to design it with both care and transparency in the first place. What New Zealand Select Committees do not do well is technical scrutiny of Bills, as is analysed later in this section of the paper.

Pressures are also evident in the Select Committee process. The amount of time allowed by Select Committees for the public to file submissions is often insufficient. Three weeks is the minimum usually allowed and more usually six weeks, but there is no provision in the Standing Orders about minimum time allowed for the filing of public submissions. For big legislative measures the time allowed is often insufficient. The House in about 30 per cent of cases abridges the time within which a Bill must be reported back, which is generally within six months.<sup>50</sup> On rare occasions Bills can spend less than a week before a Select Committee.

At the beginning of these bold new procedures, ample time was given to submitters to develop their arguments orally in front of the Committee but the situation has deteriorated. I recall one client some years ago who came from Boston was given eight minutes. Large and complicated submissions are usually restricted to 15 minutes to develop their points orally in front of

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49 Geoffrey Palmer "The Cabinet, the Prime Minister and the Constitution" (2006) 4 NZJPI 1 at 35.

50 House of Representatives *Annual Report of the Office of the Clerk of the House of Representatives for the year ended 30 June 2012* (2012) at 14: "Almost 30 percent of the bills referred to committees had shortened time frames for reporting to the House, placing pressure on committee consideration."

Committees. Often government members do not engage in questioning submitters. Frequently submitters are heard together and are restricted to a few minutes only. That problem has become worse over the last 10 years. It is evident that Select Committee scrutiny is more perfunctory and superficial than it was when the changes were adopted. Many of the submissions are not referred to in the commentary that accompanies the Bills as reported back and often reasons are not developed for the acceptance or rejection of submissions.<sup>51</sup> While the situation is better than it was in the days when Bills were reported back with the amendments drafted but with no explanation, it is far from satisfactory.

The question has to be seriously asked whether our elected representatives are in fact the people who in reality determine the content of the law passed in Parliament in any real sense as opposed to a formal sense. It is doubtful whether many members actually read the Bills closely, although they are responsible for passing them into law. When I was an MP I recall one member promising on being elected to read all the Bills. I doubt that he did. As Sir Peter Blanchard remarked, accurately in my view, parliamentary time is precious and expensive and it is being misused.<sup>52</sup> One of the methods used in legislatures in democratic countries to improve law-making and allow for sober second thought is a second House. In New Zealand we abolished our appointed Legislative Council in 1950. I do not intend to spark a call for the introduction of a second chamber, despite the fact that in the life of the Bolger Government a Bill was drafted for such an institution but it was never introduced.

There has been considerable criticism of New Zealand's parliamentary processes in the academic literature in recent years. There is within official circles a somewhat defensive attitude on these issues. Urgency has been one of the prime areas of criticism, especially where it involves the passing of legislation without adequate Select Committee scrutiny. The 2011 changes to Standing Orders that provided for extended sittings, although not more sittings days, has reduced the need for urgency, with 110 sitting hours of urgency during the 50th Parliament. The main beneficiary of the changes appear to have been Māori, as a number of Treaty of Waitangi settlements Bills have been dealt with during extended sittings. Those extended sittings resulted from a submission from a research team that had conducted substantial, empirical cross-disciplinary research on the use of urgency in a joint project conducted under the auspices of the New Zealand Centre for Public Law and the New Zealand Law Society. The study is contained in the book *What's the Hurry?*<sup>53</sup> While extended sittings have assisted, the House remains a bottleneck for measures that lack political priority but would assist in tidying up administration and providing legal clarity.

A New Zealand legal philosopher who has taught in English and American Universities for many years, Professor Jeremy Waldron, has been very severe in his judgments on the New Zealand Parliament. He argues that the Parliament has lost its dignity and effectiveness as a body for scrutinising proposed legislation. He says, with an element of exaggeration, that the checks and balances within the Parliament have been stripped away and the House is too tender towards the

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51 An example of limited Select Committee scrutiny is the Justice and Electoral Committee's 13 June 2014 report on the Judicature Modernisation Bill – in that this report seems not to deal at all with the issue of whether the High Court Rules should be in an Act, despite this basic design issue being raised clearly both by the Law Commission and the Law Society; Justice and Electoral Committee *Judicature Modernisation Bill* (13 June 2014); New Zealand Law Society "Submission to the Justice and Electoral Committee on the Judicature Modernisation Bill" (20 February 2014).

52 See Peter Blanchard, above n 24.

53 Claudia Geiringer, Polly Higbee and Elizabeth McLeay *What's the Hurry? Urgency in the New Zealand Legislative Process 1987–2010* (Victoria University Press, Wellington, 2011) at 5–6.

power of the executive.<sup>54</sup> There have also been calls for pre-legislative scrutiny and draft legislation, including by George Tanner, who was Chief Parliamentary Counsel when he made the plea.<sup>55</sup> He reasoned that such a step would save time in the Select Committee examination and allow attention to be focused on fewer but more important issues. Hamish McQueen in a piece of legal writing that won a prize also made the case strongly for pre-legislative scrutiny.<sup>56</sup>

In two articles published in 2011, the University of Canterbury academic Sascha Mueller, having been alerted by the use of an urgency motion to pass controversial legislation, examined what alternatives there may be and examined in a helpful way how legislatures of other countries did things differently. He looked at Norway, Ireland, Germany, Israel and the United Kingdom. He concluded that the use of urgency was an inappropriate method of bypassing constitutional safeguards.

There are deficiencies in the legislative process in New Zealand – the House sits relatively few hours, only about 400 sitting hours per year. Ireland, Denmark and Israel sit for up to 700 hours and the House of Commons in the United Kingdom for more 1,100 hours. The legislative process is cumbersome and it discourages the passage of technical and law reform Bills. Mueller thought the current rigidities should be reduced and the House should sit more. He argued that the House could be more efficient without legislative quality suffering. He concluded that successive governments had either been overambitious in their legislative programme or that the system itself was broken. I believe it is a bit of both. His conclusions seem to me to be thoroughly justified and well made out.<sup>57</sup> The Annual Report of the office of the Clerk of the House of Representatives for the year ended 30 June 2012 show that over the last five years from 2007 to 2012, the House sat on average 75 days a year.<sup>58</sup>

Two other pieces of published research cast doubt on two aspects of the performance of the New Zealand House. Catherine Rodgers, a legislative counsel of the New Zealand Parliament, concludes that New Zealand does not have a rights scrutiny of Bills process operating independently of the executive, as can be found in Australia and the United Kingdom. She correctly points out that assessments of contestable concepts are made in-house by the executive in a largely non-transparent process. The current vetting process under s 7 of the Bill of Rights Act 1990 cannot provide, she contends, adequate human rights scrutiny for the legislative process. Select Committees have no obligation to consider rights issues even where a s 7 report has been made. That New Zealand is lagging behind is her conclusion.<sup>59</sup>

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54 Jeremy Waldron “Parliamentary Recklessness: Why we need to legislate more carefully” (Annual John Graham Lecture, Maxim Institute, Auckland, 28 July 2008) at 28 and 33; “Parliamentary Recklessness” [2008] NZLJ 417; “Parliamentary Recklessness – II” [2008] NZLJ 458. Waldron is famous for opposing judicial review of legislation American-style but an examination of legislative behaviour in the land of his birth made him nervous. See Waldron “The Core of the Case Against Judicial Review” (2006) 115 Yale LJ 1346.

55 George Tanner “Confronting the Process of Statute-Making” in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis NZ, Wellington, 2004) 49.

56 Hamish McQueen “Parliamentary Business: A Critical Review of Parliament’s role in New Zealand’s Law-Making Process (2010) 16 Auckland UL Rev 1.

57 Sascha Mueller “The Busy House: Alternatives to the Urgency Motion” (2011) 9 NZJPIL167; see also Sasha Mueller “Where’s the Fire? The Use and Abuse of Urgency within the Legislative Process” (2011) 17 Canterbury L Rev 316.

58 House of Representatives, above n 50, at 23.

59 Catherine Rodgers “A comparative analysis of rights scrutiny of Bills in New Zealand, Australia and the United Kingdom: Is New Zealand lagging behind its peers?” (2012) 27 Australasian Parliamentary Review 4 at 13–14.

A clerk assistant in the New Zealand Parliament, Tim Workman has analysed technical scrutiny of Bills in New Zealand.<sup>60</sup> He used the methodology of Professor Dawn Oliver, who argued for standards and checklists; she was relying on the New Zealand Legislation Advisory Committee Guidelines to some extent.<sup>61</sup> The research showed that New Zealand does not have a technical scrutiny Committee as other Parliaments do, yet the Select Committees do not take a lead on this. It is really left to the Legislation Advisory Committee (“LAC”), the research suggests.<sup>62</sup> Workman suggests that Select Committee staff in New Zealand should develop checklists from the LAC Guidelines to take into account technical standards that have evolved. Committee staff should advise on these features, he argues.<sup>63</sup>

Meanwhile Professor Oliver herself has argued that the House of Lords in the United Kingdom does a good job of technical scrutiny and if it is further reformed to become an elected body it is unlikely to continue doing so. She therefore proposes a new Scrutiny Commission to which the executive should be required by statute to submit its Bills before and after each stage in the parliamentary process. This proposal she makes to “protect us from ill-considered unconstitutional legislation and departures from the rule of law.”<sup>64</sup> It would be an independent appointed body of experts. It would look at such issues as:

- What is the evidence base for the policy?
- Have appropriate environmental, equality and regulatory impact assessments and risk assessments be made?
- What consultations took place before Bills were presented to Parliament?
- Is the drafting legally workable?
- Does the Bill affect recognised principles of a constitutional kind – for instance legal certainty, non-retroactivity and respect for the independence of the judiciary?
- Does the Bill comply with international obligations and standards and human rights protections?

The purpose of the proposal is to ensure that Bills are carefully considered by the government, before being introduced into Parliament. It must be said the same need exists in New Zealand, but I believe it can be accomplished in another way than the one she proposes.

In my view the best explanation for unsatisfactory processes flows from the fact that the legislative system revolves around the convenience of ministers until the Bill is introduced and

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60 Tim Workman “Technical Scrutiny of Bills in New Zealand” (2010) 25 *Australasian Parliamentary Review* 179.

61 Dawn Oliver “Improving the Scrutiny of Bills: The case for Standards and Checklists” (2006) *Public Law* 219.

62 Legislation Advisory Committee *Guidelines on Process and Content of Legislation 2001 edition and amendments* (May 2001), available at <[www.pco.parliament.govt.nz](http://www.pco.parliament.govt.nz)>.

63 The Strategic Intentions of the Office of the Clerk of the House of Representatives published in 2014 disclose an intention to provide more support to assist MPs with the scrutiny of legislation:

Bills and the policy they seek to deliver receive rigorous scrutiny, particularly the contribution that public participation makes. There is however room to enhance scrutiny of legislation in Select Committees, particularly in terms of consistency with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990. To achieve this objective the Office will be developing a coordinated business process for examining legislative quality issues and increasing the analytical support to do so. This will involve creating a centre of excellence for the scrutiny of legislation within the Office.

See Office of the Clerk of the House of Representatives *Strategic Intentions – for the years ending 30 June 2015 to 30 June 2018* [2014] AJHR A.8.SI. How that intention will be achieved will be fascinating to watch.

64 Dawn Oliver “The Parliament Acts, the Constitution, the Rule of Law, and the Second Chamber” (2012) 33 *Statute Law Review* 1 at 5.

the convenience of ministers and MPs after that. The interests of the public and the consumers of legislation do not rank as high.<sup>65</sup> Political struggles often consume much of the effort of politicians in the House and legislative quality and careful scrutiny does not provide bankable political capital for those who engage in it.

Consider what occurred in the New Zealand Parliament on Tuesday 5 May 2014, when a Psychoactive Substances Bill banning 41 products given interim approval in legislation passed in 2013 was introduced and passed through all its stages under urgency and without Select Committee consideration.<sup>66</sup> The Bill received support from all parties in the House, with the exception of the Greens, who abstained. There had been sustained public debate on the issue but over quite a short period. Such a legislative rush would not have been possible in any jurisdiction with two houses. The question has to be asked whether such legislative panic produces good law-making. The original legislation was passed quickly and difficulties were discovered in its implementation, particularly about using animals for testing these substances and the substances that would be permitted to be sold under the statutory interim approval. It seems clear that the original Bill was not properly thought through and passed too quickly, ensuring that there would be trouble down the line.<sup>67</sup>

It is clear, however, from this and other episodes in recent years that the executive can still on many occasions get its own way relatively easily from a legislative point of view. Had Cabinet not decided to change its stance on psychoactive substances, the legislation would not and could not have progressed in the manner that it did. The support of other parties was necessary to secure a majority, but they could not have achieved it but for the Cabinet decision. Cabinet still tries to control the legislative process in Parliament and on many occasions it succeeds. Walter Bagehot famously observed “The efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers.”<sup>68</sup> The connecting link is Cabinet. Historically that statement has been valid for New Zealand, and while the domination of the executive yoke has been loosened by MMP it remains a potent force. To secure better law

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65 Greenberg, above n 10, at 142.

66 Other recent instances of urgency are: on Tuesday 8 September 2009, the House agreed to a motion to accord urgency to the introduction and passing through all stages of the Crown Retail Deposit Guarantee Scheme Bill.

On 24 November 2009, the Policing (Constable’s Oaths Validation) Amendment Bill was, under urgency, briskly introduced and passed through all stages without amendment. On 30 March 2010, urgency was accorded the introduction and passing through all stages of the Environment Canterbury (Temporary Commissioners and Improved Water Management) Bill and the Immigration Act 2009 Amendment Bill. On 28 April 2010, the House at about 4.30pm accorded extraordinary urgency to the introduction and passing of the Bill for the Excise and Excise-equivalent Duties Table (Tobacco Products) Amendment Act 2010, and also gave leave to omit the Bill’s Committee stage and preserve the usual (6 pm to 7.30 pm) dinner break (despite Standing Order 57(2)(a)). In the event, the Bill got a first reading.

67 Psychoactive Substances Amendment Bill, First Reading, Second Reading, Third Reading (6 May 2014) 698 NZPD 17509 dealt with in all its stages under urgency. It was noted that the original Act that received its third reading in July 2013 and the House had not had time to consider an important amendment made by the Minister: (11 July 2013) 692 NZPD12001–12002. See, for example, Iain Lees-Galloway MP noting during the first reading that the original legislation was rushed through, it was complex and novel legislation and that it was “absolutely inappropriate for Parliament to be rushing the legislation.” The MP further pointed out that “It is a never a positive outcome when a piece of legislation has to be amended in such a short space of time after it was originally passed.” See also statements of Louisa Wall MP.

68 Walter Bagehot *The English Constitution* (14th ed, Fontana/Collins, Glasgow, 1977) at 65.

it needs to be loosened in the way legislation is made and in particular to make transparent the processing within the executive branch for making its legislative proposals. The legislative process needs to be front-end loaded.

Three readings and the Committee of the Whole stage comprise the essence of parliamentary consideration of legislation. And it has been so for many years. The debates have little impact on the content of the legislation. The process can be abbreviated by the taking of urgency but the usual practice is to take each stage on different sitting days, allowing time for reflection and discussion. Since 1979 it has been the practice to send Bills to Select Committee for public submission, scrutiny and for the Select Committee to make changes to the Bill in light of its deliberations that are usually accepted by the House. By *reading* is meant debate. Debates in the New Zealand Parliament tend to concentrate upon the policy contained in the Bill and political issues.

There is little analytical consideration of technical legal aspects of the Bill. The Committee of the Whole stage that is used to examine the Bill clause by clause has become less of a legislative scrutiny and more of a political debate, due to the taking of almost all Bills through this stage part by part.<sup>69</sup> The nuts and bolts of a Bill are now no longer properly examined. While this did give opportunity for filibusters by oppositions on occasion, it also provided the opportunity of discussing whether the nuts and bolts of the Bill were practical and would work. With the increased pressures on the legislative process it became common, and now it is universal, for Bills to be considered part by part rather than clause by clause. This cuts down one essential job of the Parliament to ensure that each provision of the legislation is fit for purpose. Governments ensure that Bills are drafted in parts that are as big as possible in order to shorten the time for debate.

A recent improvement is the disclosure of essential information about most government Bills. This includes the policy objectives the Bill is intended to achieve, the availability of quality assurance processes, the significant powers conferred by legislation and unusual features together with an analysis of the key impacts of the policy.<sup>70</sup> These processes are not yet statutorily required and it is too early to evaluate whether the processes have made any real difference to the performance of the system.

More rigorous legislative scrutiny requires time and resources, and both are in short supply in the New Zealand Parliament. If the Parliament is to deal with as much legislation as it does, the Parliament should sit more days in a year. It sits only about 75 days a year. Alternatively, the volume of Bills it is asked to consider should be reduced. The domination at Select Committee of the departmental advisers who are servants of the executive often cuts out the opportunity for other options to be investigated. While some independent advisers are available, they are insufficient in terms of numbers, expertise and seniority to carry sufficient influence to make much impact.

There is a remorseless tendency in the New Zealand Parliament for governments to be determined to get their measures through rather than get them right. That feature has much to do with the fact that we have only one House and political embarrassment can be reduced by getting a measure through. Public discussion dies away once it is passed. The most recent high-profile

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69 On 24 November 2009 the Policing (Constable's Oaths Validation) Amendment Bill was, under urgency, briskly introduced and passed through all stages without amendment. The Bill was (unusually) not drafted in parts – it simply had four clauses – but the House granted leave for it to be dealt with as one question (rather than as provided in SO 293(3)). That approach was also taken with the Corrections (Use of Court Cells) Amendment Bill (also not in parts).

70 Cabinet Office Circular "Disclosure Requirements for Government Legislation" (4 July 2013) CO (13)3; Legislation Amendment Bill 2014.

example was the legislation concerning the GCSB.<sup>71</sup> Although urgency was not taken, the Bill when it came back from the Statutory Committee progressed through all its remaining stages within three weeks.

The issue is what changes can be made to the way both Cabinet and the House process legislation that can improve both its quality and transparency. There are a number of measures that can be considered. The best solution would be to have pre-legislative scrutiny. One possible improvement would be to build on the practice that has occasionally been used of publishing a fully developed draft Bill before it is introduced into the House. This route offers the prospect of real progress. If such a step were adopted, it may allow one of the other steps in the parliamentary process to be dropped.

The good features of the New Zealand Select Committee system that involves public participation and a close scrutiny of the policy contained in Bills has tended to obscure the fact that other elements of the legislative process are quite poorly done by the New Zealand Parliament. I have mentioned technical scrutiny and Bill of Rights scrutiny. But perhaps the biggest danger lies in what happens in the Committee of the Whole when amendments are moved and agreed to in circumstances that often do considerable damage to the Bill, its logic and coherence. While the debates at this stage have lost their value in terms of an examination of whether each clause is fit for purpose, it is possible to move amendments, both opposition and government, with little notice and with uncertainty until the last minute whether they will be accepted. Amendments can be tabled right up until the moment that voting begins on the provisions to which they relate. Piecemeal amendments can cause harm but there is a reluctance to have Bills subject to such amendments recommitted. This feature of the process may have become worse under MMP due to deals to secure the numbers. There have been attempts over the years to try and rectify this somewhat chaotic feature of the New Zealand process but so far none have been effective. Supplementary Order Papers of more than 100 pages are not unknown.<sup>72</sup> This is a reason why the introduction of a

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71 The GCSB legislation encompasses the Government Communications Security Bureau Amendment Bill, Inspector-General of Intelligence and Security Amendment Bill, and Intelligence and Security Committee Amendment Bill. Debates on the legislation in the House can be found in Hansard: (21 August 2013) 692 NZPD 12689; (20 August 2013) 692 NZPD 12585; (8 August 2013) 692 NZPD 12532; (6 August 2013) 692 NZPD 12346; (1 August 2013) 692 NZPD 12254; (8 May 2013) 689 NZPD 9657.

72 In 2009 a Government SOP of 112 pages of amendments to the Climate Change Response (Moderated Emissions Trading) Amendment Bill was released.



Main Committee on the Australian model should be supported, in the hope that technical scrutiny and close scrutiny of each provision in a Bill can be done properly.<sup>73</sup>

Adoption of a parallel legislative Chamber would enable the House to devote more time to legislation and process it in a more timely fashion. The Australian Parliament uses this mechanism through the “Main Committee.” This Committee, established in 1994, has been very successful. About a third of all legislation is referred to it. The committee stage of Bills that are largely uncontroversial could be taken in this parallel chamber that would consist of no more than 30 members. It would be a wonderful use for the old Legislative Council Chamber. It would enable more time and attention to be given to the detail of Bills and to getting them right. In the event of significant disagreement, the Bill would revert to the full Committee of the House. The change would mean that the House could deal with two streams of business concurrently. There is little hope of eliminating the parliamentary bottleneck unless some such measures are adopted.

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73 David Bagnall “Problems with New Zealand’s Legislative Process, and How to Fix Them” (2009) 24(2) Australasian Parliamentary Review 114, in which he suggests that the conduct of the committee stages of all or most Bills should be conducted in the second chamber without the need for unanimity. Bagnall at 119 helpfully summarises the present purpose of the Committee of the Whole stage:

- a. to provide a further opportunity for members to debate the Bill in a public setting, focusing on the details of the Bill;
- b. to allow for a relaxation of the rules of debate, so as to encourage the exchange of views and observations about the detail of the Bill;
- c. to provide a focal point for the scrutiny of legislation and for holding the Minister or member in charge of the Bill to account;
- d. to give the Government a means to put forward amendments that promote its policy intentions in the wake of amendments incorporated as a result of the select committee stage;
- e. to provide an opportunity for members (other than the Minister or member in charge) to propose and test the numbers on their own amendments;
- f. to permit further amendments to be made to fine-tune the text of the Bill – the ‘final shot at getting it right’.

The irony involved in this analysis lies in the fact that not only is scrutiny often inadequate, but also it takes too long. The result is that necessary and often uncontroversial changes wait a long time to be passed into law. It is important to keep the law up to date and remove faults.<sup>74</sup>

Adoption of such a procedure would be quite practical in the New Zealand Parliament and would be likely to facilitate business for uncontroversial measures. It would also improve the quality of parliamentary scrutiny. There is a substantial need for such changes due to the serious delays many needed measures are subject to because they lack political priority and the House has become a serious bottleneck. The fact that the United Kingdom Parliament in the Grand Committee in the House of Lords has borrowed from the Australian experience suggests that it has merit. It should be tried in New Zealand.<sup>75</sup>

Support for the bottleneck theory of the legislative process that has been the subject of complaint for years gains further and important support from the June 2014 report of the Productivity Commission.<sup>76</sup> The problem has much more general application than regulatory statutes. Interestingly the Commission found that quality checks on legislation and regulation appear to be reducing: “They are fragmented, of varying effectiveness, and in some cases under strain.”<sup>77</sup> It reported that the availability of parliamentary time remains a significant bottleneck to “the maintenance, repair and, where appropriate, repeal of the stock of regulatory legislation”.<sup>78</sup> General legislation, I observe, suffers in the same way. There are, the Commission tells us, a range of options “to enable Parliament to better understand the quality of the legislation it has created

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74 These are extracts from a book reproduced on the Australian Parliamentary website <[www.aph.gov.au](http://www.aph.gov.au)>:

The Main Committee is an extension of the Chamber of the House, operating in parallel to allow two streams of business to be debated concurrently. It is an alternative venue rather than an additional process.

In respect of legislation, proceedings in the Main Committee are substantially the same as they are for the same stage in the House. A significant difference, stemming from the lack of opportunity in the Committee for divisions, is the provision for the “unresolved question”. Proceedings on a Bill may be continued regardless of unresolved questions unless agreement to an unresolved question is necessary to enable further questions to be considered. If progress cannot be made the Bill is returned to the House.

At the conclusion of the Bill’s consideration in detail the question is put, immediately and without debate, “That this Bill be reported to the House, without amendment” or “with (an) amendment(s)” (“and with (an) unresolved question(s)”), as appropriate. If the Committee does not desire to consider the Bill in detail it may grant leave for the question “That this Bill be reported to the House without amendment” to be moved immediately following the second reading.

A Bill may be returned to the House at any time during its consideration by the Main Committee by any Member moving, without notice or the need for a seconder, “That further proceedings be conducted in the House”. A Bill may also be recalled to the House at any time by motion moved in the House (without notice or need for seconder). ....

Consideration in detail

After the Bill has been read a second time, and if it is the wish of the House or Main Committee, the House or Committee proceeds to the detailed consideration of the Bill. The function of this stage is the consideration of the text of the Bill, if necessary clause by clause and schedule by schedule, the consideration of amendments, and the making of such amendments in the Bill as are acceptable to the House or Committee. ...

75 A serious proposal for such a step was made by the then Acting Second Clerk – Assistant of the Office of the Clerk in New Zealand: Bagnall, above n 73, at 114.

76 New Zealand Productivity Commission *Regulatory Institutions and Practices* (June 2014) at 457.

77 At 457.

78 At 457.

or authorised.”<sup>79</sup> When Parliament rose for the general election there were 71 Bills remaining in front of it, more than 50 of them government Bills. Quite often that is the total number of Bills the government introduces in a year.

## V. EVALUATING LEGISLATION AFTER IT IS PASSED

In New Zealand we have a bad habit of passing large legislative schemes and never analysing whether they were effective and efficient in achieving their goals. There are many reasons for the phenomenon but none of them convinces. Some exciting new developments have been tried in some European countries, notably Belgium, the Netherlands and the EC Commission in this respect.<sup>80</sup>

Acts of Parliament are designed to produce a set of policy results into the future. Whether these will be achieved cannot be known fully at the time the law is made. Thus, efforts to compare the results that were actually achieved with those expected and desired would seem essential in any rational policy-making community. Laws are passed to make improvement and produce better outcomes. Legislation is used as an instrument to change behaviours and shape society in various ways, whether it be the economy, the environment, health, housing, education or crime. The New Zealand approach, however, seems to be to continue legislating in quantity with little attempt to see what actually happened, until something goes sufficiently wrong to require hurried legislative attention. Too often known and reliable research is not followed or not examined, and seat-of-the-pants reactions and popular sentiments are used to change the law more than careful analysis. In this age when there are a variety of social science research methodologies available for examining how legislation has performed in practice, this seems unfortunate. It is only by carrying out such work that it will be possible to make definitive judgments about the quality of both the policy and the law.<sup>81</sup>

The reasons why inadequate examination of laws passed takes place afterwards are as follows:

- It costs money to do research and such expenditures are outranked by other priorities.
- Such investigations can be complex and that is a disincentive to undertake them.
- Public concern often does not emerge strongly enough to secure attention due to the lack of influence of those who are adversely affected.
- Enforcement is frequently expensive and policy-makers would rather not know whether the law is being followed.
- The increased complexity of many of the problems with which modern legislation deals make it easy to get it wrong.
- Those who fashion legislation, particularly ministers, would rather not know that it has not turned out how they would have wished or how they said it would.
- Political ideology drives much legislation rather than rigorous empirical analysis so the incentives to find out how it worked are lessened.

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79 At 419.

80 Koen van Acken “From Vision to Reality: *Ex Post* Evaluation of Legislation” (2011) 5 *Legisprudence* 41.

81 Post-Legislative Scrutiny is a topic upon which the Attorney-General, the Hon Christopher Finlayson, has been active: Chris Finlayson, Attorney-General of New Zealand “Post-Legislative Review” (speech to Meeting of the Commonwealth Parliamentary Association, 16 August 2006).

- The laws may be too complicated, unclear or inaccessible to those whose behaviour it is desired to alter.
- Laws become out of date and do not reflect current mores but the politics of altering them is so difficult that it is not attempted. The Adoption Act 1955 is a classic example of badly out-of-date law that has not been addressed but should be.

Some new mechanisms should be developed to look rigorously at the effect of legislation that has been passed and to ensure that it achieved the objectives upon which it was based and did not achieve unforeseen consequences of a deleterious kind. It seems a sound idea to do this examination before rushing in with amendments as occurs so often in New Zealand. Such analysis is also necessary before embarking on new proposals to replace existing law. Further, evaluations can pave the way for the development of a new legislative approach where the existing law contains serious defects upon examination. Such evaluations can show where existing law is out of date or otherwise unsuitable for purpose. The reports should spark public involvement and debate.

The English Law Commission published in 2006 a discussion paper on post-legislative scrutiny. The case for carrying out some post-legislative scrutiny is put at [6.2]:<sup>82</sup>

The primary reason which has been recurrently suggested to us is that legislation should be reviewed after it has been brought into force to see whether it is working out in practice as intended and if not to discover why and to address how any problems can be remedied quickly and cost-effectively. This driver for post-legislative scrutiny is based on a concern that every year a huge and increasing amount of legislation is poured onto the statute book, most of which is not thoroughly digested. Much of this generates further regulation either in the form of secondary legislation or in the form of codes and guidance. There may also have been a number of amendments introduced with little time for scrutiny during the passage of the Bill. In 2003, Parliament passed 45 Acts which ran to a total of over 4,000 pages. There were also 3,354 Statutory Instruments, running to 11,977 pages. There is a perceived need to take stock of this by providing a mechanism that will enable Parliament to look back and review the effects of legislation once it has been implemented. We do not suggest that review of this kind would have any impact at all in stemming the flow or volume of legislation, rather that the fact of the flow necessitates looking back to see what lessons may be learnt. Post-legislative scrutiny should translate into better regulation. If there is to be public commitment to better regulation, an obvious part of that is the examination of legislation once it has been brought into force; it may be that wider lessons can then be learnt on the method of regulation and the necessity for legislation.

The difficulty with post-legislative scrutiny is to provide an effective set of intellectual tests as to what it comprises and how it can be delivered. Data and information must be generated if the analysis is to be meaningful. The first issue is whether Parliament itself should engage in this activity. In New Zealand, Select Committees can conduct inquiries on a very wide range of matters. But Parliament is busy and there are resource restraints. Furthermore, there are many different types of legislation.

It should be noted that the English Law Commission in its final report in 2008 rather backed off the ambition of the issues paper and made this prime recommendation:<sup>83</sup>

We recommend that consideration be given to the setting up of a new Parliamentary joint committee on post-legislative scrutiny. Select committees would retain the power to undertake post-legislative review, but, if they decided not to exercise that power, the potential for review would then pass to

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82 Law Commission (UK) *Post-Legislative Scrutiny: A Consultation Paper* (No 178, 2006) at 30.

83 Law Commission (UK) *Post-Legislative Scrutiny* (No 302, 2006) at [347].

a dedicated committee. The committee, supported by the Scrutiny Unit, could be involved at pre-legislative as well as post-legislative stages in considering what should be reviewed, could undertake the review work itself or commission others to do so and would develop organically within its broad terms of reference.

The government's response to the report was measured and made a commitment to have every relevant department review new legislation three years after it was passed. The government was careful to keep most questions within its own control.<sup>84</sup>

In New Zealand it is always possible to put within a Bill a statutory requirement for a review of the statute to be tabled in Parliament within a specified time period, after it has been in operation. This occurred with the Evidence Act 2006. The second avenue proposed by the English Law Commission contemplates post-legislative scrutiny for which there was no prior commitment and therefore relies on post enactment triggers for review. The performance of this function should be carried out by the new Legislation Office and the modalities of the arrangements provided for in the proposed Legislative Standards Act.

Obvious questions that need to be examined in post-legislative scrutiny exercises would be the following:

- What interpretative difficulties have been encountered in the legislation?
- Has the legislation had unintended legal consequences?
- Have the policy objectives been achieved?
- What have been the economic costs imposed by the legislation, and what does it cost to administer? and
- Has it been cumbersome and bureaucratic?

Indeed, proper assembly of data at the pre-legislative scrutiny stage and making plans to monitor legislation after it goes into effect should be carried out much more than it is. Given that much regulation is provisional or experimental and requires adjustment, the need for assessment is even more important.<sup>85</sup> There is a direct and dynamic relationship between pre-legislative and post-legislative scrutiny. Consideration needs to be given in New Zealand to imposing some requirements in both phases to avoid the common syndrome: "We have a problem, let's pass a law".

While post-legislative scrutiny may be difficult and expensive, it is impossible to see why it should not be carried out. How much do we really know about the effects of all the laws that have been passed? Modern social science research methods often seem to be ignored as a means of finding out. A multitude of methods exist: survey research, focus groups, time series analysis, regression analysis, cost-benefit analysis, cost-effectiveness analysis, analysis of implementation processes and costs, measuring administrative burdens, legal textual analysis, historical analysis, in-depth interviewing and participant observation all have their uses in this field. In my view New Zealand will often need to know whether its legislation is effective, efficient, enforced,

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84 Office of the Leader of the House of Commons *Post-Legislative Scrutiny – The Government's Approach* (CM 7320, March 2008). See also Government Response (18 July 2013) to *Ensuring standards in the quality of legislation* (HC 85, 20 May 2013) at [7]–[44].

The response's primary recommendation was to have the relevant department review legislation three years after it has been passed. The full response is worthy of close study and as far as I can tell a Parliamentary Joint Committee was not established.

85 Joel Colón-Ríos "Experimentations and Regulation" in Susy Frankel and John Yeabsley (eds) *Framing the Commons* (Victoria University Press, Wellington, 2014) 94.

coherent, clear and relevant to the problems that exist. In a rational society committed to the rule of law we should know more. Passing more legislation without knowing the effects of what we have is like whistling in the dark.

## VI. PRESENTATION, DRAFTING AND ACCESSIBILITY

There have been many developments in the presentation, drafting and accessibility of the New Zealand statute law since 1978. When the Law Commission was established, one of its earliest references was on legislation and its interpretation.<sup>86</sup> Among the most important have been the following:

### A. *Plain English*

The development over time to drafting in plain English to remove as the Law Commission put it “Prolivity and Tautology.”<sup>87</sup> There has been a substantial improvement in drafting since the 1980s. A number of changes made by the Parliamentary Counsel Office have made the drafting simpler and the structure of Acts better. The inclusion of purpose clauses has given better guidance to the courts indicating what targets the statute aims to hit. There has also been an increased trend to set out the principles upon which the Act is based. Old-fashioned legal language is now eschewed in New Zealand statutes and plain language used. Charts and examples are often used now to explain various provisions. There is increased recognition that judges and lawyers are not the only audience for statutes and that many people use legislation.<sup>88</sup>

### B. *Interpretation Act 1999*

Another benign development was passage of a new Interpretation Act 1999 recommended by the Law Commission. That Act states admirably the fundamental rule of interpretation in s 5(1): “The meaning of an enactment must be ascertained from its text and in the light of its purpose.” The new Act signalled progress.

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86 Law Commission *Reference on Legislation and its Interpretation* (28 May 1986), the purpose of which was to propose ways of making legislation as understandable and accessible as practicable and of ensuring it is kept under review in a systematic way. It was also to ascertain what changes were necessary or desirable in the law relating to the interpretation of legislation. Over the years much good work was accomplished by the Commission and eventually it bore fruit in significant changes to both law and practice. The challenge of finding a way to keep statute law under systematic review remains unsolved.

87 Law Commission *A New Interpretation Act to Avoid “Prolivity and Tautology”* (NZLC R17, 1990). See also Law Commission *Legislation Manual Structure and Style* (NZLC R35, 1996).

88 As at 9 August 2014, the New Zealand Government’s Legislation website lists the top documents in order in terms of demand by the public as follows: Resource Management Act 1991, Companies Act 1993, Crimes Act 1961, Health and Safety in Employment Act 1992, Employment Relations Act 2000, Income Tax Act 2007, Building Act 2004, Judicature Act 1908, Sale and Supply of Alcohol Act 2012 and Privacy Act 1993.

### *C. Legislation Act 2012*

The Legislation Act 2012, based on a joint project by the Parliamentary Counsel Office and the Law Commission, contains many innovations and improvements; furthermore it puts all the law in one place.<sup>89</sup> Here are the purposes of the Act set out in s 3, and it is a good example of a purpose provision:

The purposes of this Act are—

- (a) to bring together in this Act the main provisions of New Zealand legislation that relate to the drafting, publication, and reprinting of legislation, and the disallowing of instruments;
- (b) to provide for electronic and printed copies of Acts and legislative instruments to be published;
- (c) to provide for official versions of Acts and legislative instruments to be published in electronic form;
- (d) to facilitate the production of up-to-date reprints that are modernised and made consistent with current drafting practice concerning their mode of expression, style, and format;
- (e) to make New Zealand statute law more accessible, readable, and easier to understand by facilitating the progressive and systematic revision of the New Zealand statute book so that—
  - (i) statute law is rationalised and arranged more logically;
  - (ii) inconsistencies and overlaps are removed;
  - (iii) obsolete and redundant provisions are repealed; and
  - (iv) expression, style, and format are modernised and made consistent.
- (f) to enable certain kinds of subordinate legislation to incorporate material by reference in reliance on this Act, subject to compliance with consultation and other requirements; and
- (g) to replace the Statutes Drafting and Compilation Act 1920 with modern legislation that continues the Parliamentary Counsel Office as a separate statutory office and facilitates the drafting and publishing of high-quality legislation.

### *D. Revision of Statutes*

The Legislation Act also makes provision for the preparation and execution of a Revision programme for statutes that will assist with accessibility if used effectively. Consultations about a three-year programme of revisions is now underway. Here the purpose is “to re-enact, in an up-to-date and accessible form, the law previously contained in all or part of 1 or more Acts”.<sup>90</sup> A revision Bill will not generally make policy changes because as introduced it can only make minor changes to the effect of the law as allowed under s 31(2)(i) and (j) of the Legislation Act 2012. This section does allow a revision Bill to:

- make minor amendments to clarify Parliament’s intent or reconcile inconsistencies, and
- update monetary amounts for Consumers Price Index changes or provide for amounts to be prescribed by Order in Council.

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<sup>89</sup> Law Commission, above n 3. See also Legislation Bill 2014.

<sup>90</sup> Legislation Act 2012, s 29(2).

Also, while the Act does not affect powers of the House of Representatives to amend a revision Bill for any purpose and to pass it with amendment, procedural rules will make substantive law change amendments outside the scope of the Bill difficult.

### *E. Accessibility*

The Law Commission has produced over the years many papers on the format, structure and style of legislation and these have produced changes with a positive effect.<sup>91</sup> The most significant change to the accessibility of New Zealand statute law that has been made since the 1957 reprint project was facilitated by the digital revolution allowing official versions of the New Zealand statutes to be made available online, provided free of charge and searchable. The project that led to this change took some years. It was painstaking and systematic and reflects considerable credit on the Parliamentary Counsel Office, who persisted with a difficult number of IT issues over quite a few years and resolved them all successfully. Now the statutes are obtainable as official versions online, a relatively recent occurrence. Furthermore, the historic statutes are now available, that is to say the law as enacted by the New Zealand Parliament from the beginning. But there is a need for more of these to be made available in terms of amendments made over the years to original statutes.<sup>92</sup>

### *F. Residual Issues*

There is a considerable quantity of good news in all these developments. But there remain substantial deficiencies when the profile of the New Zealand statute book is considered as a whole. Consider what Sir Kenneth Keith said in 1978 and let us examine how many of the weaknesses remain.

The difficulty with the new digital technology compared with the old is that it encourages longer statutes and facilitates adding to the bulk of statute law. It also allows them to be drafted and printed more quickly. Email has made it worse. This all encourages more speed in the preparation of legislation and less time for thought.

First, the vast New Zealand statute book is difficult to use despite its electronic availability. If the person does not know the name of the statute concerned, complicated electronic searches have to be undertaken yielding a large number of hits that are irrelevant. The provision of a subject index would improve accessibility greatly and remove for lay people many of the law's mysteries. New Zealand ceased producing an official index in 1931 and the Law Commission in its 2008 report stated "It is remarkable that one does not exist for something as important as our statute law."<sup>93</sup> Every large publication has an index but not the New Zealand statute book. The production of such an index was recommended by the Law Commission report *Presentation of New Zealand Statute Law*. That report stated that it was the state's responsibility to produce one which is as detailed and comprehensive as possible. The report said the need for an index was so obvious that

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91 Much of this work was brought together in Law Commission *Legislation Manual Structure and Style* (NZLC R35, 1996).

92 For example, while the historic statutes are a useful addition to the Legislation website, they suffer from a weakness: if one wants to examine the Commissions of Inquiry Act 1908 as it was before it was repealed in 2013, it is necessary to look up the original 1908 Act and then check every year after for amending Acts.

93 Law Commission, above n 3, at 5.



“it goes without saying.” It was recommended that the index be available both in electronic form and in hard copy.<sup>94</sup>

The recommendation of the Law Commission was rejected by the government, and the Legislation Act 2012 makes no provision for an index. The justification for such a decision is unclear. The estimate was that preparation of an index would cost \$1 million.

New Zealand still amends existing statutes extensively without reworking the whole. This leads to serious incoherence in big statutory schemes such as the Resource Management Act 1991. The prime reason, in my experience, why governments do not like to rework whole statutes is not only the policy and drafting work involved but the political fact that it opens up a much wider range of considerations that can be debated and submitted upon to a Select Committee, and that complete statutes take longer to pass through the Parliament. Often, however, the reality is different. The time is taken up behind closed doors arguing about the policy and drafting, and once the statute reaches the Parliament it may prove uncontroversial and pass quite quickly. Such was the position with the Companies Act 1993, proposed by the Law Commission in 1989, and several years were spent in hard-fought debate with the Ministry of Justice and the government.

While there is more room in statutes now for principles, there is still far too much verbosity and administrative detail in statutes that is quite unnecessary. The prime reason for this, in my experience, lies in the desire of ministers and on occasion public servants to control every little detail of how things are done. A prescriptive approach to laying down detailed procedures as occurs in so many statutes, again the Resource Management Act comes to mind, is often futile, frequently expensive and often unnecessary. It seems to be born of a feeling flowing from the doctrine of parliamentary supremacy that “we know best and this is how you will do it.” Local government legislation, for example, is particularly prone to the tendency, demonstrating central government’s desire to control local government in minute detail.

## VII. PROPOSAL FOR REFORM

### *A. The Problems*

The definition of the problems that confront the making of statutes in New Zealand and access to them are:

- an unmanageable quantity of statute law resulting in attendant dangers for the rule of law norm;
- rapid increases over time in the cumulative bulk of statutes;
- a pronounced tendency to pass too many amending Acts that damage the coherence of the principal Act;
- insufficient care and planning in the development of significant new statutory schemes because time is not allowed and the quality is reduced;
- undue delays occurring in the passage of smaller changes to the law that are needed;
- a propensity to pass new statutes where changes to the law are not needed;
- a failure to evaluate systematically whether statutes have achieved their purpose;

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94 At 5.

- a lack of transparency surrounding the preparation of legislation within the executive and the fact that the legislative programme is not publicly available;
- a lack of clarity as to whether the executive or Parliament is responsible for the quality of legislation;
- that Parliament does not sit long enough to properly process the legislation that is introduced and does not do a good job of technical scrutiny;
- that urgency can prevent proper scrutiny of Bills and the taking of urgency unreasonably reduces safeguards;
- that procedures in the House of Representatives do not add sufficient value to the quality of legislation and need to be changed;
- that the moving of extensive amendments in the Committee of the Whole can often be too quick, so the amendments are not properly scrutinised;
- that statutes contain too much detail, rendering them prolix;
- that too often agreed legislative standards are not followed; and
- despite great advances in accessibility, that there is no index to the New Zealand statute book and it is not arranged around topics.

A systematic reconfiguration of the legislative process is required and changes need to be made to the presentation and accessibility of the work product.

### *B. More Care at the Beginning*

A prime feature of the cure should be to take much more care at the beginning and provide the public with detailed information on proposed legislation before it reaches the House of Representatives. In turn that requires rigorous thinking to define the policy problems to be solved.

### *C. Publication of Legislative Programmes*

The government should produce and publish a legislative programme for government Bills, including Law Commission projects, for the whole parliamentary term. This will mean ministers will have to think through their priorities. Obviously there has to be flexibility and each year an annual legislative programme should be published. It will be particularly important that the timetables for legislation be carefully set. This transparency will help everyone concerned with legislation. The Bills on the programme should be classified into one of three categories as involving major change, moderate change or minor change.

### *D. Major Legislation*

All major change legislation should be preceded by careful analysis and public consultation. A document in the nature of a White Paper should be prepared setting out the government's proposals in detail: the options considered, the administrative arrangements proposed, the costings of the new policy, a regulatory impact statement, a risks assessment analysis, whether the drafting is legally workable, whether the Bill complies with New Zealand's international obligations, and a summary of the consultations that have been held with stakeholders. A draft Bill prepared by parliamentary counsel should be included. Bills are the enemy of sloppy thinking. Only through the production of a Bill can it be seen how the policy proposal will work and allow judgments to be

made whether the policy has been thought through. This should ensure that the present disjunction between development of the policy and the design of its legislative form ceases.

The White Paper should be published and lie upon the table of the House for three months, allowing the public and affected parties to consider it carefully. At the end of three months the House should debate the Bill and, if the House decides to proceed, Select Committee scrutiny and public submissions should follow. If the government decides its original proposals need modification, those should be tabled during the first parliamentary debate. Such pre-legislative scrutiny should improve quality, make the task of the House easier and submissions to the Select Committee less hurried.

Moderate or minor legislative proposals, with accompanying information, should also be tabled for a month before consideration by the House. The Annual Statutes Amendment Bill should continue, and one omnibus Law Reform Miscellaneous Bill should be permitted each year to make routine repairs and maintenance to the statute book.<sup>95</sup> Big amending Bills should be avoided. The methods for dealing with revision Bills, local Bills, members' Bills and private Bills should remain as they are, although the parliamentary processing of Bills needs to be improved. It is cumbersome and often ineffective. The Business Committee should take a lead in sorting out the difficulties and the Standing Orders need to be revised.

### *E. Cut Clutter*

The drafting of Bills should be changed so that statutes are not cluttered with as many process and administrative details as they are now. This would reduce the length and complexity of statutes and allow clearer exposition of the relevant principles. Local government legislation is a prime example of endless prolixity. The bulk of delegated or subordinate legislation in New Zealand is far less than for Acts of Parliament. The necessary details should be placed in subordinate legislation.

### *F. A New Legislation Office*

In order to produce more systematic preparation of all legislation, the present role of departments should be changed. Whole of government standards for legislative design should be secured by having all Bills prepared in the same way by one agency, a new Legislation Office. This should be located in Parliament rather than the executive, but under the control of the Attorney-General, who will be the minister responsible for a new Legislative Standards Act that will embody some of the suggestions in this proposal.<sup>96</sup> This is not a proposal to divorce legislation from Cabinet influence and ultimate control before it is introduced to Parliament but rather to make those elements more transparent, leaving room for quality to flourish and sound legislative principles to be upheld. Politics is the language of priorities and ministers set the priorities.

When first a new policy proposal is made that requires legislation, the Cabinet paper should contain a report from parliamentary counsel on the legislation issues. Once Cabinet has decided to approve the proposal, the detailed design of both the policy and legislation should be shifted to

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95 There has been great controversy over the years about Law Reform Miscellaneous Bills, particularly between the former Clerk of the House, David McGee, and former Chief Parliamentary Counsel, George Tanner. Some limited relaxation of the current restrictions in Standing Orders in this regard should be carried out.

96 Compare Legislative Standards Act 1992 (Qld).

the Legislation Office. A group of officials from the administering department should be seconded to the Office for the duration of the project. They should be joined with other officials from other relevant agencies similarly seconded for the project and any relevant outside experts such as Law Commissioners, practising lawyers and academic lawyers who can make useful contributions in areas of their specialist expertise. Frequently other disciplines are needed depending on the subject matter. Economic analysis is required for most big projects. The dedicated team, who will have no other distractions, will produce the information, the analysis and the Bill that will go into the White Paper. It will be approved by Cabinet before being published.

### *G. A Legislative Standards Act*

Some of the principles and processes to be followed by the new Office would be laid down in statute, a Legislative Standards Act. The Office would be subject to the Official Information Act. The Office would have a permanent staff as well as project teams and these would include the present Parliamentary Counsel Office, some economists and other experienced policy analysts. The Office will need to be adequately funded.

### *H. Whole of Government Legislative Standards*

Agreed whole of government legislative standards would be applied to all Bills. These standards would include the Legislation Advisory Committee Guidelines, the New Zealand Bill of Rights Act, protections against proposals of legal dubiety that will not stand up in court, or proposals that are constitutionally suspect. The protection of legislative integrity will be safeguarded by parliamentary counsel who are expert and independent. They would certify that these standards have been met in the Bills drafted. Where the standards are departed from, that would be explicitly authorised by the Attorney-General and the details would be tabled in the House. The Attorney-General is a special minister, the Senior Law Officer of the Crown who is responsible for seeing that government is conducted according to law and for upholding the rule of law. He is also the minister at present responsible for parliamentary counsel and should continue to be.

### *I. Parliamentary Counsel*

Parliamentary counsel will be prominent members of the new Legislation Office and their independence needs to be strengthened. Placing them in the new Legislation Office in Parliament will send a powerful signal in this regard.<sup>97</sup> The status of parliamentary counsel as constitutional gatekeepers needs to be recognised. They more than anyone are responsible for the quality of the statute book and they need to be given the tools to do the job. They need to be able to refuse to draft provisions that are dubious even if officials or even some ministers want them. They are, with the Attorney-General, the guardians of the legal integrity of legislation.

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<sup>97</sup> The Statutes Drafting and Compilation Act 1920 created an office of Parliament called the Law Drafting Office, under the control of the Attorney-General. The Law Commission in its 2009 report to which I was a party recommended that the Office should no longer be described as an office of Parliament: *Review of the Statutes Drafting and Compilation Act 1920* (NZLC R107, May 2009) at 78. I now think that the issue should be revisited, although the Attorney-General should be in charge and responsible. I am persuaded of this by an article, David Hull “The Virtue in an Old Act” [2011] 2 *The Loophole* 79.

### *J. An Index to the Statute Book*

The Legislation Office would also be responsible for the presentation of the statute law including the production of an index to the statute book and the preparation of codes so that all the relevant law on a topic could be found in one place. Digital availability of the official statutes online has been a great step forward but more needs to be done to make the law accessible.

### *K. Post-Legislative Scrutiny*

In addition to being responsible for the design and drafting of new legislation, the Legislation Office would have a division whose responsibility it would be to examine existing legislation and publish reports upon whether it met its objectives and what its achievement has been and to analyse what unforeseen consequences may have occurred. Passing new legislation without knowing the effects of what we have has an element of futility about it. Systematic post-legislative scrutiny is largely missing at present. We have little idea in many cases whether what we have legislated for has worked in practice. A programme where five or six big statutes a year were examined and reported on would be beneficial.

### *L. Repealing Old Law*

Another responsibility of the new Office should be to examine the statute book for old laws that have passed into desuetude or are no longer needed and should be repealed. Not enough of this is being done. We need to get rid of the dross left over from earlier days.

### *M. Lack of Parliamentary Time*

MMP has slowed the legislative process down. That is not a bad thing but not if so much law is proposed for passage as has been the case over the past 20 years. Parliament needs to have more sitting days to process Bills properly and look at them more closely. It sits fewer days a year than many Parliaments. In the five years to 2012 it sat an average of 75 days a year. Less legislation should be proposed unless the House sits more.

The House, by changing its methods, can make better use of the time it devotes to legislation. MPs are legislators and they need to take the responsibility for producing good law more seriously. The level of technical scrutiny in New Zealand has been justly criticised and it needs to be improved. The MPs add most value in the parliamentary process at Select Committees. The debates themselves frequently waste valuable parliamentary time. Not every Bill need go through the same parliamentary process, as is required at present.

More time needs to be available to prepare legislation and improve the quality of our statute law. That provides a strong reason for favouring a four-year fixed parliamentary term, although since that involves an entrenched provision of the Electoral Act it will be difficult to bring about. Nevertheless, too much big change is done quickly with serious adverse consequences for quality. The remorseless pressure seems to be to get a measure through rather than get it right.

The way in which Parliament deals with legislation needs to be improved. Three of the four parliamentary debates laid down in Standing Orders for Bills at present have little influence on the content of the legislation. Some of the stages need to be dropped for some Bills. In some respect the more detailed scrutiny that used to occur no longer occurs. Furthermore, while the Select Committee consideration of Bills allowing for public submissions is an important democratic

check, the hearings have become, over the years since the adoption of the process, in my experience increasingly perfunctory. Witnesses have little opportunity to have their points adequately taken on board by MPs. New mechanisms have to be adopted to deal with the problems both of legislative overload and the timely production of necessary but uncontroversial law that is required for the maintenance and repair of the statute book.

#### *N. Revised Parliamentary Procedures*

The Australian Parliament has a Main Committee that is an extension of the Chamber of the House operating in parallel to allow two streams of business to be debated concurrently. The Main Committee carries out detailed consideration of a Bill, the text of it, clause by clause, and schedules. It can amend the Bill. If MPs in the Committee are not happy, they can ensure the Bill goes back to the House itself, and Bills can be recalled from the Committee at any time by motion moved in the House without notice or the need for a seconder. A similar approach has been adopted in the House of Lords. The Standing Orders of the Parliament should be revised to include a procedure similar to the Australian one. The Committee could sit in the old Legislative Council Chamber and deal with the Committee of the Whole stages of uncontroversial Bills, the Statutes Amendment Bills and the Law Reform Miscellaneous Bills. It may even be possible to move the entire Committee of the Whole stage for all Bills to the new Committee.

#### *O. Urgency and Supplementary Order Papers*

Making law takes more time in the House of Representatives than any other of its functions. The time needs to be more constructively spent. Much of it is now wasted in terms of producing quality legislation. Amendments carried out rapidly by Supplementary Order Paper need better scrutiny and less speed. Restraint in the moving of Supplementary Order Papers needs to be enforced by new rules. Amendments to Bills that occur during the parliamentary process need to be more carefully dealt with and proper notice given of them. The urgency provisions of the Standing Orders need to be restricted further by requiring a 75 per cent majority in Parliament to allow urgency to be taken. Urgency has been taken much less frequently since the changes to Standing Orders in 2011 that provided extended sittings. Urgency has over the years been too often abused to truncate Select Committee consideration of Bills or facilitate consideration of highly controversial Bills. This is an ever-present temptation in a Parliament with only one House. Emergencies do occur that require urgent legal change by legislation but they are not frequent.

### VIII. CONCLUSION

The proposals developed here are designed to rectify untidy, cumbersome and out-of-date methods of law-making. Half measures do not work. We have tried them. People do not take much interest in either the presentation of legislation or the manner in which it is made. It is time to pay serious attention to these issues since quite a number of the nation's political discontents can be traced indirectly to the problems outlined.

10 September 2014

# THE SPECIAL TRIBUNAL FOR LEBANON: WORK IN PROGRESS AT THE FIRST TRIBUNAL CHARGED WITH TERRORIST JURISDICTION

BY SIR DAVID BARAGWANATH\*

## I. INTRODUCTION

The term *terrorism* is less a legal concept than a vivid expression conjuring conduct too horrific to fall within vile yet less evocative categories such as murder or threatening to kill. Presumably because of the need of a more graphic expression, like *genocide*, *terrorism* was developed and put to use to denote especially grave crime. Later in the year I am to explore the use for that purpose of this term of undefined meaning employed in a wide variety of other contexts, among them political rhetoric.<sup>1</sup> Since that topic is notoriously challenging I decided to try out some preliminary thoughts on what for me, as an honorary professor of this University, is home territory. The occasion is enlivened by the company of Dean Brad Morse, Professor Neil Boister<sup>2</sup> and other old and new friends from both profession and Law School with the prospect of Tompkins Wake's hospitality.

While in a decision to which I was party the Appeals Chamber of the Special Tribunal for Lebanon (STL) has sought to provide interpretations of terrorism, both in the domestic law of Lebanon and at international law, this presentation will not seek to resolve the debate to which that decision has given rise. Rather, from the base of a paper published by this University three years ago<sup>3</sup> and experience since then in the STL, the first international criminal tribunal with jurisdiction over terrorism as a crime, I invite your reaction to a sketch of what the STL has been doing and some tentative ideas.

There are two broad themes:

- the creation of an international criminal tribunal with jurisdiction over terrorism; and
- the challenges of dealing with terrorism.

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\* President, Special Tribunal for Lebanon. Lecture: Te Piringa – Faculty of Law, University of Waikato; Offices of Tompkins Wake, Hamilton, 3 September 2014.

1 David Baragwanath “Terrorism as a Legal Concept” (Second Annual Ashgate Lecture on Criminal Law, Centre for Evidence and Criminal Justice Studies, Northumbria Law School, Newcastle, 27 November 2014).

2 Whose illuminating chapter on terrorism in his *An Introduction to Transnational Criminal Law* (Oxford University Press, Oxford, 2012) is of particular interest.

3 David Baragwanath “Liberty and Justice in the Face of Terrorist Threats to Society” (2011) 19 Wai L Rev 61.

## II. AN INTERNATIONAL CRIMINAL TRIBUNAL WITH JURISDICTION OVER TERRORISM

### A. *The Three Generations of International Criminal Courts*

| Generation | Court  | Jurisdiction   |
|------------|--|--|
| First      | Nuremberg and Tokyo (which attracted claims of “victors’ justice”) | Crimes under international law against peace, war crimes and crimes against humanity.  |
| Second     | ICTY, ICTR and ICC <sup>4</sup>                                    | Similar jurisdiction.<br>Inclusion of genocide in all three courts (not covered in first generation courts).   |
| Third      | STL  | Crimes under domestic law of Lebanon, including terrorism as well as murder.<br>See also ECCC and SCSL <sup>5</sup> (hybrid courts with both international and domestic jurisdiction). |

### B. *Lebanon and the Rule of Law*

Lebanon has contributed three main pillars of modern civilization:<sup>6</sup>

- the alphabet used by the Greeks to express democracy, including Aristotle’s formulation of the rule of law;<sup>7</sup>
- the Roman law underpinning many modern legal systems, much of the common law<sup>8</sup> and no little part of international law; and
- from its universities, 17 of the delegates – of Iran, Iraq, Saudi Arabia and Syria, as well as Lebanon – who at the 1945 San Francisco Conference created the United Nations (UN) Charter.

It has the potential with international assistance to develop its current role as a banking and financial centre of the Middle East to resume its historic status as “nurse of laws”.<sup>9</sup>

4 International Criminal Tribunal for the former Yugoslavia (ICTY); International Criminal Tribunal for Rwanda (ICTR); International Criminal Court (ICC).

5 Extraordinary Chambers in the Courts of Cambodia (ECCC); Special Court for Sierra Leone (SCSL).

6 Amin Maalouf *Disordered World: Setting a New Course for the Twenty-First Century* (Bloomsbury, New York, 2011) at 184.

7 Alan Ryan *On Politics: A History of Political Thought: From Herodotus to the Present* (Penguin, London, 2013) at 91. Another opinion is that Aristotle was preceded by Solon.

8 Both in the Academy (Timothy Endicott “From the Dean” (2014) 18 Oxford Law News 1 “It was the study of [Roman] law that gave Oxford a university”) and in the courts.

9 Justinian’s description of Beirut in the Introduction to his Digest “The most fair city of Berytus, which may well be styled the nursing mother of law” Charles Henry Monro (ed) *The Digest of Justinian Volume 1* (Cambridge University Press and Stevens and Sons Ltd, London, 1904) at xxiii.



### *C. The Civil War and Subsequent Attacks*

In Lebanon's 15-year civil war, concluded in 1990, of its less than 4,000,000 population more than 150,000 were killed. In the years that followed there was a succession of fatal attacks on political leaders that culminated in the bombing on Valentine's Day 2005 that killed 22 people and injured 220 others, causing damage within a 500-metre radius.

During the period October 2004 to December 2005, there were 13 further fatal attacks.

### *D. The Creation of the STL*

The Lebanese government initially negotiated an agreement with the UN, however when the agreement could not be ratified, the provisions of the agreement and the accompanying statute were brought into force pursuant to Chapter VII of the UN Charter. The Security Council exercised that exceptional power to resolve that:

- the bombings in Lebanon constituted a threat to international peace and security;
- it should take action to maintain and restore such peace and security; and
- that should be by way of an international criminal tribunal, with – as well as investigators, prosecution and defence – Lebanese and international judges.<sup>10</sup>

### *E. Chapter VII of the UN Charter*

The Charter states:

#### *Article 39*

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

...

#### *Article 41*

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

#### *Article 42*

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Hence, under arts 39 and 41, Resolution 1757 dated 20 May 2007 created the STL.<sup>11</sup>

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10 *Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon* SA Res 1757, S/RES/1757, 29 March 2006.

11 *Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon*, above n 10.

### F. *The STL Structure*

The STL comprises:

- (a) chambers, consisting of:
  - (i) a (novel) pre-trial judge/*judge de la mise en état* (“putting in order”);
  - (ii) a Trial Chamber (three judges and two alternate judges); two Lebanese judges and three international; and
  - (iii) an Appeals Chamber (five judges including a president with additional diplomatic and administrative roles); two Lebanese judges and three international;
- (b) the Office of the Prosecutor;
- (c) the Registry (including the Victims and Witnesses Unit); and
- (d) the (novel) Defence Office and the Head of Defence.

### G. *The Challenge to Jurisdiction*

The Charter states:

*Article 2(7)*

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

...

*Article 24(2)*

In discharging these duties the Security Council shall act in accordance with the ... Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapter ... VII ... .

In *Prosecutor v Ayyash* the Trial Chamber and, on appeal, the Appeals Chamber dismissed the defence challenge to the validity of the Security Council’s Resolution to create the STL.<sup>12</sup>

The fact that the Security Council must act in accordance with the Principles of the United Nations, means, so it was argued by counsel for the defence, that there was no jurisdiction to create a tribunal: all the killings occurred within Lebanon and were merely a threat to national peace and security. You will remember the mother who looked down at the soldiers marching past and proudly said to her husband, “they’re all out of step except our Albert”. I was Albert: the Judges of the Trial Chamber and all Judges in the Appeals Chamber except me were of the view that our legality was not an issue justiciable by the Tribunal; we had been created by the Security Council and who were we to challenge its exercise of power to create the STL?

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<sup>12</sup> *Prosecutor v Ayyash (Pre-trial)* STL Pre-Trial Chamber STL-11-01/PT/AC/AR90.1, 24 October 2012 (Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal).

The competing view which, with the support of the ICTY<sup>13</sup> I ventured to express, is simply that the first thing any judge has to determine is whether he or she has jurisdiction in the case; otherwise the tribunal should not be sitting. Arbitrators know all about this. In *Boddington v British Transport Police*<sup>14</sup> the appellant, having defied a sign in a railway carriage saying “do not smoke”, had been convicted before magistrates of breach of the relevant by-law. His conviction stood until the House of Lords held that when appearing before a criminal court you may take an administrative law point – if it is a good point – in defence of yourself, even though the role of magistrates does not usually extend to judicial review of the legality of prohibitions of smoking. It followed that we too must face the issue.

When Benazir Bhutto was assassinated within her own state of Pakistan, the Security Council considered that was an infringement of international peace and security: the consequences went beyond the bounds of the state. Given the respect due to the Security Council, with all the resources its members possess, I was prepared to follow that opinion as rational. So I joined my fellow Judges in dismissing the appeal, although it took me more paper to do so.

## H. Giving Victims Rights

Another important topic is that of victims:<sup>15</sup>

### Article 17

[T]he Special Tribunal shall permit the ... views and concerns [of victims] to be presented and considered at stages of the proceedings determined to be appropriate by the Pre-Trial Judge or the Chamber and in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Hence r 86(A) – a victim has the power to make a request to the pre-trial judge for grant of status as victim participating in the proceedings; and r 87 – a victim participating in the proceedings may request the Trial Chamber, after hearing the parties, to call witnesses and to authorise him to tender other evidence and permit his counsel to examine or cross-examine witnesses and file motions and briefs.

What had never sufficiently occurred to me before arriving at The Hague is that the *raison d’être* of criminal law, as of any criminal prosecution, is the victims. In the common law, at least while I was at the bar and for most of my time as a judge, victims didn’t get much say. Except of course in a homicide, the victim might be a witness; but the idea of having counsel appointed to represent the interests of victims, or that victims including next of kin should have status as participants in the proceedings, was well off my screen. My conversion to another opinion may have been aided by the lucid arguments of leading and junior counsel for the victims participating in the proceedings

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13 The Appeals Chamber of the ICTY in the seminal jurisdictional decision *Prosecutor v Tadić* ICTY Appeals Chamber IT-94-1-AR72, 2 October 1995 had also been of the view that it could explore the legality of its creation. That case held that an international tribunal like the ICTY has the power to decide on its own jurisdiction – *compétence de la compétence*. Like the STL, the ICTY was created by the UN Security Council acting under Chapter VII. The majority of the STL Appeals Chamber departed from that jurisprudence.

14 *Boddington v British Transport Police* [1999] 2 AC 143 (HL).

15 *Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon*, above n 10, art 17.

(VPP),<sup>16</sup> a status accorded by the pre-trial judge; he has accepted some 74 people as having that status. They include both next of kin and people who have been frightfully injured because that is what bombing does. I am now persuaded by counsel for the VPP that their role does not merely replicate unnecessarily the work of the prosecutor, but brings a different dimension to bear.

I do not however view victims as parties equivalent to and with the same procedural rights as the accused. In an appeal against refusal of the pre-trial Judge to order permanent suppression of the names of persons admitted to status as VPP, I concurred with the dismissal of the appeal, concluding:<sup>17</sup>

- [34] ... Although the importance of the interests of victims is clearly emphasized by the [STL] Statute, Article 17 recognises that they are subordinate to those of the accused. Theirs is a double right both to fair trial and to expeditious process. The logical argument [for accepting the cost and delay of embarking on an enquiry whether the presumption of disclosure to the Defence can be rebutted and as to risk to a victim who will suffer psychological impairment if not admitted as a VPP yet risk loss of life if identified] stacks possibility on possibility and would inject complication and delay into a process that, while it must be fair, must also seek reasonable expedition.

The competing arguments as to the role of victims are the subject of a thoughtful essay by a distinguished Judge of the International Criminal Court with long experience as a Judge of the International Criminal Tribunal for the former Yugoslavia.<sup>18</sup> The topic demands careful consideration in terms both of how far concerns for victims should be taken within the law of a particular jurisdiction and how the competing values should be weighed in determining specific cases.

### *I. Trial in Absentia*

A further novelty for a common lawyer is trial in absentia, familiar in France, Lebanon and other jurisdictions which include the European Court of Human Rights. Here, while keeping in mind that in absentia trials are not completely alien to common law jurisdictions – as when an accused absconds – I have sustained a conversion.

Before I put my name forward to be considered for appointment to the Tribunal I was worried, until I read art 22 of the Statute, by the idea of trying people behind their backs. Now, in *Prosecutor v Ayyash*<sup>19</sup> we looked at art 22 of the Statute and r 106 of our Rules (made under art 28 by the judges). Article 22 gives a person accused in absentia and, all the more, a person convicted in absentia, an absolute right to retrial. Given such a guarantee the European Court of Human Rights has endorsed the law of France, which has been adopted in Lebanon, that permits trial in absentia.

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16 Peter Haynes QC of the English bar, Nada Abdelsater-Abusamra of the bars of Beirut and New York and Mohammed F Mattar of the Beirut bar.

17 *Prosecutor v Ayyash (Pre-trial)* STL Appeals Chamber STL-11-01/PT/AC/AR126.3, 4 October 2012 (Decision on Appeal by Legal Representative of Victims against Pre-Trial Judge's Decision on Protective Measures).

18 Van den Wyngaert "Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge" 44 *Case Western Reserve Journal of International Law* 475. See also Carolyn Hoyle and Leila Urlich "New Court, New Justice? The Evolution of 'Justice for Victims' at Domestic Courts and at the International Criminal Court" (2014) 12 *Journal of International Criminal Justice* 681.

19 *Prosecutor v Ayyash (Appeal)* STL Appeals Chamber STL-11-01/PT/AC/AR126.1, 1 November 2012 (Decision on Defence Appeals against Trial Chamber's Decision on Reconsideration of the Trial In Absentia Decision) at 349.

Why bother with trial in absentia? The answer is that the alternative to trial in absentia is not trial with the accused there; it is no trial at all, with the file gathering dust in some basement. When the Law Commission prepared its *Coroners* report,<sup>20</sup> we identified two reasons for having inquests; one to find out, especially so that the family could know, how the death had occurred; the other to try to avoid such catastrophe for the future. Trial in absentia serves something like the same purposes. What it allows, especially if you have a strong Head of Defence Office who appoints strong defence counsel, is a proper trial. Certainly it's not as good as if the accused were there and able to give instructions to their counsel. But I am now converted to the view that for really serious matters, if the following test construing art 22 of the STL Statute and r 106 set out by the Appeals Chamber judgment *Prosecutor v Ayyash* is met, trial in absentia should be permitted:<sup>21</sup>

- [31] Article 22 of the Statute and Rule 106 of the Rules, interpreted in light of the international human rights standards, require that in absentia trials are possible only where (i) reasonable efforts have been taken to notify the accused personally; (ii) the evidence as to notification satisfies the Trial Chamber that the accused actually knew of the proceedings against them; and that (iii) it does so with such degree of specificity that the accused's absence means they must have elected not to attend the hearing and therefore have waived their right to be present.

### III. THE CHALLENGES OF DEALING WITH TERRORISM

#### A. The STL's Approach

In its decision in *Prosecutor v Ayyash* of 16 February 2011, the STL Appeals Chamber made:<sup>22</sup>

##### 1. An attempt to define terrorism at international law:

- [85] ... a customary rule of international law regarding the international crime of terrorism, at least in time of peace, has indeed emerged. This customary rule requires the following three key elements:

- the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act;
- the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it;
- when the act involves a transnational element.

20 Law Commission *Coroners* (NZLC R62, 2000).

21 *Prosecutor v Ayyash (Pre-trial)*, above n 17.

22 *Prosecutor v Ayyash (Appeals)* STL Appeals Chamber STL-11-01/I, 16 February 2011 (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Appeals Chamber) at 29.

23 *R v Gul* [2012] EWCA Crim 280, [2012] 1 WLR 3432.

While followed by Court of Appeal of England and Wales in *R v Gul*,<sup>23</sup> the Appeals Chamber decision goes further than did the United Kingdom Supreme Court on further appeal, holding as a Full Court: “there is no accepted norm in international law as to what constitutes terrorism”.<sup>24</sup>

2. An interpretation of terrorism in the domestic law of Lebanon:

[111] ... the subjective element of the crime under discussion is twofold,

- i) the intent or dolus of the underlying crime and
- ii) the special intent (dolus specialis) to spread fear or coerce an authority.

The objective element is the commission of an act that is criminalised by other norms (murder, causing grievous bodily harm, hostage taking, etc.).

The crime of terrorism at international law of course requires as well that

- i) the terrorist act be transnational.

3. A comparison between interpretation of terrorism in the domestic law of Lebanon and at international law:

[113] A comparison between the crime of terrorism as defined under the Lebanese Criminal Code and that envisaged in customary international law shows that the latter notion is much broader with regard to the means of carrying out the terrorist act, which are not limited under customary international law, whereas it is narrower in that

- i) it only deals with terrorist acts in time of peace,
- ii) it requires both an underlying criminal act and an intent to commit that act, and
- iii) it involves a transnational element.

#### IV. DISCUSSION

I turn to some of the questions to which later in the year I will invite, if not answers, at least broad responses.

##### A. *Why Try to Introduce Terrorism into the Criminal Law?*

I offered in opening the suggestion that, like “genocide”, *terrorism* was developed and put into use as a more graphic expression than murder, or threatening to kill, to denote especially grave crime. But it runs into the problem of definition. Is there a justiciable concept of terrorism? Leading jurists have said no. Critics of the Appeal Chamber’s formulation of a concept of terrorism in international criminal law have argued that there is no customary international crime of terrorism.

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24 *R v Gul* [2013] UKSC 64, [2013] 3 WLR 1207 at [44], following its earlier decision in *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54, [2013] 1 AC 745 at [37] that “there is as yet no internationally agreed definition of terrorism”.

Regional treaties variously:

- focus on specific terrorist methods without defining terrorism;
- contain wide or conflicting generic definitions;
- define terrorism only to criminalise ancillary conduct;
- create no definition at all;
- exclude self-determination struggles; or
- are excessively vague.<sup>25</sup>

Indeed, should students of terrorism follow the example of Francisco Bethencourt's *Racisms*<sup>26</sup> and pluralise the term?

But may it be argued that to reject *terrorism* as too broad a concept to be justiciable approaches the issue from the wrong end: why not create a definition of an essential core that *is* justiciable?

To that may be retorted there is no international legislature with authority to legislate for such a definition; it is the task of judges to apply rather than create international law; in any event the principle of legality prohibits retrospective judicial legislation; and in the absence of any authority to adjudicate in the abstract on a purely prospective basis, any attempt to do so must exceed their authority. Save for the Arab Convention on the Suppression of Terrorism 1998, there is no multipartite treaty; states have proved unable to reach agreement on that approach.

And as regards domestic law, since the Ladies Directory case *Shaw v DPP*,<sup>27</sup> no respected common law court has attempted to create a criminal offence. So the sole means of creating a crime of terrorism is by domestic legislation; yet since that is likely to compete with the values of other states there arise great problems of dealing effectively with the most sinister class of terrorist – the cross-border operative.

Consider however:

- How is international law created?
- Like the common law, international law is in large measure a judicial creation.
- The Statute of the International Court of Justice, art 38, giving as sources of international law:
  - international conventions;
  - international custom;
  - general principles of law; and
  - judicial decisions and the teaching of the most highly qualified publicists as subsidiary means for the determination of rules of law.
- Grotius, and indeed Cicero before him, may perhaps be said to have applied a test of “highest standard of practical necessity”.<sup>28</sup>

What are the arguments for and against creation of a uniform international law by exercise of judicial initiatives?

25 Ben Saul *Terrorism* (Hart, Oxford, 2012) at lxx–lxxii.

26 Francisco Bethencourt *Racisms: From the Crusades to the Twentieth Century* (Princeton University Press, Princeton, 2014).

27 *Shaw v DPP* [1962] AC 220 (HL).

28 David Baragwanath “The Interpretative Challenges of International Adjudication Across the Common Law/Civil Law Divide” (2014) 3(2) Cambridge Journal of International Criminal Law 450 at 450.

*Against:*

- Nothing more is needed than existing concepts of murder and attempted murder.
- Terrorism is too vague a concept to employ as a formulation of criminal liability.
- It is too difficult to evaluate and reconcile the competing policies.
- That is seen in the range of criticisms levelled against the Appeals Chamber version, some of them listed by Professor Ben Saul in his *Terrorism*.<sup>29</sup>

*For:*

- It is the nature of final level adjudication to evaluate and reconcile competing policies and come up with an optimum solution.
- Perhaps a crime of terrorism is needed to deal with cases for which existing criminal concepts are inadequate: the incidence of international terrorism is expanding in step with globalisation, and to perform its function the criminal law may require a crime to match:
  - Perhaps judges can contribute to the principled and systematic development of international law by trimming the concept to the extent needed to provide necessary specificity.
  - Perhaps either the Appeals Chamber solution should be confirmed or a better option articulated; rejecting the “too hard” option is an abdication of the judicial function.

I will resist the temptation of further discussing these fascinating topics and in the forthcoming Ashgate Lecture will take advantage of the valuable responses they provoked, for which I express my grateful thanks to all contributors.

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<sup>29</sup> Saul, above n 19.



# LESSONS FROM AOTEAROA – NEW ZEALAND: RECONCILIATORY JUSTICE AND FEDERAL INDIAN LAW

BY DR TORIVIO A FODDER\*

Like Māori in New Zealand, the effects of colonisation on American Indians have been broad and far-reaching. Given a common history of colonisation, as the governments of New Zealand and the United States move to implement the principles of the lately adopted 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), there will be many lessons to share between the two nations concerning the rights of indigenous peoples. For the United States, the New Zealand model of reconciliatory justice, in particular, offers a number of important benefits to consider in light of current and past piecemeal approaches to Indian rights claims under the American legal framework. This article attempts to illustrate some of these lessons through a comparative analysis of the New Zealand reconciliatory justice model and the American federal Indian law framework.

This approach is novel in that it attempts to explore methods for applying the New Zealand framework of reconciliatory justice to the situation of American Indians for the first time. To accomplish this, I proceed in four parts:

1. Part I introduces the topic in more detail.
2. Part II seeks to briefly outline the colonisation experiences of American Indians and Māori en route to establishing the extant legal structure regarding indigenous peoples in the United States and New Zealand.
3. Part III provides an in-depth analysis of the New Zealand model of reconciliatory justice, exploring both the definition of reconciliatory justice and how the elements operate under the New Zealand Treaty settlement process.
4. Part IV applies the reconciliatory justice model to the situation of American Indians, establishing a reasoned basis for implementing the model and demonstrating how such an implementation might proceed.

## I. INTRODUCTION

*“Though the coerced still chooses, the alternatives are determined for him by the coercer so that he will choose what the coercer wants.”<sup>1</sup>*

The Waikato River is a broad, insouciant waterway, languidly flowing through the heart of New Zealand’s North Island. As guns blazed during the British Invasion of the Waikato in 1863,

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1 FA Hayek *The Constitution of Liberty* (The University of Chicago Press, Chicago, 2011) at 200.

the river became a strategic location for both sides during the months-long conflict. With British gunboats roaming the Waikato's murky waters, Māori rebels defended an extensive network of pā along its banks – an enterprise aimed at critically undermining the Redcoat advance. The river, itself once a source of sustenance and deep spiritual significance, quickly became a battleground between two warring cultures.

The river's role in the New Zealand Wars is an intriguing example of conflicting values and the bellicosity that results when cultures clash as they invariably do. As the waters of the Waikato move steadily onward, over the memories of atrocities past, the question for modern governments and their indigenous populations remains one of progress. Today, indigenous peoples around the world face the nagging question of whether governments will maintain frameworks of legal coercion to achieve their own ends vis-à-vis the self-determination of indigenous populations within their territorial boundaries.<sup>2</sup>

In addressing this important issue, Aotearoa – New Zealand has set a unique example for the nations of the world. The Waitangi Treaty settlement process for settling Māori claims is nothing if not innovative, marking the first time that an erstwhile colonial government has acknowledged the need for reparations “for the good of the whole country”.<sup>3</sup> The process, of course, has not been without its critics. Feminist scholars have concurrently denounced the Treaty settlement procedure for its “erasure of Māori women” from the national-level discourse, and for facilitating Māori assimilation generally.<sup>4</sup> Other scholars have criticised the Treaty settlement process for its supposed “neoliberal” underpinnings – the likes of which are enigmatically said to reduce Māori to a second class of corporatised New Zealand citizens.<sup>5</sup>

Notwithstanding the criticisms of the Waitangi Treaty settlement process, this distinctly New Zealand model of facilitating indigenous rights offers a number of lessons that are especially relevant to the United States as both countries move to implement the aspirations of the UNDRIP. In order to highlight some of reconciliatory justice's elements and their potential applications, this paper analyses the Waitangi Treaty settlement process through the emerging Māori lens of reconciliatory justice – a framework first outlined by New Zealand legal scholar Dr Robert Joseph. Joseph argues that reconciliatory justice, as implemented in the Treaty settlement process, is uniquely situated to bring about meaningful reconciliation between indigenous peoples and society's dominant cultures.<sup>6</sup>

## II. TALES OF COLONISATION

While both the United States and New Zealand have significant numbers of indigenous peoples living within their territorial boundaries, the two nations have developed vastly different legal frameworks for the facilitation of indigenous rights. In order to appreciate the different

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2 At 199–200.

3 At 524.

4 Nan Seuffert “Nation as Partnership: Law, ‘Race,’ and Gender in Aotearoa New Zealand's Treaty Settlements” (2005) 39(3) *LSOCR* 485 at 485.

5 Maria Bargh *Resistance: An Indigenous Response to Neoliberalism* (Huia Press, Wellington, 2007) at 41.

6 Robert Andrew Joseph “A Jade Door: Reconciliatory Justice As a Way Forward, Citing New Zealand Experience” in Marlene Brant Castellano, Linda Archibald and Mike DeGagné (eds) *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Aboriginal Healing Foundation, Ottawa, 2008) 207 at 207–208, available at <[www.speakingmytruth.ca](http://www.speakingmytruth.ca)>.

trajectories of New Zealand and American indigenous peoples law, and the lessons embedded within New Zealand's Waitangi Treaty settlement process, it is first necessary to gain a better understanding of the colonial foundations that buttress the extant legal framework of each country.

### A. Colonisation in America

The situation of America's federal Indian law jurisprudence has been most eloquently framed by Thomas J. Writing in concurrence with the Court's landmark decision in *United States v Lara*,<sup>7</sup> his Honour opined:<sup>8</sup>

The Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain that the tribes possess anything resembling "sovereignty."... [Yet] the history points in both directions.

The conflicting legacy of tribal sovereignty Thomas J cites has had far-reaching effects that have encompassed both ends of the policy spectrum. On the one hand, federal policies toward American Indians once occasioned the termination of the federal–tribal relationship.<sup>9</sup> On the other hand, today's federal Indian policy now trumpets the values of tribal sovereignty and self-determination.<sup>10</sup> To say the least, America's law of indigenous peoples, or federal Indian law, has been a source of Constitutional consternation for American courts and policymakers alike since the adoption of the Declaration of Independence some 237 years ago. The United States Supreme Court's Indian law jurisprudence, in particular, has had an especially vexing history of contradiction and inconsistency on the question of Indian title<sup>11</sup> and the metes and bounds of American Indian tribal sovereignty juxtaposed with the power of the United States Government itself.

#### 1. The Marshall Model

Despite the existence of competent tribal governments prior to contact with European powers, the colonial settling of North America ushered in a systemic and systematic destruction of tribal institutions, rooted in the English common law principles of conquest. Upon defeat of the British in the American Revolution, the United States Government and its newly minted Supreme Court adopted whole portions of the English common law, including its justifications of conquest. The move thereby enshrined late Renaissance era notions of warfare and conquest as the foundation for much of federal Indian law today.<sup>12</sup> The resulting three pillars of federal Indian law are the doctrine of discovery; the doctrine of trust; and the doctrine of Congressional plenary power over Indian affairs.

In *Johnson v McIntosh*, the United States Supreme Court considered whether Indian tribes had the authority to convey title to their ancestral lands.<sup>13</sup> Crafting a slight variation of Lord Coke's

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7 See generally *United States v Lara* 541 US 193 (2004) (affirming Congressional plenary power over Indian affairs and Congress's ability to reinvest tribes with inherent prosecutorial authority over non-member Indians).

8 At 225.

9 Con Res 108, 83rd Congress, 67 Stat B132 (1953).

10 See generally *Indian Self-Determination and Education Assistance Act of 1975* Pub L No 93-638, 88 Stat 2206 (1975).

11 See *City of Sherrill v Oneida Indian Nation of New York* 544 US 197 (2005).

12 Robert A Williams *The American Indian in Western Legal Thought: the Discourses of Conquest* (Oxford University Press, New York, 1990) at 107.

13 *Johnson v McIntosh* 21 US 543 (1823) at 572.

now infamous dicta on the principles of conquest taken from the English common law precedent in *Calvin's Case*, the Court observed:<sup>14</sup>

The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new by bestowing on them civilisation and Christianity in exchange for independence.

With the justification for conquest of the New World framed in terms of civilisation and Christianity, the justification for conquest of the Indians was easily built upon the same foundation laid by Lord Coke in 1608. The Supreme Court held “that discovery gave title to the government by whose subjects or by whose authority it was made against all other European governments, which title might be consummated by possession.”<sup>15</sup> As a result, Justice Marshall concluded that the ultimate title to lands in the New World rested with European powers asserting dominion over it, leaving Indians with only a “right of occupancy” and no authority to give title.<sup>16</sup>

The second pillar of federal Indian Law is known as the trust doctrine. Under the trust doctrine, the United States assumed an official “guardian–ward relationship” with the “conquered” Indian tribes.<sup>17</sup> In *Cherokee Nation v Georgia*, the Court considered whether the Cherokee Nation had standing to bring suit against the State of Georgia as the tribe sought an injunction barring the state from enforcing its laws within Cherokee territory – laws that were passed by the Georgia State legislature in order to abolish the tribe’s political structures and seize its land.<sup>18</sup>

Before addressing the substantive issues of the case, the Court was obliged to first consider the jurisdictional question of whether the Cherokee Nation could actually sue a state under Article III of the United States Constitution.<sup>19</sup> According to the Court, Article III plainly permitted a foreign state to bring suit against the State of Georgia in United States courts, but the remaining question was whether Indian nations constituted such “a foreign state in the sense of the Constitution”.<sup>20</sup> As the University of Arizona’s Robert A Williams notes, the doctrine of discovery established in *Johnson v McIntosh* led the Court to conclude that Indian tribes are categorically not foreign nations under the Constitution, because “the discovery doctrine ... inalterably placed the tribes under the superior political sovereignty of the United States.”<sup>21</sup>

Though Indian tribes were said to lack standing to sue, the Court found that tribes constituted a unique form of “domestic dependent nation”, one without a title to the lands they occupy and in a state of “pupilage” to the Government of the United States – a relationship resembling that of “a ward to his guardian”.<sup>22</sup> While the conclusion was largely dicta at the time, the Court’s ward–guardian relationship in *Cherokee Nation v Georgia* has become one of the most “critical

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14 At 573.

15 At 573.

16 At 574.

17 Robert A Williams *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (University of Minnesota Press, Minneapolis, 2005) at 61.

18 *Cherokee Nation v Georgia* 30 US 1 (1831) at 15.

19 At 15.

20 At 15–16.

21 Williams, above n 17, at 61.

22 *Cherokee Nation v Georgia*, above n 18, at 17.

passage[s]” of the early Indian law cases, establishing the foundation for a “trust doctrine”, which now serves as the “primary protective principle of Indian rights under United States law.”<sup>23</sup>

The final pillar of modern federal Indian law is known as the doctrine of Congressional plenary power over Indian affairs. Consistent with previous opinions, in *Worcester v Georgia*, the Court heard yet another jurisdictional question regarding federal Indian law.<sup>24</sup> There, a Christian missionary from Vermont was convicted of residing within the Cherokee nation “without a license” in flagrant violation of the laws of the State of Georgia.<sup>25</sup> The defense did not deny the allegation but instead argued that the laws of Georgia did not apply to the Cherokee Nation<sup>26</sup> because the laws unconstitutionally interfered with the regulation and control of Indian affairs, a right solely vested in the United States Congress.<sup>27</sup>

Citing its earlier precedents, the Court held that “the constitutional powers of the Federal Government ... must be considered as the supreme laws of the land”, and that “[t]hese laws throw a shield over the Cherokee Indians”, in order to guarantee their rights of occupancy and self-government.<sup>28</sup> The Court declared that “the laws of Georgia can have no force” within the Cherokee Nation, and that the Constitution vests the United States Government with exclusive authority over Indian affairs.<sup>29</sup>

The preceding opinions are known among federal Indian law scholars as “The Marshall Model” of Indian rights. While the legal landscape has changed greatly in Indian Country over the course of the past two centuries, these basic fundamental tenets – the doctrine of discovery, the trust doctrine and the doctrine of Congressional plenary power – remain the foundation of the Supreme Court’s Indian law jurisprudence.<sup>30</sup>

## 2. *The Results of Federal Indian Law*

The legacy of the Marshall Model principles has been nothing if not consequential. As a body of law, scholar Matthew Fletcher explains that the basic principles of the Cherokee cases above still “form the basis for Indian law today.”<sup>31</sup> Moreover, their endurance marks an extraordinary example of legal predictability that has persisted over most of the life of the United States.<sup>32</sup> This is not to say that the legal predictability created by the Court has played a positive role in facilitating indigenous human rights. In fact, the Supreme Court precedent in *Worcester*, which subordinated tribal governments to the whims of an all-powerful legislature, has led to a number of policy vacillations in recent decades that have evinced vastly different outcomes, even while leaving the

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23 Williams, above n 17, at 61.

24 *Worcester v Georgia* 31 US 515 (1832) at 537.

25 At 537.

26 At 538.

27 At 539–540.

28 At 595.

29 At 561.

30 Matthew LM Fletcher “The Supreme Court and the Rule of Law: Case Studies in Indian Law” (2008) 55 Fed Law 26 at 27.

31 At 27.

32 At 27.

basic legal principles of Indian law intact. Of late, the Supreme Court's Indian law jurisprudence has all but reduced the field of federal Indian law itself to "a jumble of confusion and obfuscation".<sup>33</sup>

Despite the Court's finding of a trust obligation over Indian affairs in the Cherokee cases of the 1830s, the burgeoning non-Indian population in the United States continued to encroach on tribal lands. In response, the Federal Government quickly began the lengthy process of Indian forced displacement.<sup>34</sup> The early boundaries of removal were marked by the Appalachian Mountains, extending from Lake Erie in the North to Georgia in the South.<sup>35</sup> However, by 1830, Congress passed the Indian Removal Act, which provided for the removal of Indian tribes even further west – past the Mississippi river, and redefined Indian Country to exclude lands located within the borders of those states east of the Mississippi.<sup>36</sup> The result of the federal removal policy was the reservation era of federal Indian law,<sup>37</sup> when the United States Government continued to accumulate formerly tribally controlled lands while corralling the Indians "on reservations within their aboriginal domain".<sup>38</sup> The first reservations were located in the Midwest in areas that had not yet been widely settled, but as non-Indian settlers moved further west, Indian reservations were also moved increasingly further west to accommodate the new influx of people. As a result, hostilities between displaced tribes, civilian settlers, and the United States Army increased dramatically.<sup>39</sup>

In addition to the malevolent effects of forced displacement, the Federal Government also adopted a policy of cultural assimilation aimed at further weakening tribal institutions and absorbing Indian tribes into non-Indian society. The first attempt came under the General Allotment Act of 1887, a legislative boondoggle that coerced tribes into Western property systems of which many had little understanding.<sup>40</sup> The General Allotment Act, in turn, was wildly successful at divvying up tribal reservations and redistributing the lands to individual Indians.<sup>41</sup> The effects, however, were devastating to Indian landowners who had little knowledge of agriculture and homesteading, and even less familiarity with the government's tax policies.<sup>42</sup> Upon assuming title to their lands (that is to say, allotments), many Indians simply sold their property to non-Indians at below market values.<sup>43</sup> Others saw the abrupt liquidation of their lands due to tax obligations they did not realise they had.<sup>44</sup>

Despite these assimilationist policies, federal Indian law was not wholly without its moments of reform. After decades of relative ambivalence, major reforms in federal Indian policy finally came as a part of the broader restructuring of the American Government during the implementation of President Franklin D Roosevelt's New Deal agenda. Passed in response to the Great Depression,

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33 At 27.

34 Marc Slonim "Indian Country, Indian Reservations, and the Importance of History in Indian Law" (2010) 45(2) *Gonz L Rev* 517 at 519.

35 At 521.

36 At 521.

37 At 519.

38 At 519.

39 At 521.

40 See General Allotment Act Ch 119, 24 Stat 388 (1887).

41 *Judith V Royster* "The Legacy of Allotment" (1995) 27(1) *Ariz St LJ* 1 at 12.

42 At 12.

43 At 12.

44 At 12.

the New Deal sought to strengthen the United States economy through a number of policies including the reform of government institutions.

As the matter relates to American Indians, the New Deal ushered in changes in American Indian policy aimed at abruptly ending the late 19th century policies of assimilation. In keeping with its title, the first objective of the Indian Reorganization Act (IRA) was to provide Indian tribes with an opportunity to reorganise their tribal governments through the voluntary adoption of constitutional forms of government that would enhance their inherent sovereignty.<sup>45</sup> The legislation also provided alternative governance institutions that granted federal corporate charters to tribes that sought to manage their economic objectives through corporate entities.<sup>46</sup> In a related manner, the IRA also created revolving credit programs as a means of stimulating economic development in Indian Country.<sup>47</sup> Third, and perhaps most significantly, the IRA authorised the Secretary of the Interior to take lands into trust for tribes and individual Indians, creating an indefinite trust status for Indian lands and placing “more, not less, Indian land . . . under federal supervision.”<sup>48</sup>

The IRA effectively ended the allotment era and its program of divvying up the reservation. Still, the legislation did not address the growing problem of fractionated ownership resulting from Indian allotments.<sup>49</sup> As generations of original Indian allottees passed away, lack of probate and estate planning resulted in many allotments being divided indiscriminately amongst their heirs. As the heirs of the allottees began to pass away, the interests in the allotments became further fractionated between the heirs of the heirs, and so on.<sup>50</sup> Such limited and diverse ownership interests would make putting these lands to productive use extraordinarily difficult for future generations. Similarly, the IRA also failed to address the most significant effect of the allotment era – the surplus lands lost under the General Allotment Act, which consisted of roughly two-thirds of all lost Indian lands.<sup>51</sup>

The second attempt at cultural assimilation came with the enactment of legislative policies intended to terminate the government-to-government relationship between Indian tribes and the United States<sup>52</sup> – a policy that was formally adopted by Congress in 1953.<sup>53</sup> The policy of termination was elegant in its simplicity, but profoundly disturbing for tribes in its application. The resolution declared that it was the policy of Congress “to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States” as rapidly as possible.<sup>54</sup> Ultimately, the great irony of the federal termination policy was that the terminated Indians simply exchanged one form of wardship for another.<sup>55</sup> Rather than being in a

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45 *The Indian Reorganization Act* (IRA), Ch 576, 48 Stat 984 (1934), 25 USC, §§ 461–479 and (h) (2004).

46 Kevin Gover “An Indian Trust for the Twenty-First Century” (2006) 46(2) *Nat Resources J* 317 at 330.

47 At 330.

48 At 331.

49 At 330.

50 Royster, above n 41, at 29.

51 At 29.

52 See H Con Res 108, above n 9.

53 Michael C Walch “Terminating the Indian Termination Policy” (1983) 35 *STNLR* 1181 at 1185.

54 H Con Res 108, above n 9.

55 Walch, above n 53, at 1185.

guardian–ward relationship with the Federal Government, the terminated Indian tribes became wards of the state as individuals and families under the apparatus of federal social welfare programs.

## B. Colonisation in New Zealand

In Aotearoa – New Zealand, Māori have suffered a similar colonial predicament wrought from the British claim of sovereignty in 1840 under the Treaty of Waitangi. Still, even prior to the Treaty, European explorers had regarded the Māori with some wariness and, more often, with contempt. Eighteenth century explorers decried the perceived warlike tendencies of Māori, while dismissing them as Neolithic barbarians whose “principal profession” was war.<sup>56</sup> However, these ethnocentricities aside, the development of trade relationships with the Māori would quickly become a necessity for European explorers looking to make in-roads into the heart of New Zealand. Māori knowledge of the land, its resources, the control they wrested over the accessibility of local foods, all made Māori trade an important aspect of early colonialism.<sup>57</sup> In fact, when New Zealand formally, albeit somewhat prematurely, declared its independence in 1835 under the influence of British colonial envoy James Busby, trade figured prominently in the motivation.<sup>58</sup> A State flag of New Zealand was quickly adopted to allow for the recognition of New Zealand shipping, and was acknowledged by the British Government.<sup>59</sup>

### 1. The New Zealand Wars

While steady trade between the Māori and the British made the relationship relatively stable, skirmishes resulting from the increased sale of Māori lands to British settlers led to a petition to the Crown for intervention in New Zealand, citing the need for protection from the Māori and their penchant for “lawlessness on the frontier”.<sup>60</sup> The settlers’ appeal for intervention was not without some foundation. The situation for settlers and Māori alike just 10 years earlier in 1820 had grown quite volatile during the Māori Civil Wars.<sup>61</sup> Figures vary widely, but historians have estimated that between 20,000 and 60,000 Māori were killed in the years of conflict from 1810 to 1840.<sup>62</sup> In 1839, the Crown and Parliament acted on the settlers’ request, weighing a variety of competing plans for intervention.<sup>63</sup> The plans considered ranged from the complete annexation of New Zealand, to governance by a coalition of Māori iwi organised under the United Tribes of New Zealand, to the establishment of a Crown colony under British control while also ceding some lands to be

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56 Stephanie Vieille “Māori Customary Law: A Relational Approach to Justice” (2012) 3(1) *The International Indigenous Policy Journal* 1 at 1.

57 Catherine J Iorns Magallanes “Reparations for Māori Grievances in Aotearoa New Zealand” in Federico Lenzerini (ed) *Reparations for Indigenous Peoples: International & Comparative Perspectives* (Oxford University Press, Oxford, 2008) 523 at 524.

58 Sian Elias “First Peoples and Human Rights: a South Seas Perspective” (2009) 39 *NMLR* 299 at 300.

59 At 300–301.

60 Iorns Magallanes, above n 57, at 526.

61 Robert Consedine and Joanna Consedine *Healing our History: The Challenge of the Treaty of Waitangi* (Penguin Books, London, 2012) at 83.

62 At 83.

63 Iorns Magallanes, above n 57, at 526–527.



governed by Māori.<sup>64</sup> The end result of the Crown's dithering was the Treaty of Waitangi, signed in 1840.

From the British perspective, the signing of the Treaty was simply *fait accompli* after waves of European migration had already set in motion the “annexation” of the entire country.<sup>65</sup> The Māori perspective was quite different. The general post-colonial critique of New Zealand's Treaty of Waitangi is that contrasting interpretations of its contents led to disparate expectations. Whereas the British presented the treaty as one of “cession”, Māori framed the Treaty as establishing mutual sovereignty among equals.<sup>66</sup> As the “respectful separation” understood in the Māori version of the treaty began to crumble,<sup>67</sup> British governors were busy shoring up control over New Zealand with a colonial agenda of bringing civilisation to their Māori counterparts.<sup>68</sup> The result was sadly predictable.

Clashes between Māori and British soldiers over breaches of the Treaty and the confiscation of Māori lands led to the New Zealand Land Wars of the 1860s.<sup>69</sup> This period was marked by the rise of the Kingitanga movement as a tactical Māori counter-weight to British military manoeuvrings. Given the ongoing hostilities with Māori on the North Island, the New Zealand Government sought to further the process of assimilation through a concomitant legislative agenda fixed on the destruction of Māori culture through the implementation of an English-only education curriculum, the confiscation of Māori lands and the criminalisation of Māori religious and medicinal practices.<sup>70</sup>

In the theatre of war, matters came to a head when the erstwhile disorganised Māori resistance evolved into a systematised, tactical opposition united behind the Kingitanga near Waitara in 1860. As the Crown moved to take lands that Māori leaders had refused to sell, intense fighting broke out up and down the length of the Waikato River.<sup>71</sup> The outcome was predictably dire for Māori, much as it was for American Indians in the United States. By the time hostilities ceased, the British confiscation of Māori lands resulted in the immediate loss of roughly 1.3 million hectares (an area roughly the size of the State of Connecticut) and saw the influx of 28,000 British troops into New Zealand. The Land Wars of the 1860s saw New Zealand's once Māori majority transformed into a “dispossessed, marginalised, threatened and involuntarily minority population in their own country.”<sup>72</sup>

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64 At 526–527.

65 Robert J Miller and Jacinta Ruru “An Indigenous Lens into Comparative Law: The Doctrine of Discovery in the U.S. and New Zealand” (2009) 111 *W Vir L Rev* 849 at 878–879.

66 At 882.

67 At 882.

68 At 885.

69 Consedine and Consedine, above n 61, at 93.

70 Miller and Ruru, above n 65, at 886–887.

71 Consedine and Consedine, above n 61, at 93–94.

72 At 97.

### III. RECONCILIATORY JUSTICE: THE NEW ZEALAND MODEL OF INDIGENOUS CLAIMS SETTLEMENT

In the United States, it was not until the administration of President Richard Nixon that federal Indian policy took a substantially different course from the policies of assimilation that dominated American domestic affairs from the 1890s through the 1950s.<sup>73</sup> In New Zealand, during roughly the same period, piecemeal attempts at reform would eventually give way to the Māori protests of the 1970s and the advent of the Waitangi Tribunal in 1975.<sup>74</sup> In addition to the Tribunal, New Zealand would also recognise some Māori interest in aboriginal title.<sup>75</sup> These major changes in legal thinking would bring about the interpretation of legislation in light of the principles of the Treaty of Waitangi; and, ultimately, the direct negotiation of Treaty settlement claims with the Crown.<sup>76</sup>

In terms of the Treaty Settlement process and its operations, the Tribunal is the main point of inquiry for determining whether or not the Crown has violated the principles of the 1840 Treaty of Waitangi discussed above.<sup>77</sup> In resolving disputes brought before it, the Tribunal has taken a “restorative” approach to settling claims as opposed to a punitive one.<sup>78</sup> Recommendations for achieving restoration have included “a wide range of remedies”, including financial compensation and the return of large parcels of Māori land.<sup>79</sup>

While the Tribunal’s efforts have been capably analysed through the lens of restorative justice, with a heavy emphasis on reparations, a more helpful understanding of the Tribunal’s operations is to analyse its work as an ongoing pursuit of reconciliation. In this analysis, Māori legal scholar Dr Robert Joseph was a pioneer in the development of a reconciliatory justice framework. Joseph described the Tribunal’s work as a “process for appropriately addressing past grievances, for exploring future relationships, and for overcoming a culture of denial.”<sup>80</sup> In framing the matter as one of the pursuit of reconciliation, Joseph’s analytical framework, in some ways, begins with the end in mind. The purpose of the reconciliatory justice process is to achieve “the desired outcomes to a process of reconciliation between parties.”<sup>81</sup> To state matters differently, the most important aspect of the Tribunal’s proceedings is not the conclusions reached regarding remedies for breaches of the Treaty of Waitangi, but the hope that a “durable, respectful” relationship can emerge between Māori and non-Māori peoples.<sup>82</sup>

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73 Walch, above n 53, at 1185.

74 Iorns Magallanes, above n 57, at 536–537.

75 At 536–537.

76 At 536–537.

77 At 537.

78 At 539.

79 At 539.

80 Joseph, above n 6, at 207.

81 At 207.

82 At 207.

### A. *Defining Reconciliatory Justice*

The term reconciliatory justice is defined as an effort to “reframe conflict and grievances so that parties are no longer preoccupied with that which divides them.”<sup>83</sup> To achieve this reconciliation, both parties to the grievance must seek fresh approaches to “address, integrate, and embrace the painful past and to imagine a shared future.”<sup>84</sup> In contrast to conventional understandings of reparations, reconciliatory justice is not focused on the past grievance itself but on ways to move the conflicting parties forward.

Naturally, accomplishing such a feat after centuries of colonisation, assimilation and racial tension is not a simple proposition. At first blush, reconciliatory justice seems somewhat contradictory. Joseph notes that reconciliatory justice is an ongoing process, consisting of roughly eight different steps that lead to reconciliation between an aggrieved party and an injuring party.<sup>85</sup> Yet it is not a process that concludes with an obvious termination such as “the publication of an apology or the signing of an agreement.”<sup>86</sup> In this way, the process is imbued with an element of morality that is not well handled in Western legal structures.

On the other hand, reconciliatory justice is a very outcome-oriented process. The goal in initiating the reconciliatory formalities is to provide a space where diverse grievances can be engaged and reconciled. In the case of indigenous peoples, this includes addressing a painful legacy of colonisation in hopes of achieving the Māori value *ea*, or the mutual agreement of both aggrieved and injuring parties that “the debt is repaid and the matter is finally settled.”<sup>87</sup> For many indigenous peoples and nations alike, such a resolution would be a welcome departure from the status quo – one that not only makes amends for historic injustices, but also paves the way for amicable relations in a new era.

### B. *Opening the Jade Door: The Elements of Reconciliatory Justice*

The reconciliatory justice framework as applied in New Zealand consists of eight principles that proceed in sequence. Unlike theories that may be somewhat flexible in their approach to reconciliation, including some indigenous approaches to dispute resolution,<sup>88</sup> reconciliatory justice tends to conflate form and substance. The process here is the substantive outcome and the order has its own intrinsic value.

#### 1. *Recognition*

The first element of the reconciliatory justice framework is the principle of recognition or truth-telling.<sup>89</sup> Under the Waitangi Tribunal process, truth-telling or truth-finding involves “[h]earing testimonies of suffering and systemic injustice”, that prompts an understanding of the

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83 At 211.

84 At 211.

85 At 212.

86 At 221.

87 At 222.

88 One example of a flexible reconciliation procedure comes from the Navajo Nation in the United States where traditional dispute resolution processes are individually tailored to the particular family and person at the center of the conflict. See Raymond D Austin *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance* (University of Minnesota Press, Minneapolis, 2009).

89 Joseph, above n 6, at 213.

harms committed and their effects on indigenous peoples.<sup>90</sup> This recognition is intended to prompt a sense of “moral responsibility” for past atrocities while also creating a public record that can inform proceedings as they unfold.<sup>91</sup>

The recognition principle under the reconciliatory justice framework has its origins in the work of restorative justice pioneer Howard Zehr. While Zehr’s now famous handbook on restorative justice has direct implications for the field of criminal law, its relevance for issues related to indigenous rights is clear. Zehr places a major emphasis on the need for “truth-telling” as an opportunity for victims to experience “transcendence” of past traumas.<sup>92</sup> Given the painful histories of colonisation outlined above, Joseph’s application of Zehr’s work to the trauma endured by indigenous peoples is a natural extension of the recognition principle and the cathartic effects of truth-telling.

On the other hand, it is also important to note that reconciliatory justice and restorative justice are two quite different frameworks. Zehr himself was careful to add that “restorative justice is not primarily about forgiveness or reconciliation,” and that “there should be no pressure to choose” to forgive or to seek reconciliation.<sup>93</sup> So, while there are elements of restorative justice that inform the reconciliatory justice framework, one paradigm should not be confused with the other. Whereas reconciliatory justice is concerned with providing a new foundation, upon which both parties to a conflict can build and move their relationship forward,<sup>94</sup> restorative justice is concerned with the needs that incidents of crime create as well as the “roles implicit in crimes.”<sup>95</sup>

## 2. Responsibility

The recognition phase of the process is followed by a formal, public acknowledgment of responsibility for the “past and present injustices” borne by the injured party.<sup>96</sup> According to Joseph, acknowledgment occurs when “private knowledge becomes officially sanctioned and enters into the public discourse.”<sup>97</sup> Accordingly, the reconciliatory justice framework contemplates not only a recognition of the painful legacy of colonisation but also a confession of sorts that communicates the depth and breadth of actions that have been far too long denied or left to “fester” in silence.<sup>98</sup>

The responsibility element of reconciliatory justice that Joseph outlines is similarly embedded within the framework of restorative justice. Attorney Helen Bowen and erstwhile restorative justice activist Jim Consedine explain the matter well in their work exploring practical applications for restorative justice within the New Zealand criminal justice system. They argue that restorative justice allows for offenders to provide answers to the victims of crime, thereby allowing the relationship between the parties to “begin in a more healthy and transformed environment.”<sup>99</sup>

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90 At 213.

91 At 213.

92 Howard Zehr *The Little Book of Restorative Justice* (Good Books, Intercourse (PA), 2002) at 13.

93 At 6.

94 Joseph, above n 6, at 212.

95 Zehr, above n 92, at 11.

96 Joseph, above n 6, at 214.

97 At 214.

98 At 214.

99 Helen Bowen and Jim Consedine *Restorative Justice: Contemporary Themes and Practice* (Ploughshares Publications, Lyttelton, 1999) at 22.

Before such a transformation can occur, the offender has accepted responsibility for the crimes committed and provided an admission of guilt for the offense.<sup>100</sup>

Given Bowen and Consedine's explanation above, it is clear that both the restorative and reconciliatory justice frameworks contemplate an acceptance of responsibility as a necessary precursor to moving the relationship between the offender and victim forward. However, the difference between the two is the level at which acceptance of responsibility occurs. Whereas restorative justice envisions an individual acceptance of responsibility, reconciliatory justice concerns the state's acceptance of responsibility for its treatment of indigenous peoples. Here again, the two frameworks are similar, but crucial differences remain.

### 3. *Remorse*

Following an acknowledgment of responsibility, the reconciliatory justice process naturally moves forward to an expression of remorse via "sincere apology".<sup>101</sup> The sheer power of an apology in this instance is magnified because it will often mark the first time that an injuring party has taken "responsibility for the damage done to the listener."<sup>102</sup> The apology itself gains credibility in the public discourse when it is accompanied by significant publicity, thereby transforming important questions about the legacy of injustices into a national conversation about healing.<sup>103</sup> In New Zealand, the reconciliatory justice process was accompanied by a visit and apology from New Zealand head of state Queen Elizabeth II to the Waikato-Tainui iwi, following the completion of the first major historical claims settlement.<sup>104</sup>

Under the restorative justice framework, Zehr argues that offenders often rationalise away their remorse whilst locked away in a penal system that does nothing to challenge their "misattributions".<sup>105</sup> Rather than engendering the necessary "sincere apology" as a next step in the process of restoration, Zehr notes that the penal system actually shields offenders from "the real human costs of what they have done".<sup>106</sup> Given the individual level at which restorative justice operates, the power of apology is muted. In contrast, under the reconciliatory justice framework, apology is a key part of the process for rebuilding the relationship between the state and indigenous peoples.<sup>107</sup>

### 4. *Restitution*

Once remorse has been expressed, reconciliatory justice moves toward repairing the relationship between the parties. The first step to righting the relationship involves some form of restitution as a good-faith effort to right the relationship between indigenous peoples and the government.<sup>108</sup> Restitution in this sense is not necessarily a full restoration of the "status quo ante" – in many

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100 At 22.

101 Joseph, above n 6, at 214.

102 At 215.

103 At 216.

104 At 218.

105 Howard Zehr *Changing Lenses: A New Focus for Crime and Justice* (Herald Press, Scottsdale, 1990) at 41.

106 At 41.

107 Joseph, above n 6, at 215.

108 At 218.

instances this simply is not possible.<sup>109</sup> The whole of New Zealand, for example, cannot be returned to Māori and, indeed, no Māori claimant has ever requested as much. However, under the reconciliatory justice framework, the principle of restitution requires the state to make a “sincere effort for restitution”.<sup>110</sup> Such a showing of good faith demonstrates trust in the new relationship between the government and indigenous peoples and undertakes a “concrete action” that corroborates not only the state’s expression of remorse, but also its acknowledgment of responsibility, and recognition of the past injustice.<sup>111</sup>

Similar points about restitution are made in Jim Consedine’s early work on restorative justice. Drawing heavily from the Māori experience, Consedine describes the process for administering justice on the marae.<sup>112</sup> Using traditional justice methods, Māori elders would call a meeting between the parties to the incident in hopes of arriving at a suitable punishment for the offender.<sup>113</sup> Elders of the community would take turns “shaming” the offender and, indeed, the offender’s family, with an ultimate goal of “dealing with the matter, so as to heal any hurts and restore things to ‘normal’ again.”<sup>114</sup>

The restorative justice framework Consedine derives from the traditional Māori system of justice is markedly similar to the restitution element of reconciliatory justice. Both envision an outcome that will “restore things to normal” and that will create good faith between the parties.<sup>115</sup> While restorative justice operates at the individual level, the act of restitution itself is one that is easily transferrable to the relationship between indigenous peoples and the government.

### 5. *Reparation*

Under the reconciliatory justice framework, the principle of reparations is a crucial element of the reconciliatory process because it provides an opportunity to atone not only for past injustices but also for “its subsequent effects” on indigenous peoples.<sup>116</sup> In this sense, the principle of reparations necessarily follows and goes beyond restitution, although the two concepts are closely related. Whereas restitution seeks merely to right the balance in the relationship between injuring and injured parties, the principle of reparations envisions an atonement of sorts for the legacy of injustice by accounting for its ill-effects.<sup>117</sup> Joseph notes that the principle of reparation is particularly important where full restitution is impossible because it provides an acceptable alternative to “non-compensable harms”.<sup>118</sup>

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109 At 219.

110 At 219.

111 At 219.

112 Jim Consedine *Restorative Justice: Healing the Effects of Crime* (revised ed, Ploughshares Publications, Lyttelton, 1999) at 80.

113 At 81.

114 At 81.

115 At 81.

116 Joseph, above n 6, at 220.

117 At 220.

118 At 220.

The question of reparations for indigenous peoples has a rich tradition in the field. In his authoritative compendium on the topic, the University of Siena's Federico Lenzerini describes reparations as a restoration of justice:<sup>119</sup>

... through *wiping out all the consequences* of the harm suffered by the individuals and/or peoples concerned as a result of a wrong, and at *re-establishing the situation which would have existed if the wrong had not been produced* ... .

In order to meet this definition, the reparation must be both “adequate and effective”, which suggests that the measure taken must not only be proportionate to the harm endured but must also be accepted by the peoples harmed as such.<sup>120</sup>

Though Lenzerini's definition of reparation is a bit lofty, his work is nonetheless imbued with an international focus that is informed by various approaches that nations around the world have taken toward reparations.<sup>121</sup> The end result for our purposes is that reconciliatory justice as it is practised in New Zealand is eminently consistent with the emerging international norms as they relate to reparations for indigenous peoples. Moreover, in many ways, New Zealand remains at the vanguard of movement towards providing redress for the historical harms that indigenous peoples have endured, notwithstanding the various criticisms of the New Zealand approach.

## 6. *Redesign*

Given the history and institutionalisation of injustice as it relates to indigenous peoples, the redesign of social and political institutions is another concept of reconciliatory justice that is closely tied to the principles of restitution and reparation.<sup>122</sup> In many instances, the extractive, discriminatory policies of land expropriation and forced assimilation foisted upon indigenous peoples have been undertaken with the full blessing of government, both through the precedents of the courts and through statute.<sup>123</sup> As a result, legal and political institutions remain in dire need of reform in order to ensure that they “refrain from repeating injustices of the past.”<sup>124</sup> In New Zealand, this took the form of empowering iwi with a modicum of self-governance as well as the right of participation in the “government of the nation-state.”<sup>125</sup>

The concept of institutional redesign is echoed in the literature on international development. In a recent book, Massachusetts Institute of Technology (MIT) economist Daron Acemoglu and Harvard political scientist James Robinson write extensively about the need for nations to redevelop economic and political institutions so as to transform individual talent “into a positive force” for

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119 Federico Lenzerini “Reparations for Indigenous Peoples in International and Comparative Law: An Introduction” in Federico Lenzerini (ed) *Reparations for Indigenous Peoples: International & Comparative Perspectives* (Oxford University Press, Oxford, 2008) 3 at 13 (emphasis in original).

120 At 14.

121 Federico Lenzerini “The Trail of Broken Dreams: The Status of Indigenous Peoples in International Law” in Federico Lenzerini (ed) *Reparations for Indigenous Peoples: International & Comparative Perspectives* (Oxford University Press, Oxford, 2008) 73 at 84–97.

122 Joseph, above n 6, at 220.

123 For American examples of how racism was embedded within federal Indian law, see generally Williams, above n 17.

124 Williams, above n 17, at 221.

125 At 221.

society.<sup>126</sup> While their discussion of indigenous peoples is fairly perfunctory, their conclusions about the importance of institutions are crucial for understanding the ways in which societies can influence the work of institutional redesign.

It is also important to note that the basic principle behind the redesign element outlined by Joseph is the same as that outlined by Acemoglu and Robinson: the institutions of societies matter a great deal because of the “behaviour and incentives” they create for people.<sup>127</sup> Where former extractive policies such as the expropriation of indigenous lands and the policies of assimilation once set the course for the development of similarly discriminatory governmental institutions, the lessons of both reconciliatory justice and international development suggest that these must be redesigned in such a way as to promote the welfare of indigenous peoples.<sup>128</sup>

### 7. *Refrain & Reciprocity*

The final two elements of reconciliatory justice are closely related. In addition to its elements of redress, the framework of reconciliatory justice requires affirmative measures to ensure that the wrongs of the past are not repeated.<sup>129</sup> One aspect of this requires a vigilant effort to “anticipate present and future wrongs as well.”<sup>130</sup> While the framework is admittedly vague on how such vigilance should be undertaken, the point is still important. Given the painful atrocities indigenous peoples have endured, it stands to reason that some sort of ongoing good-faith effort must be maintained in order to guard against the paternalistic and assimilative policies of the past.

The final step along the path toward reconciliatory justice is the act of forgiveness on the part of indigenous peoples. Joseph describes this step as an integral part of the framework because forgiveness allows for all parties involved to “move forward”.<sup>131</sup> While the notion may seem quaint after centuries of oppression, reciprocity is, in many ways, the hallmark of the reconciliatory justice model. The objective is not merely to make a recompense for past wrongs but to develop a foundation upon which to build the relationship between indigenous peoples and the government.

Turning once more to the work of Lederach, in his ruminations on a career of peacebuilding, Lederach notes that there is a profound disconnect between modern society and indigenous peoples, and the way that each group understands the notion of time.<sup>132</sup> According to Lederach, as indigenous peoples confront the effects of colonisation, the past remains very much alive – in fact, it keeps “showing up on the doorsteps of constructive social change.”<sup>133</sup> To address the persistent effects of colonisation, Lederach adjusted his theories of peacebuilding to accommodate indigenous notions of time through storytelling and sharing experiences.<sup>134</sup>

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126 Daron Acemoglu and James A Robinson *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (Profile Books, London, 2013) at 42–43.

127 At 372.

128 At 372.

129 Joseph, above n 6, at 221.

130 At 221.

131 At 222.

132 John Paul Lederach *The Moral Imagination: The Art and Soul of Building Peace* (Oxford University Press, Oxford, 2005) at 137–138.

133 At 138.

134 At 138.



While the distinction is fraught with generalisation, Lederach's point is surely true for the indigenous peoples he lists in his work, and for more than a few that are not. Under such a non-linear understanding of time, the state's assimilationist policies and indigenous land expropriations are far from relics in the dusty annals of history. Rather, they are living memories that place upon the state a genuine obligation to assuage indigenous concerns about its potential to commit further atrocities.

Only after such doubts have been put to rest by the government's commitment to refrain from further acts of colonisation can a new relationship be built. Naturally, building a new relationship with the state requires a reciprocal commitment on the part of indigenous peoples to move the relationship forward and continue the journey together. On this score, Lederach remarks:<sup>135</sup>

To live between memory and potentiality is to live permanently in a creative space, pregnant with the unexpected. But it is also to live in the permanency of risk, for the journey between what lies behind and what lies ahead is never fully comprehended, nor ever controlled.

While the explanation for reciprocity above may seem somewhat existential, it largely mirrors the reality faced by both the state and indigenous peoples under the framework of reconciliatory justice. Moving toward reconciliation offers both parties a tremendous opportunity to repair broken relationships and afford indigenous peoples their fundamental human rights. Yet under a framework of reconciliatory justice there is simply no guaranteed outcome – a point that is true for most of life as well.

#### IV. RECONCILIATORY JUSTICE AND FEDERAL INDIAN LAW

The fundamental argument Dr Joseph makes in his analysis of the Waitangi Treaty settlement process is that reconciliatory justice is uniquely situated to bring about meaningful comity between indigenous peoples and the dominant culture of a society.<sup>136</sup> For the purposes of this comparative analysis, the question that follows is whether the argument can be applied to the American context with similar effectiveness.

Before beginning this analysis, I should hasten to add the caveat that there are a number of differences and challenges to the development of a reconciliatory justice framework in the United States, not the least of which includes the potential ambivalence of the United States Government itself. The adoption of a model similar to that of New Zealand would portend a major rethinking of legal doctrine within the federal Indian law corpus, and require a major change in the discourse surrounding American Indian policy.

As the New Zealand experience demonstrates, while there are many obstacles along the path of reconciliation in any country, New Zealand has shown that even in a major multicultural society with its own sordid history of colonisation, such a transition is possible. This section explores how American Indians might fare under a reconciliatory justice framework in contrast to the status quo under federal Indian law.

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135 At 149.

136 Joseph, above n 6, at 207–208.

### A. *Reconciliatory Justice vis-à-vis Federal Indian Law*

The lingering effects of colonisation have been well documented in the literature. A 2006 report by the Native Nations Institute at the University of Arizona and the Harvard Project on American Indian Economic Development is particularly illuminating on the topic.<sup>137</sup> There, lead researcher Stephen Cornell of the University of Arizona provides a lengthy overview of the effects of colonisation. He notes that in the context of Australia, Canada, New Zealand and the United States, indigenous peoples have suffered a dark colonial legacy with “catastrophic and long-lasting effects on the original inhabitants.”<sup>138</sup> In the United States, American Indians “are among the country’s poorest citizens”, living in the country’s poorest places, consigned to a quality of life that is “at the bottom, or near the bottom, of the scale of income, employment, health, housing, education and other indices of poverty”.<sup>139</sup> Yet, in places where tribal nations have been able to exercise genuine decision-making power, to develop capable governing institutions and to ensure that their institutions are well-suited for their “Indigenous political culture”, the trend of poverty has been significantly abated.<sup>140</sup>

Given that tribes already wield a modicum of self-determination and sovereignty that is independent of the Federal Government, it stands to reason that the implementation of a reconciliatory justice framework in the United States could yield positive benefits for American Indians by addressing the socioeconomic disparities outlined above. After all, empowering tribes to exercise genuine decision-making, and supporting them in the development of competent governance structures have been hallmarks of the New Zealand process all along. Though the New Zealand model is not perfect, what immediately follows is an exploration of how American Indians might fare under such a reconciliatory justice framework relative to their lot under federal Indian law.

#### 1. *Apology: Recognition, Responsibility and Remorse*

The first phase of the reconciliatory justice process can be adequately summarised by the notion of apology. While it may come as somewhat of a surprise, the United States Government has already issued a formal apology to American Indians. One could be forgiven for being unaware of the gesture. In the Department of Defense Appropriations Act 2010, the United States Government heralded its remorse in § 8113 of the 67-page bill.<sup>141</sup>

After recognising the “special legal and political relationship” between tribes and the Federal Government, and the “thousands of years that [Native Americans] have stewarded” the land,<sup>142</sup> the Government officially:<sup>143</sup>

... apologizes on behalf of the people of the United States to all Native Peoples for the many instances of violence, maltreatment, and neglect inflicted on Native Peoples by citizens of the United States ...

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137 Stephen Cornell “Indigenous Peoples, Poverty and Self-Determination in Australia, New Zealand, Canada and the United States” (Native Nations Institute for Leadership, Management, and Policy, Tucson, 2006).

138 At 6.

139 At 12.

140 At 14.

141 Department of Defense Appropriations Act HR 3326, § 8113(a)–(b) (2010).

142 Section 8113(a)(1)–(2).

143 Section 8113(a)(4).

In addition, the bill also expressed “regret for the ramifications of former wrongs”<sup>144</sup> while inexplicably shielding the United States from any liability for the very wrongs that the bill recognises.<sup>145</sup>

The apology itself was the product of a bipartisan effort between two United States Senators in their last term in office, both of whom had spent lengthy appointments on the United States Senate Committee on Indian Affairs.<sup>146</sup> However, strikingly little effort went into consulting with tribal leaders, and the apology was accordingly met with a lukewarm response from Indian Country.<sup>147</sup> Under the reconciliatory justice model, the preliminary element of recognition and truth-telling requires much more than a vaguely worded apology buried in a Defense appropriations bill. Reconciliatory justice envisions a national conversation regarding the systemic injustices that were forced upon indigenous peoples – one that encompasses both the colonial regime and the governments that replaced them.<sup>148</sup> It is an apology that strives to be on par with the atrocities, no matter how wide the gulf. In a different context, this might be called “good faith.”

Similarly, the closely related second element of the reconciliatory justice framework is a formal acknowledgement of responsibility – a potentially powerful and detailed recognition of the scope of wrongs committed against indigenous peoples.<sup>149</sup> Yet, the formal American apology to its tribal nations includes an express waiver of liability for any of the wrongs committed against them, thereby wholly avoiding the second prong of reconciliatory justice. The text of the apology’s liability waiver reads as follows:<sup>150</sup>

- (b) Disclaimer— Nothing in this section—
  - (1) authorizes or supports any claim against the United States; or
  - (2) serves as a settlement of any claim against the United States.

Given this express disavowal of responsibility, it comes as little surprise that the third element of reconciliatory justice is also notably absent from the United States Government’s apology to American Indians. The reconciliatory justice framework includes an expression of sincere apology or remorse as demonstrated through significant public awareness that ultimately leads to a national conversation about the legacy of injustice and the wrongs that indigenous peoples have suffered through colonisation.<sup>151</sup> In the United States’ apology no such overtures are made to American Indians. While the apology is public in nature by virtue of its appearance in a public law, the fact that it is relegated to the doldrums of a massive Defense appropriations bill makes it hardly equal to the national conversation that reconciliatory justice attempts to spark.

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144 Section 8113(a)(5).

145 Section 8113(b)(1).

146 John D McKinnon “U.S. Offers an Official Apology to Native Americans” (22 December 2009) Washington Wire <[www.blogs.wsj.com](http://www.blogs.wsj.com)>.

147 Lise Balk King “A Tree Fell in the Forest: The U.S. Apologized to Native Americans and No One Heard a Sound” (3 December 2011) *Indian Country Today Media Network* <[www.indiancountrytodaymedianetwork.com](http://www.indiancountrytodaymedianetwork.com)>.

148 Joseph, above n 6, at 213.

149 At 214.

150 Department of Defense Appropriations Act, above n 141, § 8113(b)(1).

151 At 216.

The apology is also markedly different from the ways in which the United States Government has handled formal apologies in the past. In 1993, the United States Government made its formal apology to Native Hawaiians for the overthrow of the Hawaiian Kingdom using a formal, stand-alone, joint resolution from both houses of Congress.<sup>152</sup> Even the historic Cobell class action settlement of 2010 was handled through formal, stand-alone legislation.<sup>153</sup> In this way, the deficits of the American apology underscore how very different such an effort would have to be in order to meet the high standards of a reconciliatory justice framework.

If there is any lesson to be gleaned from the preceding analysis of the United States Government's apology to American Indians, it is that an apology under the reconciliatory justice framework would benefit America's tribal nations considerably more than the one they received. The United States Government's apology not only fails to recognise the specific wrongs committed, but it also disavows any liability under its terms for the actions of the government, and neglects to express its remorse in a meaningful, public way. Ultimately, these deficiencies render the Government's apology unequal to the task of advancing an important national conversation about the legacy of colonisation under a framework of reconciliatory justice. That the American apology is so lacking from the outset bespeaks the need for an enhanced legal structure that encompasses more than words alone.

## 2. *Redress: Restitution, Reparation and Redesign*

The second phase of the reconciliatory justice framework can be summarised by the notion of redress. Having received a formal apology from the government, the reconciliatory justice framework moves to provide redress to indigenous peoples by providing restitution for the wrongs committed, reparations to mitigate harms that have resulted from the initial wrongs, and the redesign of political institutions within the nation-state in order to ensure that such wrongs are not committed against indigenous peoples again.

As with the apology phase of reconciliatory justice, in the United States, the reconciliatory justice element of restitution has been met with some piecemeal efforts at reform over the years. The Indian Claims Commission,<sup>154</sup> which convened from 1946 to 1978, was intended to be a comprehensive claims settlement mechanism for American Indians to settle their historic claims against the United States.<sup>155</sup> While the concept worked well in theory, the work of the Commission struggled in practice.<sup>156</sup>

The Commission operated in three phases before any sort of restitution could be granted:

- Phase one involved a determination of the validity of a tribe's historic claim to the area of land being reviewed.
- Phase two involved a valuation of the land and a finding of the government's liability to the tribe.

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152 See US Congressional Apology Resolution (to Native Hawaiians) Pub L No 103-150, 107 Stat 1510 (1993).

153 See Claims Resolution Act of 2010 Pub L No 111-291, 124 Stat 3064 (2010).

154 See Indian Claims Commission Act of 1946 25 USC 70a (1946).

155 Indian Claims Commission *Indian Claims Commission: Final Report* (30 September 1978) at 3, available at <[www.narf.org](http://www.narf.org)>.

156 At 6.

- Phase three involved a determination of whether the government had given the tribe any money as a concession of the lands lost at any point prior to the establishment of the Commission – any outlays would be deducted from the amount to be recovered.<sup>157</sup>

Tribes had to succeed at each level before monetary compensation could be awarded.

Given the depth of the Commission's inquiry, it comes as little surprise in hindsight that tribal claimants struggled at each phase of the process. Phase one was a particularly onerous hurdle for tribes to overcome because establishing the historical metes and bounds of the territory in question was difficult given the success of the government's policies of assimilation and relocation. A second point that made phase one an effective barrier to consideration for many claimants was the fact that in order to establish a claim, tribal groups had to establish exclusivity to the territory in question. If a tribe failed to establish exclusivity in its claim, the Commission had a basis upon which to deny recovery.<sup>158</sup> The problem for tribal claimants was that traditional territories routinely overlapped with one another, having been settled by years of coexistence and traditional agreements similar to treaties among tribes. These non-Western methods of agreement made making an a priori finding of "exclusive use" of Indian territory extraordinarily difficult and as a result many claims were dismissed.<sup>159</sup>

Given limited restitution under the Indian Claims Commission, awards of reparations were similarly muted due to considerations of "judicial fiscal responsibility".<sup>160</sup> Under this principle, the Commission refused to award interest upon awards of restitution except for cases that involved governmental takings. The Commission's adoption of this principle very much protected the pecuniary interests of the United States Government, but at the expense of the tribes whose harms they were seeking to mitigate through a good-faith process. In practice, tribal claims alleging governmental takings amounted to a "very small portion of the claims,"<sup>161</sup> such that reparations, or any compensation to account for the effects of the original harms, were so limited under United States law as to be non-issues.

Analysing the work of the Indian Claims Commission through the lens of reconciliatory justice demonstrates that the United States Government's piecemeal effort at restitution falls well short of delivering meaningful redress for America's tribal nations. Under the reconciliatory justice framework, restitution is intended as a good-faith effort to right the balance in the relationship between indigenous peoples and the government.<sup>162</sup> In the American context, however, the work of the Indian Claims Commission served as much to limit governmental liability as it did to provide a forum for an honest consideration of colonisation and its effects on America's tribal nations.

First, it should be noted that some of the Indian Claims Commission's deficiency stems from the lack of meaningful apology as explored in the preceding section. The Commission did not begin its work with a public apology and commenced its work with little fanfare. As a result, it had little in the way of public mandate to provide meaningful redress to American Indians. Without such moorings, the Commission was left in the unenviable position of developing quasi-judicial operational

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157 At 9.

158 At 10.

159 At 10.

160 At 11.

161 At 11.

162 Joseph, above n 6, at 218.

procedures that lacked the requisite element of apology that is necessary to set the relationship between the United States Government and its indigenous peoples to rights. Second, reconciliatory justice contemplates an honest effort at restoring the status quo ante.<sup>163</sup> The Commission's work, in contrast, was carried out in three phases, with each phase serving as a potential barrier to recovery for tribal claimants. Even in the instances in which it did award monetary compensation, it did not restore lost lands. This is markedly different from the reconciliatory justice framework in New Zealand which presumes governmental liability by virtue of the Crown's apology from the outset, and then attempts to arrive at an agreeable settlement with Māori.

It is also worth noting that while the restitution element of reconciliatory justice has not been adequately addressed in the American context, the concept of restitution regarding Indian land claims is not particularly novel. Some 30 years ago, libertarian historian and scholar Carl Watner drafted a comprehensive article detailing how American Indian land claims could have been amicably settled at the point of contact with European powers, had Westerners simply recognised Indians as legitimate title-holders and dealt with them accordingly.<sup>164</sup> Watner argues that tribes, both in fact and in operation, were voluntary associations that could and, indeed, did sell "rights to the soil by allowing their chiefs to represent tribal interests."<sup>165</sup> In contrast to the work of the Commission, under this framework, the least of legal remedies available to tribes would be restitution for lands taken from private, collective owners, or the restoration of lands currently owned by the government, where available.<sup>166</sup>

In sum, reconciliatory justice in New Zealand begins its efforts at redress only after having been oriented in a nationally recognised apology to the indigenous population. In the United States, in contrast, the Indian Claims Commission set about its work with the conflicting objectives of both establishing and denying Indian land claims. Reconciliatory justice also sets out to provide an approximate restoration of the status quo ante – both as a gesture of goodwill, and a means of restoring trust in the relationship between indigenous peoples and the state.<sup>167</sup> In the United States, ongoing litigation related to Indian land claims suggests that trust is still a distant goal in the relationship between the Federal Government and its tribal nations, and that the status quo ante is an unrealised aspiration.

The second element of redress under a system of reconciliatory justice is, perhaps, the entire framework's most controversial. Still, reparations figure centrally within the framework because they provide an opportunity to account for the effects of colonisation on indigenous peoples, and, most importantly, they provide an opportunity to reset the relationship between indigenous peoples and the state by buttressing the apology phase of reconciliatory justice with meaningful action.<sup>168</sup> In the United States, however, the Indian Claims Commission avoided the matter of reparations entirely by invoking the paper tiger of judicial fiscal responsibility.<sup>169</sup> The notion seems quaint in

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163 At 219.

164 Carl Watner "Libertarians and Indians: Proprietary Justice and Aboriginal Land Rights" (1983) 7(1) *The Journal of Libertarian Studies* 147.

165 At 151.

166 At 151.

167 Joseph, above n 6, at 219.

168 At 220.

169 Indian Claims Commission, above n 155, at 11.

today's America. After all, United States governmental largesse bailed out the automotive industry, the nation's largest insurance company, the American Investment Group, and mortgage giants Fannie Mae and Freddie Mac all within the same year.<sup>170</sup>

Nevertheless, some scholars have argued that reparations for historical injustices cannot be sustained on a moral basis because such claims are simply too difficult to be effective whether they take the form of “a deterrent strategy ... or as a form of corrective justice.”<sup>171</sup> Better to tackle current forms of injustice in the present than dwelling on the past, so the argument goes.<sup>172</sup> The problem with this basis for denying reparations, similar to the blind eye turned by the Commission, is that it overlooks the need for reconciliation between former colonial powers and indigenous populations. The purpose of reparations under the reconciliatory justice framework is neither about setting an example by the punishment of the former colonising power, nor is it about correcting the atrocities that befell indigenous peoples – harms that are on balance incompensable.<sup>173</sup> The purpose of reparations under a reconciliatory justice framework is fundamentally about the manifestation of apology so that the relationship between the nation state and indigenous peoples can move forward.<sup>174</sup> Through reparations, the apology phase of reconciliatory justice segues from words to an investment in the future relationship between the state and indigenous peoples, lending credence to the apology that was expressed, and providing a solid foundation upon which the future relationship between indigenous peoples and colonising nations can be built.

If reparations can be called the most controversial element of the reconciliatory justice framework, then redesign might be the most difficult element to implement. Redesign envisions dismantling the policies and institutions used to discriminate against indigenous peoples and reforming institutions in such a way as to ensure that the injuries of the past do not happen again.<sup>175</sup> While there has been precious little in the way of legal reform in the United States to correct the racist presuppositions embedded in federal Indian law,<sup>176</sup> scholars have already begun the work of envisioning ways that governmental institutions can be reformed to be more accommodating of indigenous peoples and their governments within federal systems of governance.<sup>177</sup>

In a recent example, Martin Papillion of the University of Ottawa presented a detailed overview of the legal status of indigenous peoples within the federalist governmental frameworks of the United States and Canada.<sup>178</sup> In this work, he notes that indigenous peoples face stark opposition to any claims for political autonomy, noting that federations are inherently structured to resist change.<sup>179</sup> Given these structural challenges, Papillion suggests that federal systems should adapt

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170 Cheryl D Block “Measuring the Trust cost of Government Bailout” (2010) 88(1) *Wash U L Rev* 149 at 157–159.

171 Katrina Miriam Wyman “Is There a Moral Justification for Redressing Historical Injustices?” (2008) 61(1) *Vand L Rev* 127 at 195–196.

172 At 196.

173 Joseph, above n 6, at 220.

174 At 220.

175 At 221.

176 Again, see Williams, above n 17, for a thorough discussion of the racially suspect foundations of American federal Indian law.

177 Martin Papillion “Adapting Federalism: Indigenous Peoples and Multilevel Governance in Canada and US” (2012) 42(2) *Publius: The Journal of Federalism* 289.

178 At 290.

incrementally to accommodate indigenous peoples within their governmental structures.<sup>180</sup> From this preliminary assumption regarding the nature of federalism in the United States, Papillion develops a framework of multilevel governance as a means of understanding how changes can occur within federal systems.<sup>181</sup> He promotes the use of “compact-based governance as a mechanism of institutional adaptation,” suggesting that such incremental measures are not a “radical departure for American federalism” and can be used effectively to strengthen indigenous political autonomy over time.<sup>182</sup> His conclusion suggests that as “institutional legacies” develop, so too does a “growing interdependency between governing actors,” which results in the creation of a space for indigenous political autonomy and governance.

Under reconciliatory justice, institutional redesign is a welcome departure from the systemic discrimination governments have wrought against indigenous peoples. As applied to the American context, any governmental reform that empowers tribal nations to carry on the work of governance is an improvement upon the extant system of paternalism which places their very existence at the caprice of a legislature with plenary power over Indian affairs.

### 3. *Reconciliation: Refrain and Reciprocity*

The fundamental argument that began this experiment of applying reconciliatory justice to the situation of American Indians is the assumption that the principles of the reconciliatory justice framework are uniquely situated to bring about meaningful reconciliation between indigenous peoples and a society’s dominant culture.<sup>183</sup> The final phase of the framework is reconciliation, and the ultimate harbinger of success or failure in the endeavour.

The first element of the reconciliation phase calls for the offending party to take affirmative measures to refrain from committing the wrongs of the past again.<sup>184</sup> Under this element of reconciliatory justice, states are expected to exercise vigilance to ensure that past wrongs are not repeated, while also taking steps to ensure that future policies do not inflict harms upon indigenous peoples.<sup>185</sup> In turn, this element is about both protection and prevention. Under the principle of refrain, states, which were once the aggressors, now seek to protect indigenous peoples by ceasing to commit the harms of the past. Similarly, states are now tasked with preventing the implementation of policies and procedures that may be adverse to the human rights of indigenous peoples.

In today’s context, many erstwhile colonial powers have begun developing measures to ensure that indigenous peoples are not harmed by their policies, though their effectiveness is often the subject of much debate. Still, increasing numbers of Western nations with large populations of indigenous peoples have developed policies of consultation that aim to empower indigenous populations with meaningful decision-making opportunities as governmental policies affecting them are created. In the United States, however, there is little agreement among policy makers and

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179 At 292.

180 At 293.

181 At 296.

182 At 299.

183 Joseph, above n 6, at 207–208.

184 At 221.

185 At 221.



tribes as to what a duty of consultation should include, what it requires of the government, and even what a duty to consult means.<sup>186</sup>

Collette Routel and Jeffrey Holth of the William Mitchell College of Law argue that Congress should codify the government's duty to consult with tribes in such a way that the obligation is enforceable;<sup>187</sup> that tribes are included in the consultation process early, once it is determined that a federal project has the potential to affect them;<sup>188</sup> and in such a way that the duty applies to the agencies and departments of the Federal Government uniformly.<sup>189</sup> The proposal is bold. If enacted, it would mark a major transition from the relative ambivalence among federal agencies regarding consultation with American Indians to one of active engagement. While Presidential Executive Orders mandating consultation have been issued from administration to administration, such an exercise of legislative foresight would have the potential to significantly alter the operation of the Federal Government and its dealings with American Indians on a permanent basis.

Another, related example of preventative refrain comes from the international context and the developing consensus of norms regarding corporate social responsibility and the obligations of corporations to look after the rights of indigenous peoples.<sup>190</sup> Whereas in past years corporations routinely ignored indigenous rights in a variety of contexts around the world, today, under the auspices of the United Nations, corporations are increasingly held to higher standards for protecting indigenous human rights, regardless of the frameworks in place at the national level.<sup>191</sup> As the matter relates to reconciliatory justice, it is important to note that the developing international standard mirrors the expectations of the reconciliatory justice framework. Where the United Nations is beginning the process of holding corporations accountable for their activities affecting indigenous populations, reconciliatory justice flatly imposes the obligation to look after indigenous rights at the state level, thereby allowing governments to be active participants in ensuring that key actors refrain from abusing the rights of indigenous peoples.

The boldness of the legislation proposed by Routel and Holth, and the fact that reconciliatory justice is at the comparative vanguard of protecting indigenous human rights in the world, are both consistent with the notion that American Indians would fare much better under a system of reconciliatory justice than they presently do under the legal framework of federal Indian law. A reconciliatory justice framework would implement consultation measures over time rather than bill the act of consultation as a watershed moment in federal-tribal relations. Similarly, imposing higher corporate standards for the guarantee of American Indian rights at the federal level would be a natural result of the government's obligation to refrain from the abuse of indigenous rights under a reconciliatory justice framework.

Assuming the phases of apology and redress have been implemented, and measures have been taken to ensure that the state will refrain from repeating past harms against indigenous peoples, the final element of the reconciliatory justice framework is the act of reciprocity on the part of

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186 Colette Routel and Jeffrey Holth "Toward Genuine Tribal Consultation in the 21st Century" (2013) 46(2) *U Mich J L Reform* 417 at 420.

187 At 467.

188 At 469.

189 At 473.

190 Jide James-Eluyode "The Notion of Collective Human Rights and Corporate Social Responsibility: Issues and Trends in International Law" (2013) 24(5) *International Company and Commercial Law Review* 209.

191 At 214.

indigenous peoples. Forgiveness from indigenous populations is an essential component of the framework because it allows all parties to move forward into a new relationship, indicating that the profound troubles of the past can finally be put to rest.<sup>192</sup>

Although it should not be required of them, forgiveness and reciprocity suggest that tribal nations are prepared to commend a different example of good governance than the one they endured at the hand of colonising powers. A profound model of such forgiveness in action comes from Michigan State University's Wenona Singel, who proposes that tribal governments adopt protective measures to guarantee the human rights of tribal members.<sup>193</sup> Her basic argument is that tribes should exercise leadership in the formation of an intertribal regulatory body as a means of providing "external accountability on their own terms," for the protection of indigenous human rights.<sup>194</sup> Under Singel's proposal, tribes would be tasked with the work of developing support for substantive human rights norms, reaching agreement as to their content, and ultimately, the actual development of institutional frameworks for the enforcement of indigenous human rights.<sup>195</sup>

For Singel, the emphasis of tribal leadership in the effort to develop a tribal regime for indigenous human rights accountability cannot be understated. Tribal leadership is crucial at each step of the process because it communicates that tribal governments take the human rights of their citizens seriously after having overcome a great deal. Similarly, reconciliatory justice calls upon tribes to forgive the coloniser and to move beyond a strikingly painful legacy. Should tribes choose to take the lead on the guarantee of substantive human rights for tribal members, following Singel's framework, it would set a powerful, positive example of reciprocity that conflicts with the totality of past atrocities that the tribes have endured. In this way, reconciliatory justice affirms the power of American Indians to forgive and advance the relationship with the United States Government, while also providing tribes with an opportunity to actively set an example of good governance for peoples around the world.

A related concept of forgiveness is actually embedded within the New Zealand claims settlements process. In New Zealand, when Māori claimants opt to take their claims directly to the government, negotiated apologies and forgiveness are "a standard part of the negotiations" between Māori claimants and the Crown.<sup>196</sup> Under these deeds of settlement, Māori assume the formal obligations of forgiveness as an in-kind gesture to the apology being offered to them by the Crown.<sup>197</sup> Details of the atrocities committed are enshrined forever in the preamble of the deeds of settlement.<sup>198</sup>

Similar to Singel's call to forgiveness through leadership, here again, the concept of forgiveness and reciprocity suggests the need for an active forgiveness on the part of indigenous peoples, one that can set the relationship between indigenous peoples and the state on a new path. The New Zealand deeds of settlement with Māori claimants demonstrate that such an indigenous commitment to forgiveness can be negotiated and formalised while still being meaningful and effective.

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192 Joseph, above n 6, at 222.

193 Wenona T Singel "Indian Tribes and Human Rights Accountability" (2012) 49 San Diego L Rev 567 at 611.

194 At 611.

195 At 611–612.

196 Joseph, above n 6, at 217.

197 At 217.

198 At 217.

## V. CONCLUSIONS: TOWARD AN AMERICAN MODEL OF RECONCILIATORY JUSTICE

The New Zealand example of reconciliatory justice demonstrates that the path to reconciliation between American Indians and the United States Government will not be an easy journey. Despite America's relative apathy regarding the moral questions posed by the reconciliatory justice framework, the principles of reconciliation offer a number of strong benefits that merit consideration by American policymakers.

One notable benefit of implementing a reconciliatory justice regime in the United States is that such a framework can foster coherency in the federal Indian law corpus. As noted from the outset, America's federal Indian law jurisprudence has been rife with inconsistency and contradiction. The most obvious incongruity is the Federal Government's position on tribal sovereignty. The official policy of the United States toward American Indians is one of self-determination, a policy that extolls the virtues of tribal nations and seeks to enhance the ability of tribes to meet the governance needs of their communities.<sup>199</sup> Yet, in practice, the policy conflicts with United States legal precedent that maintains a doctrine of Congressional plenary power over Indian affairs – an exercise of *carte blanche* that exists in very few places in American law given the checks and balances of the United States Constitution.<sup>200</sup>

In contrast, a model similar to New Zealand's reconciliatory justice would bring about sorely needed coherency to the legal framework of federal Indian law by forcing the United States Government to confront the legal complexities of Indian rights head on, rather than allowing matters to fester and remain unsettled. It is also noteworthy that the implementation of a reconciliatory justice regime would elevate the national policy conversation regarding Indian affairs to one of national and potentially international importance: something tribal leaders have long sought.<sup>201</sup> Finally, and most importantly, reconciliatory justice contemplates a reset in the relationship between tribes and the state that would set a foundation upon which both indigenous peoples and the government could build going forward.

Given the ideals enshrined in the founding documents of the United States, it seems fitting that such a conversation about the essence of American Indian pursuits of life, liberty and happiness should finally take place. For despite the many good and virtuous aspirations of the American experiment in self-government, America's indigenous peoples have too long struggled for the rights guaranteed to them under the Constitution of a government that has long denied them the same.

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199 Indian Self-Determination and Education Assistance Act, above n 10.

200 See generally *United States v Lara*, above n 7, at 225.

201 See generally the National Congress of American Indians' (NCAI) efforts to raise the profile of Indian issues in the United States. National Congress of American Indians "Resolution To Support Legislation to Build a Memorial to Honor the Achievements and Contributions of American Indian/Alaska Native and Native Hawaiian Veterans in the United States" (23 June 2010) <[www.ncai.org](http://www.ncai.org)>.

# LEGISLATIVE JUDGING: BILLS OF ATTAINDER IN NEW ZEALAND, AUSTRALIA, CANADA AND THE UNITED STATES

BY DR DUANE L OSTLER\*

## I. INTRODUCTION

As England established colonies across the world, it not only transported British cultural norms to distant locations but also English law. With the passage of time, most British colonies gradually obtained their independence. These countries almost always retained the laws received from colonisation, although in modified form to fit their local circumstances. One such legal principle from England that colonies have grappled with is bills of attainder – legislative acts of both judgment and punishment. This paper will compare the way in which four countries colonised by Britain – New Zealand, Australia, Canada and the United States – have dealt with bills of attainder.

## II. BACKGROUND

A bill of attainder occurs when a legislature identifies an individual or group and passes a law convicting them of a crime, effectively taking away their property or liberty without affording them a trial to contest the issue. A bill of attainder is therefore a clear takeover of a judicial function by a legislature. Blackstone described it thus:<sup>1</sup>

[A] particular act of the legislature to confiscate the goods of Titius, or to attain him of high treason does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law.

When the result of the legislative act of conviction is death of the individual, it is a true bill of attainder. If the legislative act is for something less than death, such as a loss of property, or liberty due to imprisonment, the law is technically known as a bill of pains and penalties.<sup>2</sup> However, both are frequently lumped together under the title of “bill of attainder”.<sup>3</sup> In each case the condemned person or group is presumed guilty by legislative act, and has no chance to offer a defence. They therefore suffer a complete loss of due process.

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1 William Blackstone *Commentaries on the Laws of England* (Clarendon Press, Oxford (UK), 1765) vol 1 at 44.

2 Zechariah Chafee *Three Human Rights in the Constitution of 1787* (University of Kansas Press, Lawrence, 1956) at 97.

3 Blackstone’s cited comment (above n 1) clearly indicates he viewed them as one and the same. Furthermore, as stated in the early American case *Fletcher v Peck* US 87 (1810) at [27], a “bill of attainder may affect the life of an individual, or may confiscate his property, or may do both”.

Bills of attainder were used for centuries by Parliament in England as a way to eliminate unwanted officials. Indeed, it was by use of bills of attainder that Parliament gained its independence from the Crown.<sup>4</sup> Accordingly, bills of attainder played a key role in the development of government in England. However, with time, bills of attainder came to be seen as tools of oppression and were viewed with great disfavour. The last attempted bill of attainder in the United Kingdom that was directed at a prominent political figure occurred in 1820.<sup>5</sup>

It should be noted that bills of attainder differ from private bills, which are legislative acts naming individuals or groups and granting them a favour. The difference is in respect to punishment: a bill of attainder inflicts a punishment of some kind on the individual, while a private bill does not.

Interestingly, bills of attainder were heavily used in the American colonies during the American Revolutionary War. Over 60 bills of attainder were enacted by the 13 colonies during the revolutionary era, which were intended to seize property of “loyalists” to pay for the war.<sup>6</sup> One of these from the State of Virginia was prepared by none other than Thomas Jefferson, author of the American Declaration of Independence.<sup>7</sup>

### III. CONSTITUTIONAL PROVISIONS RESPECTING BILLS OF ATTAINDER

Of the four countries in this survey, only the United States specifically banned bills of attainder by name in its constitution. The American founding fathers knew of the overuse of bills of attainder during the war, and wanted to make sure such a thing never happened again. The ban was repeated twice, preventing bills of attainder to be enacted by the federal government, and also by any of the states.<sup>8</sup>

New Zealand has included a provision in its bill of rights which curtails bills of attainder in some respects. Section 27(2) of the New Zealand Bill of Rights Act 1990 states that “Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination”. The fact that this provision applies not only to courts but also to any “other public authority” suggests that legislative acts of attainder can be included. Hence, if the New Zealand Parliament were to enact a bill of attainder against an individual, convicting him or her of a crime without evidence and setting forth a punishment such as loss of liberty or property, that individual could apply for judicial review of the matter under s 27(2).

The concept of such a review under the New Zealand Bill of Rights is very similar to that of habeas corpus, – with one key difference. Habeas corpus provides a remedy for a person being

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4 An example is seen in the bill of attainder directed at Thomas Wentworth, the Earl of Stratford, in 1641, whereby he was executed without a trial. Wentworth was one of the king’s most valued associates, and considered to be a threat to parliament’s power. See Craig S Lerner “Impeachment, Attainder, and a True Constitutional Crisis: Lessons from the Stafford Trial” (2002) 69 (2002) 69 U Chi L Rev 2075.

5 Chafee, above n 2, at 97. The purpose of the bill was to divorce Queen Anne from King George IV, and adjust her claims to property. The bill passed the House of Lords, but failed to pass the House of Commons.

6 The attainder acts for each state are listed as Appendix C of Claude Halsted Van Tyne *The Loyalists in the American Revolution* (MacMillan, New York, 1902) at 335–341.

7 Paul Leicester Ford (ed) *The Writings of Thomas Jefferson* (GP Putnam’s Sons, New York, 1893) vol 2 at 149–154.

8 Duane L Ostler “Bills of Attainder and the Formation of the American Takings Clause at the Founding of the Republic” (2010) 32(2) Campbell L Rev 227 at 248–249.

detained before an anticipated trial when proof of wrongdoing is in question. Under a bill of attainder, the legislative act itself assumes and provides the “proof” necessary for the legislative conviction, and there is no trial. Notably, the Bill of Rights Act provides separately for habeas corpus review in s 23(1)(c), further confirming that the protection in s 27(2) is intended to cover more than just habeas corpus situations.

Canada has a somewhat similar provision. The Canadian Charter of Rights and Freedoms, found in pt 1 of the Constitution Act 1982, states in art 7 that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Article 24(1) guarantees judicial enforcement of this right. It states that “[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”

Australia on the other hand does not provide any constitutional guarantee protecting the people from bills of attainder. The reason is undoubtedly because Australia has no bill of rights, and the Australian constitution contains very few rights provisions. In fact, the Commonwealth of Australia Constitution Act 1900 guaranteed the right of the government itself to engage in racial discrimination. Article 51(xxvi) of the Act states that the Australian Parliament has power to make laws respecting “the people of any race, for whom it is deemed necessary to make special laws.” Incredibly, therefore, the Australian constitution allows bills of attainder targeted at racial groups.

However, in modern practice such discrimination in Australia is no longer tolerated. Australians pride themselves on protecting rights even though they have no written bill of rights. Furthermore, the Australian Capital Territory in 2004 and the State of Victoria in 2006 have each enacted a bill of rights, effective within their borders. Both of these bills of rights contain wording that can be interpreted to protect the people from bills of attainder. For example, they both disallow *ex post facto* laws and enhanced sentencing laws, under which punishments for crimes are made more severe than when the crime occurred.<sup>9</sup> These types of laws are both bills of attainder.

It should be noted that in the United Kingdom and New Zealand, the protections against bills of attainder are only found in statutory bills of rights, rather than in a section of the constitution devoted to rights as in other countries. This is because these two countries have no written constitution. In theory, therefore, the Parliaments in these two countries may alter the stated rights if they so desire by simply passing a new statute. However, the likelihood of such an alteration is low, considering the huge political backlash and the loss of votes that would result if they did so.

#### IV. BILL OF ATTAINDER CASES

Unfortunately, in spite of the clear constitutional prohibitions against bills of attainder in many countries, they have continued to be enacted at times by the various legislatures. Sometimes these bills of attainder have been challenged and set aside, and sometimes they have not.

For example, regardless of the ban on bills of attainder in the United States Constitution, after the civil war some states passed “test oath” requirements, prohibiting men from entering into certain professions (such as the clergy or the practice of law) unless they could swear they had never supported the south in the war. The United States Supreme Court found such laws to be bills

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<sup>9</sup> See, for example, Charter of Human Rights and Responsibilities Act 2006 (Vic), arts 21(7) and 27(1) and (2); Human Rights Act 2004 (ACT), arts 18(6) and 25.

of attainder and declared them unconstitutional, since they sought to punish former confederates.<sup>10</sup> A century later, the United States Supreme Court again found a bill of attainder in the 1965 case of *United States v Brown*.<sup>11</sup> The Court ruled that a law making it a crime for a member of the communist party to be on the board of a labour organisation was in fact a bill of attainder.

Just two years after *United States v Brown*, the United Kingdom Privy Council decided a bill of attainder case that has been cited as precedent ever since by commonwealth countries. This was *Liyanage v the Queen*.<sup>12</sup> The case dealt with a 1962 coup attempt on the Government of Ceylon (now known as Sri Lanka). After the coup failed and the conspirators were jailed, the Ceylon Parliament enacted special legislation targeting the perpetrators of the coup.<sup>13</sup> These laws took away their right to a jury trial, altered the rules of evidence, and increased the penalty they could suffer on conviction. This was an incredibly clear example of a bill of attainder.

The Privy Council recognised the Ceylon legislation for what it was and declared it ultra vires. They stated as follows:<sup>14</sup>

It goes without saying that the legislature may legislate, for the generality of its subjects, by the creation of crimes and penalties or by enacting rules relating to evidence. But the Acts of 1962 had no such general intention. ... That the alterations in the law were not intended for the generality of the citizens or designed as any improvement of the general law, is shown by the fact that the effect of those alterations was to be limited to the participants in the January *coup* and that after these had been dealt with by the judges, the law should revert to its normal state.

The Privy Council also expounded on how a bill of attainder alters and jeopardises the separation of powers. They noted that:<sup>15</sup>

These alterations constituted a grave and deliberate incursion into the judicial sphere. Quite bluntly, their aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences. ... If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges.

The ruling in *Liyanage* was clear: bills of attainder altering criminal convictions and sentencing are not acceptable. However, this lesson has not always been taken to heart. For example, the New Zealand case of *R v Poumako*<sup>16</sup> dealt with new legislation enacted by the New Zealand Parliament<sup>17</sup> which mandated an increase in the minimum sentence for murder (before any eligibility for parole) from 10 years to 13 years if the murder was committed in a person's home. The law stated that it could be applied to anyone then standing trial for murder, regardless of when the murder was committed.<sup>18</sup> Accordingly, these Acts clearly had retroactive effect and were ex post facto laws. However, it was acknowledged and understood at the time that the law

10 *Cummings v Missouri* 71 US 277 (1866); *Ex Parte Garland* 71 US 333 (1866).

11 *United States v Brown* 381 US 437 (1965).

12 *Liyanage v the Queen* [1966] 2 WLR 682 (UKPC).

13 The Criminal Law (Special Provisions) Act No 1 1962 (Ceylon) and Criminal Law Act No 31 1962 (Ceylon).

14 *Liyanage v the Queen* [1967] AC 259 at 283.

15 At 284–285.

16 *R v Poumako* (2000) 2 NZLR 695 (CA).

17 The Crimes (Home Invasion) Amendment Act 1999 and Criminal Justice Amendment Act (No 2) 1999.

18 Criminal Justice Amendment Act (No 2) 1999, s 2(4).

was created as the direct result of a brutal murder committed in the home of Mrs Bouma, by David Tuhua Poumako in late 1998. In short, the New Zealand Parliament fashioned this law specifically to deal with Mr Poumako.

Nevertheless, the majority of the justices still upheld the law. Some justified their conclusion by noting that even under the previous law, a judge had the discretion to order an increased minimum sentence, which they felt would have occurred in Poumako's case anyway. Thomas J dissented, noting that the legislation was "dangerously close to being, if it is not in fact, a bill of attainder."<sup>19</sup> Thomas J admitted the legislation did not specifically name Poumako as a traditional bill of attainder would do, and therefore "it may well be that the subsection is still not sufficiently specific to constitute a bill of attainder".<sup>20</sup> However, the law "was expressly aimed at accused persons already facing charges of murder. Widespread media publicity relating to crimes in the home had been given to certain cases, and the persons who the provision was aimed at were readily ascertainable."<sup>21</sup> Hence, the Acts' true nature as bills of attainder could hardly be ignored.

Canada has recently had a similar sentencing case as well. In the 2012 case of *R v Serdyuk*,<sup>22</sup> the trial Judge sentenced the accused based on a newly amended sentencing law that limited credit for previous time served in jail.<sup>23</sup> The appellate Court overruled the sentencing because the new Act was not in effect at the time the crime was committed but was enacted between that time and the sentencing. Hence, the Court simply removed the portions of the amended law that acted as a bill of attainder and ex post facto law, while leaving the rest of the law intact. This is one of the most effective methods courts can use when dealing with bill of attainder cases brought before them.

Australia has had several cases regarding extension of incarceration of specified individuals beyond their original sentence. For example, in *Kable v Director of Public Prosecutions*,<sup>24</sup> the Community Protection Act 1994 authorised the state's Supreme Court to hold Gregory Wayne Kable in jail past his five-year sentence, if the court felt he posed a threat to the community. The Court subsequently extended his sentence, and Kable appealed the matter. The Australian High Court found the law invalid. What was unique about the case was that the legislation named Kable personally, like a bill of attainder would, but then left the decision of whether his sentence should be extended (ie, the punishment) to the judiciary. In this way, any claim that the act was a bill of attainder was avoided, since the legislature had not directly punished him.

In contrast with this was the Queensland case of *Fardon v Attorney-General*.<sup>25</sup> Extending the sentence beyond its expiration was once more the issue, but this time the High Court found the law valid because of the way it was drafted.<sup>26</sup> The Court concluded the law was acceptable because it was not targeted at an individual like a bill of attainder but more generally at protection of the community. Furthermore the law required a higher level of proof for the protection to be invoked, thereby providing much of the due process that a bill of attainder lacks.

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19 *R v Poumako* (2000) 2 NZLR 695 (CA) at [76].

20 At [78].

21 At [77].

22 *R v Serdyuk* (2012) 102 WCB (2d) 471.

23 See the Criminal Code RSC 1985 c C-46, s 719, as amended by the Truth in Sentencing Act SC 2009 c 29, which came into force on 22 February 2010.

24 *Kable v Director of Public Prosecutions* (1996) 189 CLR 51 (NSW).

25 *Fardon v Attorney-General (Qld)* [2004] HCA 46, (2004) 223 CLR 575.

26 Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld).



## V. OTHER ATTAINDER CASES

While many bill of attainder cases have had to do with sentencing, there are some that do not. For example, in the 2005 Canadian case of *Alberta v Kingsway General Insurance Co*, the Government of Alberta legislated a freeze in auto-insurance rates.<sup>27</sup> After Kingsway Insurance sued over the constitutionality of this law, the Alberta Parliament enacted a new statute that dismissed the Kingsway case by name and all future cases like it.<sup>28</sup> This was clearly a bill of attainder. Based on this legislation, the Alberta Government then sought to dismiss the case. Kingsway responded by asserting that the new law was an unconstitutional bill of attainder and argued that, under analogous American law, it should be struck down. However, the Court of Queen’s Bench for Alberta ruled that the law was valid, and the case was dismissed. In its ruling, the Court noted several prior Canadian cases in which bills of attainder were claimed, all of which failed since the courts refused to recognise them as such for a variety of technical reasons.<sup>29</sup> This case, startling in its result, shows that even the courts may sanction a bill of attainder, resorting to technical distinctions to justify their action.

In the United States, former President Richard Nixon asserted in 1977 that the Presidential Recordings and Materials Preservation Act 44 USC forcing him to produce his private papers was a bill of attainder. The Supreme Court disagreed, noting that even though Nixon was specifically named in the law like a bill of attainder, this was not fatal since any other president would have been treated the same. The Court concluded that the law did not convict Nixon of a crime and inflicted no punishment.<sup>30</sup>

Unfortunately, bills of attainder are not always identified or made the subject of a lawsuit. The lack of a court challenge is sometimes due to a claimant’s lack of funds, or that the persons targeted by the law lack standing to bring a challenge because the very bill of attainder took that right away. For example, one scholar noted that the laws in the 1880s that took the property of the Church of Jesus Christ of Latter-day Saints (Mormons) in Utah and denied them of their rights constituted a bill of attainder. The same scholar noted that laws against suspected communists in the 1950s were also bills of attainder.<sup>31</sup>

Another way that the prohibition against bills of attainder in the United States Constitution has been dodged is when the executive branch, such as the governor of a state or the president of the United States, has issued an executive order which convicted and punished a person or group. Since the ban on bills of attainder in the Constitution pertains only to legislative acts, these executive orders are outside their coverage. An example at the state level is the 1838 Missouri Executive Order 44 or “extermination order” by Missouri Governor Lilburn Boggs, ordering that members of the Church of Jesus Christ of Latter-day Saints be either driven from the state of Missouri

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27 *Alberta v Kingsway General Insurance Co* (2005) 258 DLR (4th) 507; see the Insurance Act RSA 2000 c I-3, s 16.1(3) as in force between 4 December 2002 and 31 May 2003 subsequent to the passing of the Insurance Amendment Act 2003 (No 2) (Bill 53, 3rd Session, 25th Parliament).

28 See the Insurance Act RSA 2000 c I-3, s 16.1(3) as in force between 2 June 2005 and 31 January 2006, as amended by Insurance Amendment Act 2005 (Bill 34, 1st Session, 26th Parliament). The current version still retains this reference to the case.

29 *Alberta v Kingsway General Insurance Co* (2005) 258 DLR (4th) 507 at [119]–[122].

30 *Nixon v Administrator of General Services* 433 US 425 (1977).

31 Francis D Wormuth “On Bills of Attainder: A Non-Communist Manifesto” (1950) 3(1) *Western Political Quarterly* 52.

or exterminated.<sup>32</sup> At the federal level, an example is Executive Order 9066 issued by President Franklin Roosevelt in 1942, which ordered over 120,000 Japanese Americans (the majority of whom were United States citizens) to be incarcerated in concentration camps for the duration of World War II.<sup>33</sup> Their only “crime” was being Japanese.

In Australia, a change made to the Defamation Act 1958 (NSW) was a bill of attainder even though no lawsuit resulted from it. The law was drastically altered to allow defamation lawsuits by living relatives of deceased persons who were defamed.<sup>34</sup> It was widely believed that the change came about solely because of a new book published that year entitled “Wild Men of Sydney”, which vilified the deceased newspaper owner John Norton. Ezra Norton, John’s son, inherited ownership of his father’s newspaper and was strongly against publication of the book. Many believed that Ezra incited the New South Wales Parliament to alter the law, thereby preventing all legal sales of the book in that state. No lawsuit was ever filed in respect to the matter but, in a similar manner to the *Poumako* case, it appeared that a bill of attainder was directed at an easily ascertainable person or group – the author and publisher of the book.<sup>35</sup>

However, there have been other court cases in Australia that have dealt specifically with bills of attainder. One such case in 1950 was *Australian Communist Party v Commonwealth*, in which a law<sup>36</sup> that dissolved the communist party, took its property and denied certain jobs to its members was struck down by the High Court.<sup>37</sup> A majority of the justices felt that Parliament had overstepped its bounds in pronouncing the communist party guilty and then punishing it. This case bore many similarities to the American case of *United States v Brown*, discussed above.

Interestingly, attempts were made in 1983 and again in 1995 in the Canadian Parliament to name certain individuals in legislation and inflict a penalty on them. In both cases the speakers of the House and Senate respectively determined that Canadian parliamentary practice does not allow bills of attainder, and the effort failed.<sup>38</sup>

In New Zealand, sentencing has been the main context in which bill of attainder issues have been raised. This can be seen in the appeal cases decided in 2005 that were brought by Kenneth Morgan in respect to his parole. Morgan was convicted of cultivation and possession of cannabis, and sentenced to three years in prison. At the time he committed the crime the law allowed for parole after two-thirds of a sentence was completed.<sup>39</sup> By the time Morgan was sentenced, this parole law had been changed by the Sentencing Act 2002 and the Parole Act 2002 and no longer allowed for the earlier parole date. Morgan brought suit after serving two years of his prison

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32 Marie H Nelson “Anti-Mormon Mob Violence and the Rhetoric of Law and Order in Early Mormon History” (1997) 21 *Legal Studies Forum* 353.

33 The story of this executive order and the camps is found in: Roger Daniels, Sandra C Taylor and Harry HL Kitano (eds) *Japanese Americans: from Relocation to Redress* (University of Washington Press, 1991).

34 Section 5.

35 For a discussion of the matter, see: Michael Cannon *That Damned Democrat: John Norton, an Australian Populist, 1858–1916* (Melbourne University Press, Melbourne, 1981) at 52; Sandra Hall *Tabloid Man: The Life and Times of Ezra Norton* (Fourth Estate, Sydney, 2008) at 264–268.

36 Communist Party Dissolution Act 1950 (Cth).

37 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

38 *Canadian House of Commons Debates* 32nd Parl 2nd Sess No 3 (14 May 1984) at 3683 (Hon Jeanne Sauve), the accused being Clifford Olson; *Canadian Senate Debates* 35th Parl 1st Sess No 3 (28 November 1995) at 2367 (Hon Gildas L Molgat), the accused being Karla Homolka.

39 Criminal Justice Act 1985.

sentence, asserting that the former law should apply and he should be released. He cited s 25(g) of the Bill of Rights Act 1990, which prohibits greater punishments for a crime than existed at the time it was committed.

Morgan argued that the new laws, which eliminated his parole, were a bill of attainder. The New Zealand Court of Appeal summarised this argument, noting:<sup>40</sup>

the appellant has argued that if the 2002 Act were to apply to a person in his situation, the effect would be to subject the person to a form of legislative punishment aimed specifically at a particular person or group. It would accordingly have the character of a bill of attainder. We disagree.

The Court majority concluded that the 2002 Acts had general applicability and did not target any particular person or group. The Court further ruled that there was no violation of the Bill of Rights since the law had no impact on Morgan's actual sentence, but only on how that sentence was administered. Morgan's appeal to the Supreme Court of New Zealand was unavailing, as that Court reached the same result.<sup>41</sup>

## VI. ANTI-TERRORISM LAWS

Anti-terrorism laws have greatly increased since the September 11 2001 attacks in the United States. While such laws seek to protect the populace from terrorist attacks, they often run the risk of violating fundamental rights and can frequently be classified as bills of attainder. For example, President George Bush's Executive Order 13,224 granted federal agencies the power to seize assets of business entities that are suspected terrorist organisations. An early case resulting from this law was *Global Relief Foundation Inc v O'Neill*.<sup>42</sup> In December 2001, the FBI seized a large number of items from Global Relief because of suspicions the company had ties to terrorists. At the same time the United States Office of Foreign Asset Control (OFAC) froze the company's accounts. Global Relief then brought suit for an injunction alleging that Executive Order 13,224 was a bill of attainder. The Federal District Court disagreed, ruling that there was no punishment of Global Relief, as is the case with a bill of attainder, and that the actions taken against it were not based on legislation but on an executive order and an agency determination. The Seventh Circuit affirmed the case, repeating that no legislation was involved here.<sup>43</sup> Therefore, just as with the imprisonment of the Japanese in World War II, lack of actual legislative action against Global Relief was fatal to the bill of attainder claim.

Anti-terrorism laws in others countries are sometimes very close to being bills of attainder. For example, Canada's Anti-Terrorism Act 2001, known better as Bill C-36, contains many provisions similar to the USA Patriot Act. Many in Canada have seen it as infringing on the Canadian Charter of Rights and Freedoms.<sup>44</sup> In similar fashion, the United Kingdom's Prevention of Terrorism Act 2005

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40 *Morgan v Superintendent, Rumitaka Prison* [2005] 3 NZLR 1 (CA) at [6].

41 *Morgan v Superintendent, Rumitaka Prison* [2005] NZSC 26, [2005] 3 NZLR 1.

42 *Global Relief Foundation Inc v O'Neill* 207 F Supp 2d 779 (ND Ill 2002).

43 *Global Relief Foundation v O'Neill* 315 F3d 748 (7th Cir 2002) at 755.

44 For a discussion of this view, see: Colleen Bell "Subject to Exception: Security Certificates, National Security and Canada's Role in the 'War on Terror'" (2006) 21(1) CJLS 63 at 78; Kent Roach "Defining Terrorism: The Need for a Restrained Definition" in Craig Forcese and Nicole LaViolette (eds) *The Ottawa Principles on Human Rights and Counter-Terrorism* (Irwin Law, Toronto, 2008) 97 at 127.

also involved a fair deal of controversy. To begin with, the law was fashioned hastily<sup>45</sup> in response to a Law Lords ruling in 2004 that it was illegal to detain foreigners without trial under prior anti-terrorism laws.<sup>46</sup> Since the main goal of the 2005 Act was to allow continued detention of several suspected terrorists in spite of this ruling, the law had the strong appearance of a bill of attainder. Indeed, the judiciary has since expressed displeasure with the law. In 2006, Sullivan J quashed six control orders that were promulgated under the 2005 Act and under which suspected terrorists were being held, stating that such orders were contrary to human rights law.<sup>47</sup>

In similar fashion, the Australian Anti-Terrorism Act 2005 has been criticised by a number of former judges and politicians as providing for blatant human rights violations. Similar to England, control orders allow suspected terrorists to be held in detention that can be extended indefinitely. Such orders may be issued without a hearing at which the accused is present. Elizabeth Evatt, former chief justice of Australia's Family Court, said that the new law strikes "at the most fundamental freedoms in our democracy in a most draconian way".<sup>48</sup>

New Zealand's Terrorism Suppression Act 2002 was not as controversial as the acts in other countries. American John E Smith undertook a detailed study of this Act in 2003, and issued a report on his findings.<sup>49</sup> He concluded that "New Zealand established a model counter-terrorism regime that effectively balances national security with civil liberties."<sup>50</sup> The law does not contain the detention provisions that have caused such an uproar in the United Kingdom and Australia. Indeed, some may view the law as being too soft. The Solicitor-General refused to prosecute under the Act in the 2007 New Zealand anti-terror raids, stating that the law was hard to understand and difficult to apply domestically. The New Zealand Parliament thereafter amended the legislation, and it has not been put to the test since.

## VII. CONCLUSION

A review of legislation and cases relating to bills of attainder in the countries covered by this survey reveals that such laws continue to be enacted. This usually occurs in times of war or heightened tension, such as immediately after a terrorist attack. The temptation for Parliaments to enact bills of attainder therefore clearly continues.

At times of political stress and public outcry, the legislative branch naturally desires to act. In such situations, their actions can often get out of hand. The line between legitimate legislation and a bill of attainder is often a fine one. If Parliaments are not careful, they may threaten the liberty of the very people they are trying to protect.

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45 "Prevention of Terrorism Act 2005" (19 January 2009) *The Guardian* <[www.theguardian.com](http://www.theguardian.com)>.

46 Mark Oliver and Sarah Left, "Law lords back terror detainees" *The Guardian* (online ed, Australia, 16 December 2004).

47 Alan Travis and Audrey Gillan "New blow for Home Office as judge quashes six terror orders" *The Guardian* (online ed, Australia, 28 June 2006).

48 Michael Pelly, Tony Stephens and Marian Wilkinson, "Former leaders call for debate" *The Sydney Morning Herald* (online ed, Sydney, 25 October 2005).

49 John E Smith *New Zealand's Anti-Terrorism Campaign: Balancing Civil Liberties, National Security, and International Responsibilities* (Fulbright, December 2003).

50 At 68.

# LIMITS ON CONSTITUTIONAL AUTHORITY

BY EDWARD WILLIS\*

This article addresses the issue of substantive limits on the legitimate exercise of public power within New Zealand's constitutional system. It suggests that the recognition of limits on constitutional authority is inherent in any non-trivial claim of respect for constitutional government. However, the doctrine of parliamentary sovereignty, which by definition is virtually absolute and admits no substantive limits on Parliament's legislative capacity, is at odds with the idea of substantive limits on the legitimate exercise of public power. Despite the pervasiveness of parliamentary sovereignty, this article identifies a number of substantive constitutional limits that appear to be recognised and accepted in New Zealand. This finding suggests that further research is needed into how constitutional government may be reconciled with orthodox sovereignty theory in a New Zealand context.

## I. INTRODUCTION

Recognition of substantive limits on the legitimate exercise of public power is central to constitutional government. However, contemporary scholarship rarely engages with the New Zealand constitution in terms of substantive limits. This may be because certain characteristics of New Zealand's constitutional system – parliamentary sovereignty, for example – seem to imply a rejection of meaningful limits. As such, it is not immediately obvious how constitutional limitations on the exercise of public power may be reconciled with an orthodox understanding of the New Zealand constitution.

This article examines the extent to which substantive limits on the legitimate exercise of public power are recognised as part of the New Zealand constitution. This issue bears directly on the existence of constitutional government in a meaningful, normative sense. Engaging seriously with the idea that constitutional authority cannot be unlimited may therefore be seen as part of a broader project which explores the nature of constitutional legitimacy in a New Zealand context. Part of the challenge of this project is to escape the increasingly stale controversies surrounding the continuing persuasiveness of orthodox sovereignty theory. The legislative sovereignty of Parliament in New Zealand, which this article takes to mean Parliament's ability in practice to effect legal change, is accepted as virtually absolute.<sup>1</sup> This distinguishes New Zealand from the majority of liberal democracies, and means that limits on constitutional authority within a New Zealand context cannot necessarily be equated with *legally* effective restrictions on legislative power, for example the sort seen in Canada, the United States or France. But acceptance of that position

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1 See below pt III "Parliamentary Sovereignty".

invites the question as to why New Zealand's record of constitutional government compares so favourably with those other liberal democracies.<sup>2</sup> What is needed is the development of an account of constitutional legitimacy that addresses directly New Zealand's distinctive constitutional system. This article aims to take the first (tentative) steps towards that ultimate goal.

It does so in the following way: pt II of this article establishes the importance of constitutional limits as a means of conferring legitimacy in a state that aspires to constitutional government.

Part III then briefly sets out an orthodox account of sovereignty theory within the New Zealand context. It contends that orthodox sovereignty theory does not admit any substantive limits on Parliament's power to legislate, and this is *prima facie* in tension with the ideal of constitutional legitimacy as articulated in pt II.

Against this background, pt IV investigates whether substantive constitutional limits on the exercise of public power, particularly Parliament's exercise of the legislative functions, are recognised as part of New Zealand's constitutional system. It is suggested that substantive limits are indeed considered to be a part of New Zealand's constitutional framework despite the continuing pervasiveness of sovereignty theory, although the extent and enforceability of those perceived limits vary.

In the light of this finding, pt V concludes that the development of an account of constitutional legitimacy that directly addresses the doctrine of parliamentary sovereignty in a New Zealand context is an important area for further research. It is tentatively suggested that matters of constitutional structure are likely to be the *loci* most for constitutional limits, especially where those structural aspects are underpinned by accepted constitutional values and principles.

The analysis presented here is primarily exploratory rather than dispositive, reflecting the beginnings of a broader academic project with uncertain parameters. This approach does not detract from the relevance of the analysis, as the aim is to provide the foundation for future work rather than offer definitive conclusions, but it does create some difficulty in orienting the analysis within a wider body of scholarship. For instance, the analysis could be characterised as an investigation into the space between legal effectiveness and constitutional propriety that seeks to demonstrate respect for both concepts. This perspective defies, and in some senses supersedes, ready categorisation within traditional jurisprudential philosophies. The ongoing debate between positivists and natural law theorists remains important, for example, and key strands of that debate will be apparent in the analysis. However, full consideration of the relevance of such debates remains part of a future task of placing the ideal of constitutional legitimacy in a New Zealand-specific context within an appropriate jurisprudential frame. The burden of this article is limited to establishing the broad relevance of substantive limits on the legitimate exercise of public power to a complete understanding of New Zealand's unique constitutional arrangements.

## II. THE IMPORTANCE OF CONSTITUTIONAL LIMITS

The New Zealand constitution is characterised by the absence of a central constitutional document prescribing either the structure of government or the nature of power to be exercised in the name of the state. The existence of constitutional limits on the exercise of public power is often either

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2 See, for example, *Inquiry to review New Zealand's existing constitutional arrangements: Report of the Constitutional Arrangements Committee* (presented to the House of Representatives, I 24A, August 2005) at [7] (citing the submission of Lord Cooke of Thorndon to the Inquiry, at 6).

stated expressly<sup>3</sup> or implied<sup>4</sup> in written constitutional systems, but may not be taken as self-evident in the context of New Zealand's unwritten constitution.<sup>5</sup> This part contends that a constitution not only describes but purports to legitimise the exercise of public power within the state. Further, constitutional legitimacy is contingent on the consistency of accepted substantive limitations.

### A. *Beyond Descriptive Constitutional Analysis*

The term “constitution” is ambiguous, and may be used in two senses.<sup>6</sup> The first meaning is as a descriptive term for the actual institutions and practice of government.<sup>7</sup> This is the traditional interpretation of the term “constitution”, which predates the relatively modern trend of adopting written constitutions that began towards the end of the 18th Century.

The second, modern meaning of “constitution” refers to the adoption of certain substantive principles as fundamental law.<sup>8</sup> This understanding of a constitution has been influenced by the proliferation of written constitutions around the world, but it has meaning for all constitutional systems. It recognises a normative dimension to a constitution that the older meaning of the term obscures. The traditional meaning provides a name for the existence of public power but does little to advance our understanding of what a constitution can tell us about the proper exercise of that public power. In contrast, the modern understanding of constitution suggests that a state's constitution itself provides an implicit standard – consistency with fundamental principles – against which the legitimacy of public power can be assessed. To describe the exercise of public power as “constitutional” in this second sense is therefore to make a normative claim regarding the legitimacy of that public power.

Since unwritten constitutional systems do not have a demonstrable fundamental law, the analysis of the exercise of public power in such systems tends to be undertaken on the basis of the first, more descriptive interpretation of the term “constitution”, rather than on the basis of a normative inquiry into standards of constitutional legitimacy. Bogdanor has noted this tendency in respect of the unwritten British constitution:<sup>9</sup>

The fundamental peculiarity of the British constitution ... is that it seems possible to analyse it only in descriptive terms, as a summation of past experience, rather than in genuinely constitutional terms as representing the recognition of certain normative principles.

Not surprisingly, given our shared constitutional origins, analysis of the New Zealand constitution exhibits a similar tendency. This tendency is perhaps exemplified by Matthew Palmer's development

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3 See, for example, Constitution Act 1982 (Can), s 52.

4 See, for example, *Marbury v Madison* 5 US 137 (1803).

5 New Zealand is often grouped with Israel and the United Kingdom as the only three democratic nations that purport to have unwritten constitutions. At a superficial level, it is therefore interesting to note that the Israeli constitution does appear to acknowledge constitutional limits on the exercise of legislative authority: see *United Mizrahi Bank Ltd v Migdal Cooperative Village* [1995] Isr LR 1.

6 Colin R Munro *Studies in Constitutional Law* (2 ed, Butterworths, London, 1999) at 2.

7 Charles Howard McIlwain *Constitutionalism: Ancient and Modern* (Cornell University Press, Ithaca, 1940) at 5.

8 At 5.

9 Vernon Bogdanor *The New British Constitution* (Hart Publishing, Oxford, 2009) at 19.

and application of “constitutional realism”.<sup>10</sup> Palmer describes the “essence” of constitutional realism as the:<sup>11</sup>

... rigorous use of candour in penetrating the form and fiction of a law or constitution in order to understand the reality of what is going on in the underlying human interactions.

This approach places emphasis on the practical operation of a constitution in a realistic context, which naturally lends itself to descriptive analysis. For example, Palmer uses his theory to identify a class of constitutional actors whom he believes are often overlooked in traditional accounts of the New Zealand constitution – high-ranking members of the public service – based solely on the influence members of that class can exercise over public decision-making in practice. For Palmer, the constitution is not an institution of principle, but a messy reality. Accurately *describing* the New Zealand constitution appears to be Palmer’s primary motivation for developing this realist theoretical perspective.<sup>12</sup>

A descriptive analysis is crucial to a complete understanding of our constitutional arrangements. Such analysis assists in identifying constitutional change,<sup>13</sup> for example, which may otherwise be less than obvious in the context of New Zealand’s fragmented and flexible constitution.<sup>14</sup> But if a constitution is understood to be a normative institution, which informs the legitimate exercise of public power, then a descriptive analysis only takes us so far. A deeper inquiry into constitutional principle is essential for any complete understanding of a constitution.<sup>15</sup>

There are good reasons to understand the New Zealand constitution in terms of a normative as well as a descriptive dimension. The demonstrable legitimacy of public power is something to which all states aspire. If New Zealand claims constitutional government on the international stage, then it is fair to assume that it is asserting something more profound than the mere existence of government institutions. To be meaningful, any such claim must involve a distinctly normative contention; namely, that the exercise of public power by the New Zealand state is legitimate. This is to engage the second, more modern interpretation of a constitution, which suggests strongly that the distinction between descriptive and normative constitutionalism is important.<sup>16</sup> Accordingly, if we wish to claim constitutional government in respect of New Zealand’s constitutional arrangements, then we are directly concerned with establishing the legitimacy of public power.

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10 Matthew SR Palmer “What is New Zealand’s Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office-holders” (2006) 17 PLR 133 at 134. Palmer appears to prefer the term “perspective” to the term “theory” when discussing constitutional realism, although if a distinction between the two terms is intended the nature of that distinction is not clarified.

11 Matthew SR Palmer “New Zealand Constitutional Culture” (2007) 22 NZULR 565 at 566 (footnote omitted).

12 See generally Palmer, above n 10.

13 Matthew SR Palmer “Using Constitutional Realism to Identify the *Complete* Constitution: Lessons from an Unwritten Constitution” (2006) 54 Am J Comp L 587 at 634–635.

14 Palmer, above n 10, at 141.

15 Palmer does apply his theory of constitutional realism in an effort to identify the fundamental “norms” of New Zealand’s constitution, but this analysis is of limited value in the current context given the descriptive rather than normative character of Palmer’s academic project. Accordingly, Palmer’s use of the term “norm” is somewhat confusing, as it appears to refer to usual (that is, normal) constitutional practice rather than fundamental constitutional principle: see Palmer, above n 11.

16 Suri Ratnapala “The Idea of a Constitution and Why Constitutions Matter” (1999) 15 Policy 3 at 3.



## B. *Constitutional Legitimacy*

The recognition of substantive limits on the exercise of public power provides a normative basis for claiming constitutional legitimacy. A constitutional government is “one that *limits* the powers of public authorities”.<sup>17</sup> This is what makes a constitution so important: “it seeks to limit what has historically been the most coercive power exercised in a society – the power of government”.<sup>18</sup> Internationally, the basic tenets of constitutional government are largely accepted, and the need for substantive limits on the exercise of public power to secure constitutional legitimacy can be demonstrated through analysis of these fundamental tenets. It follows that limits on the exercise of public power are important for any state claiming constitutional government, including New Zealand.

In the context of a modern liberal democracy, constitutional government is often recognised as comprising at least four salient features:<sup>19</sup>

1. the recognition of constitutional norms based on substantive values;
2. supremacy of those constitutional norms over all forms of the exercise of public power, including the exercise of the legislative function;
3. independent adjudication of the exercise of public power for compliance with those constitutional norms; and
4. entrenchment of those constitutional norms against change by ordinary legal and political processes.

The first of these features is simply a restatement of the modern, normative understanding of a constitution discussed above.<sup>20</sup> That modern understanding recognises that fundamental ideals and normative principles underpin any exercise of public power purporting to be genuinely “constitutional”. Accordingly, the recognition of constitutional norms, based on substantive values, is a key feature of modern constitutional government that may be taken as relatively uncontroversial.

That the remaining three features are relevant to constitutional government in all modern democratic contexts is a claim that is more difficult to substantiate in a manner that will satisfy everyone. The list clearly owes an intellectual debt to the modern tradition of an entrenched, fundamental written constitution. It is right to question whether constitutions derived from the Westminster tradition are also compatible with such features.<sup>21</sup> However, as Bogdanor has noted, there is a lack of normative analysis at the level of fundamental principle within the Westminster tradition.<sup>22</sup> Alternative means of understanding constitutional government in a meaningful *normative* sense are not obvious within that tradition.

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<sup>17</sup> At 3 (emphasis added).

<sup>18</sup> Geoffrey WR Palmer and Matthew SR Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, Auckland, 2004) at 4.

<sup>19</sup> See, for example, Barak Cohen “Empowering Constitutionalism with Text from an Israeli Perspective” (2003) 18 *Am U Int'l L Rev* 585 at 586. See also Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at [1.5.8].

<sup>20</sup> See pt II.A “Beyond Descriptive Constitutional Analysis”.

<sup>21</sup> Richard Ekins, for example, in a jurisprudential rather than a constitutional context, has strongly questioned the applicability of reasoning from fundamental principle with the Westminster tradition's distinctly “Hartian” character: see Richard Ekins “Judicial supremacy and the rule of law” (2003) 119 *LQR* 127 at 135. A similar objection might be raised in the present context.

<sup>22</sup> Bogdanor, above n 9.

Further, the above list of features is not as alien to the Westminster tradition as may first appear. For example, the first three features listed above do an excellent job of describing judicial review of administrative decision-making for consistency with fundamental common law principles and values.<sup>23</sup> These principles and values can even be “entrenched”, or resistant to change by ordinary processes, as cases such as *Anisminic* demonstrate, which implicates the final feature listed above.<sup>24</sup> The key issue is not the nature of the framework suggested by the above list, but the extension of this framework to the legislative function.

If the recognition of constitutional norms is taken seriously, then it is clear that the supremacy of those constitutional norms over all forms of the exercise of public power, the independent adjudication of the exercise of public power and the entrenchment of those constitutional norms against change by ordinary means are necessary to ensure that those constitutional norms are afforded respect within any particular constitutional framework. Anything less would risk paying lip service to fundamental principles, with the result that “[d]ay-to-day expediency becomes the only guide for action”.<sup>25</sup> The above list provides a basis for understanding how normative standards may be given effect within a particular constitutional framework, which the Westminster tradition generally overlooks. This list of features also has the advantage of being relatively international in character, which is the primary context in which claims of constitutional government are likely to be made. It therefore serves as a useful point of departure for analysing how to establish the constitutional legitimacy of the exercise of public power.

If these features of constitutional government are accepted, then the need for substantive limits on the constitutional exercise of public power in order to secure legitimacy becomes obvious. The three ways in which constitutional norms are recognised – supremacy of those constitutional norms over the exercise of public power, independent adjudication of the exercise of public power, and entrenchment of those constitutional norms against change by ordinary means – essentially translate constitutional norms into limits based on substantive principles and values. Substantive limits on the exercise of public power are therefore rightly described as an “essential quality” of constitutional government,<sup>26</sup> and they provide a degree of constitutional legitimacy to the exercise of public power. It would, therefore, be wrong to assume that in a state with an unwritten constitution, such as New Zealand, limits on the legitimate exercise of public power are irrelevant. That contention comes close to rejecting the relevance of constitutional government in the New Zealand context, which is much further than most constitutional commentators would be willing to go. The principle seems to be universal; its application in practice, however, may prove to be rather more dependent on constitutional context.

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23 Importantly, the analogy with administrative law standards holds whether one subscribes to the common law or ultra vires theory of judicial review.

24 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (UKHL). See also below at pt IV.C “Fundamental Human Rights” and the cases cited therein.

25 MJC Vile *Constitutionalism and the Separation of Powers* (Clarendon Press, Oxford, 1967) at 237. This statement was originally made in the specific context of the separation of powers, but it would appear to be equally applicable to fundamental constitutional principles in general.

26 McIlwain, above n 7, at 22.

### III. PARLIAMENTARY SOVEREIGNTY

Parliamentary sovereignty is a distinctive characteristic of Westminster constitutional systems, including New Zealand.<sup>27</sup> As noted above, the extension of the tenets of constitutional government to the legislative function is controversial, and this is largely because it would appear to qualify Parliament's otherwise unfettered legislative authority.

This part provides an account of parliamentary sovereignty as understood in a New Zealand context to demonstrate that the doctrine is *prima facie* in tension with the idea of constitutional limits on the exercise of public power. As a result, reconciling the idea of constitutional limits with New Zealand's distinctive constitutional arrangements is likely to prove less than straightforward.

Traditionally, parliamentary sovereignty was understood to be virtually absolute, admitting no formal limits at all on the exercise of the legislative function. Dicey provided the classical statement of the doctrine,<sup>28</sup> and the courts have confirmed that this approach applies in contemporary New Zealand.<sup>29</sup>

... the constitutional position in New Zealand ... is clear and unambiguous. Parliament is supreme and the function of the Courts is to interpret the law as laid down by Parliament. The Courts do not have a power to consider the validity of properly enacted laws.

This position is fundamental, perhaps even axiomatic, to an orthodox understanding of New Zealand's constitution.<sup>30</sup>

This traditional view has, however, come under strain from growing recognition of the possibility that Parliament can restrict the "manner and form" in which it (and future Parliaments) pass legislation. The manner and form theory holds that Parliament's legislative actions are subject to legal rules, which Parliament as a legally sovereign institution may amend.<sup>31</sup> Dicey rejected this view on the basis that no limitations on Parliament's legislative power, whether procedural or substantive, could be legally effective. Accordingly, if manner and form restrictions are recognised in New Zealand, then this represents something of a departure from a "pure" Diceyan view of parliamentary sovereignty.

The extent of any such departure from the understanding that parliamentary sovereignty is completely unfettered has obvious implications for inquiries into the recognition of limits on constitutional authority. It is interesting to note that there are indications that the prevailing academic view is coalescing around support for the theory that Parliament can at least place

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27 Section 15(1) of the Constitution Act 1986 affirms that the New Zealand Parliament has "full power to make laws", while s 3(2) of the Supreme Court Act 2003 records New Zealand's "continuing commitment" to "the sovereignty of Parliament".

28 V Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan & Co, London, 1959) at 39–40.

29 *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323 (HC) at 330; cited with approval in *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA) at 157. Parliament's legislative authority also is not limited by the Crown's residual legislative prerogative: Joseph, above n 19, at 491–492.

30 KJ Scott *The New Zealand Constitution* (Clarendon Press, Oxford, 1962) at 39; Joseph, above n 19, at 487.

31 Richard Ekins "Acts of Parliament and the Parliament Acts" (2007) 123 LQR 91 at 100. The phrase "manner and form" appears to derive from the text of the Colonial Laws Validation Act 1865 (Imp), s 5.

procedural restrictions on itself.<sup>32</sup> The basis for this collective view is, however, not immediately obvious. Support for the manner and form theory relies in part on the fact that the New Zealand Parliament has previously purported to enact manner and form restrictions on the passage of future legislation. The Electoral Act 1993 entrenches certain “reserved provisions”, which can only be appealed or amended by a majority of 75 per cent of the members of the House of Representatives or a bare majority of electors polled at a referendum.<sup>33</sup> However, the legal effectiveness of this purported entrenchment may be more apparent than real. At the time of enactment, it was expressly conceded that the “entrenched” provisions would not be legally effective (because Parliament cannot bind itself), but were designed only to place strong moral pressure on any subsequent government proposing amendment.<sup>34</sup> The weight that may be afforded to this example is, therefore, questionable.

Support for the manner and form theory also derives from the jurisprudence of the courts. There is limited New Zealand authority that supports the view that manner and form restrictions are legally effective.<sup>35</sup> However, this jurisprudence does not appear to have satisfactorily answered Salmond’s point, extended by Wade, that judicial obedience to legislation is the “ultimate legal principle” of the constitution.<sup>36</sup> Parliamentary sovereignty is a political fact rather than a legal rule. Parliament alone cannot change this political fact.<sup>37</sup> It is, of course, possible for this political fact to change, but it is far from clear that such a change has occurred so that the courts will recognise manner and form entrenchment of legislation. The prevailing opinion within New Zealand society generally appears to be one of significant mistrust of entrenched legislation that cannot be unwound by Parliament.<sup>38</sup> Accordingly, the preferred view regarding the legal effectiveness of manner and form restrictions is that there can be no certainty on whether the courts would uphold any such restriction in any particular case.<sup>39</sup>

The lack of judicial acceptance of the manner and form theory suggests a Diceyan view of unfettered parliamentary sovereignty, which admits no legal restrictions on legislative capacity, still holds significant sway in New Zealand. Even if the manner and form theory is accepted, as the weight of academic opinion suggests, it is likely that perceived reasons for the imposition of

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32 See, for example, Sian Elias “Something Old, Something New: Constitutional Stirrings and the Supreme Court” (2004) 2 NZJPIL 121 at 136; Matthew Palmer, Claudia Geiringer and Nicola White “Appendix F: Parliamentary Sovereignty” in *Inquiry to Review New Zealand’s Existing Constitutional Arrangements: Report of the Constitutional Arrangements Committee* (presented to the House of Representatives, 1 24A, August 2005) at 147; Joseph, above n 19, at 548.

33 See Electoral Act 1993, s 268, carrying forward the provisions of the Electoral Act 1965, s 189.

34 (1956) 310 NZPD 2839–2840. Theoretical support for this view is provided in Scott, above n 30, at 11–16. See also *Report of the Constitutional Reform Committee* [1952] AJHR I.18.

35 *Shaw v Commissioner of Inland Revenue*, above n 29, at [13]; *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [91]; *Carter v Police* [2003] NZAR 315 (HC) at 325.

36 HWR Wade “The Basis of Legal Sovereignty” [1952] 13 CLJ 172 at 187–188, citing John Salmond *Jurisprudence* (10th ed, Sweet & Maxwell, London, 1947) at 155.

37 Wade, above n 36, at 189.

38 See Justice and Law Reform Select Committee “Final Report on a White Paper on a Bill of Rights for New Zealand” [1988] AJHR I8C.

39 The author understands this position to be consistent with that adopted in JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 21.

such procedural limitations will be highly influential as to the result in particular cases.<sup>40</sup> This suggests that any limits on Parliament's legislative capacity that result from the acceptance of the manner and form theory are likely to be modest, and will not trespass into substantive restrictions on Parliament's exercise of the legislative function:<sup>41</sup>

Consider, for example ... a law as to form providing some existing statute can be amended or repealed only by express words, and not mere implication. If the courts were prepared to enforce those laws, by invalidating any statute enacted contrary to them, Parliament might no longer be fully sovereign in Dicey's sense. But it would still be fully sovereign in the more important sense of being free to change the substance of the law however and whenever it should choose.

Based on an orthodox interpretation of parliamentary sovereignty, Parliament remains free from any meaningful substantive limitations on the exercise of its legislative function in practice. In fact, "Parliament can by legislation override the core elements of representative government, the basic tenets of the rule of law, and fundamental human rights".<sup>42</sup> Such a result would be in clear tension with the ideal of constitutional government, based on substantive limits on the legitimate exercise of public power articulated in pt II. The question explored in the remainder of this paper is whether this acceptance of parliamentary sovereignty requires a rejection of the idea of substantive limits on the legitimate exercise of public power.

#### IV. CONSTITUTIONAL LIMITS

Despite New Zealand's commitment to a relatively absolute interpretation of parliamentary sovereignty, the idea of constitutional limits on public power, including legislative power, is pervasive. In fact, it is often recognised that the New Zealand Parliament's theoretical sovereign power far exceeds Parliament's actual ability to exercise that power in practice.<sup>43</sup> As a result, orthodox sovereignty theory has been unable to prevent the theme of limits on the constitutional exercise of public power taking hold in New Zealand. For example, the introduction to the *Cabinet Manual 2008* expressly acknowledges that Parliament has "full power to make laws",<sup>44</sup> but then goes on to state that:<sup>45</sup>

[a] balance has to be struck between majority power and minority right, between the sovereignty of the people exercised through Parliament and the rule of the law, and between the right of elected governments to have their policies enacted into law and the protection of fundamental social and constitutional values. The answer cannot always lie with simple majority decision making. Indeed, those with the authority to make majority decisions often themselves recognise that their authority is limited by understandings of what is basic in our society, by convention, by the Treaty of Waitangi, by international obligations and by ideas of fairness and justice.

40 Joseph, above n 19, at 567–568. See also AW Bradley and KD Ewing *Constitutional and Administrative Law* (15th ed, Pearson Longman, New York, 2011) at 68.

41 Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, Oxford, 1999) at 15. See also *Bribery Commissioner v Ranasinghe* [1965] AC 172 (PC) at 200.

42 EW Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 5 at 15.

43 See Palmer and Palmer, above n 18, at 156; BV Harris "The Constitutional Future of New Zealand" [2004] NZ Law Review 269 at 277.

44 Cabinet Office *Cabinet Manual 2008* at 1.

45 At 4.

This part undertakes a survey of primary and secondary sources in respect of the New Zealand constitution to determine the extent to which substantive limits on the exercise of public power are perceived to be a feature of New Zealand's constitutional arrangements. The analysis is coloured by the conclusion reached in pt III that an orthodox understanding of parliamentary sovereignty is *prima facie* inconsistent with the concept of substantive limits. Accordingly, a key focus of this inquiry is the actual or perceived constitutional limits on the exercise by Parliament of the legislative function.

Without purporting to be exhaustive, the following list represents the dominant themes within which the idea of substantive limits on constitutional, including parliamentary, authority can be found:

- representative democracy;
- constitutional convention;
- fundamental human rights;
- the rule of law;
- the nature of the judicial function; and
- the Treaty of Waitangi.

Each of these themes is examined below.

### *A. Representative Democracy*

Representative democracy is “one of the fundamental generic means by which Western constitutions meet the challenge of constraining the abuse of the coercive power of the state”.<sup>46</sup> Parliament's nature as a representative institution undoubtedly places practical restrictions on what can feasibly be achieved through legislation. Factors such as “the weight of public opinion, particularly as felt by politicians through elections” are important for constraining parliamentary power in practice.<sup>47</sup> Representative democracy also provides a normative justification for parliamentary sovereignty, as it locates the justification for sovereign power in the fact that Parliament is designed to give effect to the will of the electorate.<sup>48</sup> It is therefore possible that the nature of representative democracy itself places effective limits on the legitimate exercise of the legislative function.

Dicey considered this to be the case. He identified two inherent limits on Parliament's exercise of the legislative function: an “external limit” in the form of the “possibility of popular resistance”, and an “internal limit” that Parliament will not pass legislation inimical to its very character.<sup>49</sup> The external limit is related to, but distinct from, the idea that Parliament is accountable to the electorate. The risk that the people might wilfully disobey an Act of Parliament places a practical limit on the subject matter in respect of which a pragmatic Parliament may be willing to legislate, even if a justification for such legislation could be provided by popular mandate.<sup>50</sup> Dicey's internal limit is just as important: as a human institution, Parliament is constrained by the morality of its members. For that reason, Parliament would not pass legislation that its members would find

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<sup>46</sup> Palmer, above n 11, at 580.

<sup>47</sup> Palmer and Palmer, above n 18, at 156.

<sup>48</sup> See Palmer, above n 11, at 582.

<sup>49</sup> At 79.

<sup>50</sup> At 76–77.

morally abhorrent. Dicey placed great stock in this internal limit on parliamentary sovereignty, considering it to be as powerful, if not more so, than the external limit on legislative power.<sup>51</sup>

The existence of these practical limits has been considered essential to the desirability of parliamentary sovereignty in a modern context. Goldsworthy has argued that Dicey's external and internal limits "make many conceivable abuses of the power virtually impossible".<sup>52</sup> There is a risk however, that Goldsworthy has overstated the case. It is not at all clear whether the internal and external limits on parliamentary sovereignty identified by Dicey are, by themselves, sufficient to ensure constitutional government. Indeed, Dicey himself suggested that a despot would also be subject to the very same external and internal limitations on the exercise of public power.<sup>53</sup> In reality, therefore, these "limits" tell us very little about the principles underpinning Westminster constitutionalism or the nature of Parliament's legislative sovereignty.

Dicey did, however, go further to make a specific claim about Westminster constitutionalism. It is not the existence of the internal and the external limits themselves, but the alignment of those limits that characterises the Westminster constitution. Here we return to the idea of representative democracy. The necessary alignment between the external and the internal limit results from Parliament's nature as a representative institution. According to Dicey, representative government ensures that the internal limit and the external limit are aligned to the greatest extent possible.<sup>54</sup> The common morality between Parliament and the electorate, achieved by representative democracy, places a principled limit on Parliament's scope to act.

Dicey's reconciliation of Parliament's unfettered legal power, with practical and moral constraints stemming from the reality of the politics of Westminster constitutionalism, is a superficially attractive account of constitutional government. However, there are at least three reasons why Dicey's account of representative democracy is not, by itself, sufficient to provide effective constitutional limitations on the exercise of public power. The first is that Dicey's account assumes that the particular mode of representative democracy applied in the constitutional system is workable. Whether any electoral system is workable in a democratic sense is a matter of empirical investigation and cannot simply be assumed. Such an investigation is not pursued here.<sup>55</sup> It is relevant, however, that Dicey also did not entertain this question.

Second, even if Parliament is effectively held to account by the will of the people in a manner that is representative, democratic and effective, this merely shifts the issue of unrestricted political power from Parliament to the electorate. The good nature and common sense of the people may be sufficient in many cases, but this is a political rather than constitutional safeguard as traditionally understood.<sup>56</sup> If a matter is reduced to nothing more than a political convenience or advantage, it cannot be described as "constitutional" without depriving that concept of at least some of its

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51 At 80.

52 Jeffrey Goldsworthy "Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty" (2005) 3 NZJPIL 7 at 31.

53 Dicey, above n 28, at 78.

54 At 83–84.

55 In many states, voter apathy or ignorance, or even vote rigging and violence, may mitigate against the effectiveness of representative democracy. Pertinently in a contemporary New Zealand context, the Electoral Commission is currently undertaking a review of New Zealand's mixed member proportional voting system for the House of Representatives pursuant to the Electoral Referendum Act 2010, s 75.

56 Thomas, above n 42, at 15. See also Dicey, above n 28, at 72–73.

meaning.<sup>57</sup> In many cases, political safeguards – based on a line of accountability that traces through Parliament to the electorate – may simply be too blunt to recognise constitutional ideals.<sup>58</sup>

Finally, it must be noted that “representative democracy” is an abstract, and perhaps ambiguous, concept. The High Court of Australia has used this concept to invalidate Commonwealth legislation that prohibited the broadcasting of political advertising for a period of time before an election.<sup>59</sup> The decision was justified on the basis that freedom to communicate ideas was essential to the electoral contest that forms the basis of representative democracy.<sup>60</sup> While the High Court’s enthusiasm for the concept of representative democracy is difficult to challenge, the result in that case has been criticised as undermining the level playing field necessary for a meaningful and effective contest of political ideas.<sup>61</sup> The concept may have different implications for different people, and is potentially open to abuse as a platitude that justifies all but the most egregious state action. For these reasons, the idea that representative democracy is necessary to secure constitutional government appears to start from the wrong premise.<sup>62</sup> One of the key aims of constitutional government is to secure representative democracy in a tangible sense, which requires the articulation and protection of prior tangible principles and ideals within the constitutional structure. Vague appeals to representative democracy are simply unable to achieve this.

### B. *Constitutional Conventions*

One of the key distinctions between written and unwritten constitutions is the demonstrable reliance on constitutional conventions in unwritten constitutional systems.<sup>63</sup> Constitutional conventions are “observed norms of political behaviour that are generally acknowledged to have attained a significance and status worthy of general acknowledgment”.<sup>64</sup> These norms are enforced through “the pressure of informed public opinion, politics, and history”.<sup>65</sup> Where they apply, constitutional conventions are generally considered to be binding on those who exercise public power. Importantly, the limits required by constitutional conventions are often justified on the basis of respect for, and consistency with, representative democracy. Constitutional conventions may therefore represent a means of linking the abstract ideal of representative democracy with substantive limits on the exercise of public power based on tangible (and actionable) constitutional principles.

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57 FF Ridley “There is No British Constitution: A Dangerous Case of the Emperor’s Clothes” (1988) 41 *Parliamentary Affairs* 340 at 356.

58 RQ Quentin-Baxter “Themes of Constitutional Development: The Need for a Favourable Climate of Discussion” (1985) 15 *VUWLR* 12 at 22.

59 *Australian Capital Television Pty Ltd v Commonwealth of Australia* (1992) 177 CLR 106 (HCA).

60 At 138–140.

61 Stephen Sedley “Human Rights: a Twenty-First Century Agenda” (1995) *Public Law* 386 at 393–394; Thomas, above n 42, at 28–29.

62 Compare Joel Colon-Rios “New Zealand’s Constitutional Crisis” (2011) 24 *NZULR* 448.

63 There is, however, a growing appreciation of the role of principles, norms and conventions that do not have an explicit basis in the canonical constitutional text in written constitutional systems: See, for example, Benjamin L Berger “White Fire: Structural Indeterminacy, Constitutional Design, and the Constitution Behind the Text” (2008) 3 *Journal of Comparative Law* 249.

64 Palmer, above n 11, at 621. The circularity in this definition is patent, but presumably deliberate (Palmer himself describes the definition as “cynical”) and perhaps, given the inchoate nature of constitutional conventions, inescapable.

65 Palmer and Palmer, above n 18, at 5.



The acceptance of a constitutional convention suggests that constitutional actors should not be able to rely on the full extent of their legal discretion when discharging their constitutional function. It has been put this way with respect to the British constitution:<sup>66</sup>

The British monarch, for example, has the legal power to prevent a bill that has passed both houses of Parliament from becoming law by withholding the royal assent. Similarly, the monarch may dismiss a ministry that still has a working majority in Parliament. Britons would describe such actions as “unconstitutional”, indeed as gross violations of their constitution.

Such substantive limitations on the legitimate exercise of constitutional authority appear to apply equally in the New Zealand context.<sup>67</sup> Constitutional conventions therefore do act to ensure that legal power is exercised in a constitutionally legitimate manner, in some important circumstances.

However, there does not appear to be any consensus on whether constitutional conventions place any limit on Parliament’s exercise of its legislative power. Where limits of this nature have been suggested, they do not appear to have garnered either empirical or academic support. Marshall, for example, purported to identify a “vague but clearly accepted conventional rule” that Parliament does not enact tyrannous or oppressive legislation.<sup>68</sup> If demonstrated or accepted, the existence of such a convention would have significant implications for the constitutionality of legislative acts. However, no firm evidence supporting the existence of such a convention has been provided, and the notion of a convention governing the discharge of the legislative function generally has been labelled a “disputable one” in the New Zealand context.<sup>69</sup> A general constitutional limit of this kind based on convention cannot therefore be assumed to act as an effective restraint on Parliament’s sovereign power.

An alternative possibility for influencing Parliament’s legislative power, through the medium of convention, is the doctrine of mandate. The doctrine of mandate describes the view that the government may only pursue significant policy reforms if the issue has been put to the electorate as part of the policy platform, contested at a general election. There is a strong democratic basis for the doctrine.<sup>70</sup> However, even if this argument were accepted, it does not appear that the doctrine of mandate has taken hold in New Zealand. The doctrine may once have applied in respect of significant constitutional reform,<sup>71</sup> but the contemporary view appears to be that the doctrine took on a political rather than a constitutional character.<sup>72</sup> The advent of a proportional representation system appears to have further limited the effectiveness of any mandate requirement for all but

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66 Thomas C Grey “Constitutionalism: An Analytic Framework” in J Ronald Pennock and John W Chapman (eds) *Constitutionalism: Nomos XX* (New York University Press, New York, 1979) at 192.

67 Joseph, above n 19, at 223–224. While neither specific example is cited, both appear to be consistent with the “cardinal convention” recognised in New Zealand that the sovereign exercises its powers on and in accordance with advice from a ministry that enjoys the confidence of the House of Representatives.

68 Geoffrey Marshall *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press, Oxford, 1984) at 9. Something similar appears to be hinted at in Quentin-Baxter, above n 58, at 15.

69 Joseph, above n 19, at 235.

70 Indeed, there appear to be shades of Dicey’s theory that representative democracy reconciles the internal and external morality of Parliament in the principles underpinning the doctrine.

71 Scott, above n 30, at 52–54.

72 Joseph, above n 19, at 530. See also Ridley, above n 57, at 352.

the most exceptional constitutional changes.<sup>73</sup> As such, the mandate doctrine appears to do little to influence the exercise of Parliament's legislative function in practice.

In general, therefore, it appears that Parliament is not subject to constitutional conventions that directly affect the exercise of its legislative prerogative. Even if substantive obligations based on convention could be demonstrated, the ability of such obligations to influence constitutional outcomes in practice must remain open to question. Conventions are not always obeyed,<sup>74</sup> and respect for convention may have eroded significantly in recent years as community standards of proper conduct have been gradually replaced by individual morality.<sup>75</sup> Discussion of constitutional conventions in New Zealand suggests that acceptance of the obligations by the politicians themselves is likely to be the determinative factor.<sup>76</sup> Any convention based on substantive obligations alone is therefore unlikely to be sufficient to meaningfully promote constitutional legitimacy.

However, conventions deal not only with obligations, but also with rights, powers and duties.<sup>77</sup> Where the discharge of constitutional functions by other actors of government is seen to be contingent on Parliament's adherence to constitutional convention, the practical restraint on Parliament may be real and effective. It is not the inherent nature of conventions themselves (in the sense of a political rather than legal rule), but the distribution of power within those conventions that serves as an effective constitutional device. In discussing the potential for abuse of convention by Parliament, which he suggests is very unlikely, Quentin-Baxter argues:<sup>78</sup>

[W]e may be a little less sure that a government facing electoral defeat would not be tempted to steal a march on its successor in some unconstitutional way. Nevertheless, the Governor-General's own duty to act on the advice of ministers is also based only upon convention, and does not tie his [or her] hands if ministers persist in a manifestly unconstitutional course of action.

Thus, where adherence (or otherwise) to constitutional convention invites action from other constitutional actors, political reality is likely to strongly incentivise compliance with that constitutional convention.

Whether this is sufficient to "check" Parliament's exercise of the legislative function is a question that remains unanswered. Parliament's legislative sovereignty means that it has little need to rely on other constitutional actors in order to enact laws, which suggests the relevance of convention may be limited. The need for the Sovereign's assent to legislative initiatives proposed by the House of Representatives may, however, be something of an exception. Doubts over whether the Sovereign would assent to proposed legislation that did not satisfy manner and form requirements might ensure compliance with those requirements, but this is highly unlikely to amount to a substantive restriction on Parliament's ability to legislate. In this sense, constitutional conventions may provide a reason to give pause for thought in respect of Parliament's exercise of legislative function by

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73 See Joseph, above n 19, at 531.

74 Marshall, above n 68, at 6.

75 Nevil Johnson "Law, Convention, and Precedent in the British Constitution" in David Butler, Vernon Bogdanor and Robert Summers (eds) *The Law, Politics, and the Constitution: Essays in Honour of Geoffrey Marshall* (Oxford University Press, Oxford, 1999) at 140.

76 Joseph, above n 19, at 250. This interpretation appeals to the positive morality view of conventions, rather than the critical morality view: see Marshall, above n 68, at 11–12.

77 Marshall, above n 68, at 7.

78 Quentin-Baxter, above n 58, at 19.

highlighting the gap between legal and constitutional authority. This opportunity for reflection appears vital to a healthy version of Westminster constitutionalism.

### C. Fundamental Human Rights

Respect for fundamental human rights has been described as the international language of constitutional government.<sup>79</sup> Fundamental rights resonate strongly with liberal ideals that prioritise the freedom and sanctity of the individual. Constitutional arrangements purporting to adhere to that political tradition are obliged to address the issue of human rights. This is as true of New Zealand as any state with a written constitution or an entrenched constitutional bill of rights.<sup>80</sup> In the absence of a written constitution protecting fundamental rights in New Zealand, substantive limits on Parliament's ability to pass rights-incompatible legislation may have a basis in the common law, or in statute, or may be implied directly from New Zealand's constitutional arrangements and principles.

#### 1. Common law rights

There has long been a strand of jurisprudence within the common law that fundamental rights may be affirmed in the face of legislation that might abrogate such rights. This jurisprudence is founded on the enduring idea that the common law is prior to, and therefore controls the exercise of, Parliament's legislative function.<sup>81</sup> It has also given rise to a modern line of cases in New Zealand that at least hints at a similar result. After flirting with the idea of entrenched common law rights in a number of judgments,<sup>82</sup> Cooke J suggested explicitly that "[s]ome common law rights presumably lie so deep that even Parliament could not override them".<sup>83</sup> Writing extra-judicially, Cooke J subsequently explained that parliamentary supremacy remains subject to only very broad limits, and the substantive rights and freedoms that limit Parliament's sovereign power are few.<sup>84</sup> However, the fundamental point underpinning Cooke J's dicta is that democracy necessarily entails some limit on the exercise of legislative power.

Cooke J's dicta have not been directly applied by any New Zealand court, and have been strongly criticised on the ground that judicial respect for legislation is itself fundamental to the constitutional order:<sup>85</sup>

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79 Philip A Joseph "The Higher Judiciary and the Constitution: A View from Below" in Rick Bigwood (ed) *Public Interest Litigation: New Zealand Experience in International Perspective* (LexisNexis NZ, Wellington, 2006) at 214.

80 Indeed, New Zealand rights jurisprudence has been directly influenced by international trends in human rights recognition: see *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA). For discussion see Claudia Geiringer "Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66.

81 *Dr Bonham's Case* (1610) 8 Co Rep 107; 77 ER 638 (CP). For discussion of Dr Bonham's case and modern authorities see Karen Grau "Parliamentary Sovereignty: New Zealand – New Millennium" (2002) 33 VUWLR 351.

82 See *L v M* [1979] 2 NZLR 519 (CA) at 527; *Brader v Ministry of Transport* [1981] 1 NZLR 73 (CA) at 78; *New Zealand Drivers Association v New Zealand Road Carriers* [1982] 1 NZLR 374 (CA) at 390; *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA) at 121. For discussion of this "quiet revolution" see John L Caldwell "Judicial Sovereignty – A New View" [1984] NZLJ 357.

83 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398.

84 Robin Cooke "Fundamentals" [1988] NZLJ 158 at 164–165.

85 Michael Kirby "Lord Cooke and Fundamental Rights" in Paul Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 331 at 353. See also *Builders Labourers Federation v Minister for Industrial Relations* (1986) 7 NSWLR 372 (NSWSC) at 406.

[T]he principle of judicial respect for Parliament is to be taken as one that lies so deep that Courts will just accept it so long as Parliament has acted as a Parliament and within power ... it is good that Lord Cooke has sparked this debate but heresy is heresy. And it may be dangerous heresy besides.

However, his dicta appear to have been accepted elsewhere as an important dimension of New Zealand's unwritten constitution.<sup>86</sup> As a result, "it is possible we will come to recognise substantive limitations upon the competence of [P]arliament to make laws in breach of ... human rights".<sup>87</sup> The guarded nature of the language employed in Cooke J's judgments has been noted as appropriate and even uncontroversial in the context of the close relationship between Parliament and the Executive characteristic of New Zealand government.<sup>88</sup> It seems likely, therefore, that Cooke J's dicta have had some influence on understandings of the legitimate exercise of legislative power in New Zealand.

While the New Zealand courts have not struck down legislation which is inconsistent with fundamental common-law rights, the courts may still seek to give effect to fundamental rights in the face of an apparent parliamentary intention to the contrary. Such "creative interpretation" by the courts has long been an established part of orthodox constitutional practice.<sup>89</sup> In confronting the claim that the courts do in fact strike down legislation that is inconsistent with fundamental principles, Dicey responded:<sup>90</sup>

Language which might seem to imply this [overruling of legislation on moral grounds] amounts in reality to nothing more than the assertion that the judges, when attempting to ascertain what is the meaning to be affixed to an Act of Parliament, will presume that Parliament did not intend to violate the ordinary rule of morality, or the principles of international law, and will therefore, whenever possible, give such an interpretation to a statutory enactment as may be consistent with the doctrines of both private and international morality.

This approach is consistent with the principle of legality developed by the United Kingdom courts, where it has been held that "unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law".<sup>91</sup> In *Thorburn v Sunderland City Council*, Laws LJ relied on this line of authority to draw a distinction between "ordinary" and "constitutional" statutes for the purposes of applying the doctrine of implied repeal.<sup>92</sup>

For the repeal of a constitutional Act or the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature's *actual* – not imputed, constructive or presumed – intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to the effect the result contended for was irresistible.

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86 Harris, above n 43, at 277.

87 Sian Elias "Sovereignty in the 21st Century: Another Spin on the Merry-go-round" (2003) 14 PLR 148 at 160.

88 Grau, above n 81, at 361.

89 It might be more pejoratively labelled judicial "activism" by some: see DF Dugdale "Framing Statutes in an Age of Judicial Supremacism" (2000) 9 Otago LR 603 at 608.

90 Dicey, above n 28, at 62–63.

91 *R v Secretary for the Home Department, ex parte Pierson* [1998] AC 539 (HL) at 575. See also *R v Secretary for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL).

92 *Thorburn v Sunderland City Council* [2003] QB 151 at [63]. For a fuller account of the case see Rebecca Prebble "Constitutional Statutes and Implied Repeal: The Thorburn Decision and the Consequences for New Zealand" (2005) 36 VUWLR 291.

Accordingly, “[o]rdinary statutes may be impliedly repealed. Constitutional statutes may not”.<sup>93</sup> The New Zealand courts appear ready to adopt a similar approach.<sup>94</sup> Consistent with Dicey’s statement above, the common law provides a mechanism for the protection of fundamental human rights that does not contemplate a “fatal assault” on parliamentary sovereignty as it is traditionally understood.<sup>95</sup> It remains a possibility that the New Zealand courts may develop a principle of legality jurisprudence in preference to Cooke J’s dicta, given the potential to reconcile the principle of legality with parliamentary sovereignty.<sup>96</sup>

### 1. Statutory rights

Fundamental rights also receive affirmation and recognition in New Zealand through statute. In particular, the New Zealand Bill of Rights Act 1990 (NZBORA) affirms a number of civil and political rights and freedoms that apply against the legislative, executive and judicial branches of government, as well as any other person discharging a public function or duty. In this sense, NZBORA provides a “benchmark for acceptable governmental conduct”.<sup>97</sup>

The New Zealand courts appear to treat NZBORA rights in a manner consistent with the principle of legality, often “reading down” statutory provisions that appear to conflict with NZBORA rights and freedoms. In *Zaoui v Attorney-General*,<sup>98</sup> for example, the Supreme Court found that the right to freedom from torture and the right not to be deprived of life – both fundamental human rights – should be given effect so that a refugee with security risk status would not be deported. To achieve this result, s 114K of the Immigration Act 1987, which required the Minister of Immigration to make a decision on whether to deport based on confirmation of a security risk certificate in respect of a refugee, was effectively stripped of legal effect.<sup>99</sup> By this means, the courts can give an appropriately broad interpretation to NZBORA rights and freedoms.

It has been argued that the rights and freedoms affirmed in NZBORA amount to binding, substantive restrictions on Parliament’s exercise of the legislative function. The basis for this argument is that NZBORA is expressly stated to apply to “acts done by the legislative [branch] ... of the Government of New Zealand”.<sup>100</sup> Accordingly, NZBORA contains a statutory requirement that “the form and content of legislation” is consistent with the rights and freedoms affirmed by NZBORA.<sup>101</sup> “The only relevant “act” that can be “done” by Parliament, as such, is the passing of

93 *Thoburn v Sunderland City Council*, above n 92, at [63].

94 *R v Pora* [2001] 2 NZLR 37 (CA) at 40–52.

95 John Laws “Constitutional Guarantees” (2008) 29 Statute LR 1 at 6. For comment in the New Zealand context see Petra Butler “Human Rights and Parliamentary Sovereignty in New Zealand” (2004) 35 VUWLR 341 at 361–365.

96 For a list of common law principles and values that are fundamental in the sense that they have implications for the interpretation of legislation that bears on those principles see Burrows and Carter, above n 39, at 320–326. A similar but more (possibly over) extensive list is provided in Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (May 2001) at 49–52.

97 Paul Rishworth “Interpreting and Applying the Bill of Rights” in Paul Rishworth and others *The New Zealand Bill of Rights Act* (Oxford University Press, Melbourne, 2003) at 26.

98 *Zaoui v Attorney-General (No 2)* [2005] 1 NZLR 577 (SC).

99 Claudia Geiringer “Parsing Sir Kenneth Keith’s Taxonomy of Human Rights: A Commentary on Illingworth and Evans Case” in R Bigwood (ed) *Public Interest Litigation* (LexisNexis, Wellington, 2006) at 182.

100 New Zealand Bill of Rights Act 1990 (NZBORA), s 3(a).

101 See Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ, Wellington, 2005) at 87–89.

legislation”.<sup>102</sup> This purported requirement is largely self-enforcing,<sup>103</sup> and there are institutional mechanisms to assist Parliament in meeting this obligation, such as the Attorney-General’s responsibility to vet proposed legislation for potential inconsistencies with NZBORA.<sup>104</sup> But these institutional checks within the parliamentary system do not lessen the purported effect of the legal obligation to act consistently with NZBORA, and are consistent with the position of principle that:<sup>105</sup>

It should never be appropriate to promote legislation or implement a policy that is inconsistent with the Bill of Rights. It must always be remembered that inconsistency with the Bill of Rights necessarily means that the relevant law or policy limits fundamental rights in a manner that cannot be justified in a free and democratic society. The point of the Bill of Rights is to prevent that happening, not to affirm that it can happen.

However, this approach appears to require an acceptance of the manner and form theory of legislation, which, as discussed above,<sup>106</sup> has not yet been accepted in New Zealand. In the absence of support for the manner and form theory, Parliament’s own view is likely to be determinative.<sup>107</sup> Further, the claim that Parliament has a legal obligation not to legislate inconsistently with NZBORA is arguably incorrect as a matter of statutory interpretation. In addition to the legislative history, which included a deliberate move away from supreme law status,<sup>108</sup> the statutory restriction on judicial vindication of NZBORA in the face of an inconsistent enactment may reveal a wider legislative policy “that the Bill of Rights was not to be substantively or remedially superior to other legislation”.<sup>109</sup> Against that broader legislative policy, it has been argued that there is no clear legal obligation on Parliament not to legislate inconsistently with NZBORA rights and freedoms.<sup>110</sup> Therefore, there are reasonable grounds to conclude that NZBORA does not place greater restrictions on the exercise of the legislative function than the fundamental rights recognised at common law.<sup>111</sup>

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102 Paul Rishworth “When the Bill of Rights Applies” in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 72.

103 In this respect, s 4 of NZBORA, which requires the courts not to impliedly repeal or disapply any enactment only because that enactment is inconsistent with NZBORA, does not diminish the nature of the legal obligation imposed on Parliament. Section 4 is concerned only with the consequences of breach of NZBORA by Parliament, not the primary obligation not to act inconsistently: see Rishworth, above n 102, at 72.

104 New Zealand Bill of Rights Act 1990, s 7. The exercise of this function is non-justiciable: see *Boscawen v Attorney-General* [2009] NZCA 12, [2009] 2 NZLR 229. There is also the possibility that the courts may declare legislation to be inconsistent with the rights and freedoms affirmed in NZBORA: see *Moonen v Film & Literature Board of Review* [2000] 1 NZLR 9 at 17.

105 Rishworth, above n 97, at 31.

106 See above II.B “Modern Interpretations: Manner and Form”.

107 Claudia Geiringer “The Dead Hand of the Bill of Rights? Is the New Zealand Bill of Rights Act 1990 a Substantive Legal Constraint on Parliament’s Power to Legislate?” (2007) 11 Otago LR 389 at 414. See also Rishworth, above n 102, at 36–37. There is ample evidence that legislators do not consider themselves to be so bound: see Geiringer, above n 107, at 399.

108 Geoffrey Palmer *A Bill of Rights for New Zealand: A White Paper* [1984–1985] I AJHR A6 at 22.

109 Geiringer, above n 107, at 410.

110 At 411; compare Butler and Butler, above n 101, at 87–89; Rishworth, above n 102, at 72.

111 This position appears to be consistent with the analysis in Claudia Geiringer “The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*” (2008) 6 NZJPIL 59.

## 2. Implied constitutional rights

Finally, fundamental rights may be implied by the nature of a state's constitutional arrangements.<sup>112</sup> Such implied rights are a feature of liberal democracies with written constitutions. For example, in Australia, the courts have identified an implied freedom of political communication as essential to Australia's system of representative government,<sup>113</sup> as well as a limited right to vote based on a universal franchise.<sup>114</sup> Further, the Supreme Court of Canada has identified four "fundamental and organizing principles" of the Canadian constitution: federalism, democracy, constitutionalism (including the rule of law) and respect for minorities.<sup>115</sup> Goldsworthy, a staunch defender of parliamentary sovereignty, has labelled implied constitutional rights as the most serious challenge to parliamentary sovereignty.<sup>116</sup>

Implied constitutional rights may also be a feature of unwritten constitutions. In the United Kingdom, increasing judicial willingness to expressly give effect to fundamental rights has been interpreted as a move by the courts:<sup>117</sup>

... to shift the boundaries of administrative law into the constitutional realm by explicitly endorsing a higher order of rights inherent in our constitutional democracy. These rights emanate not from any implied Parliamentary intent but from the framework of modern democracy within which Parliament legislates.

It has further been suggested that a similar trend has developed in New Zealand law, with human rights (as found in domestic and international sources) and the principles of the Treaty of Waitangi forming the basis for constitutional review.<sup>118</sup> This view has, however, only received limited endorsement,<sup>119</sup> and there do not appear to be any New Zealand authorities that directly support the notion of implied constitutional rights. Fundamental rights have been recognised and protected on the basis of either the common law or orthodox statutory interpretation of Parliament's legislative intention,<sup>120</sup> which is inconsistent with the recognition of rights implied by a democratic constitution independent of legislation.

## D. The Rule of Law

The rule of law is "the very spirit of the constitution we inherit" in New Zealand.<sup>121</sup> The term is often employed as shorthand for the principles of constitutional government, its essence being that law

112 For an international example, see *McGraw-Hinds (Australia) Pty Ltd v Smith* (1979) 144 CLR 633 (HCA) at 670.

113 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (HCA).

114 *Roach v Electoral Commissioner* [2007] HCA 43, (2007) 233 CLR 162.

115 *Reference re Secession of Quebec* [1998] 2 SCR 217 (SCC) at [32].

116 Goldsworthy, above n 52, at 33.

117 Jeffrey Jowell "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] Public Law 671 at 675.

118 Philip A Joseph "Constitutional Review Now" [1998] NZ Law Review 85. See also Joseph, above n 19, at 519–521.

119 See, for example, Palmer and Palmer, above n 18, at 291.

120 See, for example, *R v Pora* [2001] 2 NZLR 37 at [52]. Founding the basis for protection of fundamental rights in Parliament's intention expressly may be in part a result of the higher esteem in which parliamentary sovereignty is held in contemporary New Zealand compared with the United Kingdom: see Andrew Geddis and Bridget Fenton "Which is to be Master?" – Rights-friendly Statutory Interpretation in New Zealand and the United Kingdom" (2008) 25 AJICL 733 at 770–776.

121 Quentin-Baxter, above n 58, at 13.

ought to limit and control otherwise arbitrary power.<sup>122</sup> The term carries significant rhetorical value, is widely recognised in New Zealand case law, and has received statutory acknowledgement.<sup>123</sup>

The rule of law is a notoriously ambiguous concept. It is customary to divide conceptions of the rule of law between those that emphasise either the formal or substantive elements of the concept.<sup>124</sup> Formal conceptions of the rule of law require only that certain procedural requirements are satisfied in order for any given law to be valid and effective. Such conceptions do not consider the rule of law to be a component of substantive political morality.<sup>125</sup> In contrast, substantive conceptions of the rule of law require, in addition to any minimum procedural requirements, that certain substantive values are recognised and protected.<sup>126</sup> The rule of law implications for the legitimate exercise of public power in New Zealand depend on the particular conception that is adopted. As argued above, a meaningful commitment to constitutional government requires a substantive conception of constitutional propriety.<sup>127</sup> A purely formal interpretation of the rule of law may describe little more than the existence of organised public power, which can be taken as characteristic of virtually all constitutional systems.<sup>128</sup> A substantive conception of the rule of law is therefore the focus of this section.

In the United Kingdom, the courts have endorsed a particularly strong substantive conception of the rule of law that may even extend to enforceable limits on parliamentary sovereignty.<sup>129</sup> While the New Zealand courts have also endorsed a substantive conception of the rule of law,<sup>130</sup> they have not gone this far. There is, however, academic support for the rule of law as a substantive constraint on Parliament's legislative function, in addition to other exercises of public power. Joseph has argued that the Westminster constitution is best understood as giving effect to substantive rule of law values, and he developed an account of the rule of law that amounts to a rights-based theory of law and adjudication.<sup>131</sup>

Joseph's scholarship is self-consciously normative.<sup>132</sup> To Joseph, the role of a constitution is to give effect to the rule of law, which provides a link between moral and legal principle.<sup>133</sup> Within this framework, the rule of law gives rise to a form of "institutional morality", which reflects "the

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122 Jeffrey Goldworthy *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, Cambridge, 2010) at 60.

123 Supreme Court Act 2003, s 3(2).

124 See Paul Craig "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] PL 467.

125 See, for example, Joseph Raz "The Rule of Law and its Virtue" (1977) 93 LQR 195.

126 Joseph, above n 19, at 177–178.

127 See above pt II "The Importance of Constitutional Limits".

128 Joseph, above n 19, at 149.

129 *R (Jackson) v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262 at [102].

130 *Petrocorp Exploration Ltd v Butcher* [1991] 1 NZLR 1 at 38 (CA).

131 In this regard Joseph's account of the rule of law is similar to the theories of Sir John Laws, Trevor Allan and Ronald Dworkin. See John Laws "Law and Democracy" [1995] PL 72; "The Constitution, Morals and Rights" [1996] PL 622; TRS Allan "Parliamentary Sovereignty: Law, Politics, Revolution" (1997) 113 LQR 443; TRS Allen *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford, 2001); Ronald Dworkin *Taking Rights Seriously* (Duckworth, London, 1978).

132 See Philip A Joseph "The Constitutional State" in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation: Essays in Honour of John Burrows QC* (LexisNexis, Wellington, 2008) at 249.

133 Philip A Joseph "The Rule of Law: Foundational Norm" in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis, Wellington, 2011) at 53.



state's collective wisdom for the guidance of public action".<sup>134</sup> This is a sophisticated account of political morality that is not necessarily reducible to a single, subjective viewpoint. Institutional morality is informed by the "the higher learning, beliefs, and ideals of an age", meaning only those who engage with this constitutional discourse at this level can authoritatively comment on the constitution.<sup>135</sup> Institutional morality thus provides a reasonable, principled and defensible basis for public action through "higher-law values" and "pragmatic assumptions" that inform the exercise of public power.<sup>136</sup> In this way, the morality inherent in the rule of law provides a standard against which the legitimacy of every exercise of public power can be assessed.

From this account of the rule of law, Joseph draws out two key implications: a rejection of parliamentary sovereignty, and a necessary role for the judiciary in the scrutiny of legislation. In respect of parliamentary sovereignty, the rule of law represents supreme law, and replaces parliamentary sovereignty as the ultimate principle of the Westminster legal system.<sup>137</sup> Accordingly, Parliament's legislative power is limited by the rule of law and the principles of morality it represents.<sup>138</sup>

If this were solely a normative claim it would perhaps be unsurprising. The undesirability of unfettered parliamentary sovereignty is a feature of much rule of law analysis.<sup>139</sup> But Joseph's claim is much broader: he suggests that parliamentary sovereignty, since it implies supremacy of any kind, is a descriptively unsound account of Westminster constitutionalism.<sup>140</sup> A better understanding, according to Joseph, is that Parliament and the courts are engaged in the "collaborative enterprise" of government, in respect of which neither branch of government has absolute supremacy.<sup>141</sup> Talk of parliamentary sovereignty in this context is simply redundant.

Joseph attributes the role of the scrutiny of legislation to the judicial function in his collaborative enterprise. Within the "constitutional state", all state action must be held accountable in terms of the rule of law, including legislation. The courts must therefore strike down legislation inconsistent with the rule of law, but only in extreme circumstances would this be justified.<sup>142</sup> Joseph sees the rule of law as providing a defensible basis for the courts to impose and enforce limits on the supremacy of Parliament, similar to the role of the judiciary under a written constitution.<sup>143</sup> Joseph's reasons for conferring this role on the courts, however, are not strong. Joseph suggests that:<sup>144</sup>

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134 Joseph, above n 132, at 259.

135 At 261. See also Philip A Joseph and Geoffrey R Walker "A Theory of Constitutional Change" (1987) 7 OJLS 155 at 172–181.

136 Joseph, above n 132, at 258 and 260.

137 Joseph, above n 133, at 70–71; Joseph, above n 132, at 250.

138 Joseph, above n 133, at 73.

139 See John Laws "The Constitution, Morals and Rights" [1996] PL 622 at 628; Allan, above n 131, at 3.

140 Joseph, above n 132, at 256; Joseph, above n 79, at 214. Compare with Philip A Joseph "The Legal History and Framework of the Constitution" in Colin James (ed) *Building the Constitution* (Victoria University of Wellington Institute of Policy Studies, 2000) at 168.

141 Philip A Joseph "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 KCLJ 321 at 322; Joseph, above n 79, at 224. For a similar idea, albeit in the context of a written constitution, see Peter Hogg and Alison Bushell "The Charter Dialogue between Courts and Legislature (Or Perhaps the Charter Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall LJ 75.

142 Joseph, above n 133, at 74.

143 Joseph, above n 79, at 232.

144 At 220.

The natural movement of political power is to innovate in accordance with the popular mandate; the natural movement of judicial power is to restrain in accordance with law and due process. ... The political and judicial vocations are fundamentally different. Politicians exercise a democratic mandate and govern in the national interest, while Judges adjudicate disputes impartially according to law, without fear or favour.

In line with this statement, Joseph appears to consider that the judiciary do not face the same risk of non-compliance with the rule of law; this is a failing of the political branches of government only: “[d]isagreement typically occurs where one branch of government takes action that undermines the institutional autonomy of the other branch, *or where the political branch for whatever reasons contravenes the canons of institutional morality*”.<sup>145</sup> However, Joseph’s primary evidence for this is a protracted and public disagreement between the Chief Justice and a senior government minister over the relationship between Parliament and the courts.<sup>146</sup> In spite of the subjectivity of this example, where we must concede that reasonable people may reasonably disagree on the substantive merits of the dispute, this is not an example of the independent exercise of the judicial function. The statements of the Chief Justice were clearly made extra-judicially, and the minister appears to have understood them in that context.<sup>147</sup>

Joseph’s conception of the rule of law provides valuable normative guidance as to how public power should be exercised in New Zealand. It may not be possible, however, to reconcile a substantive account of the rule of law such as this with orthodox understandings of parliamentary sovereignty.<sup>148</sup> Joseph’s solution to this dilemma is to reject parliamentary sovereignty, which appears to be somewhat out of alignment with the reality of New Zealand’s constitutional arrangements. Palmer, for example, notes several examples where the rule of law has been overridden by legislation, apparently legitimately:<sup>149</sup>

There are regular examples of behaviour by governments that could be characterised as breaches of elements of the rule of law. Recent examples include:

- The Foreshore and Seabed Act 2004 that removed an avenue for Māori to argue in court for enforceable property rights;
- The Electoral Amendment Act 2004 that retrospectively validated Harry Duynhoven’s membership of Parliament; and
- The Appropriation (Parliamentary Expenditure Validation) Act 2006 that vitiated a live legal challenge to the legality of that expenditure.

In each of these examples, aspects of the rule of law were trumped by constitutional norms that run more deeply in New Zealand constitutional culture. Application of the law irrespective of to whom it is applied was trumped:

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145 Joseph, above n 132, at 277 (emphasis added).

146 Elias, above n 87; Michael Cullen “Parliamentary Sovereignty and the Courts” [2004] NZLJ 243.

147 It may also be noted that it was the Chief Justice, not a member of the political branch, who launched the first salvo.

148 Martin Loughlin *Public Law and Political Theory* (Clarendon Press, Oxford, 1992) at 151.

149 Palmer, above n 11, at 588–589. Palmer’s understanding of the rule of law is not necessarily a substantive one and is certainly not as substantive as Joseph’s interpretation, but the point remains that Parliament can override the rule of law through legislation.

- In the Foreshore and Seabed Act 2004, by parliamentary sovereignty reinforced by egalitarianism and authoritarianism;
- In the Electoral Amendment Act 2004, by parliamentary sovereignty in the context of representative democracy reinforced by authoritarianism and pragmatism;
- In the Appropriation (Parliamentary Expenditure Validation) Act 2006 by parliamentary sovereignty in the context of representative democracy, reinforced by authoritarianism and pragmatism.

In each case, parliamentary sovereignty is a key feature of the legitimacy of overriding the rule of law. If this is an accepted means of understanding the relationship between parliamentary sovereignty and the rule of law, then this relationship is the opposite of what Joseph suggests. Palmer concludes his analysis by noting that the rule of law is a vulnerable norm in New Zealand.<sup>150</sup> It is Parliament's unlimited legislative power that appears to be the key source of this vulnerability.

### *E. The Judicial Function*

The role of the courts in interpreting legislation and applying the common law is not often implicated in the imposition of substantive limits on Parliament's exercise of the legislative function under an orthodox interpretation of the New Zealand constitution.<sup>151</sup> Orthodox sovereignty theory suggests that the courts are required to give effect to legislation as enacted by Parliament.<sup>152</sup> However, the dynamic relationship between Parliament and the courts, and the potential for that relationship to change over time, may in practice dissuade Parliament from enacting legislation that trespasses upon fundamental constitutional principles. In this way, Parliament may acknowledge effective substantive limits on its freedom to legislate so as not to prejudice its relationship vis-à-vis the courts.

Thomas has articulated a theory of this kind. Importantly, Thomas accepts that Parliament is sovereign in New Zealand.<sup>153</sup> However, Thomas also recognises that New Zealand's constitutional arrangements are dynamic and that continued acceptance of parliamentary sovereignty may, at some future point, come under strain.<sup>154</sup> This is especially likely to be the case if Parliament legislates in abrogation of constitutional fundamentals such as "basis of representative government, or the rule of law, or fundamental human rights".<sup>155</sup> If that were to happen, the courts may "at a future date respond to legislation ... with an opinion declaring the legislation to be unconstitutional."<sup>156</sup>

Thomas is not the first commentator to suggest that the courts might be justified in responding to oppressive or tyrannous legislation in this way. Cooke, when adopting a natural law approach,<sup>157</sup>

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150 Palmer, above n 11, at 589.

151 Compare IV.C "The Rule of Law".

152 Dicey, above n 28, at 40.

153 Thomas, above n 42, at 18.

154 See also Elias, above n 87.

155 Thomas, above n 42, at 14.

156 At 14.

157 Cooke, above n 84, at 160–161.

suggested that the common law is premised on “two complementary and lawfully unalterable principles: the operation of a democratic legislature and the operation of independent courts”.<sup>158</sup> These two “fundamentals” require the protection of the judiciary in the face of potential legislative abrogation.<sup>159</sup> Thomas’ approach does not appear to go as far as Cooke. While Cooke considered that the common law inherently limits Parliament’s powers of legislation at the extremes, Thomas both accepts parliamentary sovereignty and rejects natural law theory as part of an orthodox understanding of New Zealand’s current constitutional arrangements.<sup>160</sup> This position does not, however, preclude the possibility of constitutional change led by the judiciary if such a change is necessary to protect fundamental constitutional principles. Any such change is, however, a matter for the future – the issue can be “left up in the constitutional air”.<sup>161</sup>

This possibility of constitutional change creates a kind of tension within the constitutional system, which Thomas considers can serve as an effective limit on the exercise of Parliament’s legislative function.<sup>162</sup>

The resulting uncertainty or inconclusiveness serves a valuable constitutional function. ... [The uncertainty] furthers forbearance among those to whom political power is distributed. Uncertainty as to whether the courts will intervene to strike down legislation perceived to undermine representative government and destroy fundamental rights must act as a brake upon Parliament’s conception of its omnipotence; and uncertainty as to the legitimacy of its jurisdiction to invalidate constitutionally aberrant legislation must act as a curb upon judicial usurpation of power. A balance of power between these two arms of government is more effectively achieved by the unresolved doubt attaching to the question than would be the case if the question were to be resolved affirmatively in either Parliament’s or the judiciary’s favour.

The uncertainty inherent in a constitutional structure that is susceptible to change, therefore, acts as a substantive limitation on Parliament’s willingness, if not its ability, to legislate in a manner that impacts on fundamental constitutional principles.

Thomas’ thesis is attractive for a number of reasons. It presents a case for the recognition and protection of fundamental constitutional principles without requiring a reinterpretation of New Zealand’s existing constitutional structure. Further, it appears to have explanatory value. Thomas is able to find some direct support for the deferral of definitively resolving the question of Parliament’s legislative sovereignty in judgments of the courts.<sup>163</sup> In addition, Thomas’ uncertainty thesis appears to be consistent with parliamentary practice in New Zealand, which generally respects fundamental constitutional principles.

Thomas’ thesis is also consistent with theories of how unwritten constitutions operate more broadly. The conscious or unconscious deferral of constitutional questions in spite of (or perhaps because of) apparent conflict in the principles underlying and justifying constitutional practice

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158 At 164.

159 At 164.

160 Thomas, above n 42, at 24.

161 At 7.

162 At 7–8.

163 *Cooper v Attorney-General* [1996] 3 NZLR 480 (HC) at 484; *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA) at 158.

has been identified as a key means of distributing and regulating the exercise of public power in unwritten constitutional systems.<sup>164</sup> These uncertainties have been described as:<sup>165</sup>

... those implicit understandings and tacit agreements that could never survive the journey into print without compromising their capacious meanings and ruining their effect as a functional form of genuine and valued ambiguity. It is not just that such understandings are incapable of exact definition; rather their utility depends upon them not being subject to definition, or even to the prospect of being definable.

If this analysis is accepted, then Thomas' uncertainty thesis may have broader implications across New Zealand's constitutional structure. Certainly, parliamentary sovereignty and its corollary, judicial obedience to legislation, appear to fit within this definition because of the obscure origins of the principles underpinning those doctrines and the fact that the edges of each remain untested.<sup>166</sup> This is precisely Thomas' point, and it suggests that potential limits based on uncertainty about the scope of Parliament's legitimate exercise of the legislative function is consistent with broader understandings of the limits of constitutional practice within an unwritten constitutional system.

#### F. *The Treaty of Waitangi*

Judicial rhetoric suggests that the Treaty of Waitangi (the Treaty) is "of the greatest constitutional importance to New Zealand".<sup>167</sup> However, the Treaty has only limited legal and constitutional effect. There are clear tensions between the need to give effect to Treaty rights and parliamentary sovereignty, which may override those rights. The debate is not yet settled, but in the current constitutional climate, the Treaty does not act as an effective constraint on Parliament's exercise of the legislative function.

The Treaty has only limited legal effect in common law. A treaty of cession will not bind the political branches of government and is not enforceable in the ordinary courts except to the extent that it has been incorporated into domestic law.<sup>168</sup> The leading decision on the legal status of the Treaty, *Hoani Te Heuheu Tukino v Aotea District Māori Land Board*, confirmed that this general rule applies to the Treaty.<sup>169</sup> The practical result is that the Treaty is usually considered legally relevant only where statutory obligations import the Treaty into particular contexts.<sup>170</sup>

*Te Heuheu* has been reaffirmed by the courts, and the rule as to the legal effect of the Treaty, at common law, has been described as a "fundamental proposition".<sup>171</sup> However, this basic understanding does little to acknowledge the tension inherent in the relationship between the constitutional importance of the Treaty and the orthodox legal position. Legal and political developments since *Te Heuheu* have provided the Treaty with a significant, if informal, constitutional

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164 Michael Foley *The Silence of Constitutions: Gaps, "Abeyances," and Political Temperament in the Maintenance of Government* (Routledge, London, 1989).

165 At 9.

166 At 94.

167 *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 516.

168 *Vajesingji Joravarsingji v Secretary of State for India* (1924) LR 51 IA 357 (PC) at 360.

169 *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308 (PC) at 324–325.

170 See BV Harris "The Treaty of Waitangi and the Constitutional Future of New Zealand" [2005] NZ Law Review 189 at 191–192.

171 *Ngati Apa ki te Waipounamu Trust v Attorney-General* [2003] 1 NZLR 779 (HC) at 804.

role. For instance, the Cabinet Manual requires Ministers to draw legislative proposals that affect or have implications for the principles of the Treaty of Waitangi to the attention of Cabinet, and there are now numerous statutory references to the Treaty that impact on a wide range of policy areas.<sup>172</sup> This suggests an acceptance of the place of the Treaty by the political branches of government.<sup>173</sup> The courts have relied on this development to significantly expand the legal application of the Treaty, using it as an extrinsic aid to statutory interpretation even where it is not directly referred to.<sup>174</sup> Further, the decisions of the courts on the legal application of the Treaty and its principles that have received statutory recognition have resulted in a “constitutionalisation” of the Treaty.<sup>175</sup> Finally, our local Supreme Court may be more willing to develop an indigenous jurisprudence involving the Treaty, not least because the Supreme Court’s establishing legislation expressly contemplates resolution of Treaty issues.<sup>176</sup> Taken together, these developments lend support to the observation that special protection of Māori interests represents the “status quo” in New Zealand’s prevailing legal and political culture.<sup>177</sup>

A further development of considerable moment is the establishment of a specialist Tribunal to inquire into potential breaches of the Treaty. The Waitangi Tribunal was established by legislation in 1975,<sup>178</sup> and since 1985 has had the ability to inquire into historical Treaty breaches on behalf of Māori applicants. The Tribunal is a quasi-judicial body, and has an exclusive mandate to inquire into “the meaning and effect of the Treaty of Waitangi”.<sup>179</sup> The Tribunal may review any acts or omissions of the Crown for compliance with the “principles of the Treaty”,<sup>180</sup> and if a breach of those principles is established, the Tribunal may recommend appropriate redress.<sup>181</sup> However, the Tribunal’s recommendations are non-binding on the Crown,<sup>182</sup> and there is no guarantee that breaches will be remedied in line with the Tribunal’s views. The Tribunal’s moral authority is nevertheless significant, exerting at least some influence of both the political and judicial branches of government.<sup>183</sup>

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172 *Cabinet Manual*, above n 44, at [7.60].

173 See State-owned Enterprises Act 1986, s 9; Conservation Act 1987, s 4; Education Act 1989, s 181; Crown Minerals Act 1991, s 4; Resource Management Act 1991, s 8; Crown Research Institutes Act 1992, s 10; New Zealand Public Health and Disability Act 2000, s 4; Local Government Act 2002, s 4; Land Transport Management Act 2003, s 4; Public Records Act 2005, s 7; Public Finance Act 1989, s 45Q.

174 See *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210.

175 See Catherine Callaghan “‘Constitutionalisation’ of Treaties by the Courts: The Treaty of Waitangi and the Treaty of Rome Compared” (1998) 18 NZULR 334. See also Joseph, above n 118.

176 The purpose of the Supreme Court Act includes “to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions”: see Supreme Court Act 2003, s 3(1)(a)(ii).

177 See Harris, above n 170, at 193.

178 Treaty of Waitangi Act 1975.

179 Section 5(2).

180 Section 6.

181 Section 6(4).

182 The limited exception is provided for in s 8A(2).

183 See respectively PG McHugh “The Constitutional Role of the Waitangi Tribunal” [1985] NZLJ 224 at 224; *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 655.

In the light of these developments, whether *Te Heuheu* should remain precedent in the modern legal climate is clearly a matter of some debate.<sup>184</sup> A formal constitutional role for the Treaty that is in some sense resistant to parliamentary sovereignty will, in time, become necessary for the continuing legitimacy of New Zealand's cultural arrangements.<sup>185</sup> New Zealand's current Chief Justice has stated extra-judicially that:<sup>186</sup>

[T]he sovereignty obtained by the British Crown was a sovereignty qualified by the Treaty. It has not been treated as so qualified as a matter of domestic law. But the elements of our unwritten constitution have never been fully explored to date.

It is not yet clear what form this role will take. One possibility is that a new jurisprudence will develop, which recognises that some legal and political interests based on the principles of the Treaty are analogous to fundamental human rights.<sup>187</sup> This understanding suggests that the legal system should respond to claims based on Treaty rights in a manner consistent with the recognition of other fundamental rights, including (where appropriate) constitutional recognition.<sup>188</sup> There is Waitangi Tribunal jurisprudence that supports this analysis,<sup>189</sup> and recognition of Treaty rights is consistent with the Treaty jurisprudence of the courts.<sup>190</sup> However, as discussed above, recognition of such rights does not necessarily limit parliamentary sovereignty, and it seems unlikely that Treaty jurisprudence would lead jurisprudence in respect of other fundamental rights in this regard.

In fact, Parliament's willingness and ability to pass legislation in apparent contravention of the principles of the Treaty of Waitangi was arguably reaffirmed with the relatively recent enactment of the Foreshore and Seabed Act 2004. That legislation was passed in response to *Ngati Apa v Attorney General*, which dealt with the issue of Māori customary title to the foreshore and seabed.<sup>191</sup> The Court of Appeal found that Māori customary title had not been extinguished on the Crown's acquisition of sovereignty, and that customary title would continue until lawfully extinguished. This had never been achieved on a general basis, and it was the proper role of the Māori Land Court to determine whether customary title had been extinguished or remained valid in each case.<sup>192</sup> The Foreshore and Seabed Act responded to that finding by vesting title of all foreshore and seabed land in the Crown, effectively by extinguishing customary title.<sup>193</sup> It also

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184 See Sian Elias "The Treaty of Waitangi and the Separation of Powers in New Zealand" in BD Gray and RB McClintock (eds) *Courts and Policy: Checking the Balance* (Brookers, Wellington, 1995) at 213 and 219. It has been suggested that *Te Heuheu* may not even have been supported by authority at the time it was decided: see Alex Frame "Hoani Te Heuheu's Case in London 1940–41: An Explosive Story" (2006) 22 NZULR 148 at 164–165.

185 David V Williams "The Treaty of Waitangi: A 'Bridle' on Parliamentary Sovereignty?" (2007) 22 NZULR 598.

186 Elias, above n 87, at 153.

187 This analogy has already been recognised by the Human Rights Commission: see generally Human Rights Commission *Human Rights and the Treaty of Waitangi: Te Mana i Waitangi* (2003). See also Ivor Richardson "Rights Jurisprudence – Justice For All?" in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 61 at 75.

188 See Edward Willis "Legal Recognition of Rights Derived from the Treaty of Waitangi" (2010) 8 NZJPIIL 217.

189 At 222–232.

190 At 233–235.

191 *Ngati Apa v Attorney General* [2003] 3 NZLR 643 (CA).

192 The Māori Land Court's mandate is set out in Te Ture Whenua Māori Act 1993.

193 Foreshore and Seabed Act 2004, s 13(1).

provided for a regime to allow for more limited recognition of territorial rights,<sup>194</sup> and rights to carry out certain customary activities.<sup>195</sup>

While these issues primarily implicated common law customary rights, a claim that the government policy preceding the legislation was in breach of the principles of the Treaty was pursued before the Waitangi Tribunal.<sup>196</sup> The Tribunal found that the government policy was clearly in breach of arts 2 and 3 of the Treaty. The Tribunal considered that land comprising the foreshore and seabed was a taonga (treasure) to Māori in terms of art 2, and therefore entitled to protection under the Treaty. The removal by the government of access to the Māori Land Court to determine issues of customary title therefore breached art 2.<sup>197</sup> In addition, art 3, which guaranteed equal protection under the law, was breached by the policy because it protected other existing private property rights to the foreshore and seabed while removing altogether the prospect of customary title.<sup>198</sup> Neither potential breach could be justified in accordance with the Crown–Māori Treaty relationship, and so the Tribunal’s ultimate conclusion was that the enactment of the proposed legislation would amount to a violation of Treaty rights.<sup>199</sup>

Despite these clear findings, and indeed in the face of strong domestic political pressure,<sup>200</sup> Parliament enacted the Foreshore and Seabed Act in substantially similar terms to the criticised policy. The normative force of the Treaty – which perhaps manifested in stronger and more explicit terms in respect of this issue than on any other in recent history<sup>201</sup> – and the related ability of the Tribunal to act as Parliament’s conscience on Treaty matters did not appear to perturb Parliament as it abrogated Māori rights in passage of legislation.<sup>202</sup> It remains unclear whether this result represents a satisfactory constitutional outcome, and the Foreshore and Seabed Act controversy highlights that the place of the Treaty in New Zealand’s constitutional arrangements continues to be an important matter of debate. The controversy does at least illustrate that parliamentary sovereignty continues to trump any perceived need to ensure consistency with principles of the Treaty, despite the increasing indications of a move away from orthodox sovereignty theory towards increasing legal and constitutional recognition of the Treaty of Waitangi.

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194 Sections 32–39.

195 Sections 48–53.

196 For details of the political controversy and policy processes and that led to the Foreshore and Seabed Act 2003 see Harris, above n 170, at 191–197; Claire Charters “Responding to Waldron’s Defence of Legislatures: Why New Zealand’s Parliament Does Not Protect Rights in Hard Cases” [2006] NZ Law Review 621 at 632–635.

197 Waitangi Tribunal *Report on the Crown’s Foreshore and Seabed Policy* (WAI 1071, 2004) at [5.1.1].

198 At [5.1.3].

199 At [5.1].

200 Before the Select Committee, 94 per cent of submissions received opposed the proposed legislation: Harris, above n 170, at 195. In addition, anecdotal reports suggest that in excess of 20,000 people (both Māori and non-Māori) marched on Parliament to express concern at the proposed legislation, making it one of the largest acts of political protest events in recent times.

201 See above n 170.

202 The legislative process that led to the enactment of the Foreshore and Seabed Act is critically examined in Charters, above n 196.



## V. CONCLUSION

The range of constitutional sources examined in pt IV suggests that there is recognition of substantive limits on the legitimate exercise of public power in New Zealand. This conclusion is perhaps unsurprising. While orthodox sovereignty theory does contemplate substantively unlimited powers of legislation for Parliament, “[t]he dangers of such unlimited powers are obvious enough and not tolerated in most democratic countries”.<sup>203</sup> Substantive limits on constitutional authority are a key aspect of constitutionalism, and given our constitutional experience there is little reason to doubt that New Zealand is a state that “upholds the rule of law and constitutional government”.<sup>204</sup>

The survey of constitutional sources undertaken in this article is not exhaustive, but some (tentative) conclusions can be reached about the nature of substantive limits on the legitimate exercise of public power in New Zealand. On the basis of the analysis presented here it can be concluded that while abstract, constitutional values, such as representative democracy and the rule of law, permeate our understanding of New Zealand’s constitutional arrangements, their rhetorical value alone does not always appear to be sufficient to provide a basis for action. Specific constitutional principles, such as those that derive from fundamental human rights and the Treaty of Waitangi, do place (sometimes significant) pressure on Parliament’s willingness to legislate, without formally restricting parliamentary sovereignty. However, it is matters of constitutional structure such as constitutional conventions and the function of the courts that appear to place the hardest substantive limits on Parliament’s legitimate exercise of legislative authority. These structurally-enforced limits are in turn underpinned by abstract constitutional values and specific constitutional principles, suggesting that none of the features of New Zealand’s constitution can be properly considered in isolation from each other. Such holistic consideration must also include a full account of parliamentary sovereignty, which appears to push back significantly against any formal attempts to limit its scope.

Substantive values and the normative principles that limit the legitimate exercise of public power in New Zealand are certainly “alive in the background” of the New Zealand constitutional structure even if they are not always clearly expressed in constitutional analysis.<sup>205</sup> Reconciling the existence of substantive limits on the legitimate exercise of public power more fully therefore remains a key challenge for constitutional scholars. One solution is to revisit the contemporary relevance of parliamentary sovereignty. The issue of limits on Parliament’s legislative function has already been formally identified as “significant and topical” in respect of future constitutional reform,<sup>206</sup> for example. But this would be a debate about future changes. While important, this debate risks overlooking the fact that acceptance of both parliamentary sovereignty and the need for constitutional government currently exist within New Zealand’s constitutional framework. Further, there appears to be little indicative evidence to suggest that the prima facie tension between these two constitutional touchstones masks a deeper, more acute constitutional conundrum.

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203 Palmer and Palmer, above n 18, at 156.

204 Philip A Joseph “The Legal History and Framework of the Constitution” in Colin James (ed) *Building the Constitution* (Victoria University of Wellington Institute of Policy Studies, 2000) at 168.

205 See BV Harris “The Law Making Power of the Judiciary” in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) at 269.

206 *Inquiry to review New Zealand’s existing constitutional arrangements: Report of the Constitutional Arrangements Committee* (presented to the House of Representatives, I.24A, August 2005) at [78].

But important questions remain. Even though we are apparently comfortable with the idea of Parliament as a supreme legislator, we have not yet been able to determine exactly what that means for Parliament to legislate under the laws of the constitution.<sup>207</sup> Put another way, we do not yet seem to know what the appropriate or principled response might be to a valid claim that, in discharging the legislative function, Parliament has acted unconstitutionally. Every exercise of public power, including of the legislative function, must be subject to substantive limits if it is to be considered legitimate or constitutional. Consistency with these limits is a requirement of constitutional government. Over 30 years ago Sir Owen Woodhouse suggested:<sup>208</sup>

... as a matter of constitutional principle there are ultimate limits upon a proper exercise of sovereign power in our democratic community. In the case of the Legislature those limits are nebulous to a degree and they are unenforceable by the Courts. But they are limits nonetheless because beyond them there is an absence of constitutional authority to act.

Further research into the nature of these nebulous and ostensibly unenforceable constitutional limits on the exercise of public power remains critical to New Zealand's ongoing constitutional development.

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207 See Elias, above n 87, at 162.

208 Owen Woodhouse *Government Under the Law* (Price Milburn, Wellington, 1979) at 11.

# CLIMATE CHANGE CONSIDERATIONS UNDER THE RESOURCE MANAGEMENT ACT: A BARRIER TO CARBON CAPTURE AND STORAGE DEPLOYMENT IN NEW ZEALAND?

BY GREG SEVERINSEN\*

In 2004, the New Zealand Parliament enacted amendments to the Resource Management Act 1991. Among other things, these amendments introduced a suite of provisions that prohibited local government from considering the effects of activities on climate change when deciding resource consent applications. Some uncertainty exists as to whether this prohibition could act as a barrier to the deployment in New Zealand of a relatively novel climate change mitigation technology called carbon capture and storage (CCS). CCS involves the capture of carbon dioxide emissions prior to emission to the atmosphere, and the compression and injection of the gas into subsurface storage formations. The courts have taken a strongly purposive approach to the 2004 amendments, restricting the jurisdiction of local government over climate change to a greater extent than is provided in the express provisions of the Resource Management Act. In the context of CCS, where the positive effects of the activity are almost wholly related to the climate, this may in practice result in consent being declined in all cases.

This article contends that while the prohibition in the 2004 amendments could at present hamper efforts to develop CCS projects in New Zealand, a solution can be found within the Resource Management Act itself, without the need for wholesale legislative amendment. In short, national environmental standards and national policy statements should be developed to direct or enable consent authorities to have regard to the positive aspects of CCS. This will enable CCS to occur in contexts where it truly promotes sustainable management, and allow market signals under the emissions trading scheme to determine, without inappropriate regulatory interference, when the technology should be implemented. However, alternative options involving more far-reaching legislative reform are possible, and may be preferable for reasons outside the scope of this article.

## I. INTRODUCTION

Climate change is poised to be one of the defining global issues of the 21st century. New Zealand's response to this threat thus far has been to implement an emissions trading scheme (ETS) under the Climate Change Response Act 2002 (CCRA). This reflects a policy intention that effects on climate change are to be regulated primarily by economic incentives rather than command and control

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\* LLB (hons), BA. PhD Candidate, Victoria University of Wellington. A four-page summary of the key points in this article appears in ch 2 of B Barton, K Jordan and G Severinsen *Carbon Capture and Storage: Designing the Legal and Regulatory Framework for New Zealand* (University of Waikato, Hamilton, 2013), where the author was the primary contributor on this specific area. I am grateful for the kind agreement of my co-authors to expand and publish on this topic.

mechanisms, and that responses are to occur at a national level. A complementary national-level focus has been implemented in the Resource Management Act 1991 (RMA, or the Act) through amendments to the Act in 2004. These require that local authorities, when making rules and considering applications for resource consent, cannot (as a generalisation) consider effects on climate change. In this paper, this requirement is generally referred to as the “prohibition”.

Overseas, the prospect of climate change has led to the development of carbon capture and storage (CCS) technology. CCS is a climate change mitigation tool that involves three main phases. First, carbon dioxide (CO<sub>2</sub>) is captured at a point source, such as a large industrial plant or power station, and prevented from escaping into the atmosphere. Second, the captured CO<sub>2</sub> is liquefied and transported to an injection site. Thirdly, the CO<sub>2</sub> is injected into a deep geological formation for long-term storage, post-closure monitoring and stewardship. In this manner, CO<sub>2</sub> is prevented from escaping to the atmosphere and contributing to climate change.

A number of CCS projects are currently operating or under construction globally.<sup>1</sup> Technical capabilities for CCS deployment in New Zealand and the required features of a regulatory regime are also being seriously investigated, although no CCS-specific regulatory or policy action has yet been taken.<sup>2</sup> No applications for resource consent have been lodged in New Zealand, and the activity is not yet commercially viable. However, in the future there is a possibility that it will provide one tool in the national toolbox for addressing climate change. The removal of regulatory barriers to the deployment of the technology is therefore a worthwhile exercise.

The interaction between CCS activities and the RMA’s prohibition on considering effects on climate change is one potentially problematic regulatory barrier to CCS. There has been no judicial or academic comment on how this might affect consent applications for CCS, and the extent of the prohibition is not always clear. In fact, the courts in other contexts have adopted a purposive approach to read in features that are not apparent from a literal reading of the relevant sections.<sup>3</sup>

This paper seeks to explore the extent to which a purposive approach to the 2004 amendments presents a regulatory hurdle for CCS deployment in New Zealand. In short, the paper’s contention is that the absence of other positive effects associated with CCS may result in applications being inappropriately declined, if the positive effects of CCS on climate change cannot be considered by consent authorities. It also contends that there exists at least one appropriate solution that could be implemented within the RMA framework, without wholesale legislative amendment.

On a policy level, CCS should not be allowed to stymie the development of essential renewable energy resources, or put at risk New Zealand’s long term energy security by increasing reliance on fossil fuels. It is, however, unlikely to do so, given the country’s existing and planned focus on renewable generation. The practical impact of CCS, should it occur, is more likely to be felt in large industrial applications. As long as the technology is implemented in an environmentally responsible fashion, CCS provides an attractive temporary option to reduce harmful greenhouse gas emissions, while easing the social and economic costs of the transition to more sustainable heavy industry practices. It is also notable that the Fifth Assessment Report of the Intergovernmental

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1 Global CCS Institute *The Global Status of CCS* (Global CCS Institute, Melbourne, 2013).

2 Barry Barton, Kimberley Jordan and Greg Severinsen *Carbon Capture and Storage: Designing the Legal and Regulatory Framework for New Zealand* (Centre for Environmental, Resources and Energy Law, Hamilton, 2013).

3 *Greenpeace New Zealand Inc v Genesis Power Ltd* [2008] NZSC 112, [2009] 1 NZLR 730; *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32.

Panel on Climate Change has built into its forecasts an assumption that CCS technology will be deployed in the future.<sup>4</sup>

## II. THE CHARACTERISATION OF CCS UNDER THE RMA

At the outset it is important to consider how the range of CCS activities is likely to be characterised under the RMA. The prohibition under the Act may apply differently to different kinds of activities.

In a terrestrial context, the construction of pipelines and the injection of CO<sub>2</sub> would require land use consent under s 9 of the Act, and injection would also require a discharge permit under s 15.<sup>5</sup> If CCS injection were to occur offshore within the coastal marine area, a coastal permit would be required for the laying of pipelines and the construction of an injection installation under s 12. A coastal permit would also be required for the injection of CO<sub>2</sub>, although it is unclear whether this would be required under s 15A, concerning dumping of waste or other matter, or s 15B, concerning the discharge of contaminants from offshore installations. Given that, internationally, CCS has tended to be characterised as a form of dumping, it is more likely that s 15A would govern applications for injection to the sub-seabed.<sup>6</sup> Although additional authorisations may be required for CCS under other regimes, this paper is concerned only with authorisations affected by the prohibition under the RMA.

## III. THE STATUTORY PROHIBITION IN THE RMA

The Resource Management (Energy and Climate Change) Amendment Act 2004 (the amendment Act) introduced a suite of four provisions aimed at removing the regulation of activities' effects on climate change from the purview of local decision-making in favour of national-level decision-making. This suite comprises ss 70A, 70B, 104E and 104F of the RMA. As a generalisation, the amendments have resulted in all effects of activities on climate change being addressed solely through the ETS.<sup>7</sup>

Section 70A of the Act prohibits the consideration of effects on climate change of discharges of greenhouse gases into air, when a regional council is developing rules in a regional plan that relate to the discharge of contaminants. Section 70B provides, however, that national environmental standards (NESs), developed under s 43, can be mirrored in regional rules to control the effects on climate change of such discharges. Regional and district rules must not conflict with an NES.<sup>8</sup> Section 104E reflects s 70A in the context of an application for resource consent to discharge contaminants, and prevents the consideration of the effects of that discharge on climate change

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4 Intergovernmental Panel on Climate Change "Climate Change 2013: The Physical Science Basis" (Intergovernmental Panel on Climate Change, Working Group 1 Contribution to the Fifth Assessment Report of IPCC, September 2013) at 526; Detlef P van Vuuren and others "The representative concentration pathways: an overview" (2011) 109(1–2) *Climate Change* 5 at 17.

5 Carbon dioxide falls within the broad definition of a "contaminant" under s 2 of the RMA and CCS injection is therefore restricted by s 15.

6 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 36 ILM 1 (signed 7 November 1996, entered into force 24 March 2006).

7 Apart from the positive effects on climate change of renewable energy, in cases of applications for renewable energy projects.

8 Resource Management Act 1991 (RMA), s 44A.

by a consent authority. Similarly, s 104F mirrors s 70B in the context of applications for consent, enabling the consideration of any NESs that have been developed to address climate change.

In both ss 70A and 104E, the general prohibition is subject to only one express exception: the effects of a discharge on climate change can be considered to the extent that renewable energy enables the reduction of greenhouse gas emissions. The courts have held that this exception applies only where an application is *for* a renewable energy project and the relative climate change benefits of renewable generation cannot be considered where applications are for non-renewable energy projects.<sup>9</sup> Therefore, the exception is not directly relevant to CCS, given that the technology does not amount to, facilitate or encourage renewable energy projects. Furthermore, no NES has been developed thus far under the powers in ss 70B and 104F which overrides the general prohibition. These sections can therefore be disregarded, for now.

One further point requires emphasis at this juncture. Section 7(i) of the RMA, also inserted by the 2004 amendment Act, obliges decision-makers to have particular regard to “the effects of climate change”. This reflects the importance of requiring local authorities to plan for the effects “of” climate change by planning for adaptation measures,<sup>10</sup> and does not generally allow local authorities to address the root causes of climate change by considering, in consent decisions, the effects of activities “on” climate change.<sup>11</sup>

#### IV. THE IMPACT OF THE STATUTORY PROHIBITION IN S 104E ON THE CONSIDERATION OF APPLICATIONS FOR CCS

In assessing the extent to which the prohibition in s 104E affects decision-making on CCS consent applications, two key questions need to be examined. Firstly, what are the points at which the prohibition is triggered? Secondly, in cases where the prohibition is triggered, what is the scope of the prohibition? These questions are intertwined and require consideration of both the express wording of s 104E and the purpose behind this provision.

##### A. *A Literal Interpretation of s 104E*

Section 104E provides that:

###### **104E Applications relating to discharge of greenhouse gases**

When considering an application for a discharge permit or coastal permit to do something that would otherwise contravene section 15 or section 15B relating to the discharge into air of greenhouse gases, a consent authority must not have regard to the effects of such a discharge on climate change, except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases, either—

- (a) in absolute terms; or
- (b) relative to the use and development of non-renewable energy.

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<sup>9</sup> *Greenpeace*, above n 3, at [56].

<sup>10</sup> Adaptation measures could include appropriate land use zoning in coastal areas, and the provision of coastal erosion structures.

<sup>11</sup> *Buller Coal*, above n 3, at [130].

The express wording of the section suggests that the prohibition will be triggered only where applications are made for permits to do something otherwise restricted under s 15 (concerning the discharge of contaminants) or 15B (concerning the discharge of contaminants from offshore installations and ships). In its terrestrial context, CCS injection will constitute the discharge of a contaminant under s 15.

On a literal interpretation of s 104E, land use consent applications or incidental applications for the taking or use of water would appear not to trigger the prohibition, as they are not restricted under s 15 or 15B and do not relate to the discharge control functions of a regional council. This would equally be the case for applications for coastal occupation or construction of installations and pipelines in the coastal marine area, as these are governed under s 12 rather than s 15.

Whether the prohibition is triggered in cases of CCS injection in the coastal marine area is less straightforward. Injection into the seabed is likely to be characterised as a “dumping” rather than a “discharge”, and therefore require a coastal permit by virtue of s 15A of the RMA rather than s 15 or 15B. On the face of s 104E, which applies only to applications concerning s 15 or 15B matters, a regional council would not be barred from considering the impacts of CCS on climate change by taking into account the positive effects of this “dumping”. This stands in contrast to the position in the terrestrial context, where injection is a “discharge” restricted by s 15.

However, for the s 104E prohibition to apply to terrestrial injection, an application for CCS must also “relate” to the discharge into air of greenhouse gases. If it does not, the prohibition does not bite on such applications. That said, an application may not have to *propose* that a discharge to air take place for it to “relate” to the atmospheric discharge of CO<sub>2</sub>. It could be sufficient for a discharge to require consent under s 15 or 15B (which could include proposals to discharge not only to air but also to land or water) as long as it somehow related to a discharge to air. By way of example, a regional council could, in theory, be prevented from considering the effects of a discharge of greenhouse gas to air where an application itself sought consent to discharge a contaminant to land (from an industrial or trade premises) or to water.

This may appear to be largely an academic scenario, given that a discharge to land or water would not generally require any consideration of the effects of a discharge to air. However, an application for CCS injection to land would be unique. Such an application would not itself involve an application to discharge CO<sub>2</sub> to the air. The purpose of the activity is the prevention of the escape of gases to the atmosphere. However, at least in the terrestrial context, CCS *would* involve the discharge of a contaminant to land under s 15. The application may also, arguably, “relate to” the discharge into air of greenhouse gases, in the sense that it would require a decision-maker to consider the effects on climate change of a discharge to air.

This last point requires some elaboration. Because CO<sub>2</sub> is captured before it is discharged into the atmosphere, the sequestration of the gas underground has no real environmental benefit, relative to the status quo, at the time of injection. If a bystander were to measure the levels of CO<sub>2</sub> in the global atmosphere immediately prior to injection and again immediately after injection, the injection would not affect atmospheric CO<sub>2</sub> levels in any way. This is because gas, prior to injection, would necessarily be contained and separated from atmospheric CO<sub>2</sub>. Carbon capture and storage is concerned with preventing future effects rather than remedying existing effects. However, the positive future effects of CCS on climate change can be assessed only by making a comparison to the negative impact the gas would have *if it were discharged to the air*. This requires consideration of the effects of a discharge into air of greenhouse gases on climate change, even though no discharge is actually proposed. This may be described as a hypothetical discharge,

which is used only as a reference point to determine the positive effects of sequestration. Without considering the adverse effect of discharging the gas to the atmosphere, it would be impossible to assess the relative benefit of injecting it underground.

The question that needs to be answered is therefore whether the consideration of a hypothetical discharge to air, as a reference point to determine the climate benefits of CCS, is a prohibited consideration under s 104E of the RMA. In other words: does the consideration of the effects of a hypothetical discharge, as a reference point, “relate to” the discharge of greenhouse gases to air?

On a literal interpretation of s 104E, seeing CCS as triggering the prohibition may seem somewhat strained because the phrase “relating to the discharge into air” would more comfortably be interpreted as requiring that an application actually propose a discharge to the air. On the other hand, one may argue that the phrase has a wider meaning than other formulations that could have been used. Parliament could have used more specific terminology – for example, to do something “involving” the discharge into air of greenhouse gases – but instead chose the more general term “relating to”. This may suggest that a proposed activity does not have to “involve” or “propose” a discharge into air of greenhouse gases for local authorities to be prevented from considering the effects of a hypothetical atmospheric discharge of greenhouse gas.

However, on balance, it would be reading down the wording of s 104E to claim that the injection of CO<sub>2</sub> to the subsurface “relates” to the discharge “into air” of greenhouse gases. The release of CO<sub>2</sub> into the atmosphere is the very thing CCS is designed to prevent. Thus on a literal reading, it is more likely that the prohibition does not bite in the case of CCS applications and local authorities *could* consider the positive effects of CCS on climate change by measuring them against the discharge into air that would otherwise result. There would thus be no issue, and no need to amend the RMA or remove CCS from the Act on these grounds.

However, the courts have not taken a literal approach to s 104E. They have taken a highly expansive purposive approach. This approach would be likely not only to recognise such a prohibition in cases of CCS, but to widen it considerably – to include within the prohibition decisions on CCS applications for land use, coastal occupation, construction of marine structures, and marine dumping.

### B. *A Purposive Approach to s 104E*

A purposive approach to s 104E could present a substantial regulatory hurdle to CCS applicants. The material part of the purpose of the 2004 amendment Act provides:<sup>12</sup>

- 3 The purpose of this Act is to amend the principal Act—
  - ...
  - (b) to require local authorities—
    - ...
    - (ii) not to consider the effects on climate change of discharges into air of greenhouse gases.

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12 Resource Management (Energy and Climate Change) Amendment Act 2004, s 3.



This purpose is expressly incorporated into the RMA by virtue of ss 5(1) and 23 of the Interpretation Act 1999, despite the fact that the purpose text does not appear in the amended legislation itself.<sup>13</sup> Section 3 of the amendment Act is to be read in conjunction with the overall purpose in s 5 of the RMA and the statute as a whole.<sup>14</sup> The purpose of the amendment Act is clearly much broader than the wording of the prohibition in s 104E in that the latter applies only to activities restricted by ss 15 and 15B.

The Supreme Court has, in the context of s 104E (although in relation to a different issue),<sup>15</sup> emphasised the importance of focusing on the purpose of legislation:<sup>16</sup>

The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose . . . .

If s 104E were interpreted in the light of its purpose, the prohibition may prevent the consideration of the positive effects of CCS on climate change in deciding any consent application required for a CCS project. The prohibition would not only apply to applications to a regional council for discharges restricted by s 15 or 15B. The prohibition would likely also apply to both district and regional councils, to the determination of applications for consent under s 15A, and to the determination of applications for incidental consents (such as permits to take or divert water).

### 1. *Greenpeace v Genesis Power*

A purposive approach to s 104E has been taken by the courts in the two leading cases under the section: *Greenpeace New Zealand Inc v Genesis Power Ltd*<sup>17</sup> and *West Coast ENT Inc v Buller Coal Ltd*.<sup>18</sup> Earlier cases on the validity of climate change effects under the RMA are of little relevance, as they were decided before the coming into force of the 2004 amendments.<sup>19</sup> The Supreme Court in *Greenpeace* held that:<sup>20</sup>

[t]he underlying policy of the Amendment Act was to require the negative effects of greenhouse gases causing climate change to be addressed not on a local but on a national basis while enabling the positive effects of the use of renewable energy to be assessed locally or regionally.

While undoubtedly this statement represents the current law, it is silent on the particular issue that arises in the context of CCS. The Court clarified that negative effects on climate change are to be considered on a national level and that positive effects of renewable generation are to be considered on a local level. However, the Court did not clarify whether the positive effects on climate change

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13 *Royal Forest and Bird Protection Society of New Zealand Inc v Buller Coal Ltd* [2012] NZHC 2156, [2012] NZRMA 552 at [14], undisturbed on appeal by the Supreme Court's majority judgment in *Buller Coal*, above n 3, at [176] (despite a dissenting view from Elias CJ at [86]).

14 *Buller Coal*, above n 3, at [153].

15 In relation to the scope of the exception to the s 104E prohibition for renewable energy development.

16 *Greenpeace*, above n 3, at [51].

17 *Greenpeace*, above n 3.

18 *Buller Coal*, above n 3.

19 *Environmental Defence Society Inc v Auckland Regional Council* [2002] NZRMA 492 (EnvC), (2003) 9 ELRNZ 1; *Environmental Defence Society Inc v Taranaki Regional Council* EnvC Auckland A184/2002, 6 September 2002; *Todd Energy Ltd v Taranaki Regional Council* EnvC Wellington W101/05, 7 December 2005.

20 *Greenpeace*, above n 3, at [55].

of a non-renewable energy activity like CCS, where these involve the consideration of the effects of a discharge on climate change, are to be considered nationally or sub-nationally. There was no need in the case to contemplate the existence of a technology that impacted positively on climate change while not itself involving renewable generation.

The question remains: does the prohibition in s 104E extend to the consideration of the positive aspects of an activity on climate change? The majority decision in *Greenpeace* made comments of broader application concerning the centralising purpose of the amendments,<sup>21</sup> including that “local authorities are generally prohibited from having regard to the effects on climate change of the discharge of greenhouse gases”.<sup>22</sup> This suggests that regional and district councils (and the Environment Court) are generally prohibited from considering both the negative and positive effects of activities on climate change.

Section 104E does, of course, make a narrow exception to allow local consideration of the positive impacts of renewable energy on climate change. The need for this explicit statutory exception for the positive impacts of renewable generation suggests that the general effect of the section is to prohibit consideration of not only the negative but also the positive effects of activities on climate change. A purposive approach does not require that effects be treated as an exception to the prohibition simply because they are positive. It can be speculated that this issue may arise, in the future, in the context of forestry projects. Any positive effects on climate change from the planting of trees (as a carbon sink) may well be an irrelevant consideration under the Act, just as it would be if planting were imposed as a condition to mitigate the climate impacts of industrial emissions. In practice, the prohibition may impact less on forestry than CCS. Forestry projects are likely to have fewer negative effects on the environment than CCS, and more justiciable positive effects, thus making a grant of consent more likely.

Although recognising a broad prohibition by taking a purposive approach to the 2004 amendment Act, the Court’s specific comments in *Greenpeace* were targeted towards the consideration of applications that themselves propose the discharge of greenhouse gases to air (such as from a gas fired power plant).<sup>23</sup> In contrast, CCS would not propose any discharge to air and the atmospheric discharge being considered would be a hypothetical one. However, the more recent judgment in *Buller Coal* saw the Supreme Court determine, in an appeal on declaratory proceedings, the effect of the prohibition in a context that is more analogous to CCS.

## 2. *West Coast ENT Inc v Buller Coal Ltd*

The Supreme Court in *Buller Coal* considered whether the effects on climate change of the end use of coal (that is, the eventual discharge of CO<sub>2</sub> to air overseas) could be considered in a land use application for the extraction of coal in New Zealand. The Court in its majority decision upheld the

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21 At [58].

22 At [62].

23 Some commentators have attempted to characterise the Supreme Court’s approach in *Greenpeace* as “textual” rather than purposive, based on the order in which s 104E and the purpose of RMA were considered (see Edward Willis “The Interpretation of Environmental Legislation in New Zealand” (2010) 14 NZJEL 135). However, it is difficult to avoid the basic conclusion that the majority in *Greenpeace* used the purpose of the Amendment Act to widen significantly the apparent scope of the text of s 104E. In this sense the approach must be seen as strongly purposive, irrespective of any perceived unorthodoxy in how (or the order in which) text and purpose were reconciled by the Court.

decision of the Environment Court<sup>24</sup> and the High Court<sup>25</sup> that a consent authority could not do so, because the intention of s 104E is to prevent the consideration of the effects on climate change of any discharge to air of greenhouse gases.<sup>26</sup> The Supreme Court established that, despite the express wording of s 104E, the prohibition applies not only in relation to applications that *themselves* propose discharges of greenhouse gases and not only in relation to activities otherwise restricted by s 15 or 15B. It applies also in relation to any consent application, whether at district or regional level, and also prohibits the consideration of the effects of purely hypothetical discharges that have not occurred or may never occur.<sup>27</sup> On the facts, the Supreme Court considered that a local authority could not consider the impact that the end use of coal would have on climate change, even though the land use applied for (mining) did not propose or involve any discharge (except incidental discharges). To conclude otherwise would result in anomalous results.<sup>28</sup> For example, proposals to discharge greenhouse gases could be challenged by the “back door”, by allowing climate change arguments to be advanced in hearings for land use or other consents only incidental to a discharge activity.<sup>29</sup> This would defeat the purpose of the 2004 amendments.<sup>30</sup>

Despite some criticism of the courts’ position<sup>31</sup> and a forceful dissent by Elias CJ in *Buller Coal*, it is submitted that the majority decision of the Supreme Court was correct in law. The broad purpose of the 2004 amendments signalled an intention by Parliament to remove consideration of the effects of greenhouse gases from regional and district control, irrespective of the specific wording of s 104E and irrespective of the merits of such a policy choice. To carve out wide exceptions would be to upset Parliament’s intent, threaten the practical effectiveness of the prohibition where it did apply, and undermine the financial signals to be sent to participants under the ETS. Arguments against the majority judgment have, quite understandably, been driven by more practical motives and have pointed to the ineffectiveness of the current regime governing climate change (due partly to the absence of a national environmental standard to regulate greenhouse gas emitters) as well as the weakness or inapplicability of the ETS.<sup>32</sup> Such arguments have not focused on legislative intention. At law, such intention is paramount, irrespective of the perceived desirability of the result on a policy level.

A consequence of the Supreme Court’s approach is that the phrase “relating to” a discharge into air must be given a more expansive meaning than simply “involving” or “proposing” a discharge. As in *Buller Coal*, the prohibition can be triggered when a local authority purports to consider the effects on climate change of any discharge of greenhouse gas to the air, including a hypothetical discharge that may or may not occur. Thus it seems possible that the prohibition would bite in the case of a CCS application, which also involves the consideration of a hypothetical discharge to air.

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24 *Re Buller Coal* [2012] NZEnvC 80, [2012] NZRMA 401.

25 *Royal Forest and Bird Protection Society of New Zealand*, above n 13.

26 *Buller Coal*, above n 3, at [175] and [176].

27 At [175].

28 At [169].

29 At [169].

30 At [170].

31 Sarah Baillie “RMA and Climate Change” [2013] NZLJ 11.

32 At 12.

The drafters of the 2004 amendments would not have envisaged that climate change arguments could arise in a context other than an application for a discharge consent.<sup>33</sup> This gave rise to the confusion in *Buller Coal*, where the Court was compelled to discover the will of Parliament in a scenario not directly contemplated in the Act. Similarly, it is unlikely that the drafters of the amendment contemplated an activity like CCS, which also involves the consideration of a hypothetical discharge but has potential to have *positive* effects on climate change.

### 3. *Distinguishing CCS from Buller Coal on the Grounds of Causation*

Although the Court in *Buller Coal* settled on a broad interpretation of s 104E that, *prima facie*, could restrict consent authorities considering CCS applications, it may be possible to distinguish the scenario in *Buller Coal* from a proposal for CCS. The latter may justify an exception to the broad prohibition recognised under the purposive approach in *Buller Coal*, for a number of reasons.

Firstly, in *Buller Coal* there was no causation between the activity applied for and the alleged effect on climate change. The future discharge in *Buller Coal* was considered not to be an effect of the land use proposed.<sup>34</sup> It was seen rather to occur only indirectly from mining and to be an effect of a different activity that would occur outside New Zealand's geographical jurisdiction, being a discharge from the combustion of coal.<sup>35</sup> This argument rested partly on a jurisdictional bar – the inability of consent authorities to consider speculative effects overseas – rather than an assessment of the scope of the prohibition under s 104E itself.

The Supreme Court held that the discharge from coal combustion would not be an “effect” of mining under the RMA at all (even if the 2004 amendments had not been enacted) because it arises only indirectly from the land use and is thus too remote.<sup>36</sup> In contrast, the consideration of a hypothetical discharge to air (and the consequent positive effects on climate change) in the case of CCS injection would clearly be within the scope of the effects of the activity actually applied for (a discharge or dumping into the subsurface). The relevant activities associated with a CCS project would also take place within New Zealand's geographical jurisdiction, removing any practical and legal difficulties with applying sustainable management to activities in other countries.<sup>37</sup> In other words, there would be no jurisdictional bar on a consent authority in considering the effects of CCS on climate change, and this aspect of *Buller Coal* would be distinguishable.

However, the material question for CCS is not the existence of this kind of jurisdictional bar or lack of causation (which would be relevant even if the 2004 amendments had not been made) but rather whether CCS would be subject to the prohibition in s 104E itself. In *Buller Coal*, the issue of causation and difficulties with measuring effects in foreign jurisdictions did not detract from the fact that the purpose of s 104E (a shift in jurisdiction from local to central) poses a separate barrier to the consideration of effects of coal mining on climate change.<sup>38</sup> Therefore, even though the effects of CCS would be within the jurisdiction of the New Zealand courts and would be a direct result of the activity requiring consent, it may still fall foul of the wider jurisdictional purpose behind the prohibition in s 104E.

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33 *Buller Coal*, above n 3, at [168].

34 Baillie, above n 31, at 12.

35 *Buller Coal*, above n 3, at [175].

36 At [172].

37 Such difficulties are described by the Supreme Court in *Buller Coal*, above n 3, at [175].

38 At [173]–[176].

#### 4. Distinguishing CCS from Buller Coal: Positive and Negative Effects

The second reason CCS may arguably be distinguished from the scenario in *Buller Coal* is because CCS would have a positive effect on climate change, while the use of fossil fuels as in *Buller Coal* would have adverse effects. In *Buller Coal* the discharge of CO<sub>2</sub> and its associated adverse effects were at least likely to occur at some point, namely when the coal in question was burned after it was exported overseas. In part, the prohibition in that case was extended beyond the wording of the section to prevent the negative effects of a discharge being considered by the “back door” in applications for activities only incidental to a discharge. In the context of CCS, a purely hypothetical discharge of CO<sub>2</sub> to the air would be considered only as a reference point to assess the merits of sequestration (a discharge to land), rather than something that would be likely or even possible as a downstream adverse effect. Allowing this discharge to be considered would therefore not provide an opportunity to debate the *adverse* climate effects of CO<sub>2</sub>-emitting activities by the “back door”, which was a central concern of the Supreme Court in *Buller Coal*.

However, to use this difference between positive and negative effects to conclude that the prohibition would be inapplicable to an application for CCS would be misguided. This is so for three reasons.

Firstly, it would require that an artificially narrow view of the purpose in s 3 of the amendment Act be taken. The courts have taken an expansive construction of s 3 and indicated that the amendment was not simply a tool to prevent the obstruction of emissions-intensive activities. The fundamental rationale behind s 104E is that climate change mitigation as a whole, wherever it involves the consideration of discharges to air, requires a national-level response. To allow divergent regional approaches would undermine the coherency of this national approach.<sup>39</sup>

Thus the Supreme Court has recognised “the clear legislative policy that addressing effects of activities on climate change lie outside the functions of regional councils and, *a fortiori*, territorial authorities”<sup>40</sup> and commented that the “commitment and the statutory and national mechanisms provided for in the 2002 [Climate Change Response] Act left little – and arguably no – scope for useful involvement by local authorities”.<sup>41</sup> The High Court in *Buller Coal* (undisturbed on appeal to the Supreme Court) also held that “the unambiguous policy of these amendments is to secure coherent regulation of greenhouse gas emissions at a national level and subject to national instruments”.<sup>42</sup> Whata J here also chose not to disagree with the words of the Environment Court that “the whole of the Amendment Act, but particularly section 3, point strongly to a finding that regulatory activity on the important topic of climate change is taken firmly away from regional government”.<sup>43</sup>

This wide interpretation of s 3 is supported by the fact that the purpose of the amendment Act makes no distinction between jurisdiction over the positive and the adverse impacts of activities on climate change. Although both *Greenpeace* and *Buller Coal* involved activities that would make climate change worse if consented, the prohibition is not limited to activities that would exacerbate climate change.

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39 *Royal Forest and Bird Protection Society of New Zealand*, above n 13, at [40], undisturbed on appeal by the Supreme Court’s majority judgment in *Buller Coal*, above n 3, at [176].

40 *Buller Coal*, above n 3, at [173].

41 *Greenpeace*, above n 3, at [127].

42 *Royal Forest and Bird Protection Society of New Zealand*, above n 13, at [40].

43 At [37].

Secondly, it would be a mistake to see the purpose of the 2004 amendments as being to enhance climate change mitigation and therefore being inherently in favour of measures, like CCS, that have positive effects on climate change. It is worthwhile pausing at this juncture to consider what exactly is being meant by a “purposive” approach in this context. The Supreme Court characterised its expansive interpretation of s 104E in *Buller Coal* as resting on a purposive, rather than literal, approach to the amendments.<sup>44</sup> But is the wider context of New Zealand’s commitment to mitigation relevant to the interpretation of s 104E? Some may argue that, because New Zealand has set targets to reduce its greenhouse gas emissions and because CCS is designed to improve rather than contribute to climate change, a wider purposive approach would exclude CCS from the scope of the s 104E prohibition. For example, the purpose of the CCRA, which is strongly supportive of reducing emissions, would prima facie support the ability to consider the climate benefits of CCS.<sup>45</sup>

The Supreme Court in *Buller Coal* explored the context provided by the CCRA and the ETS, notably recognising that the ETS left little room for local authority jurisdiction over climate change.<sup>46</sup> However, the Court did not place weight on the purpose of the CCRA when determining the scope of the prohibition in s 104E. Instead, it focused on the purpose of the 2004 amendment Act itself, in conjunction with the scheme of the RMA as a whole, to widen the scope of the prohibition expressed in s 104E.<sup>47</sup>

This is an appropriate approach. While the intention of Parliament to transfer wider climate change mitigation jurisdiction from local to central government is not clear from s104E itself, the purpose of the CCRA should not be used to guide or cast doubt on the meaning of a section in a different Act that is subject to its own expression of legislative intent (that is, in section 3 of the amendment Act).

The purpose of the CCRA is, at least in its aspirations, what may be termed “climate friendly”. It aims, among other things, to implement an ETS that reduces New Zealand’s net emissions. The ETS is designed to be the primary mechanism by which New Zealand addresses greenhouse gas emissions. The complementary prohibition in s 104E of the RMA suggests that the CCRA is intended to do so to the express exclusion of local mitigation measures. This is understandable, of course, given that the ETS could be undermined if activities were also subject to varying regulatory and policy restrictions in local planning instruments. Thus the “climate friendly” approach of the CCRA cannot be automatically transferred to the interpretation of other instruments that are specifically designed *not* to have a major role in mitigation. In other words, one should not assume that any relatively weak climate outcomes under the RMA are inappropriate or should be subject to a strained interpretation simply because of statements in the CCRA that would support climate mitigation measures.

It is more persuasive to see the amendment Act as being neutral in a climate policy sense. It is designed to complement the ETS by removing jurisdiction from a local to a central level, so that consistent policy decisions can be made across the country. The jurisdictional shift was designed neither to increase mitigation, nor to reduce it. It simply changes the location where such decisions can be made. The fact central government has not yet embraced its regulatory role by implementing an NES on climate change, and the resulting weakening of climate regulation in practice, is irrelevant to interpreting the purpose of the amendment itself.

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44 *Buller Coal*, above n 3, at [153].

45 Climate Change Response Act 2002, s 3.

46 *Buller Coal*, above n 3, at [127].

47 *Greenpeace*, above n 3, at [153].

Thirdly, it would be difficult to justify a different outcome in a CCS application from that in *Buller Coal* even if it was accepted that a wider “climate friendly” purpose were behind the transfer of jurisdiction in s 104E. At first glance, the effects of the fossil fuel activities in *Buller Coal* and *Greenpeace* may appear very different to those of CCS proposals. The former would have exacerbated climate change if consent were granted, while the latter would mitigate climate change. However, in *Buller* and *Greenpeace* the Court extended the scope of s 104E to prohibit the consideration of the activities’ adverse effects on climate change, thereby increasing the likelihood of consent being granted. In other words, a purposive interpretation produced an outcome that in practice was *bad* for climate change.

Applying the prohibition to an application for CCS would, in contrast, reduce the likelihood of consent being granted. However, as in *Buller* and *Greenpeace*, this is also an outcome that would be bad for the climate. The simple fact that CCS would have a *positive* effect on climate change cannot by itself be a reason to carve out an implied exception from the prohibition, because the positive effects that would have resulted if jurisdiction had been extended in *Buller* and *Greenpeace* were not seen as good reason carve out exceptions in those cases. This is because the aim of s 104E is not to enhance climate change mitigation, but simply to create consistency in climate policy by shifting jurisdiction to central government. The difference between the adverse effects of the activity considered in *Buller Coal* and the positive effects of CCS therefore are not material in determining whether CCS falls within the scope of the s 104E prohibition.

##### 5. Distinguishing CCS from *Buller Coal*: Does CCS “Relate to” a Discharge to Air?

There is a third way in which it might be possible to distinguish an application for CCS from *Buller Coal* and therefore argue that the prohibition would not apply to the former. Whereas in *Buller Coal* the application in question concerned an activity that could foreseeably result, eventually, in the discharge of greenhouse gases, the intention behind CCS is that no discharge to air would ever eventuate. Therefore it can legitimately be asked whether a consent authority, in looking at the positive impacts of CCS, would be considering an application that “relates to” a discharge to air. The fictitious atmospheric discharge being considered as a reference point may be too remote to be caught by the section. It has been concluded earlier in this paper that, on a literal reading, including CCS within the scope of the prohibition would be reading down this requirement that the discharge under consideration be to air.

However, the purpose of the amendments suggests that this difference would not be material and the fictitious discharge to air would not be too remote. Firstly, the hypothetical nature of a discharge to air does not in itself put it beyond the scope of the prohibition, as was made clear in *Buller Coal*. Secondly, prohibiting the consideration of the positive impacts of CCS on climate change remains within the more general jurisdiction-shifting purpose of the amendments, as described above.

Thirdly, the approach of s 104E to renewable energy suggests that activities that have no prospect of discharging greenhouse gases to air may still “relate to” the discharge of such gases to air and thus be subject to the prohibition. As with CCS, a renewable electricity project such as a hydro-electric dam does not propose, or ever have the intention of, releasing greenhouse gases to the air. The only way in which a hydro dam involves the consideration of the discharge into air of greenhouse gases is by assessing the emissions that would be released if a non-renewable alternative were used. It involves an assessment of its relative positive impact on climate change by using a hypothetical discharge to air as a reference point, in much the same way as an assessment would be made in an application for CCS.

The fact that an express exception to the prohibition for renewable energy has been included in s 104E indicates that such projects would otherwise be caught by s 104E. It suggests that the consideration of a hypothetical discharge, even as a reference point for comparison, would otherwise be prohibited. This is highlighted by the specific inclusion in the exception of the “relative” benefits of renewable energy for climate change, which would require a comparative assessment of non-renewable, greenhouse gas-emitting options. In other words, for the exception to apply, a renewable energy project does not have to contemplate *any* discharge to air as long as it would prevent discharges to air that would result from a non-renewable alternative.

If the consideration of an atmospheric discharge as a reference point only were not caught by the general prohibition, there would have been no need to include the specific statutory exception for renewable energy. Therefore on a purposive approach, including CCS within the scope of the prohibition in s 104E does not involve a reading down of s 104E. The inclusion within the general prohibition of a hypothetical discharge to air (as a reference point) is in fact a necessary outcome, if the express exception for zero-emission renewable energy projects is to be explained. The Supreme Court in *Greenpeace* commented:<sup>48</sup>

Local authorities are generally prohibited from having regard to the effects on climate change of the discharge of greenhouse gases, but *may do so when ... considering an application for consent to an activity involving the use and development of renewable energy.*

Here, the Court clearly contemplated that assessing an application for a renewable energy activity *does* involve the consideration of the discharge to air of greenhouse gases. The judgment indicates that the prohibition, to the extent not specifically overturned by the exception, can apply to activities that do not themselves propose or ever potentially lead to the discharge of greenhouse gases to the air. Given that CCS is clearly not a renewable energy activity, it does not fall within the specific exception. It must therefore fall within the general prohibition from which the exceptions were carved out. This is consistent with the general jurisdictional rationale underlying the 2004 amendments.

Thus on a purposive approach to s 104E, an application for CCS is likely to fall within the scope of its prohibition and a consent authority is likely to be prevented from considering its positive effects on climate change. This presents a potential barrier to applications for consent for CCS.

The discharge and rapid dispersal of purified CO<sub>2</sub> to the air would in most cases have only limited or no adverse environmental effects – apart from those on climate change. In other words, if climate effects were disregarded, there may be no appreciable environmental benefit from storing the gas underground rather than releasing it to the atmosphere. If the benefits of CCS could not be considered – by contrasting sequestration with the adverse effects that would result if that gas were discharged to the air – consent would be more likely to be declined under the consent authority’s overall broad judgment. This is particularly concerning given that CCS could have a number of potentially adverse effects and, other than impacts on climate change, only limited positive effects.<sup>49</sup> The only way in which the climate benefits of CCS could be considered would be if national-level regulation were developed to address these benefits specifically. This has not yet occurred and, as

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48 *Greenpeace*, above n 3, at [62] (emphasis added).

49 For example, potential effects could include acoustic effects, disruption of marine and terrestrial ecology, effects on petroleum or water resources, and disturbance of seabed and land. Compared to these adverse effects, non-climate-related positive effects such as increased employment opportunities may receive little relative weight.



explored below, some questions remain over the ability of local and central government to develop the policy instruments necessary to make such regulation effective in practice.

## V. THE IMPACT OF THE PROHIBITION IN S 70A ON CCS CONSENT APPLICATIONS

In the consenting context, the RMA requires a consent authority to have regard not only to the effects of the proposed activity but also policy provisions in regional and district planning documents that are relevant to those effects.<sup>50</sup> When developing or reviewing these planning documents, s 70A of the RMA mirrors s 104E and prevents regional councils from developing policies addressing the causes of climate change. The section provides:

### **70A Application to climate change of rules relating to discharge of greenhouse gases**

Despite section 68(3), when making a rule to control the discharge into air of greenhouse gases under its functions under section 30(1)(d)(iv) or (f), a regional council must not have regard to the effects of such a discharge on climate change, except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases, either—

- (a) in absolute terms; or
- (b) relative to the use and development of non-renewable energy.

On its express wording, the prohibition in s 70A appears to have limited effect on CCS applications. This is so in three ways. Firstly, it expressly applies only to regional and not district councils. The prohibition does not apply to the consideration of territorial authority functions relating to land (for example land use or subdivision control). Secondly, it applies only to a regional council's functions relating to the control of discharges. It does not apply, for example, to coastal occupation or the taking of freshwater. Thirdly, the section relates only to the making of rules, and does not expressly prohibit the making of policies or objectives concerning the effects of activities on climate change.

The first two aspects identified above have been discussed already in the context of s 104E. There is no reason to believe that the courts would take a different approach to s 70A. A purposive approach would suggest that the prohibition applies equally to regional and district councils, and in developing rules pursuant to all their functions under the RMA (not only discharge control functions).

The third aspect mentioned above – the fact that s 70A relates only to the making of rules and not policies or objectives – is more difficult. Is local government barred from developing policies that highlight the positive effects of activities (such as CCS) on climate change? A view that s 70A applies only to the making of rules or controls, and not the development of sub-national policy, is supported by the express ability of a national environmental standard (NES) to dictate the extent to which climate change is controlled at a regional level.<sup>51</sup> In contrast, no provision is made for a national policy statement (NPS) to amend the extent to which policies and objectives in regional and district plans can provide for effects on climate change. This may suggest that the prohibition does not apply to policy development, because the removal of policy jurisdiction from

<sup>50</sup> RMA, s 104(1)(b).

<sup>51</sup> RMA, s 70B. This is also reflected in comments made throughout the legislative process of the 2004 amendments: *Todd Energy Ltd v Taranaki Regional Council*, above n 19, at [42].

local government has not been complemented by the granting of jurisdiction to central government (as it has been for regulatory provisions like rules and NESs).

However, the fact remains that the courts have taken an expansive, purposive approach to the 2004 amendments. In short, local authorities have been directed by the Supreme Court not to consider the effects on climate change of discharges into air of greenhouse gases. This broad direction would likely result in the prohibition applying equally to the development of regional and district policy concerning effects on climate change, because “given the unambiguous policy of the Amendment Act 2004 ... [one] must be slow to imply ... collateral jurisdiction”.<sup>52</sup> It is unlikely that a regional council could lawfully develop a policy in a regional plan that recognised the benefits of CO<sub>2</sub> injection for climate change mitigation.

Some might argue that questions over the prohibition on sub-national policy development are academic only. After all, the practical effect of the prohibition in s 104E is that a consent authority cannot consider the effects of an activity on climate change in any application for consent. Policies are only of relevance in the consenting context once a rule triggers a requirement for consent. Therefore, even if policies in plans could lawfully address the effects of activities on climate change, a consent authority would not be able to consider them when deciding an application under s 104.

However, the scope of the prohibition in s 70A becomes more practically significant if central government were to implement an NES that imposed rules and standards for activities having effects on climate change. The ability for an NES to do so is clearly provided for in s 70B. If such activities were treated as permitted or prohibited activities under the standard, no issue would be likely to arise. This is because no consent would (or could) be granted. However, if an NES were to impose a discretionary or non-complying status on an activity having effects on climate change, a consent authority would retain discretion as to whether it granted consent. At this point, there would be a need for the consent authority to consider the policy instruments outlined in s 104(1)(b). Given that an NES is a purely regulatory instrument and not designed to provide policy guidance,<sup>53</sup> and the fact that the broad prohibition in s 104E prevents regional or district consideration of positive effects on climate change, discretionary decisions on CCS might remain skewed in favour of declining consent even if an NES “enabled” it through a discretionary activity status.

This point will, perhaps, become clearer when put in context. In the case of CCS, an NES could foreseeably be developed to provide that injection be classified as a discretionary activity, subject to certain discretionary activity standards or technical requirements. The classification of injection as a discretionary activity and the imposition of standards could, under s 70B, lawfully be based on the positive effects that CCS could have on climate change. If an application for CCS injection were to be lodged as a discretionary activity, a consent authority would then need to have regard to the policy guidance referred to in s 104. The touchstone of the decision would be pt 2 of the Act. However, pt 2 is silent on the policy direction to be taken where an activity has effects specifically on climate change, and addresses only the importance of preparing for the

52 *Royal Forest and Bird Protection Society of New Zealand*, above n 13, at [41]. This point was undisturbed by the judgment of the Supreme Court on appeal.

53 Despite one curious and anomalous reference in s 46A(2)(b)(i) of the RMA to “policies in ... national environmental standards” and a comment by Whata J that the 2004 amendments “accorded primacy to national regulations by requiring regional policies on discharges to align with national environmental standards”: see *Royal Forest and Bird Protection Society of New Zealand*, above n 13, at [46]. The obligation on local authorities in s 44A of the RMA is only to remedy conflicts between an NES and *rules*, not perceived conflicts between an NES and *policies*.

effects of climate change.<sup>54</sup> The same is generally true of other national-level policy documents.<sup>55</sup> The result would be that, although an NES could technically enable CCS on the basis that it had positive effects on climate change, a consent authority may be left with a paucity of lawful policy considerations in favour of CCS. This would be set against a potentially formidable range of policy considerations against it, providing an artificial bias towards declining consent.<sup>56</sup>

For a decision on CCS truly to reflect sustainable management, all relevant matters need to be weighed with minimal interference or exceptions. The activity's positive effects on climate change, along with its adverse environmental effects and applicable policy guidance, should be considered. The technology is unique in this sense, because consideration of greenhouse gas emissions is essential, rather than incidental, to the activity. Disregarding its effects on climate change, there is little to commend CCS to a decision-maker. In contrast, activities such as forestry may have positive effects on climate change, but have many other positive features to balance against their (generally more minor) adverse effects. By no means would all CCS proposals represent sustainable management and be granted consent. However, in cases where the adverse effects of injection were outweighed by potentially significant positive effects on climate change, sustainable management should demand that consent be granted. The blanket prohibition in the RMA suggests that this may be unlikely to occur at present. A key question, therefore, is whether an NPS *could* be developed by central government to enable consent authorities to consider the positive effects of CCS on climate change, thereby alleviating the implied barrier to local policy development in s 70A.

## VI. THE DEVELOPMENT OF NATIONAL-LEVEL POLICY

In contrast to an NES, the development of an NPS on climate change is not specifically provided for in the RMA. However, the development of an NPS is likely not prohibited in the same way that sub-national policy development is likely to be prohibited. The RMA provides that an NPS can be developed on any matter of national significance, including those that reflect "New Zealand's interests and obligations in maintaining or enhancing aspects of the national or global environment".<sup>57</sup> The development of an NPS touching on climate change would amount to national-level direction, and thus not infringe the purpose of the 2004 amendments.

Although there is no statutory barrier to the development of an NPS recognising the climate change benefits of CCS, some doubt remains over whether such an NPS could overcome the prohibition in s 104E when determining an application for resource consent. Section 104F creates an exception to the prohibition in s 104E only to the extent that an NES provides standards, methods and technical requirements addressing the effects of activities on climate change. There is no express exception to the prohibition stating that a consent authority can have regard to an NPS on climate change.

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54 RMA, s 7(i).

55 One exception is the National Policy Statement on Renewable Electricity Generation 2011, to the extent that renewable energy enables such a reduction. This is consistent with the exception in ss 70A and 104E that the climate change benefits of renewable generation are valid considerations.

56 Including the potential adverse environmental effects of CCS and the risk that CCS could undermine the substantial body of policy direction under the RMA in favour of developing renewable energy resources.

57 RMA, s 45(2)(b).

However, once again it is useful to go back to first principles. The relevant purpose of the 2004 amendments was to require local authorities not to consider the effects on climate change of discharges into air of greenhouse gases. Implicit in this is the intention that these effects are to be considered on a national level, but not that they are to be beyond the consideration of any policy-setting body. Therefore, although technically falling within the prohibition in s 104E, consideration of an NPS under s 104(1)(b)(iii) would not infringe the purpose of the amendments. If anything, the ability of a national instrument to direct regional policy development concerning the effects of activities on climate change is necessary to achieve their centralising purpose and to complement the regulatory effect of an NES. The 2004 amendments did not seek to remove climate change from the RMA regime entirely, only to place a jurisdictional bar on its consideration by local government. Allowing consent authorities to have regard to an NPS concerning climate change would not fall foul of this purpose.

## VII. CONCLUDING COMMENTS AND OPTIONS FOR REFORM

The 2004 amendments to the RMA made significant changes to the ability of local authorities to consider the effects of activities on climate change. The courts have since taken an expansive, purposive interpretation of ss 104E and 70A, and have been willing to conclude that they impose a wider prohibition than is apparent from their express wording. This purposive approach, when applied to the context of an application for resource consent to undertake CCS, could pose a significant barrier to the granting of consent. If consent were not able to be granted to CCS in practice, market signals under the ETS could not apply to CCS operations. The positive effects of CCS would need to be a valid matter under the RMA to minimise regulatory interference and allow the market to operate efficiently.

Removing regulatory constraints to CCS proposals would be a relatively simple way to enable a technology that has potential to reduce New Zealand's carbon emissions and bridge a temporary gap to a more sustainable industrial future. Given the uncertainties that surround the interpretation of s 104E and its potential to dissuade investment in CCS, the scope of the prohibition should not be left to be decided by the courts. If it were, the most likely interpretation is one that would prohibit the consideration of the positive climate effects of the technology. The RMA has, to some extent, an inbuilt mechanism by which the barrier to CCS in s 104E can be overcome, if that mechanism is utilised. Sections 70B and 104F contemplate the implementation of an NES to impose an appropriate activity status, standards, and technical requirements for CCS activities, and the positive effects of CCS on climate change can lawfully be taken into account in their development. These then have independent effect as regulations, and lower level planning documents must not conflict with them.<sup>58</sup> An NES on CCS should outline the appropriate activity status for CCS injection (most likely to be discretionary) which should be tied to appropriate standards (potentially based on international approaches).

It is curious that no provision was made in the 2004 amendments for national-level guidance to influence or direct regional climate change policy. To ensure that both the positive and adverse effects of CCS operations are able to be considered and weighed appropriately under the umbrella of sustainable management, an NPS on CCS should also be developed. This would need to provide national direction on the extent to which the positive impacts of CCS on climate change can lawfully

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<sup>58</sup> RMA, ss 43 and 44A.

be considered when deciding applications for resource consent. Although perhaps not strictly necessary, an amendment could also usefully be made to s 104F, specifying that the prohibition in s 104E applies except to the extent that an NES *or* NPS enables the effects of an activity on climate change to be considered. At present, the prohibition in s 104E appears to apply irrespective of the contents of an NPS. Taking these actions would be one way to remove a potential, and likely unintended, regulatory barrier to the deployment of CCS technology in New Zealand.

An alternative option for reform, but one that requires legislative intervention, could be to implement a simple amendment to the RMA. An additional exception could be introduced in s 104E, to the effect that the prohibition applies except in applications proposing renewable energy *or* CCS. This would have the benefit of increased clarity, but may result in less flexibility. If central government then wished to remove the consideration of the climate benefits of CCS to the national level, further legislative change may be required.

One final option for reform merits a brief note. The recent report advising the government on the regulation of CCS recommends that the injection phase of CCS be removed entirely from scrutiny under the RMA, and transferred to CCS-specific legislation.<sup>59</sup> This would mean that the prohibition in s 104E would no longer bite on applications for consent to inject CO<sub>2</sub>, thus effectively resolving the issue discussed in this paper.<sup>60</sup> However, as yet, there has been no indication that this option has been adopted by government, and it remains one of several possible avenues for reform rather than a foregone conclusion. Removing a single activity from the scope of the Act is likely to be subject to intense political debate and would have legal ramifications beyond the resolution of the narrow issue concerning s 104E.

The ability of central government to develop NESs and NPSs on CCS, the relatively straightforward legislative amendments required to remove the problem, and the potential for the environmental impacts of CCS injection to be removed from the scope of the RMA entirely, do not render the issues discussed in this paper academic only. If the attention of policy and law makers is not directed to the potential barrier posed by s 104E to the consenting of CCS projects, it may not be immediately obvious that such remedial action is needed. The purpose of this paper is to identify this barrier, explain why it is significant, and use this as a basis to argue that some reform is needed. Whether that should take the form of national policy instruments, simple legislative amendment, or the wholesale removal of CCS injection from the RMA is an issue that is beyond the scope of this paper, and involves consideration of much broader factors.

## VIII. AREAS FOR FURTHER RESEARCH

This paper has focused on a potential barrier to CCS injection posed by the prohibition in s 104E of the RMA. A similar prohibition is contained in s 59(5)(b) of the recently enacted Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012. This provision has some curious features that are not present in the RMA context and warrants further discussion.

Similarly, the broad purpose of the 2004 amendments presents a risk that suitable enforcement jurisdiction under the RMA may not currently exist to control escapes of CO<sub>2</sub> from a subsurface storage formation after injection has occurred. Such emissions may not cause any environmental

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59 Barton, Jordan and Severinsen, above n 2, at 253.

60 In fact, the issue explored in this paper and summarised in ch 2 of the report was treated in the report as one reason (among others) to implement the solution of removing CCS injection from the RMA.

harm other than a proportionately small impact on the global climate, but would be essential for the success of a CCS project. Enforcement powers would therefore be important.

# AN (INDIGENOUS) RIGHTS-BASED APPROACH TO DEFORESTATION IN PAPUA NEW GUINEA

BY JOSHUA PIETRAS\*

Papua New Guinea (PNG) has one of the fastest-growing rates of deforestation in the world. This trend is largely a result of illegal logging by transnational corporations, which often take advantage of PNG's poorly regulated forestry laws. As a result, PNG's logging sector has now become synonymous with corruption, environmental degradation and human rights violations.

Conservation of the environment affects, and is in turn affected by, the realisation of human rights. Likewise, respect for the rights of traditional forest communities can go a long way towards achieving sustainable outcomes. The Declaration on the Rights of Indigenous Peoples contains a number of guiding principles that could assist PNG's landowning communities to combat deforestation and protect their traditional livelihood. This paper will explore some of the challenges and opportunities of applying a rights-based approach to deforestation in PNG.

## I. INTRODUCTION

Papua New Guinea (PNG) is one of the most culturally diverse countries in the world with over 860 distinct languages and ethnic groups.<sup>1</sup> It also has a population of about seven million, making it the largest developing country in the Pacific. About 90 per cent of the population live in rural areas and depend on the land for their daily sustenance.<sup>2</sup>

PNG is also home to the third largest rainforest in the world, after the Amazon and Congo Basin. Its forests provide vital ecosystem services, hold five per cent of the world's biodiversity, and give food and shelter to most of the population. In spite of their well-documented importance, PNG's forests are disappearing at an alarming rate.<sup>3</sup>

For a number of years, logging companies have been able to exploit PNG's poorly regulated processes and the desperation of local communities to acquire customary land for illegal logging.<sup>4</sup> In many cases in PNG, land acquisition and the destruction of forests have been linked to human rights violations and the loss of traditional livelihoods.

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1 Freda Talao "Papua New Guinea: Country Report on Human Rights" (2009) 40 VUWLR 1 at 1.

2 George Muroa "Land Tenure Law in Papua New Guinea" in Eric L Kwa (ed) *Natural Resources Law of Papua New Guinea* (University of Papua New Guinea, Port Moresby, 2001) 1 at 14.

3 Phil L Shearman and others *The State of the Forests of Papua New Guinea* (University of Papua New Guinea, Port Moresby, 2008).

4 Paul Winn *Up for Grabs: Millions of Hectares of Customary Land in PNG Stolen for Logging* (Greenpeace Australia Pacific, NSW, 2012) at 13.

This paper argues that illegal logging and lack of interest or indifference by the government of PNG has undermined the rights of its traditional landowners. It is therefore suggested that PNG adopt a more rights-based approach to forest conservation. This paper is divided into three parts, after the introduction (part I). Part II discusses the main drivers of deforestation in PNG and how the current legal regime has failed to protect the rights of traditional landowners. Part III investigates the relationship between human rights and the environment and how the United Nations Declaration on the Rights of Indigenous Peoples can empower traditional landowning communities to manage their forests sustainably. Finally, part IV concludes on the challenges and opportunities of implementing international human rights law in PNG.

## II. LEGAL, POLITICAL AND SOCIO-CULTURAL CONSTRUCTS OF DEFORESTATION IN PNG

### A. *Land, Law and Society*

Land occupies a complex social, economic, cultural, spiritual and therefore legal role in Papua New Guinean society.<sup>5</sup> For the most part, land is not seen as an alienable commodity; but a sacred resource linking past, present and future generations.<sup>6</sup> The current owners of the land are therefore mere custodians and hold the land on trust for future generations.<sup>7</sup>

In PNG, land is classified as either alienated or unalienated. Alienated lands comprise less than three per cent of the total landmass and are governed by the common law and statute.<sup>8</sup> Unalienated lands, also known as customary lands, comprise the majority of the land base and are governed by customary law.<sup>9</sup>

Under the common law, the state holds a radical title to all the land. Although individuals cannot own the land itself, they can obtain “ownership rights” in the form of a freehold estate. This ownership model of land is so dominant in the common law system that it is based on the assumption that all rights are stratified hierarchically. At the top of the hierarchy is the dominant absolute owner and lesser rights are carved out from this freehold estate. The dominant owner’s land rights can be sold, transferred, mortgaged, leased or disposed of altogether.

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5 Joshua Castellino and David Keane *Minority Rights in the Pacific Region* (Oxford University Press, Oxford, 2009) at 222.

6 Sue Farran “Land as a Fundamental Right: a Cautionary Tale” (2009) 40 VUWLR 387 at 388.

7 Sue Farran *Human Rights in the South Pacific: Challenges and Changes* (Routledge-Cavendish, London, 2009) at 126.

8 Peter Eaton *Land Tenure, Conservation and Development in Southeast Asia* (Routledge Curzon, London, 2004) at 128.

9 John T Mugambwa and Harrison A Amankwah *Land Law and Policy in Papua New Guinea* (2nd ed, Cavendish, London, 2002) at 117.



Under PNG's customary laws, land is owned communally by a lineage or other groups such as a clan or tribe but not by individuals.<sup>10</sup> Instead, individual members of a landowning group only possess what is known as *usufruct* or user rights.<sup>11</sup> For instance, customary law recognises that a particular lineage or other clan may have a right to extract timber, whereas hunting or fishing rights can be claimed by individual members of the landowning group.<sup>12</sup> There is no restriction on the sale of rights in customary land to other landowning groups, provided that the relevant customary processes are followed.<sup>13</sup> However, the Constitution of PNG prohibits the sale of customary land to non-citizens.<sup>14</sup>

In recent years, pressure from foreign corporations and international financial institutes has led PNG to direct its land policies towards the exploitation of natural resources.<sup>15</sup> The government's failure to incorporate customary law into these national policies has meant that many customary landowners must now rely on Western legal concepts, rather than falling back on the appropriate customary norms.<sup>16</sup> As a result, the line between customary and alienated land has become increasingly blurred.

### *B. 1973 Customary Land Reforms, Incorporated Land Groups and Forestry*

Many of PNG's land laws can be traced back to the Australian administration in the mid-1960s. During this period, there was a particular emphasis on the registration of customary land, with the aim of promoting the efficient and economic use of customary land.

One of those laws was the Land Registration (Communally Owned Land) Ordinance of 1962. This law provided for the registration of customary land in certain areas as either individually owned or communally owned. A Register of Communally Owned Lands was set up so that individual and communal owners could register their customary land. Land entered in the register remained subject to customary law but an entry on to the register was conclusive evidence of ownership at

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10 The terms "customary landowners" and "communal ownership" are frequently used in PNGs written laws. The term "ownership"; however, has no a priori meaning, but is a cultural construct of the common law. It conjures up the idea of fee-simple title, involving absolute rights that may be enforced against all other rights, which has little relevance to customary law today. Nor is ownership, as understood as a bundle of rights, equivalent to the differences of interest under customary law. Technically speaking, it may be more accurate to refer to rights to use. But for the purposes of this article, the terms "ownership" and "customary landowners" will be used to describe a customary group's allodial title to the land. For discussion, see Kenneth Brown "The Language of Land: Look Before you Leap" (2000) 4 *Journal of South Pacific Law*; Jennifer Corrin "Customary Land and the Language of the Common Law" (2008) 37 *Common Law World Review* 305.

11 Muroa, above n 2, at 32.

12 Sababu Kaitilla "Principles, Practices, and Conflicts of Customary Land-Use Rights: Emerging Socioeconomic Exchange Systems in Papua New Guinea" (1995) 18(4) *Pacific Studies* 95 at 100.

13 Sue Farran and Don Paterson *South Pacific Property Law* (Cavendish, London, 2004) at [8113].

14 Constitution of the Independent State of Papua New Guinea 1975, s 56.

15 Tim Anderson "Land Registration, Land Markets and Livelihoods in Papua New Guinea" in Tim Anderson and Gary Lee (eds) *In Defence of Melanesian Customary Land* (AID/WATCH, Sydney, 2010) 1 at 13.

16 Sue Farran "Navigating between Traditional Land Tenure and Introduced Land Laws in Pacific Island States" (2011) 43 *The Journal of Legal Pluralism and Unofficial Law* 65 at 87.

the date of registration. However, the law made no provision for dealings in the registered land or for the legal recognition and operation of landowning groups.<sup>17</sup>

The other main land law introduced by the Australian administration was the Land (Tenure) Conversion Ordinance of 1963. Unlike the previous law, this legislation provided for the conversion of customary land to individual freehold through registration. Upon registration, the land would be released from custom and all customary interests and rights to the land would be extinguished. Both this law and the previous one were administered by the Land Titles Commission, made up of senior officials of the Australian administration.

In the early 1970s, the Australian administration attempted to introduce a raft of new land legislation but introduction of such reforms were controversial in the run up to PNG's independence and faced widespread opposition. As such, the proposed laws were withdrawn. After the 1972 election, the coalition government led by Michael Somare set up a Commission of Inquiry into Land Matters (CILM) to make recommendations on customary land reforms in preparation for PNG's independence. The CILM Report of 1973 outlined two main suggestions: first, that a new system of customary land registration be introduced; and second, that all landowning groups become incorporated.<sup>18</sup>

With respect to the latter recommendation, the government passed the Land Groups Incorporation Act 1974 (LGIA) to encourage customary landowners to participate in the national economy by using their land as a vehicle for development.<sup>19</sup>

The LGIA allows customary landowning groups to gain formal legal recognition by registering as an Incorporated Land Group (ILG). The incorporation process starts with preparing a group constitution. This document must set out: the group's name, the rules on group membership, rules for appointing committee members, any limitations on the exercise of power and the customs under which the group operates.<sup>20</sup>

Once the constitution is complete, the customary group applies to the Registrar of Incorporated Land Groups for incorporation. The application is given public notice in the local area and the Registrar checks out the group's suitability for incorporation. After considering comments received and any objections, the Registrar may formally recognise the customary group as an incorporated land group by issuing it with a certificate of registration.<sup>21</sup>

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17 Jim Fingleton "A Legal Regime for Issuing Group Titles to Customary Land: Lessons from the East Sepik" in James F Weiner and Kate Glaskin (eds) *Customary Land Tenure and Registration in Australia and Papua New Guinea: Anthropological Perspectives* (ANU E Press, Canberra, 2007) 15 at 17.

18 *Commission of Inquiry Into Land Matters Report* (1973) at 54.

19 John Mugambwa, Harrison Amankwah and CEP (Val) Haynes *Commercial and Business Organizations Law in Papua New Guinea* (Routledge, Abingdon, 2007) at 187.

20 Fingleton, above n 17, at 27.

21 Section 5(3) of the LGIA states that the recognition should not be refused simply because (a) the members are part only of a customary group or members of another group; or (b) the group includes persons who are not members of the primary customary group, if the Registrar is satisfied that those persons are bound by the same customs as the primary customary group; or (c) the group is made up of members of various customary groups, if the Registrar is satisfied that the group possesses "common interests and coherence independently of the proposed recognition, and share or are prepared to share common customs". The Registrar is only required to refuse recognition where the group characteristics are "so temporary, evanescent or doubtful that the group does not have a corporate nature."

Upon incorporation, the rights and liabilities of the landowning group become the rights and liabilities of the ILG.<sup>22</sup> The powers of the ILG relate only to land, its use and management, and they must be exercised in accordance with the group's constitution and relevant customs.

ILGs operate in the same way as private companies. They can own, acquire and dispose of property, enter into transactions, sue or be sued and distribute profits amongst their "shareholders" – the individual members of the landowning group.

This is where the LGIA is most contentious, as it assumes that customary land law operates in the same way as the common law. The LGIA proceeds on the assumption that the landowning group *owns* the land as a collective unit and that its decisions are similar to the decisions of a corporation. This assumption is reflected in the LGIA's opening words:

Being an Act—

- a. to recognize the *corporate* nature of customary groups; and
- b. to allow them to hold, manage and deal with land in their customary names and for related purpose. [Emphasis added.]

Thus the purpose of the LGIA is to empower customary landowners to manage the land as a single unit. This is problematic because it assumes that the ILG's representatives have the *customary authority* to hold, manage and deal with the land on behalf of the collective. In doing so, the LGIA ignores the unique rights and obligations that exist between group members.

Although the LGIA was initially heralded as a breakthrough, for many years there was very little action taken under its provisions. The main reason for this was the lack of complementary legislation for the registration of customary lands. As previously mentioned, the LGIA was designed to assist customary landowners to "hold, manage and deal with [their] land".<sup>23</sup> It was never intended to validate ownership rights or settle land boundary disputes.<sup>24</sup> That task was reserved for a national system of customary land registration – the missing component of the CILM's recommendations.

In 1987, the Land (Tenure Conversion) Ordinance was amended to allow ILGs and other customary groups to apply for registration with the Land Titles Commission. In practice; however, very little land was ever registered under its provisions. Landowners were generally reluctant to register their customary land for number of reasons, one being that registration removed the statutory protection of customary land, thus allowing it to be sold, transferred, leased and mortgaged. In this sense, registration was seen as destructive to the group's traditional system of landownership.

Another reason for low levels of registration was the poor administration by the Land Title Commission. The procedure for registering title was inaccessible to most landowners because of the costs and time-delays within the Land Titles Commission, which was responsible for registering land titles. There were also allegations of corruption and fraud, with land titles being issued easily, tampered with, destroyed or suspiciously disappearing.<sup>25</sup>

By 1989, less than 10,000 hectares of customary land had been subject to tenure conversion and only eight groups had been incorporated under the LGIA. This would seem to indicate that the

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22 Fingleton, above n 17, at 27.

23 Land Groups Incorporation Act 1974, preamble.

24 Lawrence Kuna Kalinoe "Incorporated Land Groups in Papua New Guinea" (2003) 29 *Melanesian Law Journal* 73.

25 For example, see *Ben Ifoki v The State, Registrar of Land Titles, Keroro Development Corporation Ltd, and Deegold (PNG) Ltd* [1999] OS 313 85 at 129.

CILM was at least successful in defending customary land from further alienation. However, this does not reflect the true picture. For nearly two decades, various forms of partial and temporary alienation were permitted by the laws pertaining to certain extractive industries. For instance, the Forestry (Private Dealings) Act of 1971 allowed customary landowners to bypass the provisions of the Forestry Act 1973 by selling timber rights to a landowner company under the terms of a dealings agreement, which only required the assent of the Forests Minister. Thereafter, the landowner company could enter into a logging and marketing agreement with a logging contractor, who was then free to extract and sell the logs with minimal government supervision. As a result, logging companies were able to abuse and manipulate landowning companies into selling their timber rights.<sup>26</sup>

### C. Forestry Act 1991

In the late 1980s, PNG launched the Barnett Commission of Inquiry into the forestry industry, chaired by Australian High Court Judge Thomas Barnett.<sup>27</sup> After two years of investigation, the Barnett Commission documented widespread illegal logging and described PNG's forestry industry as "out of control". The Commission called for an immediate reduction in timber harvesting and recommended that significant reforms be made to PNG's forestry sector.<sup>28</sup> As a response, the government passed the Forestry Act 1991 and established the National Forest Authority.

One of the main goals of the Forestry Act was to improve access to forestry resources located on customary land. For this purpose, this Act required customary landowners to incorporate under the LGIA before they could sell timber rights to their lands.<sup>29</sup> The requirement for incorporation led to a flood of applications as customary landowners competed for government-backed logging projects. Nowadays, there are over 16,000 ILGs as well as hundreds of landowner companies.<sup>30</sup>

The Forestry Act prevents customary landowners from negotiating directly with members of the timber industry. The government enacted this law to protect landowners from the unscrupulous practices of logging companies, which had been well-documented in the Barnett report. The Forestry Act outlines a process in which the National Forest Authority enters into forest management agreements with the customary landowners.<sup>31</sup> A forest management agreement gives ownership of the trees, but not the land, to the National Forest Authority, which is then responsible for selling

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26 Colin Filer "Local Custom and the Art of Land Group Boundary Maintenance in Papua New Guinea" in James F Weiner and Kate Glaskin (eds) *Customary Land Tenure and Registration in Australia and Papua New Guinea: Anthropological Perspectives* (ANU E Press, Canberra, 2007) 135 at 145.

27 David Humphreys "New Policies to Counter Illegal Logging" in David Humphreys (ed) *Logjam* (Earthscan, London, 2006) 142 at 143.

28 Eric L Kwa "Forestry Law" in Eric L Kwa (ed) *Natural Resources Law of Papua New Guinea* (UPNG, Port Moresby, 2001) 59.

29 Tony Power *Incorporated Land Groups in Papua New Guinea* (AusAID, Canberra, 2008) at 8.

30 David Lea and Timothy Curin *Land, Law and Economic Development in Papua New Guinea* (Cambridge Scholars Publishing, Newcastle upon Tyne, 2011) at 125.

31 Alyssa A Vegter "Forsaking the Forests for the Trees: Forestry Law in Papua New Guinea Inhibits Indigenous Customary Ownership" (2005) 14(2) *Pac Rim L & Pol'y J* 545 at 560.

timber permits to the logging companies.<sup>32</sup> The National Forest Authority is also responsible for paying out royalties and compensation to the ILG's representatives.

### *1. Problems with the Forestry Act*

Despite its ambitions, the Forestry Act has failed to advance the rights of PNG's customary landowners. One major concern is the lack of free, prior and informed consent. In theory, the Registrar of Land Groups is required to assist customary landowners with the ILG process. In reality, this is often done by the National Forest Authority or the logging companies themselves – creating a conflict of interest.<sup>33</sup> Evidence suggests that most landowners are unable to understand the nature of the contracts or their rights and obligations under the agreements.<sup>34</sup>

Another concern is that most ILGs have not been incorporated for the main purpose for which they were designed – holding and developing customary land – but for the ulterior purpose of receiving and distributing royalties.<sup>35</sup> The problem is that the LGIA does not contain any guidance on how benefits ought to be distributed amongst individual members of the landowning group. As a result, it is not uncommon for disputes to arise around the fair distribution of benefits.<sup>36</sup>

Moreover, the use of so-called *landowning companies* has become a major issue. Often several landowning groups will organise themselves into a single entity under the Companies Act. This practice is generally promoted by the National Forest Authority as it is easier to deal with one company rather than a large number of ILGs.<sup>37</sup> Landowning companies are notorious for their lack of transparency and accountability. Very few of these companies present financial reports, file tax returns or hold public meetings.<sup>38</sup>

Owing to these difficulties, the National Forest Authority has not entered into any new forest management agreements since 2007. As a result, logging companies have come up with new ways to gain access to, exploit and rip out the last remnants of PNG's forest resources.

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32 IFRT (Independent Forestry Review Team) "Review of Forest Harvesting Projects Being Processed Towards a Timber Permit or a Timber Authority: Observations and Recommendations Report" (unpublished report to the Inter-Agency Forestry Review Committee, Port Moresby, 2001) at 50.

33 Neil Bird and others *What Can Be Learnt from the Past? A History of the Forestry Sector in Papua New Guinea* (Overseas Development Institute, London, 2007) at 2.

34 Forest Trends "Logging, Legality, and Livelihoods in Papua New Guinea: Synthesis of Official Assessments of the Large-Scale Logging Industry" (2006) at 17.

35 Fingleton, above n 17, at 31.

36 Almah Tararia and Lisa Ogle "Incorporated Land Groups and the Registration of Customary Land: Recent Developments in PNG" in Tim Anderson and Gary Lee (eds) *In Defence of Melanesian Customary Land* (AID/WATCH, Sydney, 2010) 21 at 22.

37 David Lea "The PNG forest industry, incorporated entities and environmental protection" (2005) 20(1) *Pacific Economic Bulletin*.

38 David Lea *Property Rights, Indigenous People and the Developing World Issues from Aboriginal Entitlement to Intellectual Ownership Rights* (Martinus Nijhoff Publishers, Boston, 2008) at 144.

## D. *Special Purpose Agricultural and Business Leases*

### 1. *Overview*

Since gaining independence from Australia in 1975, PNG has introduced a number of legal innovations to promote its economic policies. In most cases, these innovations have failed to achieve their desired purpose.<sup>39</sup>

One such case is the so-called lease-leaseback arrangement which was originally introduced in the early 1980s as a way for customary landowners to finance small-scale coffee estates.<sup>40</sup> Under the lease-leaseback arrangement, the state acquires a lease from the landowners and grants a formal lease back to those same landowners. The landowning group may then use this lease to secure bank loans or sublease their land to developers.<sup>41</sup>

The lease-leaseback scheme was incorporated into the Land Act 1996 in the form of special agricultural and business leases (SABLs). Section 11 of that Act authorises PNG's Minister for Lands to acquire customary land for the purpose of granting an SABL;<sup>42</sup> while s 102 states that an SABL may be granted to any person, landowning group, business group or other incorporated body.<sup>43</sup>

Before granting an SABL, the Minister must be satisfied that the landowners have given their consent. The key provisions are found in s 10(2), which states that land may only be acquired on such conditions as are agreed on between the Minister and the customary landowners; and in s 11(2), which requires that the lease to the state be executed by or on behalf of the customary landowners. These provisions were discussed in *Musa Valley Management Company Ltd v Kimas*. In this landmark decision, Canning J noted that the Land Act is silent on how the agreement of customary landowners should be attained. His Honour suggested that the minimum requirement would be that a substantial majority of customary landowners indicated their agreement by signing the lease.<sup>44</sup>

If you relied on the Land Act 1996 as your sole source of information, you would come away with the idea that SABL process is closely regulated and monitored. Unfortunately, the reality is and has been somewhat different.

### 2. *Misuse of SABLs*

After the passage of the Land Act 1996, SABLs became a popular vehicle for promoting subsistence agriculture in rural areas. In 2000; however, amendments were made to the Forestry Act to enable agricultural development companies to harvest timber under forest clearance authorities (FCAs) issued by the National Forest Authority.<sup>45</sup> This led to logging companies posing as agricultural developers to apply for FCAs after being granted a sublease from the local landowners.<sup>46</sup>

39 Colin Filer "New Land Grab in Papua New Guinea" (2011) 34(2/3) Pacific Studies 269.

40 Filer, above n 26, at 159.

41 DE Paterson "Some Thoughts About Customary Land" (2001) 5 Journal of South Pacific Law.

42 Land Act 1996 (PNG), s 11.

43 Land Act 1996, s 102.

44 *Musa Valley Management Company Ltd v Kimas* PGNC 192; N3827, 22 January 2010 at [19].

45 Winn, above n 4, at 31.

46 Frederic Mousseau *On Our Land: Modern Land Grabs Reversing Independence in Papua New Guinea* (The Oakland Institute, Oakland, California, 2013) at 11.

The fraudulent use of SABLs normally begins with the process of incorporation. The typical scenario is as follows. A private company will approach local communities on the pretence of developing agricultural projects on their land – normally palm oil or livestock grazing.<sup>47</sup> Motivated by the prospect of income and jobs, the landowners will then organise themselves into ILGs and lease the land to the state. The Minister of Lands grants a 99-year SABL to the nominated landowning company, which in turn subleases the land to the developer for the same period. After being granted a sublease, the developer will apply for an FCA and proceed to harvest the land for its timber.<sup>48</sup>

The above scenario raises a number of serious concerns. As most landowning companies are made up of several ILGs, very few of them would have exclusive customary rights over more than a few hundred hectares of land. As such, it is reasonable to suspect that the rights of most customary landowners have been ignored whenever a single landowning company obtains an SABL over very large parcels of land. From a practical point of view, it would be nearly impossible to persuade the hundreds – if not thousands – of group members to give their free, prior and informed consent to a single landowning company whose decision-making powers are vested in just a handful of representatives.<sup>49</sup> Yet this is precisely what has been occurring in PNG for the last decade.

### 3. *Recent Trends with SABLs*

Since 2003, PNG's Department of Land and Physical Planning has issued 74 SABLs, covering some 5.2 million hectares of customary land.<sup>50</sup> To put this figure into perspective, these 74 SABLs represent 11 per cent of PNG's total landmass and 16 per cent of its remaining forests.<sup>51</sup> Of the total 5.2 million hectares of SABLs granted, 75 per cent are controlled by transnational corporations, with the majority going to Malaysian and Australian logging interests.

In March 2011, following a complaint from a number of non-governmental organisations (NGOs), the United Nations High Commission for Human Rights sent an early warning letter to PNG.<sup>52</sup> The letter expressed concerns over the widespread misuse of SABLs and called on the government to ensure that indigenous lands are protected and that SABLs are only granted with the free, prior and informed consent of customary landowners.

Around the same time, a number of academics and NGOs met in Queensland, Australia to draft the Cairns Declaration. The Declaration called on PNG to: “declare and enforce a moratorium on

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47 Paul N Nelson and others “Oil Palm and Deforestation in Papua New Guinea” (2014) 7(3) *Conservation Letters* 188 at 192.

48 Winn, above n 4, at 3.

49 Colin Filer “The Commission of Inquiry into Special Agriculture and Business Leases in Papua New Guinea: Fresh Details for the Portrait of a Process of Expropriation” (paper presented to Second International Academic Workshop on Global Land Grabbing, Cornell University, New York, 2012) at 6.

50 Elizabeth Moore *The Administration of Special Purpose Agricultural and Business Leases* (National Research Institute, Boroko (PNG), 2011) at vii.

51 Mark Tran “Logging Companies Gain Easy Access to PNG's forests, says Greenpeace” *The Guardian* (online ed, London, 31 July 2012).

52 Email from Anwar Kemal on behalf of the Office of the High Commissioner for Human Rights to the Permanent Mission of Papua New Guinea to the United Nations entitled “Early Warning and Urgent Procedure Letter” (11 March 2011).

the creation of new SABLs”, “halt the issuing of new Forest Clearing Authorities” and suspend all existing FCAs.<sup>53</sup>

In May 2011, PNG’s then acting Prime Minister, Sam Abal, announced a Commission of Inquiry into SABLs along with an immediate moratorium on the granting of any new SABLs or FCAs.<sup>54</sup> The Commission was given broad terms of reference to investigate and report on the legality of SABLs. This included inquiring and reporting on customary landownership, the free, prior and informed consent of landowners, and the incompetent practices of the Department of Land and Physical Planning and the National Forest Authority.<sup>55</sup>

The international community has also urged the government to halt deforestation, increase scrutiny over its logging industries and promote the engagement of local communities.<sup>56</sup> As a further measure, some countries have insisted that PNG adopt the United Nations Declaration on the Rights of Indigenous Peoples and implement some of its main provisions into its forestry laws.<sup>57</sup>

In June 2013, the Commission of Inquiry released its final report that showed that most of the 5.2 million hectares of customary land were obtained through manipulation, violence, corruption, and without the consent of landowners.<sup>58</sup> Despite the publication of the commissioners’ report in June, PNG Prime Minister Peter O’Neil tabled the report to Parliament on 18 September 2013 and until recently has taken no steps to reverse the land grabbing.<sup>59</sup> In a long-awaited announcement on 24 April 2014, O’Neil stated that the government would cancel all controversial leases; namely, those found to be an abuse of forestry laws and not for agricultural development.

The SABL report and O’Neil’s plan to revoke fraudulent leases are clearly a step in the right direction, but are they enough? Given the government’s poor track record, it remains doubtful whether it will follow through. To date, PNG’s has done little to advance the rights of its customary landowners. Illegal logging and corruption have resulted in the loss of lands and the malicious destruction of the environment, threatening the survival of traditional landowning communities. While deforestation is not inevitable, there is a need to find a better approach to address this problem.

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53 Damien Ase and others “The Cairns Declaration: The Alarming Social and Environmental Impacts of Special Agricultural and Business Leases (SABLs) in Papua New Guinea” (James Cook University, 2011), available at <[www.woodlandleague.org](http://www.woodlandleague.org)>.

54 Winn, above n 4, at 15.

55 Transparency International Papua New Guinea “Government Must Back its Word to Fight Corruption” (press release, 8 August 2012); Winn, above n 4, at 15.

56 United Nations Human Rights Council *Report of the Working Group on the Universal Periodic Review: Papua New Guinea* A/HRC/18/18 (2011) at 79.

57 At 79.

58 John Numapo *Final Report: Commission of Inquiry into the Special Agriculture and Business Lease* (Chief Commissioner, Port Moresby, 24 June 2013).

59 Peiley Lau “Time for Action to Stop Land Grabs in Papua New Guinea” (7 May 2014) Oakland Institute <[www.oaklandinstitute.org](http://www.oaklandinstitute.org)>.



### III. SOLUTION: A RIGHTS BASED APPROACH TO FOREST CONSERVATION

The conservation of the environment affects, and is in turn affected by, the realisation of human rights. Likewise, respect for human rights can empower local communities to achieve sustainable outcomes.<sup>60</sup>

Governments and civil society have responsibilities to respect human rights in their conservation activities. To achieve this purpose, states can develop and adopt a rights-based approach to conservation.<sup>61</sup> The purpose of such an approach is to demonstrate the interrelationship between human rights and environmental objectives.<sup>62</sup> This involves the implementation of human rights norms, standards and principles into national conservation policies.

A number of commentators have argued that a rights-based approach is one of the most effective ways to protect forests and one of the best ways to uphold the rights of forest dwellers.<sup>63</sup> Rights-based forest conservation is grounded on international human rights law, with a special focus on the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration).<sup>64</sup>

#### A. *The Declaration on the Rights of Indigenous Peoples*

The Declaration was the initiative of the Working Group on Indigenous Populations (WGIP). Established in 1982, the mandate of the WGIP was to develop international standards on indigenous rights. The Declaration was a culmination of this mandate and represents the first international document that views indigenous rights through an indigenous lens. The final text was adopted by the General Assembly in September 2007, with the overwhelming majority of states in favour.<sup>65</sup> The Declaration affirms that indigenous peoples have extensive rights to their land, territories and resources as well as the right to self-determination, participation and free, prior and informed consent. These rights set the standard for dialogue between the state and indigenous peoples and provide a framework for developing forest policies that respect indigenous peoples' rights.<sup>66</sup>

PNG, like many other Pacific nations, has yet to signal its support for the Declaration. The minutes of the United Nations General Assembly Debates are clear proof that PNG was absent from its seat when the votes were taken. This has two implications. First, in 2007, the PNG government did not have a policy on what groups in PNG might be categorised as indigenous peoples. Second, the government does not support the Declaration as an affirmation of fundamental rights of indigenous peoples. The government has never given any explanation as to why its ambassador and permanent representative at the United Nations absented himself when this major piece of international law was adopted by the General Assembly.

60 Jessica Campese and others *Rights-Based Approaches* (CIFOR and IUCN, Bogor Barat (Indonesia), 2009) at 1.

61 Thomas Greiber and others "Conservation with Justice: A Rights-Based Approach" (IUCN Environmental Law and Policy Paper No 71, Rheinbreitbach (Germany), 2009) at 1.

62 See generally IUCN "Rights-Based Approaches to Conservation" (1 July 2014) IUCN Rights-Based Approach to Conservation Portal <[www.community.iucn.org](http://www.community.iucn.org)>.

63 AM Larson, D Barry and Ganga Ram Dahal "New Rights for Forest-based Communities? Understanding Processes of Forest Tenure Reform" (2010) 12(1) *International Forestry Review* 78 at 78.

64 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/61/L.67 (2007); Siri Damman and Ellen Hosvang *Rights-Based Rainforest Protection* (Rainforest Foundation, Oslo, 2012) at 4.

65 The vote was 144 in favour, 4 against, 11 abstentions and 34 absent. The four negative voting states (Canada, Australia, New Zealand and the United States of America) have since endorsed the Declaration.

66 Damman and Hosvang, above n 64, at 16.

The conclusion, therefore, is that either the government did not feel that the Declaration was of great relevance to it or that it would somehow interfere with the country's development goals. It is unfortunate that a country as ethnically and culturally diverse as PNG felt that it had no good reason to support the Declaration.

The remainder of this paper argues that PNG should endorse the Declaration and implement its key provisions into its forestry laws and policies. Before it can do so, one must first consider whether the Declaration applies to PNG's customary landowners.

## B. *Who is Indigenous?*

Indigenous peoples have classically been defined in terms of their historical situation and position of vulnerability.<sup>67</sup> Over the last few decades, however, the concept of "indigenous peoples" has evolved and now includes other culturally distinct groups. Two of the main approaches to defining "indigenous peoples" are discussed below; namely, the Martinez Cobo Study and the right to self-identification, and International Labour Organization (ILO) Convention No 169.<sup>68</sup>

### 1. *Martinez Cobo and the Right to Self-Identification*

One of the most cited descriptions of the concept of indigeness was given by Jose Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his famous *Study on the Problem of Discrimination against Indigenous Populations*.

After considering the issues involved, the Special Rapporteur offered a working definition of indigenous communities, peoples and nations. In doing so, he proposed a number of basic ideas that would guide future efforts, which included the right of indigenous peoples themselves to define what and who is indigenous.<sup>69</sup> The working definition read:<sup>70</sup>

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.

This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:

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67 Maria Victoria Cabrera Ormaza "Re-thinking the role of Indigenous Peoples in International Law: New Developments in International Environmental Law and Development Co-operation" (2012) 4(1) *Goettingen Journal of International Law* 263.

68 José Martínez Cobo *Study of the Problem of Discrimination against Indigenous Populations* E/CN.4/RES/1988/48 (1988); *ILO Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries* 1650 UNTS 383 (opened for signature 27 June 1989, entered into force 5 September 1991).

69 United Nations Department of Economic and Social Affairs *The Concept of Indigenous Peoples* PFII/2004/WS 1/3 (2004) prepared by the Secretariat of the UN Permanent Forum on Indigenous Issues, Workshop on Data Collection and Disaggregation for Indigenous Peoples, New York, 19–21 January 2004) at 2.

70 This study was launched in 1972 and was formally completed in 1986. See *Study of the problem of discrimination against indigenous populations* E/CN.4/Sub.2/1986/7 (1987) and Add 1–4.

- a. Occupation of ancestral lands, or at least of part of them;
- b. Common ancestry with the original occupants of these lands;
- c. Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);
- d. Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
- e. Residence on certain parts of the country, or in certain regions of the world;
- f. Other relevant factors.

On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).

This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.

#### (a) Self-Identification

In the years leading up to the adoption of the Declaration, numerous indigenous groups rejected the idea of a formal definition of indigenous peoples.<sup>71</sup> The concern was that a formal definition would inevitably be too restrictive, making sense in some cultures but not in others. Instead of offering a definition, art 33 of the Declaration asserts that indigenous peoples have a right to self-identification.

The right to self-identification has two components: the right of an individual to self-identify as indigenous, and the right of the indigenous group to define who its members are.<sup>72</sup> Indeed, the LGIA requires landowning groups to set out its rules for recognising individual group members within its constitution.

Based on the above criteria, it appears that PNG's customary landowners already have the right to self-identification. First, individual members of a landowning group are free to decide whether they want to be part of that group or opt out. Secondly, most landowning groups have their own customary rules on who qualifies as a member of their group.<sup>73</sup>

However, the subjective element of self-identification is unlikely to be helpful in the context of PNG. There must be some objective criteria to make the concept of indigenous peoples more workable, for example where the government is determining to whom its forest policies will apply.<sup>74</sup> What other approaches to defining indigenous peoples could assist PNG?

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71 UN Department of Economic and Social Affairs *State of the World's Indigenous Peoples* (United Nations Publications, New York, 2009) at 5.

72 Ellen Desmet *Indigenous Rights Entwined with Nature Conservation* (Intersentia, Cambridge, 2011) at 76.

73 Peter D Dwyer and Monica Minnegal "The Transformation of Use-Rights: A Comparison of Two Papua New Guinean Societies" (1999) 55(3) *Journal of Anthropological Research* 361 at 361.

74 Benedict Kingsbury "Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy" (1998) 92(3) *AJIL* 414 at 441.

## 2. ILO Convention No 169.

One of the most influential definitions of indigenous peoples is found in ILO Convention No 169. The ILO Convention was a forerunner to the Declaration and remains the only binding international document on the rights of indigenous peoples.

Article 1 of the ILO Convention makes it clear that its rules apply to both tribal and indigenous peoples. Common elements for both of these groups include: a traditional lifestyle, culture and way of life that differs from the rest of the population; and their own social organisations and traditional customs.<sup>75</sup> The only distinction between tribal and indigenous peoples is that the latter group refers to those who inhabited the country at the time of “conquest or colonisation” or during the “establishment of present state boundaries”.<sup>76</sup>

The indigenous/tribal peoples’ dichotomy was discussed in the 2008 case of *Saramaka People v Suriname*.<sup>77</sup> The Saramaka People are one of six tribes of Maroons who have inhabited Suriname since the early 1700s. Originally descendants of African slaves brought by Dutch settlers in the 17th century, the Saramaka escaped into the forest and created their own distinct communities. In 1762, the Saramaka signed a treaty with the Surinamese government recognising the tribe’s independence and the right to govern its own territories under customary law.<sup>78</sup> But in the early 1990s, the government rescinded its treaty obligations when it granted logging and mining concessions on Saramaka lands without consulting with the tribe. Unable to obtain redress in the domestic courts, the Saramaka brought a petition before the Inter-American Court for Human Rights, alleging that Suriname had violated their right to juridical personality (art 3), property (art 21) and equal protection (art 25) under the American Convention on Human Rights.

The Court concluded that:<sup>79</sup>

... the members of the Saramaka people make up a tribal community ... not indigenous to the region, but that share similar characteristics with indigenous peoples ... whose social, cultural and economic characteristics are different from other sections of the national community, particularly because of their special relationship with their ancestral territories, and because they regulate themselves, at least partially, by their own norms, customs, and/or traditions.

Having established that the Saramaka people make up a tribal community, the Court then considered whether its members required special measures to guarantee the full protection of their rights.<sup>80</sup> In this regard, the Court extended its jurisprudence on indigenous peoples’ right to property, to the tribal peoples of Saramaka, given the “similar social, cultural and economic characteristics they share with indigenous peoples”.<sup>81</sup>

Next, the Court considered whether art 21 of the American Convention protects the right of tribal peoples to the use and enjoyment of communal property. The Court noted that indigenous

75 International Labour Organization “The Basic Principles of the ILO Convention No 169” (2014) <www.ilo.org>.

76 Indigenous and Tribal Peoples Convention 1989 (No 169), art 1(1)(b).

77 *Saramaka People v Suriname (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights, 28 November 2007.

78 Lisl Brunner “The Rise of Peoples’ Rights in the Americas: The *Saramaka People* Decision of the Inter-American Court of Human Rights” (2008) 7(3) Chinese JIL 699 at 700.

79 *Saramaka People v Suriname*, above n 77, at [84].

80 Marcos A Orellana “Saramaka People v Suriname” (2008) 102(4) AJIL 841 at 842.

81 *Saramaka People v Suriname*, above n 77, at [93].

peoples' communal property is protected by art 21 and that its jurisprudence was based on the need to protect indigenous peoples' lands in order to safeguard their physical and cultural survival.<sup>82</sup> After referring to relevant case law and treaty-body decisions, the Court concluded that members of the Saramaka community make up a *tribal community* protected by international human rights law that secures the right to communal territory they have traditionally occupied and used. This right is derived from their longstanding use and occupation of the land and resources necessary for their physical and cultural survival.

Next, the Court considered whether, and to what extent, the Saramaka people have a right to enjoy and use natural resources that lie on or within their traditional territories; and whether the state may grant concessions for exploring and extracting those resources. The Court held that, for indigenous and tribal communities, the right to territory would be meaningless if it did not include the natural resources that lie on and within the land. What needs to be protected under art 21 are those natural resources traditionally used and necessary for the very survival, development, and continuation of indigenous and tribal peoples' ways of life.

The Court concluded that the right to property under art 21 was not absolute and that the state will be able to restrict, under certain circumstances, the Saramaka's property rights to natural resources found on or within their traditional territory.<sup>83</sup> However, any restrictions on the Saramaka's right to use and enjoy their traditional lands and resources cannot deny their survival as a tribal people. Thus for large-scale development projects that would have a major impact on the Saramaka's territories and natural resources, the state has a duty not only to consult with the Saramaka but also to obtain their free, prior and informed consent, as guaranteed under art 32 of the Declaration on the Rights of Indigenous Peoples.<sup>84</sup>

The Court held that the state had violated the Saramaka's right to property when it granted logging concessions on Saramaka lands without the tribe's consent. It ordered the state to take a series of actions to provide redress, the most important of which were that:<sup>85</sup>

The State shall delimit, demarcate, and grant collective title over the territory of the members of the Saramaka people, in accordance with their customary laws, and through previous, effective and fully informed consultations with the Saramaka people . . . .

The fact that Court was willing to extend international standards on indigenous rights to the Saramaka people is significant. The Court appears to have adopted a relational approach, in that the Saramaka people were seen as tribal *relative* to dominant sectors of Surinamese society. Their status as tribal peoples was based on their relationship with their traditional lands and resources, and the need to protect those lands and resources to safeguard their physical and cultural survival.

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82 The Court recognised that its interpretation of art 21 in previous cases reflected art 29(b) of the American Convention, which prohibits the interpretation of any provision of the Convention in a manner that provides less protection than under domestic law or a treaty to which the state is a party. In interpreting the scope of art 21, the Court has taken into account domestic legislation pertaining to indigenous peoples' land rights as well as ILO Convention No 169. The problem was that Suriname was not a party to the ILO Convention, and its legislation did not recognise communal property rights of tribal peoples. To overcome this obstacle, the Court utilised common art 1 (the right to self-determination and sovereignty over natural resources) of the two International Covenants and art 27 (the right to culture) of the International Covenant on Civil and Political Rights in connection with reports by treaty bodies overseeing their compliance.

83 *Saramaka People v Suriname*, above n 77 at [127].

84 At [134].

85 At [5].

Like indigenous peoples, the Saramaka tribe have a right to free, prior and informed consent with respect to any large development activities that would have an adverse effect on their lands and natural resources. Thus for the Inter-American Court, a community's relationship with the land and the degree to which that relationship is seen as essential to their survival seems to be the basis for distinguishing indigenous and tribal peoples from other minority groups.<sup>86</sup> In this regard, the Saramaka tribe was seen as sufficiently similar to indigenous peoples to render the extension of indigenous rights acceptable.<sup>87</sup>

The convergence of indigenous and tribal rights in the Saramaka decision provides a normative framework for customary landowners in PNG. Although ethnic Papua New Guineans are not normally considered to be indigenous peoples,<sup>88</sup> most of the population live in "tribal" communities. Each of these communities has its own economic, cultural and social characteristics that differ from other sections of society. That is, they are tribal relative to elites in PNG that form part of mainstream society. Moreover, these communities have a special relationship with their ancestral lands, which is essential for their survival as a people.<sup>89</sup> As such, PNG's customary landowners should be given the same rights as indigenous peoples under the Declaration.

Based on the above analysis, the terms "customary landowners" and "indigenous peoples" will be used interchangeably throughout the rest of this paper.

### C. *Right to Self-Determination*

#### 1. *Overview*

The right to self-determination is one of the cardinal principles of international human rights law. The fundamental nature of this right is evidenced in the fact that it appears in the United Nations Charter, the two International Covenants, numerous resolutions of the United Nations General Assembly and most recently in the Declaration on the Rights of Indigenous Peoples.

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86 Richard Price "Saramaka People v Suriname: A Human Rights Victory and Its Messy Aftermath" (30 July 2012) Cultural Survival <[www.culturalsurvival.org](http://www.culturalsurvival.org)>.

87 However, some commentators have labelled the Saramaka decision as essentialist, as it requires traditional communities to show that their lands are essential to their cultural survival. Culture and subsistence practices may no longer be enough to support traditional communities. As a result, communities may allow some resource extraction and development plans to take place on their lands. But if they do so, the Court, the state and others may conclude that the community has abandoned all rights to the land, including its indigenous identity. A similar problem arises when traditional communities have left or been dispossessed of their traditional lands. If this cultural connection is severed or, as Karen Engle states, "when they do not behave toward the land in the idealised manner that has come to be expected of them", they may no longer be regarded as real indigenous peoples. It is important to note, however, that many of the Court's conclusions went beyond the essentialist notion of culture. See Thomas M Antkowiak "Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court" (2013) 35(1) *University of Pennsylvania Journal of International Law* 113 at 161; Karen Engle *The Elusive Promise of Indigenous Development* (Duke University Press, Durham, 2010) at 170; Richard Price *Rainforest Warriors* (University of Pennsylvania Press, Philadelphia, 2012) at 238.

88 Von Benda-Beckmann argues that only Papuans living in West Papua (the Indonesian-controlled side of the Island of New Guinea) would qualify as indigenous peoples. See Franz von Benda-Beckmann "Citizens, Strangers and Indigenous Peoples: Multiple Constructions and Consequences of Rights, Resources and People" in René Kuppe and Richard Potz (eds) *Law and Anthropology: Natural Resources, Environment and Legal Pluralism* (Martinus Nijhoff, the Hague, 1997) 1.

89 Benjamin Reilly "Ethnic Conflict in Papua New Guinea" (2008) 49 *Asia Pacific Viewpoint* 12 at 13.

Yet the right to self-determination remains one of the most controversial rights, particularly with regard to indigenous peoples. This controversy is, for the most part, based on a lack of understanding about the meaning and significance of self-determination.<sup>90</sup> Many states have resisted the right to self-determination on the assumption that it would give indigenous peoples the right to secede from the state.<sup>91</sup>

In reality, the right to self-determination has both external and internal elements.<sup>92</sup> The external element recognises that peoples under colonial rule or other forms of oppression have the right to determine their own status and, in extreme circumstances, form an independent state.<sup>93</sup> Perhaps for this reason, the right to self-determination has been so strongly associated with secession.<sup>94</sup> On the other hand, the internal element of self-determination acknowledges that the population has a right to choose its own system of government and implement its own policies.<sup>95</sup>

## 2. *Self-Determination and the Declaration*

Article 3 of the Declaration reflects the internal aspects of self-determination. Under this article, indigenous peoples have the right to freely determine their political status and freely pursue their economic, social and cultural development. This right is qualified by art 46, which preserves the territorial integrity of the encapsulating state. In addition, art 4 provides that indigenous peoples have the right to autonomy and self-governance in matters relating to their internal and local affairs.

While the Declaration does not contain any clear definition on the right to self-determination, a number of other provisions reflect specific aspects of that right.<sup>96</sup> These include: the right to lands, territories and resources,<sup>97</sup> the right to development,<sup>98</sup> and the right to free, prior and informed consent.<sup>99</sup> Thus for indigenous peoples, the right to self-determination is a precondition to the realisation of all other rights.<sup>100</sup>

## 3. *Self-Determination in PNG*

In many ways, the right to self-determination is already reflected in PNG's legal system. The Constitution, while establishing parliamentary sovereignty, also recognises the primacy of

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90 Desmet, above n 72, at 205.

91 Erika J Techera "Legal Pluralism, Indigenous People and Small Island Developing States: Achieving Good Environmental Governance in the South Pacific" (2010) 61 *Journal of Legal Pluralism* 171 at 179.

92 Olivier De Schutter *International Human Rights Law* (Cambridge University Press, Cambridge, 2010) at 687.

93 Robert McCorquodale "Rights of Peoples and Minorities" in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) *International Human Rights Law* (Oxford University Press, Oxford, 2010) 365 at 373.

94 Alexandra Xanthaki *Indigenous Rights and United Nations Standards* (Cambridge University Press, Cambridge, 2007) at 146.

95 Helen Quane "New Directions for Self-Determination and Participatory Rights?" in Stephen Allen and Alexandra Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, Oxford, 2011) 259 at 260.

96 Robert T Coulter "The Law of Self-Determination and the United Nations Declaration on the Rights of Indigenous Peoples" (2010) 15 *UCLA J Int'l L & Foreign Aff* 1 at 13.

97 *United Nations Declaration on the Rights of Indigenous Peoples*, above n 64, art 26.

98 Article 23.

99 Article 32.

100 Donald K Anton and Dinah L Shelton *Environmental Protection and Human Rights* (Cambridge University Press, New York, 2011) at 553.

customary law.<sup>101</sup> Furthermore, the Constitution supports the rights of customary landowners to control their traditional lands, territories and natural resources.

While these customary rights form an integral part of the Constitution, they are by no means absolute.<sup>102</sup> The Constitution requires a balance to be drawn between nationhood and tribal governance but it is framed in such a way that the former goal will almost inevitably prevail. For instance, customary law ceases to apply where, and to the extent that, it is inconsistent with the Constitution. This could arise where there is a clash between customary law and National Goal 5, which requires development to take place primarily through the use of Papua New Guinean forms of social, political and economic organisation. In such a case, the constitutional requirements of state-based development would trump the customary rights of landowning communities.<sup>103</sup>

Customary law is also subject to statute. For instance, the Forestry Act 1991 restricts indigenous peoples' right to determine their own development projects. As the law stands, there is no privity of contract between customary landowners and logging companies. This means that a landowning group has no right to sue developers for breaching the conditions of a timber permit.<sup>104</sup>

The Land Act 1996 poses some additional problems. While the lease-leaseback arrangement empowers group representatives to negotiate directly with development companies, it does not necessarily empower the group as a whole. There are two main problems. First, because ILGs and landowning companies are Western constructs, they are often foreign to the traditions of the landowning group. Second, the successful use of these corporate vehicles requires landowners to adopt Western business practices. This means that only the most sophisticated and business savvy members of the community can avail themselves of the opportunities for development.<sup>105</sup> Consequently the community as a whole is not empowered, because only a minority participate in the decision-making process.

#### 4. Solution

A new focus on the right to self-determination would go a long way towards recognising the more specific rights of PNG's indigenous peoples. The Forestry Act should be amended to allow direct negotiations between customary landowners and logging companies, provided that the landowners are adequately informed and represented. This will allow the landowning groups themselves to determine the pace and extent at which they want development to occur.<sup>106</sup> Improvements within

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101 J Rivers and H Amankwah "Sovereignty and Legal Pluralism in Developing Nations: A New Appraisal of the Papua New Guinea Case" (2003) 10 James Cook University Law Review 105.

102 George MS Muroa "The Extent of Constitutional Protection of Land Rights in Papua New Guinea" (1999) 26 Melanesian Law Journal 1 at 4.

103 The National Goals are arguably non-justiciable and cannot be overruled by ordinary legislation. See Rhuks Ako *Environmental Justice in Developing Countries* (Routledge, Oxon, 2013) at 78.

104 Although landowners cannot sue in contract, there may have a cause of action under the Environment Act 2002 or in tort. For instance, in one recent case, the plaintiffs were able to sue to the developer for trespass. See *Gramgari v Crawford* [2013] PGNC 14; N4950 (30 January 2013); World Bank Inspection Panel *Request for Inspection Filed by Certain Named Customary Owners of Forests in Kiunga-Aiambak, Western Province, Papua New Guinea* (2001) at 19.

105 David R Lea *Individual Autonomy, Group Self-determination and the Assimilation of Indigenous Cultures* (North Australia Research Unit, Australian National University, Casuarina (NT), 2000) at 7–8.

106 Karen Dixon "Working with Mixed Commons/Anticommons Property: Mobilizing Customary Land in Papua New Guinea the Melanesian Way" (2007) 31(1) Harvard Environmental Law Review 219 at 277.



the corporate governance of landowning groups would also allow a greater proportion of the community to participate in the decision-making process.

Of course, the right to self-determination is not unlimited and landowners would still need to comply with basic environmental norms. Nonetheless, this call for greater self-determination would promote the sustainable management of PNG's forests and empower its indigenous peoples to benefit from their conservation activities.

#### *D. Right to Lands, Territories and Resources*

##### *1. Overview*

Land rights are at the heart of the Declaration. Articles 25–30 specifically refer to indigenous peoples' land rights, with references in several other articles as well.<sup>107</sup>

Article 26 of the Declaration draws a distinction between the rights to land *presently* occupied by indigenous peoples and rights to land *traditionally* occupied by indigenous peoples. Under para 1, indigenous peoples have the right to lands, territories and resources which they have traditionally owned or occupied; whereas under para 2, they have the right to own, use, develop and control their lands, territories and resources that they *possess* by reason of traditional ownership.

At first glance, the nature of the right under para 1 appears to be somewhat ambiguous as it does not specify whether it is a right to own, use, control or develop.<sup>108</sup> It is suggested, however, that this right must be viewed in light of the Declaration's other articles, especially those relating to indigenous peoples' rights to compensation.<sup>109</sup>

The distinction between present and traditional ownership is particularly important in the context of PNG. Unlike indigenous peoples elsewhere, most of PNG's indigenous peoples have continued to occupy and control their traditional lands, territories and resources. In the last decade, however, many indigenous peoples have become dispossessed of their territories through the expansion of forest management agreements and SABLs.

PNG now faces the difficult task of integrating the Declaration's land rights articles into its forest conservation policies. Not only does the government need to address the issue of reparation for past wrongs, but it must also find a way to strengthen and protect its indigenous peoples' present land rights.

##### *2. Right to Redress*

One of the most admirable features of the Declaration's land rights articles is the level of detail they provide on how states should address violations of such rights.<sup>110</sup> Article 28 of the Declaration

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107 Aoife Duffy "Indigenous Peoples' Land Rights: Developing a *Sui Generis* Approach to Ownership and Restitution" (2008) 15(4) *International Journal on Minority and Group Rights* 505 at 505.

108 Jeremie Gilbert and Cathal Doyle "A New Dawn over the Land: Shedding Light on Collective Ownership and Consent" in Stephen Allen and Alexandra Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, Oxford, 2011) 289 at 303.

109 *United Nations Declaration on the Rights of Indigenous Peoples*, above n 64, art 28.

110 Claire Charters "Global International Instruments and Institutions" in Federico Lenzerini (ed) *Reparations for Indigenous Peoples* (Oxford University Press, Oxford, 2008) 163 at 170.

deals with one of the most difficult issues facing indigenous peoples' land rights.<sup>111</sup> It states that indigenous peoples have a right to redress where their traditionally owned lands have been taken, used or otherwise damaged, without their free, prior and informed consent.

Article 28 identifies restitution as the primary form of redress.<sup>112</sup> Only where this is not possible should the right to restitution be substituted for the right to "just, fair and equitable compensation".<sup>113</sup> The last sentence of art 28 states that compensation shall be in the form of equivalent lands, monetary redress or other forms of appropriate redress, unless otherwise agreed by the indigenous peoples concerned.<sup>114</sup>

#### (a) Restitution

In order to comply with art 28, PNG must recognise that its indigenous peoples have extensive rights to own and control their traditional territories. This would include the right to restitution for any lands taken without their free, prior and informed consent.<sup>115</sup>

Restitution could be achieved by amending the Forestry Act 1991 and the Land Act 1996. The amending provisions would allow the government to cancel any forest management agreement or SABL that has been entered into without the landowners' consent. The grounds for saying that an agreement is void for lack of consent would vary with the circumstances of each case and the mere presence of an ILG representative's signature on the contract would not be decisive.<sup>116</sup> In most cases, lack of consent would arise whenever the relevant government department or third-party developer fails to prove two things: first, that the majority of the community understood the nature and legal effect of the contract; and second that they consented to the agreement in writing; either with their own signatures or through an authorised proxy.

Where lack of consent has been made out, PNG's Minister of Lands would be able to return the land to its rightful owners. Consequently, the landowning group would be able to maintain its unique spiritual, economic and cultural relationship with the land.

Where land has been degraded by industrial logging activities, indigenous peoples would still have the right to compensation. Although art 28 states that compensation should ideally be in the form of equivalent lands and territories, this is not possible in the case of PNG. Because virtually all of the land is owned by indigenous landowning groups, any award of equivalent lands to one landowning group would undoubtedly encroach on the rights of other landowning groups. For this reason, compensation will need to be in the form of monetary redress.

#### (b) Compensation

Section 53(2) of the Constitution of PNG directs the state to provide *just compensation* to customary landowners on whose land natural resource development projects are located. In spite

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111 David Fautsch "An Analysis of Article 28 of the United Nations Declaration on the Rights of Indigenous Peoples, and Proposals for Reform" (2010) 31 Michigan Journal of International Law 449 at 451.

112 Jérémie Gilbert *Indigenous Peoples' Land Rights under International Law* (BRILL, 2006) at 146.

113 *United Nations Declaration on the Rights of Indigenous Peoples*, above n 64, art 28.

114 Claire Charters "Indigenous Peoples and International Law and Policy" in Shin Imai, Benjamin J Richardson and Kent McNeil (eds) *Indigenous Peoples and the Law* (Hart Publishing, Oxford, 2009) 161 at 176.

115 Thomas Sikor and Johannes Stahl *Forests and People* (Earthscan, London, 2011) at 40.

116 Mike Wood "Signatures, Group Definition and an Invalid Contract in Legal Responses to an Extension of a Logging Concession in the Western Province, PNG" (Institute of Ethnology, Academia Sinica, paper presented to Legal Ground: Land and Law in Contemporary Taiwan and the Pacific, September 2013) at 5.

of this constitutional protection, PNG has yet to develop any comprehensive system of landowner compensation.<sup>117</sup> This can be explained, at least in part, by the lack of any real market for customary land.<sup>118</sup>

Because the value of customary land is intangible,<sup>119</sup> compensation can only be achieved through negotiated agreements. Experience has shown that customary landowners usually negotiate with the government collectively as a unit. However, when it comes to compensation payment time, they would rather be paid in cash individually. Strictly speaking, this is not compensation as the payment is not being used to restore the community's loss.<sup>120</sup> When environmental loss or damage is not addressed, the customary landowners will be unable to enjoy their rights to equality, culture and self-determination.

Clearly, negotiated agreements have the potential to undermine indigenous peoples' land rights, especially where they have not been fully advised or represented by independent experts. At the same time, negotiated agreements can empower indigenous peoples to have a say in what happens to their lands.<sup>121</sup>

It is suggested that negotiated agreements should be the primary method for compensation but with some restrictions on how compensation monies can be held, managed, invested and distributed. For example, the government could insist that landowners use a fixed percentage of their compensation monies to restore their traditional lands and resources through reforestation. While it is accepted that this would impose some limits on the community's right to self-determination, it would also promote the long-term economic and cultural survival of the community. This will ensure that at least some of the benefits of compensation can be passed down to future generations.

Notwithstanding some restrictions, PNG's indigenous peoples would still be free to negotiate on their own terms and conditions. This would ensure that each compensation scheme was determined on a case-by-case basis, having regard to the particular circumstances of the indigenous community at hand.

Where individual members of a landowning group have suffered some additional loss, the state could make an award for exemplary damages. In such cases, the courts would need to consider establishing a trust to ensure that any compensation money is protected from the unreasonable demands of other members of the landowning group.<sup>122</sup>

In sum, there is no "one size fits all" approach to compensation. Each negotiation must be determined on its own merits, with the full engagement of the indigenous community. At the same

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117 Laurence Kalinoe *The Ok Tedi Mine Continuance Agreements: A Case Study Dealing with Customary Landowners' Compensation Claims* (National Research Institute, Boroko (PNG), 2008) at 2.

118 Tim Anderson and Gary Lee "Understanding Melanesian Customary Land" in Tim Anderson and Gary Lee (eds) *In Defence of Melanesian Customary Land* (AID/WATCH, Erskineville (NSW), 2010) 1 at 4.

119 Tim Anderson argues that customary land is often undervalued as calculations are based on the land's "lease-value", rather than its "subsistence-value". See Tim Anderson "Valuation and Registration of Customary Land in Papua New Guinea" (Survival of the Commons: Mounting Challenges and New Realities, the Eleventh Conference of the International Association for the Study of Common Property, Bali, Indonesia, 19 June 2006).

120 Laurence Kalinoe "Compensating Alienated Customary Landowners in Papua New Guinea" (2005) 3 *Melanesian Law Journal*.

121 Spike Boydell and Ulai Baya *Resource Development on Customary Land: Managing the Complexity through a Pro-Development Compensation Solution* (World Bank, Washington (DC), 2012) at 15.

122 Douglas Tennent "Award of Damages to Part-Subsistence Villagers in Papua New Guinea" (2002) 10 *Wai L Rev* 67 at 90.

time, the government needs to impose some restrictions on how compensation can be used and distributed. This will ensure that at least some of the compensation monies are used to restore the community's lands and traditional way of life. Such an approach is also consistent with art 27 of the Declaration, which requires states to establish a process that recognises indigenous peoples' rights to their lands, territories and resources.<sup>123</sup>

The next challenge for PNG is to create a system of customary land tenure that strengthens and protects its indigenous peoples' land rights. The challenges and opportunities of this task are discussed in the following section.

### 3. *Right to own, develop and control.*

As previously mentioned, the main problem with the ILG process has been the lack of any complementary system of customary land registration. Admittedly, there have been some legislative attempts to address this issue but, as will soon become apparent, these attempts cannot adequately protect the land rights of PNG's indigenous peoples.

#### (a) Land Groups Incorporation (Amendment) Act 2009

In recent years, PNG has sought to tackle some of the problems involved in incorporating and managing ILGs through the Land Groups Incorporation Amendment Act 2009, which came into force on 1 March 2012. The amendments have introduced two sweeping changes to the ILG process: one is to tighten the requirements for registration, and the other is to improve the manner in which ILGs are governed.

First, the ILG amendment Act imposes much stricter requirements on group membership.<sup>124</sup> Significantly, an application for incorporation must now include a list of all members of the ILG (which was previously optional), coupled with an original birth certificate of each person who claims membership of the group.<sup>125</sup> However, many NGOs have suggested that this requirement is unrealistic and might even encourage the fabrication of fake birth certificates, given that very few births are registered in rural communities and most elderly members do not have one.<sup>126</sup>

Second, ILGs are now governed by an executive committee made up of elected representatives. One reason for the poor performance of ILGs so far has been the absence of clear guidelines for management of ILGs under the LGIA, together with a lack of training and support for executive officers of an ILG.<sup>127</sup> The amendments address some of these issues and attempt to improve the way ILGs are currently governed, including:<sup>128</sup>

- the obligation to hold annual meetings;
- the requirement for a quorum of at least 60 per cent attendance at meetings to vote on major transactions;

<sup>123</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, above n 64, art 27.

<sup>124</sup> Moreover, ILGs must now declare all land over which it claims ownership by highlighting a sketch of the boundaries of the land, which must identify any areas of dispute. It is important to note, however, that although boundaries must be generally identified in an application, the creation of a new ILG does not result in the registration of a land title, which is subject to a voluntary system of customary land registration.

<sup>125</sup> Land Groups Incorporation (Amendment) Act 2009, s 3(2)(b).

<sup>126</sup> PNG National Research Institute *National Land Development Taskforce Report: NGO Response* (Port Moresby, November 2008) at 22.

<sup>127</sup> Tararia and Olge, above n 36, at 23.

<sup>128</sup> These requirements are now covered by ss 14A–14K of the Land Groups Incorporation Act 1974.

- the requirement to keep accounts, which must be open for inspection; and
- the requirement for management to keep an up-to-date register for all members.

While these provisions give the much needed guidance to the representatives of ILGs, the organisational support and expense for carrying out these functions in remote communities is not addressed.<sup>129</sup> Without adequate funding and support, the executive committee will remain vulnerable to corruption and manipulation.

The major problem, however, is the Act's tacit support for the conversion of customary land into private freehold. Of particular concern here is sch 7, which provides a pro forma constitution of an ILG. Paragraph 12 of that pro forma constitution states:

12 CUSTOM WHICH APPLIES

The land group shall act in accordance with the customs of the people, but on incorporation, custom ceases to apply.

This means that upon incorporation, an ILG executive committee will not be bound by customary rules when dealing with land matters, especially in the division and distribution of profits and income to the group.<sup>130</sup>

Finally, the amendment Act contains transitional provisions, which state that all existing ILGs will cease to exist five years after the amendment Act comes into force (1 March 2012). During this period, ILGs can reapply for incorporation but must do so in accordance with the Act's new provisions. It remains doubtful whether the Department of Land and Physical Planning will be able to meet its new administrative requirements under the Act, given the findings of corruption and incompetency in the SABL report.<sup>131</sup>

(b) Land Registration Amendment Act 2009

In 2009, PNG launched its first system of customary land registration that does not require the conversion of customary land into individual freehold. Given the controversy surrounding customary land reform, the Act passed with surprisingly little opposition.

The main purpose of the Customary Land Act is to facilitate the voluntary registration of customary land through the use of ILGs. Applications for the registration of customary land are made by the representatives of an ILG to the Director of Customary Land Registration. Upon registration, a certificate of title is issued in the name of the ILG and the ILG can then lease or mortgage the land for development projects.<sup>132</sup> Thereafter, customary law ceases to apply to the land, with one exception that customary laws of inheritance will continue to apply between individual members of the ILG (and thus the right to own the land which is held by the ILG).<sup>133</sup>

Although the land itself cannot be sold,<sup>134</sup> the termination of customary law raises some serious concerns for PNG's indigenous peoples. Customary land rights are protected under s 53 of the

129 James F Weiner "The Incorporated What Group: Ethnographic, Economic and Ideological Perspectives on Customary Land Ownership in Contemporary Papua New Guinea" (2013) 23(1) *Anthropological Forum* 94 at 97.

130 Peter Donigi "What is Wrong with Land Groups (Incorporation) (Amendment) Act 2009" <[www.asopa.typepad.com](http://www.asopa.typepad.com)>.

131 Numapo, above n 58, at 237.

132 Tararia and Ogle, above n 36, at 25.

133 Land Registration (Customary Land) Amendment Act, s 34N(1).

134 Section 34O(3).

Constitution. This constitutional right cannot be abrogated by any other law nor can it be varied or terminated. Yet this is precisely what the Customary Land Act purports to do.<sup>135</sup>

To make matters worse, the Customary Land Act appears to violate art 26(3) of the Declaration, which requires states to give legal recognition and protection to indigenous peoples' lands, with due respect for their customs, traditions and systems of land tenure. So not only is the Customary Land Act unconstitutional, but it also violates one of the core principles of the Declaration – the recognition of indigenous peoples' rights to their customary lands and culture.

### (c) Solution

The challenge for PNG, along with many other Pacific nations, is to maintain its local traditions and develop a system of customary land tenure that reflects both those traditions and the international human rights regime.<sup>136</sup>

One of the best ways to balance those interests is through the so-called *minimalist method* of customary land tenure. Under this approach, the government would continue to recognise the primacy of customary law and allow indigenous peoples to regulate their own affairs.<sup>137</sup> At the same time, it would establish a compulsory system of customary land registration that records important information about the landowning group, land boundaries and any transactions affecting the customary land.

Only the name of the ILG that owns the land would be recorded on the title. There would be no need to record information about the individual rights of group members as this could lead to group fragmentation and unnecessary costs or delays. Instead, the rights of individual group members would be determined according to the group's customary laws.<sup>138</sup>

The recording and mapping of land boundaries would also become a strict pre-condition for the registration of land titles. This will allow customary landowners to enter into agreements with potential investors and prevent historical land boundary disputes from arising. The requirement for demarcation is also consistent with art 26(2) of the Declaration as it allows indigenous peoples to control access to their traditional lands and natural resources.<sup>139</sup>

Once the details on the rights and boundaries of the customary land have been recorded, it would still be necessary to register any transactions affecting that land. This will provide better tenure security for landowning groups and third-party developers. For example, a lease agreement or license to occupy the land could be registered on the title, provided that it was granted in accordance with the landowning group's customs.

Clearly registration would need to occur at the national level, as the administrative costs would be too high for provincial governments to sustain. To ensure the efficiency of the system,

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135 Peter Donigi *Lifting the Veil That Shrouds Papua New Guinea* (UA Business Brokerage, Papua New Guinea, 2010) at 72.

136 Margaret McMurdo and Jodi Gardner "Traditional Pacific Land Rights in International Law: Tensions and Evolutions" (2010) 12(1) *Asian-Pacific Law and Policy Journal* 124 at 139.

137 Anne M Larson, Deborah Barry, Ganga Ram Dahal and Carol J Pierce Colfer *Forests for People: Community Rights and Forest Tenure Reform* (Routledge, London, 2010) at 73.

138 Australian Agency for International Development *Making Land Work* (AusAid, Canberra, 2008) at 31.

139 Andrew Erueti "The Demarcation of Indigenous Peoples Traditional Lands: Comparing Domestic Principles of Demarcation with Emerging Principles of International Law" (2006) 23 *Arizona Journal of International and Comparative Law* 543 at 544.

the government would need to identify priority areas for registration so that the most vulnerable communities can be protected first.

The above model of customary land registration would allow PNG's indigenous peoples to achieve self-governance over their communally held lands and resources.<sup>140</sup> It could also promote the sustainable management of forests as landowners would be able to exercise greater control over their territories and resources.

## *E. The Right to Free, Prior and Informed Consent*

### *1. Overview*

For indigenous peoples, the right to free, prior and informed consent (FPIC) is indivisible from, and necessary for, the realisation of their right to self-determination. It also underpins their cultural rights and their ability to exert sovereignty over their lands and natural resources.<sup>141</sup>

The right to FPIC is one of core principles of the Declaration.<sup>142</sup> Article 32 provides that states must obtain indigenous peoples' FPIC before approving any project affecting their lands, territories and resources, particularly in connection with the development, utilisation and exploitation of minerals, water and other resources.

The last sentence in art 32(2) recognises that the right to FPIC is particularly important in relation to certain extractive activities. This would include industrial logging and other forestry projects that could have an adverse effect on indigenous peoples' lands and natural resources.

### *2. The Right to FPIC in PNG*

The right to FPIC has long been a controversial issue in PNG's logging sector. Although FPIC is not explicitly required under the Forestry Act 1991, the National Forest Authority has accepted that the rights of customary landowners must be respected in transactions that may affect them, especially in the negotiation of forest management agreements.<sup>143</sup> In reality, these agreements are often reached without the proper consultation of the community and often only after inadequate information has been given to local leaders.

The Land Act 1996 also bypasses the requirement for FPIC and contains little guidance on how the agreement of customary landowners should be attained. In fact, s 11(2) of the Act states that: "an instrument of lease ... executed by or on behalf of the landowning group, is conclusive evidence that the State has a good title to the [land]". This means that the groups' representatives can grant a 99-year lease without even having to consult with the rest of the group members. It is therefore little surprise that the vast majority SABLs have been granted without the FPIC of the customary landowners.<sup>144</sup>

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140 Lee Godden "Communal Governance of Land and Resources as a Sustainable Property Institution" (New Zealand Centre for Environmental Law, paper presented to Property Rights and Sustainability, Auckland, 2009) at 17.

141 Andrea Carmen "Right to Free, Prior, and Informed Consent: A Framework for Harmonious Relations and New Processes for Redress" in Jackie Hartley, Paul Joffe and Jennifer Preston (eds) *Realizing the UN Declaration on the Rights of Indigenous Peoples* (Purich, Saskatoon (Canada), 2010) 125.

142 Cathal Doyle and Jill Cariño *Making Free Prior & Informed Consent a Reality: Indigenous Peoples and the Extractive Sector* (Philippine Indigenous Peoples Links, London, 2013) at 3.

143 Marcus Colchester and Maurizio Farhan Ferrari *Making FPIC – Free, Prior and Informed Consent Work: Challenges and Prospects for Indigenous Peoples* (Forest Peoples Programme, Moreton-in-Marsh (England), 2007) at 11.

144 Kate Geary *Our Land, Our Lives: Time Out on the Global Land Rush* (Oxfam International, Oxford, 2012) at 17.

### 3. Solution

The right to FPIC is essential to forest-based policies because it sets the standard for a good consultation process.<sup>145</sup> To achieve this end, PNG must incorporate the right of FPIC into its forestry policies and measures. The right to FPIC would require the government and private companies to consult with landowners prior to the approval of any projects on their lands.<sup>146</sup> The consultation process is essential because it would give them the opportunity to communicate their ideas and concerns before making an informed decision.<sup>147</sup>

Consultations should take place at an early stage so that the whole community has a chance to have an impact on how the project takes shape. Such consultations should not be bound by any strict time frames as this may undermine the community's decision-making process.<sup>148</sup> Instead, the community should be given enough time to gather sufficient information about the project so that they can freely discuss it amongst themselves before reaching an informed decision.

Throughout the consultation process, all relevant information must be provided to the customary landowners in a manner and form that they are able to understand. In addition, the landowners would have the right to consult outside experts so that they can fully understand the implications of the project and how it will affect their land rights.<sup>149</sup> To ensure that this right is made effective, the government and developers would have to bear the reasonable costs for these services.<sup>150</sup>

Once the consultation process has come to an end, the indigenous community should have the right to grant or withhold its consent. If the community decides to give its consent, it may wish to impose certain conditions such as an undertaking by the developer not to degrade the environment. In these situations, the terms of the agreement would need to be recorded and registered on the land title. The agreement should also outline the process for resolving disputes and be compatible with the community's own priorities, customs and decision-making process.<sup>151</sup>

To make the right to FPIC meaningful, indigenous peoples must also have the right to say "no" and not suffer any retaliation if they choose to do so.<sup>152</sup> This is particularly important in the case of PNG as its indigenous peoples have suffered some of the worst human rights abuses in recent years.<sup>153</sup> The right to say "no" could also promote the sustainable management of PNG's forests as the indigenous peoples would be less likely to give their consent for destructive logging projects.

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145 Damman and Hosvang, above n 64, at 11.

146 *United Nations Declaration on the Rights of Indigenous Peoples*, above n 64, art 32(2).

147 Moneen Nasmith, Marina Campos and Christine Halvorson *Turning Rights into Reality: Issues to Consider in Implementing the Right to Free, Prior, and Informed Consent* (Rainforest Foundation US and Cultural Survival, New York, 2013) at 2.

148 James Anaya *Report of the Special Rapporteur on the Rights of Indigenous Peoples: Extractive Industries and Indigenous Peoples* A/HRC/24/41 (2013) at [69].

149 Forest Peoples Programme "Free, prior and informed consent (FPIC)" (2014) Supporting Forest Peoples' Rights <[www.forestpeoples.org](http://www.forestpeoples.org)>.

150 United Nations Global Compact *Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples* (United Nations Global Compact Office, 2013) at 27.

151 *United Nations Declaration on the Rights of Indigenous Peoples*, above n 64, art 32(3).

152 James Anaya *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* A/HRC/12/34 (2009) at [66].

153 See generally *The Untouchables – Rimbunan Hijau's World of Forest Crime & Political Patronage* (Greenpeace International, Amsterdam, 2004).



In order for PNG to effectively implement the right to FPIC, consultations should be treated as an expression of the indigenous community's right to self-determination, not as a mere administrative process.<sup>154</sup> This must necessarily include the right to say "no". Respect for FPIC would also allow PNG's indigenous peoples to fully enjoy their cultural, territorial and self-governance rights.

#### IV. CONCLUSION

Of the various challenges facing PNG, illegal logging and corruption remain the areas of greatest concern. In a country where most of the population is dependent on the land and natural resources, the loss of forests to illegal logging can be devastating for indigenous landowning communities.<sup>155</sup>

The customary ownership of land is protected by the Constitution. Yet increasingly indigenous peoples are unable to exercise control over their lands and natural resources.<sup>156</sup> Instead, they have been forced to rely on Western constructs that do not reflect the true nature of customary land.

For the most part, forestry management has been almost entirely in the hands of the government and private companies.<sup>157</sup> The Forestry Act 1991 inhibits customary landownership by preventing communities from negotiating directly with logging companies. This has allowed developers to manipulate them through bribery, unrepresentative organisations and false promises.<sup>158</sup>

SABLs were originally designed to promote economic activity in rural areas and empower indigenous landowning groups. This has not, however, been the reality of SABLs. Poor governance and corruption have allowed logging companies to exploit the SABL issuing process and gain easy access to PNG's forest resources. This has resulted in the largest alienation of customary land in the history of PNG – a clear violation of its indigenous peoples' rights.

There is now an urgent need to protect PNG's forests and its people from illegal logging. This paper has suggested that one of the best ways to achieve this goal is through better recognition of indigenous rights. To achieve this end, PNG must adopt a rights-based approach that reflects some of the key provisions of the Declaration.

Self-determination is a fundamental right of all individuals and one of the core philosophies of the Declaration. At a basic level, the right to self-determination allows indigenous peoples to develop their own policies and exert sovereignty over their lands and natural resources. For the most part, the right to self-determination has been poorly reflected in PNG's legal system. Alternatively, a new approach that addresses indigenous peoples' right to determine their own development priorities would also recognise their important role in the conservation and sustainable management of PNG's forests.<sup>159</sup>

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154 Tara Ward "The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law" (2011) 10(2) *Northwestern Journal of International Human Rights* 54 at 55.

155 Vegter, above n 31, at 574.

156 Castellino and Keane, above n 5, at 237.

157 Australian Conservation Foundation (ACF) and the Centre for Environmental Law and Community Rights (CELCOR) *Bulldozing Progress: Human Rights Abuses and Corruption in Papua New Guinea's Large Scale Logging Industry* (Australian Conservation Foundation and Centre for Environmental Law and Community Rights, Carlton, 2006) at 29.

158 Marcus Colchester *Beyond Tenure: Rights-Based Approaches to People and Forests* (Forest Peoples Programme and Rights and Resources Initiative, Washington (DC), 2008) at 10.

159 Lee Godden and Maureen Tehan *Comparative Perspectives on Communal Lands and Individual Ownership* (Routledge, Oxon, 2010) at 3.

Land rights are the focal point of the Declaration. Not only does the Declaration address the issue of reparation for past wrongs but it also recognises that indigenous peoples have extensive rights to their presently occupied lands. In the former case, the right to restitution could empower PNG's indigenous peoples to maintain their spiritual connection with the land and continue their traditional conservation practices. Compensation would also be required where indigenous peoples' traditionally owned lands have been degraded by industrial logging. This will allow them to restore the environment to a reasonable quality and share the benefits with future generations. PNG's indigenous peoples must also have the right to own, develop and control their presently occupied lands. This is best achieved through a compulsory system of customary land registration. Security of tenure is crucial to the long-term and sustainable management of PNG's forests as it would allow its indigenous peoples to exercise full control over their customary lands and resources.<sup>160</sup>

The final claim which must be addressed is indigenous peoples' right to FPIC before the government takes any measure affecting them.<sup>161</sup> The right to FPIC requires the full engagement and participation of the indigenous community concerned. Indigenous peoples must also have the right to grant or withhold their consent for any development projects within their territories. Essentially, the right to FPIC ensures that if logging is to take place, resources are shared equitably and the forests are managed sustainably.<sup>162</sup>

PNG not only needs to look at its commitment to uphold the rights of its indigenous peoples but must also ensure that they play a key role in the conservation of its forests.

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160 Augusta Molnar and others *Community-Based Forest Management: The Extent and Potential Scope of Community and Smallholder Forest Management and Enterprises* (Rights and Resources Initiative, Washington (DC), 2011) at x.

161 Siegfried Wiessner "Indigenous Self-Determination, Culture, and Land" in Elvira Pulitano (ed) *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press, Cambridge, 2012) 31 at 61.

162 Luke Freeman, Jerome Lewis, and Sophie Borreill-Freeman "Free, Prior and Informed Consent: Implications for Sustainable Forest Management in the Congo Basin" in Laura A German, Alain Karsenty and Anne-Marie Tiana (eds) *Governing Africa's Forests in a Globalised World* (Earthscan, London, 2010) 319.

# SHOULD PRE-ACTION PROTOCOLS BE ADOPTED BY THE NEW ZEALAND CIVIL JUSTICE SYSTEM?

BY SHELLEY GREER\*

## I. INTRODUCTION

Pre-action protocols (PAPs), sometimes termed pre-action or pre-filing requirements, are obligations of conduct for parties in a dispute to engage in prior to filing proceedings. They are intended to encourage the early resolution of civil disputes without recourse to the court in order to avoid the potential costs and delays associated with litigation. PAPs may also expedite proceedings by narrowing the issues in dispute where litigation is unavoidable.<sup>1</sup> An increase in the use of non-litigious dispute resolution is thought to enhance a litigant's access to justice.<sup>2</sup>

Civil justice has been described as “the means by which citizens are able to uphold their substantive civil rights against other citizens”.<sup>3</sup> However, the definition of justice is now conceptually broader than that which once focused primarily on substantive rights.<sup>4</sup> Today, civil justice involves balancing the dimensions of cost, delay and rectitude of decision.<sup>5</sup> The objective of improving a litigant's access to justice has underpinned recent civil justice reforms. Central to these reforms is the increasing recognition that settlement by negotiated agreement, such as that envisaged to occur through use of a PAP, is an approved objective of civil justice.<sup>6</sup> However, securing timely settlement, using the cooperative approach necessary in PAPs, may require attenuation of the traditional adversarial culture of dispute resolution.<sup>7</sup> Limiting such adversarialism has formed a key objective of recent civil justice reforms.<sup>8</sup>

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1 Lord Woolf *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, London, 1996).

2 Access to Justice Taskforce *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Attorney-General's Department, Barton, September 2009).

3 Hazel Genn *Judging Civil Justice* (Cambridge University Press, Cambridge, 2010) at 17.

4 Tania Sourdin “Civil Dispute Resolution Obligations: What is Reasonable?” (2012) 35(3) UNSWLJ 889 at 892.

5 Adrian Zuckerman “Justice in Crisis: Comparative Dimensions of Civil Procedure” in Adrian Zuckerman (ed) *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford University Press, Oxford, 1999) 3 at 3.

6 Simon Roberts and Michael Palmer *Dispute Processes: ADR and the Primary Forms of Decision-Making: Law in Context* (2nd ed, Cambridge University Press, Cambridge, 2008) at 283.

7 Les Arthur “Reform of the Civil Justice System: The New Meaning of Justice and the Mitigation of Adversarial Litigation Culture” (2011) Wai L Rev 160 at 162.

8 Victorian Law Reform Commission *Civil Justice Review: Report* (2008) which led to the Civil Procedures Act (Vic) 2011.

PAPs were conceived by Lord Woolf as part of his *Access to Justice Report* in 1996, which encompassed a package of civil justice reforms subsequently implemented in the United Kingdom.<sup>9</sup> PAPs are variable in form, including practice directions,<sup>10</sup> scheme-based protocols<sup>11</sup> and statutory requirements.<sup>12</sup> Although PAP obligations vary, they usually include requirements to correspond with the other party, to disclose information relevant to the legal issue at hand, to engage in cooperative conduct, and to consider or undertake a form of alternate dispute resolution (ADR).<sup>13</sup>

In New Zealand, law reform striving to reduce the cost and delay in the civil justice system has targeted the procedures that occur once litigation has commenced.<sup>14</sup> Despite these procedural reforms, recent research indicates that considerable delays are nevertheless experienced by the civil litigant in New Zealand.<sup>15</sup> In 2004, the New Zealand Law Commission did not recommend the introduction of PAPs until there was clear evidence that the potential additional costs involved did not impede access to justice.<sup>16</sup> However, almost 10 years on from the Law Commission review, it may now be time to reconsider whether New Zealand should adopt PAPs.

This paper will discuss the contending issues surrounding the rationale and use of PAPs, and their implementation and efficacy in both the United Kingdom and Australian jurisdictions. This will be followed by recommendations as to how PAPs may be effectively adopted by the New Zealand civil justice system in order to enhance a civil litigant's access to justice.

## II. THE CONTENDING ISSUES

PAPs have been defined as a “reasonable” obligation in dispute resolution if they work effectively within a suitable time frame and at an appropriate cost.<sup>17</sup> The obligations on parties to communicate and disclose relevant information, as required by a PAP, have been proposed to result in better settlement at an earlier stage by compelling parties to identify the merits of their case prior to filing.<sup>18</sup> These obligations are also thought to limit the opportunities for adversarial tactics by litigators.<sup>19</sup> A PAP may require parties to consider or participate in ADR. Where ADR is successful, it is a cost effective form of dispute resolution compared to litigation.<sup>20</sup> An advantage of actively

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9 Lord Woolf, above n 1.

10 Supreme Court of the Northern Territory Australia *Trial Civil Procedure Reforms* (Practice Direction No 6, 2009), available at <[www.supremecourt.nt.gov.au](http://www.supremecourt.nt.gov.au)>.

11 For example, a retail lease ADR scheme: Office of the Victorian Small Business Commissioner “Dispute Resolution” Victorian Small Business Commissioner <[www.vsbcc.vic.gov.au](http://www.vsbcc.vic.gov.au)>.

12 Civil Dispute Resolution Act 2011 (Cth), s 4.

13 Michael Legg and Dorne Boniface “Pre-action Protocols” (paper presented at Non-Adversarial Justice: Implications for the Legal System & Society Conference, Melbourne, 4–7 May 2010) at 1.

14 Such as reform codified in pt 7, subpt of 1 the High Court Amendment Rules (No 2) 2012 and District Courts (Discovery, Inspection, and Interrogatories) Amendment Rules 2011.

15 Rachael Laing, Saskia Righarts and Mark Henagan “A Preliminary Study on Civil Case Progression Times in New Zealand” (report, Otago University Legal Issues Centre, 15 April 2011).

16 Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at [5.176]–[5.178].

17 Sourdin, above n 4, at 913.

18 Australian Law Reform Commission *Discovery in Federal Courts* (ALRC CP2, November 2010) at 161.

19 Sourdin, above n 4, at 892.

20 Australian Law Reform Commission, above n 18, at [5.8].

considering ADR at the pre-action stage may be to assist issue clarification and prevention of the development of entrenched, polarised views by the parties.<sup>21</sup> Furthermore, by promoting settlement as a valuable aim of the civil justice system, PAPs may also reduce the burden on the court and in so doing facilitate the overarching public interest in access to justice.

### A. *Front Loading of Costs*

Despite these potential advantages, PAPs are a contentious element of law reform.<sup>22</sup> A primary concern is that PAPs generate a “front-loading” of costs for individual litigants, effectively reducing their access to justice.<sup>23</sup> Front-loading refers to the requirement that parties outlay more financial resources at an early stage of the dispute resolution process. It is argued that some litigants may not have the resources to comply with PAPs, or may settle inappropriately for fear of court-imposed sanctions for non-compliance.<sup>24</sup> Sanctions may also have disproportionately adverse effects on self-represented litigants, who may require legal advice in the pre-litigation process in order to comply with PAPs. Professor Michael Zander suggests that in cases that would have gone to trial and still go to trial, and in cases that would have settled anyway, complying with PAPs confers minimal cost benefits to the civil litigant.<sup>25</sup>

However, it may be argued that excessive costs in the early stages of litigation can be avoided by tailoring the PAP obligations to the type of dispute and to the quantity of financial resources involved.<sup>26</sup> The importance of proportionality is emphasised in recent civil justice reforms in the United Kingdom.<sup>27</sup> In addition to this tailored approach to implementation, sufficient flexibility is also thought to be necessary to account for the concept of proportionality.<sup>28</sup> For example, in a complex dispute, having due regard to the issue of front-loading, the extent of the PAP obligations may not take into consideration the nature of the dispute or the usefulness of the exchange of detailed information.<sup>29</sup> The relative balance between specificity and flexibility of PAPs varies significantly in different jurisdictions.<sup>30</sup>

While PAPs require a litigant to invest more in the initial stages of the dispute, the total cost to the litigant is generally less where settlement is reached without recourse to the court.<sup>31</sup> Furthermore, if

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21 Susan Blake, Julie Browne and Stuart Sime *The Jackson ADR Handbook* (Oxford University Press, Oxford, 2013) at [3.06].

22 Legg and Boniface, above n 13, at 1.

23 Michael Zander “Where Are We Heading with the Funding of Civil Litigation?” (2003) 22 *Justice Quarterly* 23 at 23–25.

24 Victorian Law Reform Commission, above n 8, at 140.

25 Zander, above n 23, at 23.

26 Lord Justice Jackson *Review of Civil Litigation Costs: Final Report* (HMSO, 2009) at 343.

27 The Civil Procedure (Amendment) Rules 2013 (UK) amend the overriding objective of the Civil Procedure Rules (CPR) 1.1(1) to expressly refer to proportionality.

28 Access to Justice Taskforce, above n 2, at 104.

29 At 104.

30 Compare the obligations imposed in the United Kingdom’s specific PAPs (United Kingdom Ministry of Justice “CPR – Pre-Action Protocols”) (5 August 2013) <[www.justice.gov.uk](http://www.justice.gov.uk)> with Australia’s general statutory requirements in s 4 of the Civil Dispute Resolution Act 2011 (Cth).

31 Tania Sourdin and Naomi Burstyn “Cost and time hurdles in civil litigation: Exploring the impact of pre-action requirements” (2013) 2(2) *J Civ LP* 66 at 70.

litigation commences, the costs surrounding discovery obligations and the time taken to dispose of the case may be reduced.<sup>32</sup> It is of note that despite the overall increase in case costs since the Woolf reforms, no clear link between the contribution of PAPs to this outcome has been established,<sup>33</sup> nor have specific sums been attributed to the costs of complying with the relevant PAP.<sup>34</sup>

### B. *Satellite Litigation*

A second concern is that where the courts can enforce sanctions for non-compliance, PAPs may generate “satellite litigation” as to whether the opposing party has or has not complied with the obligations imposed.<sup>35</sup> The 2010 *Review of Civil Litigation Costs: Final Report* by Lord Justice Jackson (*Jackson Review*) identifies non-compliance with PAPs as a “serious problem”.<sup>36</sup> Evidence suggests that in the Australian jurisdiction, not all courts are similarly minded regarding the enforcement of PAPs.<sup>37</sup> Currently in the United Kingdom, costs incurred during the PAP process may be recovered as costs incidental to litigation where a party fails to comply with PAP obligations.<sup>38</sup> In order to mitigate satellite litigation, it has been proposed by legal practitioners in the United Kingdom that PAPs be less onerous and that a restriction be placed on recoverable costs during the pre-action period.<sup>39</sup> A suitable remedy may also be to permit pre-action applications to the court in order to deal with serious instances of abuse or non-compliance with PAPs.<sup>40</sup> Such enforcement would require consistent support from the court in order for PAPs to be an effective civil justice tool.

However, to improve compliance and reduce adversarial tactics pre-filing, a change at a deeper level from both the parties in a dispute and their legal representatives may also be required. Aside from modifications to obligations and cost sanctions, it is suggested that to prevent satellite litigation, the changing dispute resolution landscape requires lawyers to mitigate their traditional adversarial strategies.<sup>41</sup> Given that settlement is recognised as a primary form of dispute resolution and that most cases settle, there is an arguable rationale for lawyers to focus more on developing effective negotiation and settlement skills, which may be achieved through education.<sup>42</sup>

### C. *The Diminishing Role of the Court*

A further concern is that by diverting cases away from the court system to private ADR processes, PAPs deny a litigant’s constitutional right to justice and undermine the social value of court

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32 Lord Woolf, above n 1, at [6], “Pre-Action Protocols”.

33 Sourdin and Burstyner, above n 31, at 69.

34 Lord Justice Jackson, above n 26, at 370.

35 Legg and Boniface, above n 13, at 22.

36 Lord Justice Jackson, above n 26, at 351.

37 Paula Gerber and Bevan Mailman “Construction Litigation: Can We Do It Better?” (2005) 31 Mon LR 237 at 249.

38 *Roundstone Nurseries Ltd v Stephenson Holdings Ltd* [2009] EWHC 1431 (TCC) at [48].

39 Elsa Booth “The cost of civil justice: time for review or revolution?” (2009) New Law Journal <www.newlawjournal.co.uk> at 6.

40 Lord Justice Jackson, above n 26, at 396.

41 Julie McFarlane “The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law” (2008) 1 Journal of Dispute Resolution 61 at 64.

42 At 61.

adjudication in clarifying and developing the law.<sup>43</sup> However, the obligations imposed by PAPs do not preclude the possibility of a dispute progressing to litigation. Where the legal issues are finely balanced or are concerned with a novel point of law, it may be unlikely that such a dispute would settle without judicial determination. Thus the potential to establish legal precedent may not inevitably be displaced by the phenomenon termed “the vanishing trial”.<sup>44</sup>

Furthermore, it is proposed that the success of ADR is highly dependent on its operation within the “shadow of the law” and that parties will negotiate with an idea of what the legal rules are, predicting what the judge might do if their case resorted to adjudication.<sup>45</sup> The path to settlement and that leading to pursuit of adjudication may now be thought of as disentangled, where the path to settlement is constructed around the natural procedural stages of negotiation, the two paths converging only where settlement fails.<sup>46</sup> PAP obligations such as early communication and disclosure may facilitate enhanced settlement through negotiation, with parties bearing in mind the legal framework upon which such negotiation is based. While this type of approach may not be appropriate where disputing parties want vindication not compromise,<sup>47</sup> a high rate of settlement does not necessarily indicate a failure of the civil justice system.<sup>48</sup> The implementation of PAPs does not detract from the court’s fundamental position in the dispute resolution landscape.<sup>49</sup>

#### *D. Mandatory Alternate Dispute Resolution*

It is clear that ADR is now a prevailing feature of the dispute resolution landscape.<sup>50</sup> A final issue surrounding the implementation of PAPs is that where ADR is mandated by a PAP, the advantage of using such a protocol may be diminished.<sup>51</sup> A system that compelled parties to involuntarily mediate would be “unworkable and potentially time wasting”, according to the United Kingdom Ministry of Justice.<sup>52</sup> Unsuccessful ADR processes prior to filing also increase the overall costs carried by the litigant and potentially exacerbate the dispute.<sup>53</sup> The form of PAPs implemented in the United Kingdom includes what has been termed a “quasi-compulsory” mediation scheme.<sup>54</sup>

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43 Hazel Genn “Why Privatisation of Justice is a Rule of Law Issue” (paper presented at the 36th FA Mann Lecture, Lincoln’s Inn, 19 November 2012) at 16.

44 At 6.

45 Robert H Mnookin and Lewis Kornhauser “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88(5) *Yale J Int’l Law J* at 950 as cited in Arthur, above n 7, at 162.

46 Simon Roberts “Litigation and Settlement” in AAS Zuckerman and Ross Cranston (eds) *Reform of Civil Procedure: Essays on Access to Justice* (Oxford University Press, Oxford, 1996) at 457.

47 Genn, above n 43, at 17.

48 Helen Winkelmann “ADR and the Civil Justice System” (paper presented at the AMINZ Annual Conference, Auckland, 6 August 2011).

49 TF Bathurst “The Role of the Courts in the Changing Dispute Resolution Landscape” (2012) 35(3) *UNSWLJ* 870 at 874.

50 Blake, Browne and Sime, above n 21, at [1.16]–[1.19].

51 Lord Justice Jackson, above n 26, at 361.

52 United Kingdom Ministry of Justice “Solving disputes in the county courts: creating a simpler, quicker and more proportionate system – A consultation on reforming civil justice in England and Wales” (HMSO, Consultation Paper CP6/2011, March 2011).

53 Blake, Browne and Sime, above n 21, at [3.07].

54 Melissa Hanks “Perspectives on mandatory mediation” (2012) 35 *UNSWLJ* 929 at 931.

It is argued that although ADR is not mandated, it is in practice coerced through the potential for adverse costs orders if not undertaken as part of a reasonable attempt to settle.<sup>55</sup>

However, in such a quasi-compulsory scheme, the court retains the discretion to make its own objective judgment as to whether the use of ADR is reasonable in a particular case. It has been proposed that the impartiality of judges makes them ideally placed to objectively assess whether a given case would be amenable to a form of ADR.<sup>56</sup> To address this concern, a balance must be struck between encouraging parties to participate in ADR and limiting court sanctions so this encouragement does not in practice amount to compulsion.

The process of implementing PAPs in the United Kingdom and Australian jurisdictions has involved the weighing of these contending issues. Although similar issues have arisen, it will be evident in the following discussion that there are substantial differences between the two jurisdictions in their implementation methods. Evaluation of overseas experiences may, however, assist in determining whether PAPs should be adopted in New Zealand and, if so, how they may most effectively improve a civil litigant's access to justice.

### III. PRE-ACTION PROTOCOLS IN THE UNITED KINGDOM

In response to Lord Woolf's *Access to Justice Report*, the United Kingdom civil justice system adopted ten PAPs specific to particular types of claims, as well as the general Practice Direction – Pre-Action Conduct (PDPAC), during the period from 1999 to 2008. The aims of the PDPAC are to enable parties to settle the issue without the need to start proceedings, and to support the efficient management by the court and the parties of proceedings that cannot be avoided.<sup>57</sup> These objectives are to be achieved by encouraging the parties to exchange information and to consider using ADR.<sup>58</sup>

The Civil Procedure Rules 1998 (UK) (CPR) provide the framework for courts to give directions as to compliance with PAPs. In determining whether sanctions are appropriate, the court must seek to give effect to the overriding objective of the CPR, which includes consideration of the strength of the parties, saving expenses and the principle of proportionality.<sup>59</sup> The CPR take an expansive approach to the issue of compliance; the focus is not on technical shortcomings, but on whether the parties have complied in substance with the relevant principles and requirements.<sup>60</sup> For example, in making a costs order, the court will consider whether a party was justified in withdrawing from a mediation which was integral to compliance with the relevant PAP.<sup>61</sup> The sanctions that may be imposed are many and varied, and include taking non-compliance into account when making case management directions or when making orders as to costs and interest rates on sums due.<sup>62</sup>

The definition and measurement of the efficacy of PAPs in the United Kingdom have not yet been clearly established. While it is possible to determine facts such as the number of days from

55 At 931; see *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002.

56 Bathurst, above n 49, at 875.

57 Civil Procedure Rules (UK), Practice Direction – Pre-Action Conduct, r 1.1(1) and (2).

58 Rule 1.2(1) and (2).

59 Rule 1.1(1).

60 Rule 4.3.

61 *Roundstone Nurseries Ltd v Stephenson Holdings Ltd* [2009] EWHC 1431 (TCC) at [54].

62 Civil Procedure Rules (UK), above n 57, r 4.6.



filing to hearing, it is more difficult to obtain empirical evidence regarding the efficacy of PAPs relating only to the pre-filing stage. The specific effect on the quality of settlement between parties and on the costs to litigants of complying with PAP obligations has not been determined.

The adoption of PAPs has, however, resulted in an 80 per cent reduction in new litigation in the United Kingdom High Court and 25 per cent in the County Courts.<sup>63</sup> Furthermore, Lord Justice Jackson in the *Jackson Review* established that, among the legal professionals and bodies consulted, there was a high degree of unanimity that PAPs serve a useful purpose.<sup>64</sup> However, the *Jackson Review* also identified the issues surrounding PAPs as “some of the most intractable questions”.<sup>65</sup> It was concluded that the general PDPAC should be repealed as it serves no useful purpose, in most cases increasing costs for litigants disproportionately to the claim.<sup>66</sup> Furthermore, the use of PAPs was not recommended in commercial or chancery litigation due to the complexity and variability of the legal issues.<sup>67</sup> However, specific PAPs were regarded as a valuable contribution to the resolution of disputes in the areas of judicial review, personal injury and medical negligence, housing litigation, professional negligence and defamation cases.<sup>68</sup> A debt protocol was recommended on the basis that debt claims constitute a large proportion of court business and the PDPAC was unsuitable.<sup>69</sup>

A number of the recommendations made in the *Jackson Review* came into force in the United Kingdom on 1 April 2013 via the Civil Procedure (Amendment) Rules 2013 (UK).<sup>70</sup> The PDPAC remains in force and a debt protocol was not implemented. To address the issue of non-compliance with PAPs, it was suggested that applications for cost sanctions to curb unreasonable behaviour be made available at a pre-hearing stage.<sup>71</sup> However, primary legislation is required and, until enacted, pre-trial applications cannot currently be made to secure an opposing party’s compliance.<sup>72</sup>

In attempting to address the problem of front-loading of costs, the *Jackson Review* further recommended that where a party has gone beyond the requirements of the protocol, the costs of those excessive labours shall not be recoverable.<sup>73</sup> It is also suggested, with reference to reducing costs, that the protocols be amended to make it clear that the claim letter should not annex or reproduce a draft pleading, and that expert reports should not normally be served at the protocol stage.<sup>74</sup> Such recommendations clearly favour a specific, rather than flexible, approach to the obligations imposed in a PAP.

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63 The White Book Service 2009: Civil Procedure (Sweet & Maxwell, UK, 2009) at 2306–2307, as cited in Legg and Boniface, above n 13, at 4.

64 Lord Justice Jackson, above n 26, at 345.

65 At 345.

66 At 345.

67 At 345.

68 At 353.

69 At 354.

70 Including the introduction of a low-value personal injury PAP and a PAP for damages in relation to commercial property at the termination of a tenancy.

71 Lord Justice Jackson, above n 26, at xxii.

72 Stuart Sime and Derek French *Blackstone’s Guide to the Civil Justice Reforms* (Oxford University Press, Oxford, 2013) at 9.

73 Lord Justice Jackson, above n 26, at 351.

74 At 351.

All PAPs in the United Kingdom involve consideration of the use of ADR.<sup>75</sup> The *Jackson Review* emphasised that the requirement for mediation should remain non-mandatory and that PAPs should appropriately draw attention to ADR. To improve the efficacy of ADR, it was proposed that legal practitioners and judges be educated about the benefits which ADR can bring to the dispute resolution process and the type of disputes where it may be best utilised.<sup>76</sup> Following recommendations in the *Jackson Review* that an authoritative handbook for ADR should be prepared, the *Jackson ADR Handbook* was published in 2013, intended for use by legal practitioners and the judiciary.<sup>77</sup>

It is yet to be established whether the current framework adequately addresses issues surrounding compliance and the front-loading of costs. As the PDPAC remains in force, those litigants who are subject to its general obligations may remain disadvantaged by disproportionate costs in resolving their dispute, particularly in debt recovery cases. Furthermore, as the court cannot yet make pre-hearing orders to force a party to comply with a protocol, it may be that the current framework lacks the potency needed to tackle the serious problem of non-compliance. Empirical rather than anecdotal evidence is required to accurately assess the efficacy of PAPs in the United Kingdom in terms of the quality of settlement reached and the effect on costs. This would enable evaluation of their impact on a litigant's access to justice.

#### IV. PRE-ACTION PROTOCOLS IN AUSTRALIA

PAPs have existed in Australia in a variety of forms for a number of years, the largest scheme operating in the family dispute area.<sup>78</sup> Other areas include farm debt,<sup>79</sup> strata schemes<sup>80</sup> and protocols for disputes between clients and legal practitioners.<sup>81</sup> However, PAPs have been the subject of considerable discussion in the Australian jurisdiction as a result of recent legislation in the Federal and State courts, which extends their application to a wider category of disputes. Contrary to the tailored protocols in the United Kingdom, the legislature in Australia has adopted a general approach to PAPs that relate not to the type of dispute, but rather to the type of court in which a party is filing their claim.

The Civil Dispute Resolution Act 2011 (Cth) (CDRA) seeks to ensure that potential litigants take “genuine steps” to resolve their dispute before seeking the assistance of the court by filing a “genuine steps” statement.<sup>82</sup> Taking “genuine steps” is where the steps taken by the person in relation to the dispute constitute a sincere and genuine attempt to resolve the dispute, having regard to the nature of the dispute and the person's circumstances.<sup>83</sup> Examples of genuine steps could include notifying the other party of the dispute, responding to any such notification, providing relevant information and documentation, considering ADR and attempting to negotiate with the other party

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75 Civil Procedure Rules (UK), above n 57, r 1.2(2).

76 Blake, Browne and Sime, above n 21, at 99.

77 Blake, Browne and Sime, above n 21.

78 Tania Sourdin *Background Paper – Resolving Disputes without Courts: Measuring the Impact of Civil Pre-action Obligations* (Australian Centre for Justice Innovation, 3 January 2012), available at <[www.civiljustice.info.com](http://www.civiljustice.info.com)>.

79 Farm Debt Mediation Act 2011 (Vic).

80 Strata Schemes Management Act 1996 (NSW).

81 Legal Profession Act 2004 (NSW).

82 Civil Dispute Resolution Act 2011 (Cth), s 4.

83 Section 4(1A).

to resolve some or all of the issues in the dispute.<sup>84</sup> These obligations are similar in substance to those outlined in the United Kingdom's PDPAC; however, the latter contains considerably more detail with reference to the contents of letters before the claim, and to the provision of documents.<sup>85</sup>

The rationale for this general approach to PAPs is that intentional flexibility keeps the focus on resolution and identifying the central issues, without incurring unnecessary upfront costs.<sup>86</sup> This flexibility aligns with the notion in Australia that PAPs should be non-specific, and that the meaning of "reasonable" as a concept should be determined by the judiciary.<sup>87</sup> But such an approach has met some criticism, given the problems of disproportionate costs surrounding the general PDPAC in the United Kingdom.<sup>88</sup> Additionally, in the recent *Case Management Handbook*, the Federal Court of Australia notes that some of the genuine steps in the CDRA "have the potential to be very costly to [the litigant]."<sup>89</sup>

However, in *Superior IP International Pty Ltd v Ahearn Fox Patent & Trade Mark*, the Federal Court demonstrated that a failure to comply with the "genuine steps" requirements could lead to an adverse costs order and possibly legal action against the lawyers involved.<sup>90</sup> Similarly in *Ashby v Commonwealth of Australia (No 4)*, the Court noted that the applicant's failure to take genuine steps was one component of his abuse of process, and therefore imposed a costs order.<sup>91</sup> In these cases there was flagrant non-compliance with the statutory requirements. It may be argued that, in the absence of flagrant non-compliance, the generality of the CDRA *genuineness* approach means that parties and their legal representatives cannot clearly ascertain whether the steps they have taken are sufficient until the matter proceeds to trial. Until the courts develop principles as to how the phrase "genuine steps" will be construed, lawyers will need to exercise caution when advising clients on what constitutes "genuine steps" in the context of their dispute.<sup>92</sup> It is debatable whether this general approach to PAPs will pay sufficient heed to the notion of proportionality and produce any real cost benefits for the litigant.

Attempts to introduce similar requirements in both New South Wales (NSW) and Victoria have met with considerable controversy. In 2010, amendments to the Civil Procedure Act 2005 (NSW) were enacted to establish compulsory pre-litigation dispute resolution, but were then postponed to allow monitoring of the effect of the "genuine steps" requirements in the Federal Court.<sup>93</sup> The Law Society and the Bar Association of NSW raised concerns that most lawyers and their clients make reasonable efforts to resolve disputes before the commencement of proceedings in any event, and that as a result the new provisions would create disproportionate costs.<sup>94</sup>

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84 Section 4(1)(a)–(g).

85 Civil Procedure Rules (UK), above n 57, Annex A.

86 Civil Disputes Resolution Bill 2010 (Cth) at 8, explanatory memorandum.

87 Tania Sourdin "Making an attempt to resolve disputes before using courts: We all have obligations" (2010) 21(4) ADRJ 218 at 228.

88 Bathurst, above n 49, at 870.

89 Federal Court of Australia *Case Management Handbook* (13 October 2011) at [5.20].

90 *Superior IP International Pty Ltd v Ahearn Fox Patent & Trade Mark* [2012] FCA 282.

91 *Ashby v Commonwealth of Australia (No 4)* [2012] FCA 1411, (2012) 209 FCR 65.

92 Bathurst, above n 49, at 883.

93 Greg Smith (NSW Attorney-General) "NSW Government to Postpone Pre-Litigation Reforms" (media release, 23 August 2011).

94 Greg Smith (NSW Attorney-General) "NSW Government to Postpone Pre-Litigation Reforms" (media release, 23 August 2011).

In the state of Victoria, the section of the Civil Procedure Act 2010 (Vic) (CPA) which imposed a similar pre-action “reasonable steps” obligation on lawyers and parties was repealed shortly after enactment, following a change in government. Notwithstanding this repeal, the CPA in its current form does give the court discretion to make orders to further the overarching purpose “to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute” in relation to pre-trial procedures.<sup>95</sup> However, this type of provision allows the court to function only in a reactive capacity and, like the “genuine steps” requirement, provides minimal guidance to parties as to whether they have sufficiently complied in order to avoid sanctions.

In response to these concerns, the Australian Centre for Court and Justice System Innovation (ACCJSI) has recently undertaken research to explore the impact of civil pre-action obligations in relation to the timeliness and cost of dispute resolution in the context of a retail scheme and a court-managed Practice Direction.<sup>96</sup> A further focus area of the research was to examine the general perceptions of stakeholders, including disputants, legal representatives, mediators involved in the schemes, and those outside of the case study areas.

The overall conclusion drawn from the research was that little evidence exists to suggest that PAPs add cost and time hurdles for disputants.<sup>97</sup> Costs savings were enhanced where a pre-action scheme existed that provided disputants access to a supportive framework to arrange and possibly also subsidise ADR.<sup>98</sup> In situations where disputants were required to take certain steps and arrange their own ADR, the researchers noted that to limit costs, it was crucial that the steps were not too onerous, and that compliance was more likely if lawyers supported the arrangements.<sup>99</sup> In almost all cases, the research suggested that the use of PAPs saved time for disputants who reached settlement as a result of pre-action activities, although the overall length of time taken depended significantly on the nature of the dispute, the PAP obligations and the characteristics of the disputants.<sup>100</sup> Recommendations based on these findings included the need for: legal cost frameworks, provision of low-cost ADR services, imposition of costs orders for non-compliance, court precedent in regards to conduct standards and proportionality, and articulation of exception categories for when PAPs are not appropriate.<sup>101</sup>

The implementation of PAPs in the Australian courts is reasonably new and, like in the United Kingdom, remains a controversial aspect of law reform. However, the ACCJSI research indicates that despite concerns related to front-loading of costs and satellite litigation, there is evidence that PAPs can be an effective civil justice tool if implemented subject to certain requirements. The Australian experience and research findings provide valuable information as to how PAPs may be effectively implemented in the New Zealand jurisdiction.

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95 Civil Procedure Act 2010 (Vic), ss 1(c) and 48(1).

96 Sourdin and Burstyn, above n 31, at 67.

97 At 74.

98 At 75.

99 At 75.

100 At 83.

101 At 84.

## V. RECOMMENDATIONS FOR THE ADOPTION OF PRE-ACTION PROTOCOLS IN NEW ZEALAND

### *A. New Zealand Civil Justice System Reforms*

Requirements or recommendations that parties engage in dispute resolution prior to commencing litigation, such as those connected to industry-based ombudsman schemes, are not new to New Zealand.<sup>102</sup> However, unlike Australia and the United Kingdom, the use of PAPs has not been extended to the civil justice system as part of recent law reform packages. The New Zealand Law Commission did not regard the potential benefits of PAPs to sufficiently outweigh the concerns regarding the front-loading of costs when this issue was canvassed in 2004.<sup>103</sup> The issue has not been examined since and, arguably, the culture of the New Zealand legal system has evolved so that greater emphasis is now placed on the cost and delay dimensions of justice. This is reflected in the objective of High Court Rules “to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application”.<sup>104</sup>

In 2008, the *Lawyers: Conduct and Client Care Rules* were enacted and include the requirement that a lawyer must “keep the client advised of alternatives to litigation that are reasonably available ... to enable the client to make informed decisions regarding the resolution of the dispute”.<sup>105</sup> This rule reflects the growing recognition of the value of ADR as part of the dispute resolution landscape in New Zealand.<sup>106</sup> The Family Court and Tenancy Tribunal regularly make use of mediation services.<sup>107</sup> Another example of the evolving culture of civil justice is the judicial settlement conference, a type of judge-led mediation designed to allow parties to evaluate and test their position, and to assist negotiated settlement.<sup>108</sup> However, aside from requirement that lawyers advise their clients of litigation alternatives at the pre-filing stage, all reform aimed at increasing access to justice in New Zealand has centred on procedural requirements once litigation has commenced.<sup>109</sup>

Of particular relevance is reform to the rules surrounding discovery, which now require, among other things, that parties cooperate with each other at an early stage to discuss the methods they are going to use to conduct a reasonable search proportionate to the proceeding.<sup>110</sup> As a result of these reforms, at the point of a case management conference it may be presumed that the parties have undertaken similar steps to those outlined in a PAP of early disclosure and provision of information. However, ultimately, the need to undertake such post-action discovery obligations requires that the

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102 For example, the Banking Ombudsman, Insurance and Savings Ombudsman and the Electricity and Gas Complaints Commissioner. See Australia and New Zealand Ombudsman Association (2012–2013) <[www.anzoa.com.au](http://www.anzoa.com.au)>.

103 Law Commission, above n 16, at [5.176].

104 Judicature (High Court Rules) Amendment Act 2008, r 1.2.

105 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules) 2008, r 13.4.

106 New Zealand Ministry of Justice *The Use and Provision of ADR in New Zealand* (2004).

107 These include judge-led and counsel-led mediation.

108 High Court Rules, r 7.79. From 1 February 2013, a judicial settlement conference will only be allocated where private mediation is inappropriate.

109 The High Court Amendment Rules (No 2) 2011 (2011/351) amend the High Court Rules. The District Courts (Discovery, Inspection, and Interrogatories) Amendment Rules 2011 amend the District Courts Rules 2009.

110 High Court Amendment Rules (No 2) 2011, r 8.1.

parties first have an identified cause of action. In contrast, pre-action discovery provides parties access to information that would only be available if proceedings commenced. This may result in a claim being abandoned or an appropriate settlement achieved without a specific cause of action identified, removing the need for the filing of the claim entirely. Pre-action discovery, as part of a PAP, undoubtedly reduces the burden on the courts' resources both by reducing the degree of judicial monitoring of the discovery process (if the dispute proceeds to litigation) and, as evidenced in the United Kingdom, by potentially reducing the total number of claims filed.

### *B. Costs and Delays in the New Zealand Civil Justice System*

New Zealand, like other overseas jurisdictions, has experienced increasing costs and delays in the civil justice system.<sup>111</sup> In the High Court in 2010, cases resolved before the allocation of a hearing date were disposed of in an average of 252 days (84 per cent of cases), while the remaining cases that proceeded to being allocated a hearing date took an average of 608 days to resolve (16 per cent). These figures were similar in the District Court; however, 99 per cent of cases were resolved before the allocation of a hearing date.<sup>112</sup> For the purposes of implementing PAPs, it is significant that the majority of cases are taking an average of at least seven months to settle. Furthermore, another recent study investigating public perceptions of the New Zealand court system demonstrated that none of the 1875 participants reported that the civil justice system delivered justice in a timely or efficient manner.<sup>113</sup> Although these statistics were obtained prior to the recent High Court and District Court Rules Amendments, they suggest that the current situation may require further reform in order to bring about a significant change.

### *C. Recommendations*

It is argued that it is now time to reconsider the adoption of PAPs by the New Zealand civil justice system. Based on both the research discussed and the experiences of overseas jurisdictions, the following recommendations are made:

- The concept of proportionality should be included in the objective of the High Court Rules.<sup>114</sup>
- Specific PAPs should be implemented via statutory provisions, according to the type of dispute in fields where overseas jurisdictions have found them to be most successful. There should be clearly articulated exceptions as to when PAPs are not appropriate.
- The PAP obligations should promote the early exchange of communication and clarification of issues without being excessively onerous. There should be an emphasis on the proportionality of the obligations to the complexity and cost of the dispute.
- Alternative dispute resolution should be encouraged but not be made mandatory.
- Applications should be made available at a pre-hearing stage to curb non-compliance or excessively adversarial behaviour by parties.

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111 Saskia Righarts and Mark Henagan "Public Perceptions of the New Zealand Court System: An Empirical Approach to Law Reform" (2010) 12(2) *Otago Law Review* 329 at 329.

112 Rachael Laing, Saskia Righarts and Mark Henagan "A Preliminary Study on Civil Case Progression Times in New Zealand" (report, Otago University Legal Issues Centre, 15 April 2011).

113 Laing, Righarts and Henagan, above n 15, at 341.

114 *Judicature (High Court Rules) Amendment Act 2008*, r 2.1.

- The courts should be given statutory power to impose cost sanctions for failure to comply with PAPs and where disproportionate costs are incurred by complying with the PAP, those costs should not be recoverable.

However, law reform in New Zealand may only be effective if there is some curtailment of the adversarial culture of litigation and a corresponding recognition of settlement as a legitimate objective of the civil justice system.<sup>115</sup> Legal practitioner compliance, in addition to support of costs proportionality, is likely to have an impact on legal and pre-action associated costs.<sup>116</sup> It is proposed that the mitigation of adversarialism requires culture change, not merely rule change on behalf of lawyers and the judiciary.<sup>117</sup> Education plays a key role in shaping legal culture, and is vital to guarantee that lawyers are aware of their ethical obligations and are able to apply them in practice.<sup>118</sup> The *Jackson Review* asserts that it is time for a serious campaign to ensure that all litigation lawyers and judges are properly informed about the benefits of ADR.<sup>119</sup> A further important component of such a campaign is education about which types of disputes are appropriate to refer to ADR, and when it is appropriate to do so.<sup>120</sup>

It is argued that in order for PAPs to be effective in New Zealand, their implementation must be supported by corresponding education targeted at the judiciary, legal profession and law schools. With reference to the latter, such education would ideally not only encompass the requirements of PAPs specifically but also include the development of effective negotiation and settlement skills in the context of such reform.<sup>121</sup> As outlined by Julie McFarlane in her article “The Evolution of the New Lawyer”:<sup>122</sup>

The most successful lawyers of the next century will be practical problem solvers, creative and strategic thinkers, excellent communicators, persuasive and skilful negotiators, who are able and willing to work in a new type of professional partnership with their clients.

## VI. CONCLUSION

The changing concept of justice requires that law reforms focus on methods to reduce costs and delays to the civil litigant. In overseas jurisdictions, PAPs have constituted a central part of these reforms and have generated much controversy in their application. PAPs have the potential to enhance a litigant’s access to justice; however, their use must not be overshadowed by the possible consequences of such protocols – for example, satellite litigation and the front-loading of costs. This paper has examined the contending issues surrounding the implementation of PAPs and the experiences of overseas jurisdictions in order to determine how best they may be adopted in New Zealand.

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115 Arthur, above n 7, at 162.

116 Sourdin and Burstyn, above n 31, at 75.

117 Lord Justice Jackson, above n 26, at 362, [3.5].

118 Australian Law Reform Commission *Discovery in Federal Courts* (Discovery Report) Consultation Paper No 2 (November 2010).

119 Lord Justice Jackson, above n 26, at 362.

120 TF Bathurst (Chief Justice, NSW) as cited in Sourdin, above n 77, at 50.

121 McFarlane, above n 41, at 61.

122 At 81.

However, in addition to the recommendations made regarding their methodology, it is argued that PAPs may only be effective if the legal profession attenuates its adversarial practices and pursues enhanced settlement through skilled negotiation, or recognises when a dispute may benefit from referral to an ADR process. While culture change may take time, it is argued that PAPs promote such change through their specific requirements to cooperate and undertake only that work which is proportionate to resolving the dispute. The courts may also facilitate such culture change through the imposition of cost sanctions for excessive adversarial behaviour and non-compliance with PAPs. It is proposed that it is time to consider the adoption of PAPs in New Zealand as a practical means to enhance the civil litigant's access to justice.



# CASE COMMENT: *RE GREENPEACE OF NEW ZEALAND INC*

BY JULIET CHEVALIER-WATTS\*

This has been a much-awaited decision and marks the end of a long journey with regard to matters relating to political activities and charitable trusts, as well as consideration of illegal activities and charitable purpose.<sup>1</sup>

For a charity to be recognised as charitable at law in New Zealand, and thus take advantage of the fiscal and social benefits of this recognition, an entity must apply to the Department of Internal Affairs – Charities<sup>2</sup> to register as a charity. An entity must demonstrate that its activities falls under one of the four heads of charity, which find their history in the seminal case of *The Commissioners for Special Purposes of the Income Tax v Pemsel*<sup>3</sup> and now s 5(1) of the Charities Act 2005 (the Act), which states:

In this Act, unless the context otherwise requires, **charitable purpose** includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.

Therefore each purpose must be charitable, although a non-charitable purpose will not automatically negate the overall charitable purpose of an entity so long as that purpose is ancillary to the charitable purpose of the entity; it should not be an independent purpose.<sup>4</sup>

Section 5(3) of the Act gives an example of advocacy as being a non-charitable purpose. Advocacy of a particular view may be construed as “political”, and up until this decision, it had long been held in New Zealand that if an organisation has main or dominant purposes that are political in nature, then it will be denied charitable status, although it has been asserted that the political purpose doctrine has existed for longer than this.<sup>5</sup> The rationale advanced to support the political purpose doctrine is that courts are unable to judge the public benefit of a purpose;<sup>6</sup> all purposes must have public benefit.<sup>7</sup>

The basis of the appeal to the Supreme Court was to consider the extent to which purposes that are political can be charitable, and whether purposes or activities that are illegal or unlawful

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1 *Re Greenpeace of New Zealand Inc* [2014] NZSC 105.

2 Originally the Charities Commission, which was wound up as of 1 July 2012, and moved its core functions to the Department of Internal Affairs – Charities.

3 *The Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531 (HL) at 583.

4 Charities Act 2005, s 5(3).

5 *Bowman v Secular Society* [1917] AC 406 at 442; *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA); *Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20-032 (HC); *Re Collier (Deceased)* [1998] 1 NZLR 81 (HC).

6 *Bowman v Secular Society* [1917] AC 406 at 442; Juliet Chevalier-Watts *The Law of Charity* (Wellington, Thomson Reuters, 2014) at ch 7 (publication forthcoming).

7 Charities Act 2005, s 5.

preclude charitable status. In a split decision, the majority held that the development of a stand-alone doctrine of the exclusion of political purposes, which they acknowledged has been a relatively recent development and based on little authority,<sup>8</sup> was neither necessary nor beneficial.<sup>9</sup> In other words, s 5(3) of the Charities Act does not enact a political purpose exclusion. It provides that non-charitable purposes do not affect charitable purpose, so long as they are no more than ancillary, and the inclusion of “advocacy” in the legislation is merely an example of an ancillary non-charitable purpose. However, if an object is the promotion of a cause that cannot be charitable because the attainment of the end promoted, or the means of the promotion itself, does not have the requisite public benefit, then the entity will not qualify for registration as charitable.<sup>10</sup> On the matter of illegal activity, the Court unanimously held that an entity that had purposes properly characterised as illegal would not be charitable. However, illegal activities that are not deliberately undertaken or coordinated by the entity are unlikely to amount to a purpose and therefore may well not amount to a disqualifying purpose.<sup>11</sup> For the purposes of this case comment, the issue of political purposes will be the focus.

The majority of the Court asserted that it was difficult to reconcile supporting a blanket exclusion of political purposes when it was difficult to construct any adequate theories or principles to support such an approach.<sup>12</sup> Indeed, should such a restriction apply, this would risk hindering the responsiveness of the law to changing circumstances of society.<sup>13</sup> Therefore the better approach, as suggested by the majority, is not a doctrine of exclusion of political purposes, but rather an acceptance that objects that may entail advocacy for the change in the law are simply a facet of whether purposes advance the public benefit in a way that is recognised to fall within the spirit and intent of the Statute of Elizabeth 1601.<sup>14</sup>

It was noted, however, that perhaps most often advancement of causes will not be charitable as it is not possible to say whether or not views promoted would be of benefit in the way in which the law recognises as charitable. This echoed the dissenting views of Kiefel J in *Aid/Watch Inc v Commissioner of Taxation*,<sup>15</sup> a recent Australian High Court decision concerning political purposes and charity, where her Honour stated that “reaching a conclusion of public benefit may be difficult where the activities of an organisation largely involve the assertion of its views.”<sup>16</sup> Therefore, in the majority of the Supreme Court’s view, whilst it may be accepted that there are circumstances in which advocacy of certain views may not be charitable, this does not justify a rule that all non-ancillary advocacy is properly characterised as non-charitable.<sup>17</sup>

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8 *Re Greenpeace of New Zealand Inc*, above n 1, at [59], referring to paragraphs [32]–[47].

9 At [59].

10 At [116].

11 At [109]–[112].

12 At [69].

13 At [70]–[71]; see also *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA); *Jackson v Phillips* (1867) 96 Mass 539, 14 Allen 539 (Mass SC); Charities Act 2006 (UK), s 2(2)(h).

14 *Re Greenpeace of New Zealand Inc*, above n 1, at [72]; the Statute of Elizabeth 1601 (the Charitable Uses Act 1601) has long been repealed but its preamble set out a non-exhaustive list of charitable purposes. Contemporary charitable purposes find their history in this preamble.

15 *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42, (2010) 241 CLR 539.

16 *Re Greenpeace of New Zealand Inc*, above n 1, at [73] citing *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42, (2010) 241 CLR 539 at [69].

17 *Re Greenpeace of New Zealand Inc*, above n 1, at [74].

The majority criticised the approach of the Court of Appeal, where that Court suggested that views that were generally acceptable may be construed as charitable, whilst highly controversial views would not. The majority concluded that such an approach would likely exclude much promotion of change and instead favour charitable status based on the majoritarian assessment and the status quo. An unpopular cause should not affect its charitable status, and therefore lack of controversy equally should not be determinative in assessing charity.<sup>18</sup>

The majority concluded the Court of Appeal was not correct in treating the lack of controversy in New Zealand about the goals of nuclear disarmament and the elimination of weapons of mass destruction as determinative of the question as to whether the promotion of these ends was charitable. The focus should have been on the manner of the promotion. Since the educational objects of Greenpeace are conducted through a distinct charitable trust, any educational matters relating to nuclear disarmament and eliminating weapons of mass destruction seem unlikely to be key to the promotional effort. The focus on direct action and advocacy on the entity's website might indicate the main means of promotion, but a stand-alone object must be of public benefit. Indeed, whilst advocacy or similar conduct may meet such public benefit requirements, such a finding will depend on the wider context. This wider context requires closer consideration than that which was brought to bear in the present case, however.<sup>19</sup>

As a result, the majority concluded that the matter of the charitable nature of Greenpeace's purposes had not been considered on the correct basis. The Court of Appeal acknowledged that Greenpeace had made changes to its objects, which makes it necessary for Greenpeace to provide further evidence about its activities. This was the basis for returning the case to the Board of the Department of Internal Affairs – Charities. It is proper for the Board to assess charitable purpose in the first instance. Therefore, in the majority's view, the correct course of action is to remit the application for reconsideration in light of the changes made to Greenpeace's objects and the reasons given by the Supreme Court.<sup>20</sup>

The dissenting Judges, however, did not concur with the determination of charitable purpose. They could not reconcile the notion that political activity could be charitable within the meaning of s 5(3) of the Act. Instead, their Honours determined that it was the intention of the legislature to codify this aspect of charity law because this section presupposes that advocacy is not charitable unless it is ancillary to that charitable purpose. Therefore, they could see no reason to depart from the ordinary language of s 5(3) of the Act.<sup>21</sup>

In conclusion, the majority of the Supreme Court confirmed that a political purpose exclusion should no longer be applied in New Zealand because political and charitable purposes are not mutually exclusive in all circumstances. Section 5 of the Charities Act 2005 does not enact a political purpose exclusion with an exception if political activities are no more than ancillary. Rather, it provides an exemption for non-charitable activities if they are ancillary. However, there is a continued requirement for dominant purposes to meet the public benefit test to ensure that they are charitable purposes.<sup>22</sup> In addition, illegal activities are not charitable purposes, and therefore

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18 At [75]–[76].

19 At [102]–[103].

20 At [104].

21 At [121]–[127].

22 At [3].

would disqualify an entity from obtaining registered charitable status. However, breaches of law that are not deliberately undertaken or coordinated by the entity are unlikely to amount to a purpose. Thus assessment of illegal purpose is a matter of fact and degree.<sup>23</sup>

This is a welcome case because it provides some clarity in New Zealand relating to political purposes and charitable purposes, which has been much needed. This then brings New Zealand charity law more in line with Australian charity law where the political purpose doctrine is no longer acknowledged.<sup>24</sup> Whilst there may be concerns that the *Greenpeace* decision will open the floodgates to registering as charitable those entities that would not previously have been eligible because of their political activities, it seems unlikely that this would happen. The decision still places heavy emphasis on the public benefit requirement, and as the majority of the Court pointed out, not all stand-alone or dominant political purposes will be charitable, because the public benefit will not be ascertainable. Therefore, overall, this is a timely decision that provides more certainty in this particular aspect of charity law.

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23 At [111].

24 *Aid/Watch Inc v Commissioner of Taxation*, above n 15.

# CASE NOTE: *HOLLER V OSAKI*

BY THOMAS GIBBONS\*

## I. INTRODUCTION

Residential tenancies cases rarely garner substantive legal attention: the Tenancy Tribunal has been described as both New Zealand’s most popular, and most unpopular, Tribunal.<sup>1</sup> The limits of its jurisdiction have been the subject of a number of recent decisions,<sup>2</sup> and *Holler v Osaki* adds to the rich and important jurisprudence of a Tribunal which touches the lives of many New Zealanders.<sup>3</sup> This brief note provides an outline of the case, which began with a pot boiling over on a stove, and continues through the key legal issues, which concerned the application of the Property Law Act 2007 (“PLA”) to the Residential Tenancies Act 1986 (“RTA”). The decision contains useful comment on the attributes of the RTA but beyond that, it has wide implications.

In finding that a residential tenant may be exonerated from liability under ss 40 and 41 of the RTA by virtue of the PLA, the High Court has significantly limited the potential liability of residential tenants and conversely imposed a significant future liability on landlords.

## II. BACKGROUND

Holler and Rouse owned a property in Auckland that was tenanted by Mr Osaki and his family. The property was damaged by fire in March 2009 after Mrs Osaki left a pot on the stove which boiled over. AMI as insurer met the cost of repair, which exceeded \$200,000.

Holler brought an action for summary judgment in the High Court, arguing that the negligence of Mrs Osaki had led Mr Osaki to breach the tenancy agreement, which required reasonable precautions against fire and imposed a duty of repair on Mr Osaki. Mr Osaki opposed the application, arguing that the Tenancy Tribunal had exclusive jurisdiction under the RTA, and that ss 268 and 269 of the Property Law Act 2007 (“PLA”) barred Holler’s claim on the basis that the PLA provisions exonerate tenants from liability for fire damage caused by negligence.

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1 Thomas Gibbons “The Tenancy Tribunal: Tensions of Jurisdiction, Coherence and Economics” (2012) 12 Otago LR 703.

2 See eg *Boutique Body Corporate Ltd v J Star Property Management Ltd* [2012] NZHC 3169, (2012) 14 NZCPR 242; *Anderson v FM Custodians Ltd* [2013] NZHC 2423, (2013) 15 NZCPR 123.

3 *Holler v Osaki* [2014] NZHC 1977, [2014] 3 NZLR 791.

4 Property Law Act 2007, ss 268 and 269.

Sections 268 and 269 read as follows:<sup>4</sup>

**268 Application of sections 269 and 270**

- (1) Sections 269 and 270 apply if, on or after 1 January 2008, leased premises, or the whole or any part of the land on which the leased premises are situated, are destroyed or damaged by 1 or more of the following events:
  - (a) fire, flood, explosion, lightning, storm, earthquake, or volcanic activity;
  - (b) the occurrence of any other peril against the risk of which the lessor is insured or has covenanted with the lessee to be insured.
- (2) Section 269 applies even though an event that gives rise to the destruction or damage is caused or contributed to by the negligence of the lessee or the lessee's agent.
- (3) In this section and sections 269 and 270, lessee's agent means a person for whose acts or omissions the lessee is responsible.

**269 Exoneration of lessee if lessor is insured**

- (1) If this section applies, the lessor must not require the lessee—
  - (a) to meet the cost of making good the destruction or damage; or
  - (b) to indemnify the lessor against the cost of making good the destruction or damage; or
  - (c) to pay damages in respect of the destruction or damage.
- (2) If this section applies, the lessor must indemnify the lessee against the cost of carrying out any works to make good the destruction or damage if the lessee is obliged by the terms of any agreement to carry out those works.
- (3) Subsection (1) does not excuse the lessee from any liability to which the lessee would otherwise be subject, and the lessor does not have to indemnify the lessee under subsection (2), if, and to the extent that,—
  - (a) the destruction or damage was intentionally done or caused by the lessee or the lessee's agent; or
  - (b) the destruction or damage was the result of an act or omission by the lessee or the lessee's agent that—
    - (i) occurred on or about the leased premises or on or about the whole or any part of the land on which the premises are situated; and
    - (ii) constitutes an imprisonable offence; or
  - (c) any insurance moneys that would otherwise have been payable to the lessor for the destruction or damage are irrecoverable because of an act or omission of the lessee or the lessee's agent.

Summary judgment was stayed in May 2012, it being held that the Tenancy Tribunal did have exclusive originating jurisdiction, and that while the claim exceeded \$50,000 (the upper limit of the Tribunal's jurisdiction), the Tribunal could still determine whether the claim was barred by ss 268 and 269 of the PLA.

Mr Osaki then applied for orders in the Tribunal barring the claim. The Tribunal did not agree, and determined that ss 40 and 41 of the RTA (which make tenants liable for damage they cause)

applied, and were not inhibited by ss 268 and 269 of the PLA. The District Court upheld Osaki's appeal, finding that the Tribunal was bound to give effect to ss 268 and 269 of the PLA.

The appeal to the High Court was based on the contention that the District Court had fundamentally misconstrued the RTA,<sup>5</sup> the key issue being the extent to which the PLA applied to residential tenancies under the RTA. In particular, as the Court put it:<sup>6</sup>

In imposing liability on tenants for fire damage, does the RTA incorporate by reference ss 268 and 269 of the PLA, insofar as they exonerate tenants from liability? Or does it deny them any operative effect?

### III. STATUTORY ISSUES

The Court recognised that the issue had historical and policy dimensions,<sup>7</sup> noting earlier Law Commission reports on what became the PLA,<sup>8</sup> various proposals to amend the RTA,<sup>9</sup> and that the result of failures to reform the law was that the RTA “[did] not expressly exonerate tenants from personal and vicarious liability for fire damage.”<sup>10</sup> Mr Osaki would be answerable under ss 40 and 41 of the RTA for loss suffered as a result of the fire, assuming negligence on the part of Mrs Osaki, but for ss 268 and 269 of the PLA. Section 40(2)(a) provided that the tenant would not intentionally or carelessly damage the premises, or permit any other person to do so; s 40(4) stated that it was for the tenant to prove the damage had not been caused intentionally or carelessly; and s 41(1) made Mr Osaki responsible for his wife's negligence. It was not in issue that the Tribunal would have had jurisdiction to order Mr Osaki to pay damages for the loss borne by AMI under s 77(2)(n) of the RTA but for the fact the claim exceeded \$50,000 under s 77(5) of the RTA. The Tribunal did not therefore have originating jurisdiction, though s 83(1) of the RTA allowed the Tribunal to transfer a matter to the District Court and, presumably, the High Court as well.<sup>11</sup> The key issue, then, was s 142 of the RTA, as amended in 2010, and “the extent to which [s 142] both enables and excludes the PLA being taken into account under the RTA.”<sup>12</sup> Section 142 stated:<sup>13</sup>

- (1) Nothing in Part 4 of the Property Law Act 2007 applies to a tenancy to which this Act applies.
- (2) However, the Tribunal, in exercising its jurisdiction in accordance with section 85 of this Act, may look to Part 4 of the Property Law Act 2007 as a source of the general principles of law relating to a matter provided for in that part (which relates to leases of land).

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5 *Holler*, above n 3, at [6].

6 At [7].

7 At [8].

8 At [13]–[17]. See Law Commission *The Property Law Act 1952* (NZLC PP16, 1991) and Law Commission *A New Property Law Act* (NZLC R29, 1994).

9 *Holler*, above n 3, at [18]–[20]. See Residential Tenancies (Damage Insurance) Amendment Bill 2006; Residential Tenancies Amendment Bill (No 2) 2008.

10 *Holler*, above n 3, at [21].

11 At [27].

12 At [28].

13 Residential Tenancies Act 1999, s 142.

The High Court observed that s 142 was “awkwardly expressed”,<sup>14</sup> this seems a very diplomatic way of saying it is poorly drafted. It noted that s 142(1) “must be read subject to s 142(2)”, which entitled the Tribunal to refer to pt 4 of the PLA. Did s 142(2) permit the Tribunal to resort to ss 268 and 269 of the PLA to exonerate tenants from liability?<sup>15</sup> Going further:<sup>16</sup>

Section 142(2) does not confer on the Courts in their ordinary civil jurisdiction the ability to resort to Part 4. Does that mean that the Courts are denied by s 142(1) any ability to resort to Part 4? Or does it mean that s 142(1), despite the absolute way in which it is expressed, only says that the Tribunal is not required to adhere to Part 4 literally? Does it complement s 142(2)?

With respect, this formulation by the High Court also seems awkwardly expressed. Another way of putting this might have been – is s 142(1) or 142(2) to be given greater emphasis? Or – what weight is to be given to the words “may look to” in s 142(2)? The Court’s exposition of the problem at this point seems more complex than it needed to be.

#### IV. INTERPRETATION AND THE ATTRIBUTES OF THE RTA

That said, the issues were not immediately simple. The Court referred to the principles set out in s 5 of the Interpretation Act 1999, the general lean of New Zealand commentary towards a purposive, but text-constrained, interpretation, and decisions such as *Sheehan v Watson*.<sup>17</sup> More broadly, the High Court expressed the view that there were “four attributes of the RTA, against which s 142 must be considered”.<sup>18</sup>

The first of these was the RTA’s purposes, as set out in its long title. These included “to declare accessibly the central rights and duties of the landlords and tenants”, and to provide access to a forum “less formal and expensive and more timely than the courts” for disputes concerning less than \$50,000.<sup>19</sup>

The second was that the RTA applied only to “residential tenancies” as defined in s 4, not to other kinds of tenancies, even where “closely analogous”: these might be subject only to pt 4 of the PLA. The Court thought it desirable that “rights and duties of analogously placed tenants, and their liabilities and immunities, ought not to differ radically or inexplicably.”<sup>20</sup>

The third was the manner in which s 85 of the RTA obliged the Tribunal to exercise its jurisdiction. Section 85 provided that:<sup>21</sup>

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14 *Holler*, above n 3, at [29].

15 At [29].

16 At [30].

17 At [31]–[33]. See *Sheehan v Watson* [2010] NZCA 454, [2011] 1 NZLR 314, which concerned ss 268 and 269 of the PLA. See also Interpretation Act 1999, s 5(1)–(3). The Court warned against strictly applying maxims of interpretation at [34]–[35].

18 *Holler*, above n 3, at [36].

19 At [36]. See Residential Tenancies Act 1986, long title.

20 *Holler*, above n 3, at [37].

21 Residential Tenancies Act 1986, s 85.



- (1) Subject to the provisions of this Act and of any regulations made under this Act, the Tribunal shall exercise its jurisdiction in a manner that is most likely to ensure the fair and expeditious resolution of disputes between land lords and tenants of residential premises to which this Act applies.
- (2) The Tribunal shall determine each dispute according to the general principles of the law relating to the matter and the substantial merits and justice of the case, but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities.

The Court noted that in *Welsh v Housing New Zealand Ltd*, s 85 had been said to impose a “binary duty” on the Tribunal but did not create a “licence” for the Tribunal “to impose its views on the substantial merits and justice of the case”, unless the Tribunal’s determination was “based on general principles of law”.<sup>22</sup> Therefore, if there was “no remedy provided for by the law”, it was not open to the Tribunal to invent a remedy.<sup>23</sup> This approach, the Court noted, had been applied in other cases, where s 85(2) had been described as an aid to interpretation, rather than a *carte blanche* for the Tribunal to decide the case on its own perception of the merits and justice.<sup>24</sup>

The fourth attribute of the RTA was the manner in which the legislation referred to other statutes, which in the Court’s view could be divided into three categories. First, those which defined and enlarged jurisdiction, such as the conferral of jurisdiction under the Minors’ Contracts Act 1969; second, those which enlarged or restricted the statutory matrix, such as the importation of operational rules under the Unit Titles Act 2010; and third, those which concerned machinery, such as conferring standing on a manager under the Protection of Personal and Property Rights Act 1988.<sup>25</sup> Section 58 lay within the second of these categories and the Court in *Ziki Investments (Properties) Ltd v McDonald* had held that s 58(2), which stated that s 58(1), relating to mortgagee possession of a property subject to a residential property applied “notwithstanding anything to the contrary in the Property Law Act 2007 or the Land Transfer Act 1952 or any other enactment” excluded the application of the Land Transfer Act 1952.<sup>26</sup> The Court then drew a comparison between ss 142 and 58. Like s 142, s 58 excluded pt 4 of the PLA; but if s 142(1) excluded the PLA from applying under the RTA at all, subject only to s 142(2), then a specific provision like s 58(2) had no purpose.<sup>27</sup> Contrasting s 142(2), as amended by s 364(1) of the PLA, with its predecessor, the Court noted that the provision was now aligned with s 85, which governed the way in which the Tribunal exercised its jurisdiction. Section 142 was within the first category of legislation: those which defined and enlarged jurisdiction, and “assist[ed] to define the Tribunal’s jurisdiction”.<sup>28</sup> Therefore, s 142 did not exclude ss 268 and 269 of the PLA from conferring tenant immunity.

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22 *Welsh v Housing New Zealand Ltd* HC Wellington AP35/2000, 9 March 2001 at [29], cited in *Holler*, above n 3, at [39].

23 *Welsh*, above n 22, at [30], cited in *Holler*, above n 3, at [39].

24 See *Ziki Investments (Properties) Ltd v McDonald* [2008] 3 NZLR 417 (HC) at [69]–[70], cited in *Holler*, above n 3, at [40].

25 *Holler*, above n 3, at [41]. See Residential Tenancies Act 1986, ss 14(4), 16B, and 94.

26 *Holler*, above n 3, at [42]–[43]. See *Ziki Investments*, above n 24, at [41], cited in *Holler*, above n 3, at [43].

27 *Holler*, above n 3, at [44].

28 At [48]. See also at [45]–[47].

## V. DECISION

In the Court's view, the notion that residential tenants under the RTA were entitled to claim the immunity the PLA granted to tenants generally was consistent with the policy intent of both the RTA and PLA. In addition, each kind of tenancy was and should be governed by the same general principles of law: the liability risk faced by lessees under the PLA, and the liability risk faced by residential tenants under the RTA (called "that cognate form of tenure") was "essentially indistinguishable".<sup>29</sup> Both should have the same immunities. Mr Osaki therefore had immunity and this extended to Mrs Osaki. The appeal was therefore dismissed.<sup>30</sup>

## VI. COMMENT

Four angles of perspective can be taken on the Court's decision. First, we can observe the comments of Margaret Jane Radin, who, in identifying the rights of a tenant with a kind of "personhood", has noted:<sup>31</sup>

It is widely said that the law of residential tenancy has undergone a revolution. The ordinary common law property scheme of landlord and tenant was caveat tenant, and the scheme largely prevailed as little as thirty years ago. Then came the revolution. ... It is obvious that the landlords have lost a lot of the "sticks" in their "bundle" and the tenants have gained a lot in theirs.

This decision can be seen as an example of sticks in a particular bundle of property rights shifting from landlords to tenants. Second, we can, like the Court, place some responsibility for the issue on obfuscatory drafting of legislation: the reality for the parties and the Court was that s 142 was insufficiently clear to allow a straightforward decision. Third, we can consider that the Court itself sought but did not achieve clarity: the basis of the Court's reasoning is not entirely clear, though it seems that the essence of the decision was based on the notion that landlords and tenants should be exonerated in the same way, both in terms of the general law and in terms of residential tenancies. As a matter of policy, this seems laudable, though the nature of the RTA is to treat residential tenants as being different from general tenants in many circumstances.

The fourth angle deals with the broader implications and economics of the decision. This ruling will affect a great number of residential landlords and tenants, and, in particular, the allocation of risk between them. In providing a broad exoneration of tenants from liability, it may create adverse incentives for tenants to take less care in their tenancies. Conversely, the decision seems to create a disincentive for landlords to seek insurance, as s 269 only exonerates a tenant if the landlord has insurance. Otherwise, presumably, liability may rest with the tenant under the RTA. These incentives encourage both landlords and tenants to exercise less caution and care. In this sense, the

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29 At [50].

30 Leave to appeal to the Court of Appeal has been granted: see *Holler v Osaki* [2014] NZHC 1977, [2014] 3 NZLR 791.

31 Margaret Jane Radin *Reinterpreting Property* (University of Chicago Press, Chicago, 1993) at 172–173.

economics of the decision may ultimately prove most important in future, and it can be hoped they will be properly factored in when the Court of Appeal rules on the matter.<sup>32</sup>

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<sup>32</sup> See *Holler v Osaki* [2014] NZHC 1977, [2014] 3 NZLR 791 (leave to appeal to Court of Appeal granted). On the economics of residential tenancies in New Zealand, see Gibbons, above n 1. On law and economics generally, see for example Richard Posner *Economic Analysis of Law* (4th ed, Little Brown, Boston, 1992); Sir Ivor Richardson ‘Law and Economics – and Why New Zealand Needs It’ (2002) 8 NZBLQ 151; Nicholas Leonidas Georgakopoulos *Principles and Methods of Law and Economics: Basic Tools for Normative Reasoning* (Cambridge University Press, New York, 2005).

## BOOK REVIEW

NEVILL'S LAW OF TRUSTS, WILLS AND ADMINISTRATION by Nicky Richardson (Author), 11th ed, LexisNexis, 2013, 620 pp, recommended retail price NZ\$ 149.50.

I still have my first copy of *Nevill's Concise Law of Trusts Wills and Administration* (the sixth edition), which I bought in 1976. When I looked at this latest version, the 11th edition, now written by Dr Nicky Richardson, I was struck by how much the book has been developed. In her preface to the 11th edition, Richardson makes mention of the intention expressed by Professor Julie Maxton, in the eighth edition of the book, to provide the same kind of text that Phillip Nevill intended when he wrote the first incarnation of his book, in 1954. In his own preface, Nevill said his book was never meant to take the place of the larger textbooks but designed to offer a concise summary of the principles, keeping references to cases to a reasonable minimum but at the same time including the most important cases so that his book should be useful to law students, among others. Now at 620 pages, nearly twice the size of that earlier edition, *Nevill's Law of Trusts, Wills and Administration* no longer includes "concise" in the title. Divided into 21 chapters, the book relates the law in these areas with considerable detail, with none of the original author's reluctance to use footnotes. There are plenty of references to cases and further reading to offer access to greater depth of understanding, if that is desired.

The book has a very clean-looking layout and the law is expressed very clearly. It is divided into appropriately labelled paragraphs for ease of reference. This makes it a good book to recommend to students as a companion book, where a short explanation is required rather than a lengthy treatise. Chapter 5 deals with the legality of trusts and sham transactions, which I thought was of particular value. This area of law is developing in many directions to account for situations where attempts are made to hide assets from creditors, spouses or others. The chapter concludes by setting out the current approach to these cases in this country in comparison to the "strictly orthodox" approach taken in the leading New Zealand case from 2006. Although this section is relatively short, the reader is given plenty of guidance via the footnotes towards more information and academic writing. This chapter is followed by an account of charitable trusts, which is comprehensive but surprisingly short when compared, for example, to the length of the text devoted to trustees' duties.

The chapters on wills, succession and administration now constitute approximately 40 per cent of the book. As with the rest of the work, this part of the book is extremely well written and clearly set out. Again, this is a very valuable resource for students and, up until this year, was the only student text that dealt with wills and succession.

I think that there is only one drawback to this book in that it falls somewhere between the large, comprehensive textbook and the concise guide its original author intended. The work seems to be in danger of losing its original identity and purpose. It is no longer a concise guide yet it cannot, by the nature of its size, deal with every topic in the areas of trusts, wills and administration. Trusts, in particular, seem to be given a relatively short treatment and some topics, for example tracing, are simply not dealt with because of lack of space. Considering the clear writing style and careful attention to offering a readable layout, I believe an opportunity is

being missed. If Richardson were able to offer a single-authored textbook covering all the topics in depth, it would prove to be a valuable asset to students and practitioners.

SUE TAPPENDEN\*

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