Government Law

Year in Review Half-Day Seminar

NEW ZEALAND CENTRE FOR PUBLIC LAW
TE WĀNANGA O NGĀ KAUPAPA TURE Ā IWI O AOTEAROA

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Ngā mihi

On behalf of the NZ Centre for Public Law, we would like to welcome you to our first, hopefully annual, **Government Law – Year in Review** half-day seminar.

A lot has happened within the discipline of government law over the last year or so. This seminar aims to explain some of the key developments and to explore their significance for those working inside and outside government.

Our programme blends together the traditional domains of public law with other areas of particular interest over the last year. Our scholars, joined by a few colleagues and practitioners, will lead you through these developments. Their comments are intended to provide an opportunity for those in the field to stay on top of developments, as well as some assistance in locating these developments within their broader context.

We are also excited to include some voices from abroad – video vignettes from friends in cognate jurisdictions. We hope these brief snapshots of developments overseas provide some points of connection, as well as further context for developments here.

Our thanks, also, to those that have helped make this half-day seminar happen. We are grateful to our speakers, who have given their time and expertise so willingly. Thanks also to those who helped shape the event and programme, especially feedback and other assistance from the Government Legal Network and Crown Law Office. And thanks to our events and professional staff who work behind the scenes to help put these events on.

Finally, thank you for your attendance. The tradition of the Centre and the University is to provide opportunities for those inside and outside government to reflect on important issues of the day within the civic sphere. We are pleased to add a year-in-review event to our programme – and welcome your feedback as we also look to a similar event early next year.

Professor Claudia Geiringer and **Dr Dean Knight**
Co-Directors, NZ Centre for Public Law

Monday, 12 February 2018
Rutherford House, Lecture Theatre 1
Pipitea Campus, Victoria University of Wellington

12:45pm	*Welcome*
12:50pm	*Te Tiriti/Māori issues* **Dr Carwyn Jones,** Victoria University of Wellington
1:30pm	*Video Vignette – Updates from abroad – United Kingdom: Brexit* **Catherine Callaghan,** Barrister (and, from 26 February, QC), Blackstone Chambers
1:35pm	*Judicial review* **Dr Eddie Clark,** Victoria University of Wellington *Election and government formation* **Professor Andrew Geddis,** University of Otago
2:35pm	*Video Vignette – Updates from abroad – United States: Trump and obstruction of justice* **Professor Neil S Siegel,** David W Ichel Professor of Law and Professor of Political Science, Duke University
2:40pm	*Afternoon Tea*
3:20pm	*NZ Bill of Rights Act* **Professor Claudia Geiringer,** Victoria University of Wellington
4:00pm	*Video Vignette – Updates from abroad – Canada: indigenous rights and freedom of religion (Ktunaxa Nation v British Columbia* [2017] SCC 54) **Lorne Sossin,** Dean and Professor, Osgoode Hall Law School, York University
4:05pm	This and that: · **Madeleine Laracy,** Deputy Inspector-General of Intelligence and Security *Osborne v Worksafe New Zealand – on the failure to proceed with a prosecution in relation to the Pike River disaster* · **Steven Price,** Barrister and Victoria University of Wellington adjunct lecturer *"Let's Tax This" – decisions of the Advertising Standards Authority and Broadcasting Standards Authority* · **Martha Coleman,** Barrister *Update on developments in relation to pay equity* · **Professor Susy Frankel,** Victoria University of Wellington *Comments on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership* · **Elana Geddis,** Barrister *Update on the Legislation Bill*
5:05pm	*Video Vignette – Updates from Abroad – Australia: proportionality and the constitution* **Professor Rosalind Dixon,** University of New South Wales
5:10pm	*Closing Remarks*
5:15pm	*Refreshments* (token included with registration for one free drink)
5:45pm	*Keynote Address:* · **Dr Dean Knight,** *Victoria University of Wellington* *Vigilance and Restraint in the Common Law of Judicial Review* *Address based on his book of the same name (Cambridge University Press, 2017)*
6:45pm	*Seminar Ends*

Dr Carwyn Jones, Victoria University of Wellington

Te Tiriti/Māori issues

In this session, I will address significant developments relating to the Treaty of Waitangi/Māori legal issues, covering the following three key topics:

Fiduciary duties owed by the Crown

Proprietors of Wakatū v Attorney-General [2017] NZSC 17

This case relates to the purchase of land from Māori in the Nelson area in 1839. Importantly, this purchase took place before the Treaty of Waitangi was signed between Māori and the British Crown in 1840 and was subsequently validated by the Crown. Drawing on the Canadian case, *Guerin v R* [1984] 2 SCR 335, the Supreme Court, by majority, declared that the Crown owed fiduciary duties to reserve 15,100 acres for the benefit of the customary owners of the Nelson tenths reserves (Tenths). This was the first time that a New Zealand court has accepted that in some circumstances the Crown might owe private law fiduciary duties to some Māori in this way.

Treaty settlements and tikanga in the courts

Ngāti Whātua Ōrākei Trust v Attorney-General [2016] NZHC 347; [2017] NZHC 389

In *Ngāti Whātua Ōrākei Trust*, the plaintiff challenged a preliminary decision by the Minister for Treaty of Waitangi Negotiations to transfer certain land in central Auckland to the Ngāti Pāoa Iwi Trust as part of Ngāti Pāoa's settlement.

Ngāti Hurungaterangi v Ngāti Wahiao [2017] NZCA 429

The *Ngāti Hurungaterangi* case was an appeal from an arbitral award that was used a tikanga-based process to determine that interests in specific lands which had been used as settlement redress should be held equally by both Ngāti Whakaue and Ngāti Wahiao.

These cases provide recent examples of the ways in which the courts are being asked to intervence in Treaty settlement matters and also the increasingly frequent need for the courts to grapple with questions of tikanga.

Marine and Coastal Area (Tākutai Moana) Act 2011

Re Tipene [2016] NZHC 3199; [2017] NZHC 2990

This is the first case where the High Court applied the tests for customary marine title under the Marine and Coastal Area (Takutai Moana) Act 2011.

Dr Eddie Clark, Victoria University of Wellington

Judicial review

A busy year for judicial review

Supreme Court

A deep but narrow approach.

- *Hawke's Bay Regional Investment Co Ltd v Royal Forest and Bird Protection Society of New Zealand Inc* [2017] NZSC 106.
- *Wellington International Airport v New Zealand Air Line Pilots' Association* [2017] NZSC 199.

Court of Appeal

Wrestling doctrine into shape.

- *Wellington City Council v Minotaur Custodians Ltd* [2017] 3 NZLR 464.
- *Attorney-General v Problem Gambling Foundation of New Zealand* [2017] 2 NZLR 470.

High Court

Innovation – and overreach?

- *Hu v Immigration and Protection Tribunal* [2017] NZAR 508.

Selected cases of note

- *Te Whakakitenga O Waikato Inc v Martin* [2017] NZAR 173 (NZCA).
- *Lower North Island Red Deer Foundation Inc v Minister of Conservation* [2017] NZAR 1058 (HC).

Professor Andrew Geddis, University of Otago

Election and government formation

Following the 2017 election, a new Government was formed consisting of the Labour and NZ First Parties in a formal coalition arrangement, with the Green Party giving support through an "enhanced confidence and supply agreement". The National Party, which remains the largest single party in Parliament, leads the opposition. This new arrangement of government and opposition is notable for two reasons.

First, it disproves assertions regarding a general public expectation that the largest party in Parliament *should* have some role in the country's government. The new governing arrangement thus demonstrates that, after eight elections under the MMP voting system, the public has grown comfortable with the idea that multi-party compromises on policy matters are a necessary and legitimate part of the government formation process.

Second, the new governing arrangement involves a subtly different structure to recent MMP-era governments. The preferred model since 2002 has been for one of the major parties (National or Labour) to form a minority government on its own, while entering into so-called "enhanced confidence and supply agreements" with a range of other support parties (I acknowledge that technically the 2002-2008 Government took the form of a minority coalition between the Labour Party and Jim Anderton's Progressive Party, but by that point the latter effectively was an external faction of the Labour Party). Following the 2017 election, however, in formal constitutional terms the Labour-NZ First Government is a minority one that is able to hold office with the Green Party's guaranteed support.

In practical terms, however, the three parties must manage their respective ministerial portfolios collectively, meaning that the Green Party is a functional part of the governing arrangements. Each party's different formal status in government is thus more a matter of political positioning; NZ First in particular wishes to be viewed as the dominant partner in government with Labour, and also wants to be able to deny it is "in government" with the Greens.

As a part of the government formation process, the Labour Party entered into separate agreements with the NZ First and Green Parties. (It is noteworthy that the NZ First and Green Parties have no agreement with each other – rather, they have pledged "to act in good faith" to allow the agreement Labour has reached with each of the other parties to be complied with.) Labour's agreement with NZ First then contains two election-related commitments:

- Introduce and pass a 'Waka Jumping' Bill
- Independent review of the integrity of electoral processes and enrolments.

The first of these has been actioned by the introduction and passage at first reading of the Electoral (Integrity) Amendment Bill, which would re-enact provisions that were on the statute book between 2002-2005 and were litigated in *Prebble v Awatere Huata* [2005] 1 NZLR 289. There has been no announcement as yet as to what the second commitment might mean, and given that the report of Parliament's Justice and Electoral Committee into the 2014 general election contained no minority view from NZ First raising concerns about these issues, it is hard to know what they think needs to be examined.

Professor Claudia Geiringer, Victoria University of Wellington

NZ Bill of Rights Act: Taylor *and all that*

The Court of Appeal decision in *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 (the declaration of inconsistency case) dominated 2017, and I will be spending much of my time on it. The argument that I plan to make in brief is one that I have pursued in more detail in: Claudia Geiringer "The Constitutional Role of the Courts under the NZ Bill of Rights: Three Narratives from *Attorney-General v Taylor*" (2017) 48 VUWLR 547.

Following the discussion of *Taylor*, I plan to hand out a number of bouquets and brickbats in relation to cases and developments that have particularly interested me during the course of 2017. As I will touch on a number of cases in passing, a list of full references may be useful here. In alphabetical order, I plan on mentioning:

- *A v Minister of Internal Affairs* [2017] NZHC 746
- *AH v Commissioner of Police* [2017] NZHC 930, [2017] NZAR 754
- *Holland v Department of Corrections* [2017] NZSC 161
- *Hudson v Attorney-General* [2017] NZHC 1441, [2017] NZAR 1293
- *Kearns v R* [2017] NZCA 51, [2017] 2 NZLR 835
- *Kerr v Police* [2017] NZHC 2595
- *Low Volume Vehicle Technical Association Inc v Brett* [2017] NZHC 2846
- *Smith v Attorney-General* [2017] NZHC 463, [2017] 2 NZLR 704 (the wig case)
- *Smith v Attorney-General* [2017] NZHC 1647, [2017] NZAR 1094 (on standing)
- *Smith v Attorney-General* [2017] NZHC 2810 (successful discovery application)
- *Smith and Roper v Attorney-General* [2017] NZHC 136; [2017] NZAR 331 (on security classifications)
- *Taylor and Smith v Attorney-General* [2017] NZHC 2234 (successful application to appear by audio-visual link)
- *Te Whatu v Department of Corrections* [2017] NZHC 3233

New Zealand Bill of Rights Act 1990 (as at 01 July 2013)

3 Application

This Bill of Rights applies only to acts done—

(a) by the legislative, executive, or judicial branches of the Government of New Zealand; or
(b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

4 Other enactments not affected

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—

(a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
(b) decline to apply any provision of the enactment—

by reason only that the provision is inconsistent with any provision of this Bill of Rights.

5 Justified limitations

Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

6 Interpretation consistent with Bill of Rights to be preferred

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

7 Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights

Where any Bill is introduced into the House of Representatives, the Attorney-General shall,—

(a) in the case of a Government Bill, on the introduction of that Bill; or
(b) in any other case, as soon as practicable after the introduction of the Bill,—

bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

Madeleine Laracy, Deputy Inspector-General of Intelligence and Security
Osborne and Rockhouse v Worksafe NZ*: the public law vulnerabilities of public prosecutions*

Osborne (SC) is a loud (unanimous) reminder that criminal prosecutions brought by public bodies are not a species apart from general public law but are part of it, and vulnerable to public law standards and scrutiny. The broader warning from *Osborne* is that public prosecutors need to ensure that the system incentives - good and bad, transparent and unspoken - that prompt plea negotiations, a focus on resource efficiency, and the search for meaningful outcomes for victims, do not distort the decision to prosecute.

The specific message is that if there is in substance an agreement not to prosecute in exchange for some valuable consideration, it will be an unlawful bargain, and an unlawful prosecution decision, no matter what else went into the decision-making mix.

The Supreme Court decision turns on a question of fact – was there a deal? Worksafe argued there was no "deal" - a voluntary, conditional offer, which the prosecution took into account when deciding if it was in the public interest to proceed. But, the evidence was that there was a "meeting of minds" that the "no prosecution/make payment" understanding was the "essential feature" of the arrangement.

Decisions to prosecute, or not to prosecute, are justiciable, just like other public body decisions. Intensity of review, and willingness to provide relief, may be lesser. There is no special test for justiciability - don't need bad faith, or exceptional circumstances. The Supreme Court's decision raises the possibility that the Court could exercise a more active supervisory role in respect of prosecutions than in the past.

In the regulatory context, the prosecutor ought to expressly consider the agency's own statutory objectives and enforcement priorities.

The two appellate court decisions raise questions about the role and entitlements of victims, and the status of the Solicitor-General's Prosecution Guidelines.

Steven Price, Barrister and Victoria University of Wellington adjunct lecturer

"Let's Tax This" – decisions of the Advertising Standards Authority and Broadcasting Standards Authority

Just before last year's election, the National Party put out a campaign ad called "Let's Tax This". It indicated that Labour was proposing to impose taxes on houses, land, income, water, regional fuel and agricultural carbon emissions. Complaints were made to the Advertising Standards Authority and the Broadcasting Standards Authority that these claims were inaccurate and failed to distinguish between fact and opinion.

The ASA and BSA rejected those complaints. Did they get it wrong?

The ad was clearly identified as a National Party ad; it was a bit humorous; National could point to some justification for at least some of its content; and it was broadcast during a widespread public debate about Labour's tax policies. This was political speech, falling at the core of the right to freedom of expression protected by the NZ Bill of Rights Act. The complaints bodies are rightly hesitant to uphold complaints in these circumstances.

I think the decisions were bad, for four reasons:

- The ASA and BSA failed to properly apply their usual approach of considering the perspective of ordinary viewers.
- To those viewers, the ad contained messages that were flat out wrong.
- Those messages were not portrayed as opinions.
- Those messages were central to the campaign and had the capacity to seriously mislead a large number of voters and affect the election.

The upshot: our system contains no real check on political ads, and it is reasonable to worry that ads as bad as some of the worst in the US will infect our future elections.

Martha Coleman, Barrister

Update on developments in relation to pay equity

Why is pay equity an issue now?

- The *Bartlett* case
- Care and support workers settlement
- Other claims

New legislation:

- Comparators and/or historical - systemic undervaluation?
- The notional male rate – scope of comparison
- Pay transparency
- Backpay
- Claims process and institutional support

Professor Susy Frankel, Victoria University of Wellington

Comments on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership

When the TPP became the CPTPP many of the "suspended provisions" relate to either investment or intellectual property (IP). Extension of copyright term and certain provisions that affect copyright works online are suspended. Excesses in data protection requirements and patent law that impact the price and availability of pharmaceuticals are no longer part of the agreement, but these issues remain live. I will discuss why the suspension might only be a temporary situation for New Zealand.

In its overview of changes to the patent aspects of the TPP the Ministry of Foreign Affairs and Trade (MFAT) states, "CPTPP will not lock in our existing domestic policies that provide patent protection for new uses of known products and make patents available for inventions that are derived from plants, giving us flexibility in the future." And in its overview of changes to investment MFAT espouses, "Overall safeguards mean the New Zealand Government cannot be successfully sued for measures related to public education, health and other social services, including the ability to rule out cases specifically relating to tobacco control measures." In spite of these changes many aspects of IP law that impact significant areas of public policy, including purchasing pharmaceuticals and other aspects of healthcare and access to knowledge, remain exposed to investment claims. With reference to recent IP-related investment disputes, particularly *Eli Lilly v Government of Canada*, I will explain how this exposure remains and why it matters.

Elana Geddis, Barrister

Update on the Legislation Bill

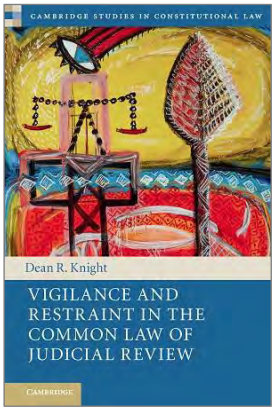
The stated purpose of the Legislation Bill is "to promote high-quality legislation for New Zealand that is easy to find, use, and understand". The Bill rewrites and replaces the Legislation Act 2012 and updates and re-enacts the Interpretation Act 1999 — bringing all of the statutory provisions regarding legislation together in a single Act, with some important new requirements.

Key features of the Bill include:

- **Requirements for the publication of "secondary legislation" (Part 3)**
  All secondary legislation must be published by PCO and tabled in the House and will not commence until the date of publication. "Secondary legislation" is defined to mean any instrument that is made: under an Act if the Act (or other legislation) states that the legislation is secondary legislation; or under the prerogative and has legislative effect. It does not include legislation made by local authorities.
- **Formalisation of the existing disclosure requirements for Government-initiated legislation (Part 4)**
  All substantive Government bills and Government amendments to bills must be accompanied by a disclosure statement, prepared by the relevant policy agency. The disclosure requirements may be extended to categories of secondary legislation by Government notice (with the approval of the House).
- **The re-enactment and updating of the Interpretation Act 1999 (Part 2)**
  The interpretative principles and definitions in the current Act have been modernised to address developments and issues identified since 1999.

Dr Dean Knight, Victoria University of Wellington

Vigilance and Restraint in the Common Law of Judicial Review



The mediation of the balance between vigilance and restraint is a fundamental feature of judicial review of administrative action. This balance is realised through the modulation of the depth of scrutiny when reviewing the decisions of ministers, public bodies and officials. While variability is ubiquitous, it takes different shapes and forms.

In this lecture, I explore the main approaches employed in New Zealand and elsewhere in the Anglo-Commonwealth to mediate this balance. I also considers how we might assess the virtue of the different approaches when engaging in conversations about how variability in judicial supervision should be expressed in individual cases.

This address is based on book of the same name:

- published by Cambridge University Press, 2017
- www.cambridge.org/nz/academic/subjects/law/constitutional-and-administrative-law/vigilance-and-restraint-common-law-judicial-review