Law, politics, policy, & elections. Lot going on in public law. Making sense of it.

Keynote address by Geoffrey Palmer
Government Law in Review
23rd February 2023
Centre for Public Law, Te Herenga Waka,
Victoria University of Wellington

Weird & uncertain time for democracies everywhere-- crisis after crisis-abnormal

- NZ now New Prime Minister and Deputy
- New Ministry with refreshed Cabinet
- Minister of Finance remains the same
- Policy adjustments for election year
- Overhang of conspiracy theories and Occupation of Parliament Grounds 2022
- Social cohesion damaged- some public expressions anger, misogyny: cost of living the immediate issue

Tips for Lawyers

- Public lawyers need to pay as much attention to House of Representatives, new Bills, Acts & secondary legislation as they do to judicial decisions-advise clients about developments
- Politics speaks the language of priorities-Cabinet sets them.
- Need to understand process for policy analysis-read “Policy Quarterly” VUW
- Develop relationships with public servants-coffee
- Do not trouble Ministers too often-election year
- Days are gone when someone can march into a minister’s office to get a problem fixed
- Politics & law inextricably intertwined-become literate on policy and politics
- Study portfolio allocations in the Ministerial List closely and delegations-Cabinet office Website and the Cabinet Manual.

Context almost everything in public law

- Disinformation, fake news, conspiracy theories, social media and mistrust in institutions-NZ better than most countries but we are not immune
- War in Ukraine, inability of Security Council to act against threats to rules- based system of international law
- Terrorist risks-Mosques attacked in NZ- more legislative action to come. Changes to the massive and recent Intelligence and Security Act 2017
- Effects of Covid-19 continue, and more pandemics and natural disasters could arrive-health system pressures, environment issues and economic adversity.
- Disaster legislation needs attention-read Law Commission paper of Janet McLean
- Repairing social cohesion

What a new agenda may look like

- New ways must be devised of doing politics to avoid short term focus and concentrate on vital issues with existential effects eg climate change, health
- More reform of Parliament- decline in the quality of scrutiny of Executive by the House. Political culture change does not require legislation.
- New Standing Orders changes could assist.
- Not enough MPs to deal with the massive work of accountability-House too small when 28 MPs who are members of the Executive and Speaker removed –cannot be accountable to themselves
- Too much legislation passed too quickly and too much urgency-not enough communication about policy developed in secret within the Executive
- Should more important principles of the unwritten political constitution be placed into Constitution Act 1986?

Constitutional change

- Further significant constitutional change inevitable. Consider recent and wide ranging recommendations of Tribunal in Wai 1040 relating to 415 claims in the North and two major Human Rights Commission Reports recently released, linking racism and constitutional transformation together. “Maranga! Mai! documents the dynamics and impact of colonisation, racism and white supremacy on Māori in Aotearoa New Zealand since first contact with Europeans,” the summary says. See also Ki te whaiao, ki tea o Mārama on community engagement.
- Will New Zealand become a Republic?
- Need for a four-year parliamentary term
- Would adoption of compulsory voting on the Australian model help foster the political legitimacy of Parliament’s decisions
- How to continue the efforts to blunt the effects of colonisation
- Where will administrative law go?
- Supreme Court now shows more confidence after a cautious start-how will Judges further develop public law

Government legislation

- The New Zealand Government legislative machine continues to pump out big quantities of legislation despite, or perhaps because of, the disruption of Covid
- Covid produced a vast amount of law, much contained in secondary legislation produced at great speed with many amendments-
- In the Calendar year 2022 86 new Acts of Parliament by my count
- At the end of January there were 41 Government Bills on the Order paper
- There is a total of 100,148 pages in all Acts of Parliament in New Zealand
- Urgency and extended sittings in 2022 required 24 motions to be passed by the House. Many of these were in November and December

Significant Bills awaiting passage

- Natural and Built Environment Bill (RMA replacement is massive)
- Spatial Planning Bill
- Inspector-General of Defence Bill, arising out of Operation Burnham Inquiry Reform Bill
- Electoral Reform Bill provides increased transparency concerning donations to political parties
- Civil Aviation Bill big new regulatory scheme
- Organic Products and and Production Bill-regulatory
- Natural Hazards Insurance Therapeutic Products Bill-regulatory

Passage of Water Service Entities Act 2022

- Supplementary Order paper proposed by Green Party at Committee of Whole stage when the House was under urgency. It required a 60 per cent of all MPs in the House to pass or repeal a clause on privatisation of public water assets or a majority cast at a poll of electors
- Failure to raise the constitutional significance of the issue in the debate, both Government and Opposition seemed to be unaware of the unusual nature of it. Issue mentioned in Select Committee Report 11 November
- Classic example of failure of proper scrutiny
- Outrage from academic lawyers, Law Society and others resulted in later recommittal and removal of the provision. Greens maintain it would be an essential check.
- Entrenchment should be restricted to six provisions of the Electoral Act and term of Parliament. Entrenchment of that Act needs to be reconsidered at present. Entrenching provision not entrenched.

The Challenges of the Pandemic-Cabinet

Ministers were, at incredibly short notice, regularly provided with information, analysis and advice and in the collective setting after robust discussion in a virtual environment, made decisions that were accurately and clearly recorded, and quickly promulgated. The long standing principle of best practice decision-making, as set out in the Cabinet Manual, were effectively combined with modern technology the adaption of system and processes with a dash of kiwi pragmatism, to deliver a decision-making approach that supported Ministers to respond to one of the most significant crises New Zealand ever faced.

Michael Webster Cabinet Secretary

Accountability for Covid Measures

- Legality of measures could be challenged in the courts, this made easier as practical matter as much of it was secondary legislation
- The most restrictive legislation required renewal by parliamentary vote
- Bill of Rights Act not abridged and that was made explicit in key Covid statute
- Regulations Review Committee chaired by an Opposition MP and was highly active and did great work. Needs something of an overhaul now to learn the lessons
- Revocation of measures automatic after lapse of time(now August 2023) and confirmation of orders by House required
- Ultra Vires always worth a look for secondary legislation. More and more used. Chorus Ltd v Minister for the Digital Economy and Communications [2022] NZHC 3602

Judicial activity on Covid

Rule of law followed

- Significant number of challenges but mainly the policies survived
- Many lay people wrongly thought protections in Bill of Rights are absolute
- Section 5 provides the rights are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”
- Government lost several significant cases, including treatment of New Zealanders overseas seeking to come home and a failure to follow Treaty principles in failing to disclose to a Māori health provider records concerning Māori not vaccinated

New Zealand Bill of Rights (“Declarations of Inconsistency”) Amendment Act 2022

- This Act is the most positive development for the Bill of Rights since it was enacted in 1990.Aftermath of the Taylor case.
- Courts have started to take rights seriously by making declarations and the House has responded with a new process to ensure that the House considers the issues thoroughly and properly
- Bill dealt with by the Privileges Committee see amendments, sections 7A and 7B of BORA and new Standing Orders were agreed
- Steps-1 Supreme Court makes a declaration of inconsistency 2 Attorney-General must present the Declaration to the House 3 Select Committee considers and reports 4 Government Response presented 5 Debate held in House
- “ A Chink in the Armour of Parliamentary Sovereignty ” [2022] NZLJ 181

Make it 16 Incorporated v Attorney-General [2022] NZSC 134 (Nov,2022)

- A declaration made that the provisions of the electoral Act 1993 and of the Local Electoral Act 2001 which provide for a minimum voting age of 18 are inconsistent with the Rights in s19 of the New Zealand Bill of Rights Act 1990 to be free from discrimination on the basis of age; these inconsistencies have not been justified in terms of s 5 of the New Zealand Bill of Rights Act
- Suggestions that this is “judicial activism” as suggested by some journalists is wrong. Very careful and orthodox judgment from Ellen France J. Court of Appeal held to be wrong not to provide a declaration
- Yet to be seen what will occur here-What will Parliament do with a declaration of inconsistency under the new procedure. Can the discrimination be justified? And what about the fact the voting age of 18 in general elections, but not local body elections, is an entrenched provision in the Electoral Act?

Appeal to Supreme Court of Chisnall v Aotearoa Department of Corrections v Mark David Chisnall [2021] NZCA 616 and [2022] NZCA 241

- Issue is whether Court of Appeal was correct to make declarations that Part 1A of the Parole Act 2002, extended supervision orders and the Public Safety (Public Protections Orders) Act 2014 are not consistent with the Bill of Rights.
- Case has been argued once but in April 2023 a further two-day hearing will be held to address what the Court has termed “fundamental” issues about the judicial method and Bill of Rights analysis in declarations of inconsistency proceedings. The roles of sections 4,5, and 6 as decided in R v Hansen and new a new approach to interpretation of the BORA could result.
- The decision when it arrives will be highly significant for Declarations of Inconsistency. The Human Rights Commission is intervening for the second argument.
- The argument for the Crown is that the the measures were not punitive and did not involve doubt jeopardy. But it has changed its argument since the Court of Appeal case. Liberty of the subject a central issue.
- The Argument for the Crown is now that the measures are accepted to be punitive and involve double jeopardy, but that the courts in making each individual order, ensure they are justifiable under section 5. Liberty of the subject is a central issue and repugnancy of retrospective criminal law as in Pora, Poumako and Mist.

Funding of political parties and influence

- Bill in front of Parliament on restricting anonymous donations and the report of the Electoral Review Panel that reports by the end of 2023 will have a more complete approach. Big donors secure influence. US experience with wealthy people and corporations spending unlimited amounts not sound, allowed by Citizens United v Federal Election Commission 558 US 310.
- United Kingdom and United States two democracies New Zealand has often looked to have both experienced and continue to experience political turbulence and sleaze.
- Issues arising from inequalities of wealth
- Needs of transparency. New Zealand's Official Information Act in need of revision but never popular with Ministers. Transparency vital to avoiding a corrupt future. I favour an Information Commissioner making OIA decisions when there is a dispute. Ombudsman has too much to do.

Tikanga Māori

- Important new developments that will become highly significant in blunting effects of colonisation and making common law more inclusive
- Peter Hugh McGregor Ellis v R [2022] NZSC 114 [7 October 2022]-tikanga part of common law but context governs application
- Two separate sets of judgments out of one case- one to decide relevance of tikanga Māori to the continuation of the appeal ie whether it survives the death of the appellant.
- Second, decision on Ellis's appeal against conviction
- Many factors at work here and due to differences of opinion among the Judges not easy to determine how the tikanga issues will work out in the future-Many cases to come I would suggest. Close analysis required. Boundaries to be worked out
- Tikanga required to be taught in law schools

Treaty of Waitangi Issues

- They are many and multiplying quickly
- Trans-Tasman Resources limited v The Taranaki Whanganui Conservation Board [2021] NZSC 127 held that Treaty clauses “must be given a broad and generous construction. An intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear.” Further it points out that customary international law is part of the common law.
- Dean Knight has written “the decision perfects a much anticipated evolutionary arc…. In other words, under the familiar principle of legality method, Treaty principles must be complied with when discretionary power is discharged unless the empowering legislation clearly says otherwise.”
- The 2022 report of the Waitangi Tribunal Tino Rangatiratanga Te Kāwanatanga-Report of Stage 2 of Te Paparatrhi o Te Traki Inquiry (Prepublication version, Wai 1040, Waitangi Tribunal 2022 covers 415 Māori claims in Te Tai Tokerau. The report covering 1785 pages. And there is more to come in the next phase of the Inquiry.
- Recommended actions so far for one of the largest Treaty claims yet are comprehensive.

Brief summary by the Tribunal of its conclusions on the Crown

- Its overarching failure to recognise and respect the tino rangatiratanga of Te Raki hapū and iwi
- The imposition of an introduced legal system that overrode the tikanga of Te Raki Māori
- The Crown's failure to address the legitimate concerns of Ngāpuhi leaders following the signing of te Tiriti, instead asserting its authority without adequate regard for their tino rangatiratanga which resulted in the outbreak of the Northern War
- The Crown's egregious conduct during the Northern War
- The Crown's imposition of policies and institutions that were designed to wrest control and ownership of land and resources from Te Raki Māori hapū and iwi, and which effected a rapid transfer of land into Crown and settler hands
- The Crown's refusal to give effect to the Tiriti/Treaty rights of Te Raki Māori within the political institutions and constitution of New Zealand, or to recognise and support their paremata and komiti despite their sustained efforts in the second half of the nineteenth century to achieve recognition of and respect for those institutions in accordance with their tino rangatiratanga
- All land owned by the Crown within the inquiry district be returned to Te Raki Māori ownership as redress for the Crown's breaches of te Tiriti/the Treaty and ngā mātāpono o te Tiriti/the principles of the Treaty …

Inquiries

- Royal Commission of Inquiry (Covid-19 Lessons) Order 2022,Reporting by 26 June 2024
- Royal Commission on abuse in care, reporting June 2023
- Review of the of the Standing Orders of the House 2023- new ones will be adopted before House rises for the election.
- Independent Electoral Review Panel, reporting by the end of 2023
- Inquiry into future of Local government, submissions on draft report due 28 February 2023,reporting to government mid-2023
- Advice to lawyers- Read carefully the Inquiries Act 2013 for those to which the Act applies can use both adversarial and inquisitorial methods. Look out for natural justice, can be very time consuming.

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Lunch Break

The next session will resume at 12:50pm

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View the upcoming 2023 ICON_S conference coming to Wellington, 3-5 July 2023
https://www.icon-society.org/icon-s-annual-conference/

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@drdeanknight

Judicial Review in 2022: #rantsandreckons
Government Law - Year in Review
NZ Centre for Public Law at @VicUniWgtn

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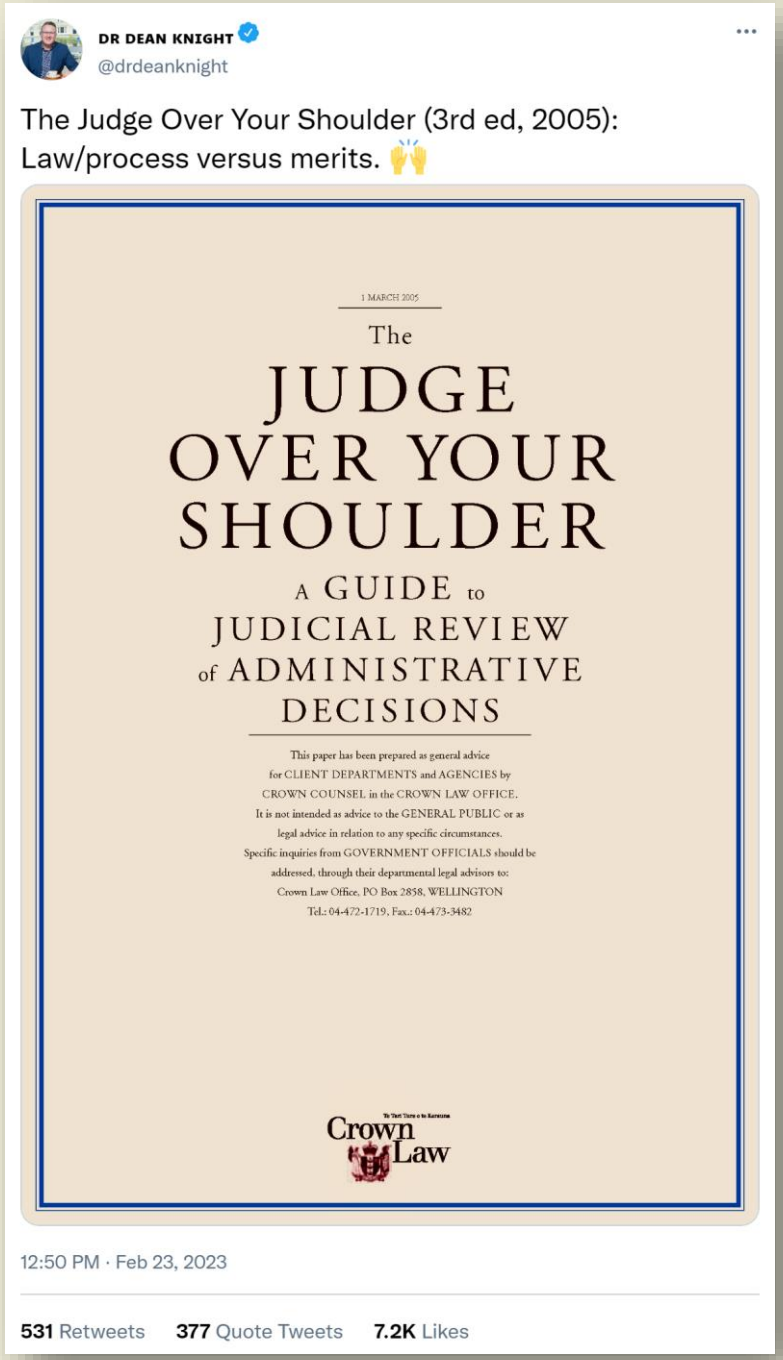

Judicial review is not concerned with the merits of a decision, but with the process by which the decision is made. So long as the processes followed are proper, a court will not interfere with the decision, unless it is clearly an unreasonable one.

Sometimes, however, it can be difficult to completely sever the decision-making process from the merits of the decision. As a result, the courts can influence the development of policy and its implementation, which are traditionally the province of the executive. Tensions arise particularly when disputes involve important political, Treaty or human rights issues.

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Classic posture reflected in many cases, eg #MinistrySocialDevelopment_v_B [2022] NZHC 1984 #KaikōuraHurinuiLandowners [2022] NZHC 2677 #LivingStreetsAotearoa [2022] NZHC 2500 #MKD_v_MinisterHealth [2022] NZHC 1997

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Variegated unreasonableness and variable intensity continues to polarise.

See eg:
Cooke J in #StudentsClimateSolutions [2022] NZHC 2116
versus
Palmer J in #HaurakiCoromandelClimateAction [2021] 3 NZLR 280
etc etc

(Also note fashion of #Hu unreasonableness [2017] NZAR 508)

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Appellate courts continue to (deliberately) dodge variable intensity.

See eg
#IdeaServices [2022] NZCA 470
#Kim [2021] 1 NZLR 338 (SC)

Supremes allergy is well-known.
Probably favour contextualism.
See hints in #Moncrief-Spittle [2022] NZSC 138

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Mallon J in #LawyersClimateChange [2022] NZHC 3064 issues a challenge to the Supremes. 💥

> [74] Unless and until the Supreme Court says otherwise, the current position is that the intensity of review varies with the context.

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For more #rantsandreckons on variable intensity (and grounds vs intensity vs contextual review): https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4308922 🤓

The Lyrics and Rhythm of Judicial Review's Supervisory Jurisdiction

Dean R Knight*

A. INTRODUCTION

Judicial review of administration is an exercise in accountability – an exercise in *dialogical* accountability.[1] In other words, judicial review is an expressive social relationship that supports the appraisal of government action against rule of law standards.[2] Ministers, officials and public bodies render account by explicating what they did and explaining why say it is justified. The supervising court, in conjunction with an affected applicant, interrogates that account, both directly through contestation and indirectly through presentation of a counter-narrative.

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Other grounds co-opted:
- legitimate expectation: #Roebeck [2022] NZHC 3341 (❌)
- factual mistake/insufficiency: #ChiefOmbuds [2022] NZCA 248 (✔)
- relevancy / weight: #Grinder [2022] NZHC 3188 (✔); #EnvironmentalLaw [2022] NZHC 2969 (✔); #Moncrief-Spittle [2022] NZSC 138 (?)

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Principle of legality recasts higher order norms -- from deliberative merits to legal contours of delegated authority.

See eg #StudentsClimateSolutions [2022] NZHC 2116 (Treaty principles) -- riffing off #Trans-Tasman.

But see #LivingStreets [2022] NZHC 2500 (intl law). 🤦

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Bill of Rights naturally take judges into merits. 💪

- #Moncrief-Spittle [2022] NZSC 138: obligs are substantive, not (merely?) procedural.
- s 5 = qn of law: pandemic cases in #Yardley [2022] NZHC 291 + #Orewa [2022] NZHC 2026.
- #Cripps [2022] NZHC 1532: applies #Drew orthodoxy.

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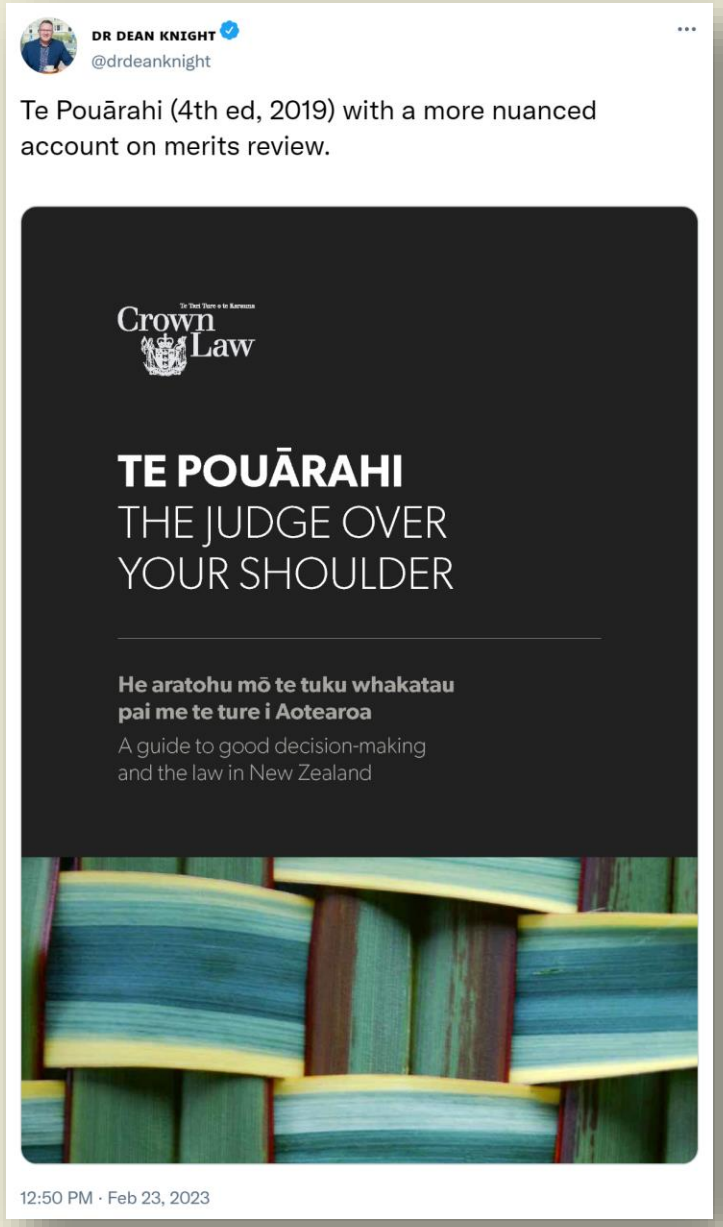

The nature and level of intensity that a review will take is a complex legal topic. The willingness of the courts to intervene for the (overlapping) reasons of … or breaches of natural justice … has been settled for some time. However, much judicial and academic time and effort is spent on the questions of whether or not and when a court should intervene on the basis of 'unreasonableness', or more recently to test the proportionality of decisions or intervene in the weightings applied by a decisionmaker.

This creates some inevitable uncertainty about the level of scrutiny that might apply to any specific administrative decision. It is now relatively orthodox and uncontentious to say that the courts will apply a sliding intensity of review for the 'unreasonableness' of decisions, based on a range of factors.

Courts will limit or refuse review of decisions involving high policy content, as the judiciary are not equipped, and are not the constitutionally appropriate body, to weigh policy considerations. … A court undertaking judicial review will not generally review the substance of a decision or substitute its own decision, although there are some exceptions.

For decision-makers, this restraint may be cold comfort. The level of scrutiny involved in a broad review of their process, and the constraints that may follow as a result of a successful judicial review, may have a significant impact on the subsequent choices available. … However, the general principle still holds – matters of substance are for the decisionmaker not the court.

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Drivers of vigilance and restraint:
- relative expertise
- institutional competence
- decisional magnitude
- cognate accountability.

#reckons 😅

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Te Tiriti and Māori issues

New Zealand Centre for Public Law

Government Law: Year in Review 2023

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- *Ellis v R* – changes in the relationship between tikanga and common law
- *Trans-Tasman Resources* – the impact of the Treaty and tikanga on statutory decision-making

Ellis v R

Supreme Court empowered to dispose of the case in the manner “best calculated to promote the ends of justice”

- *What should the NZ common law test be?*
- *Is tikanga relevant, if so which aspects, and how?*

The tikanga experts

- The common law can draw on tikanga
- In Mr Ellis’s case, tikanga would require further probing

Impact of tikanga in the case

- Tikanga ”helped clarify” the appropriate test
- Tikanga confirmed that the appeal ought to continue

How does *Ellis v R* impact the common law/tikanga relationship?

“Challenging issues may arise where there may be a difference between the process or result indicated by tikanga principles and that under the current common law…That does not necessarily mean the two are irreconcilable or necessarily by default sit in opposition."

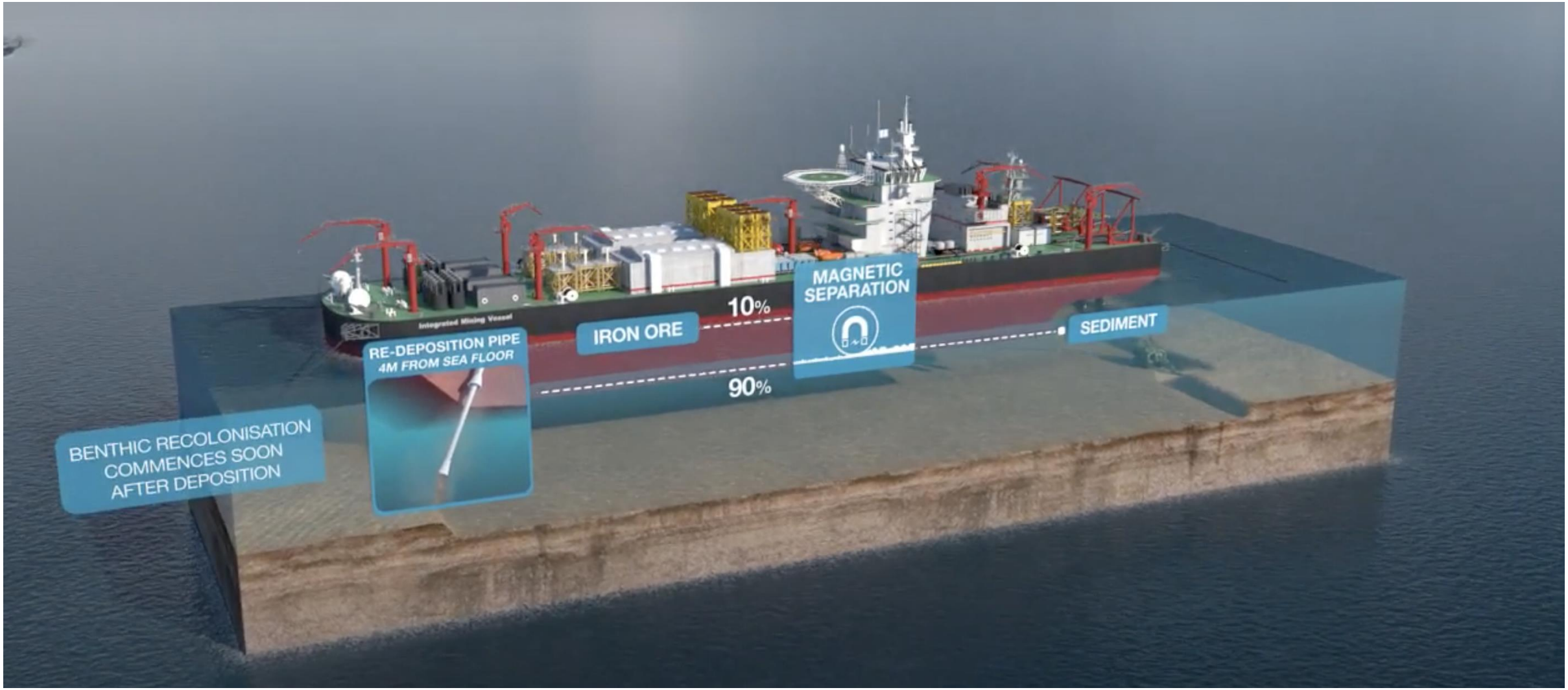
Employment

- “in good faith”, s 4
- employee status, s 6

Areas of judicial discretion

- Granting a remedy in judicial review: *Sweeney v The Prison Manager* [2021] NZHC 181
- Amending a charge under the Criminal Procedure Act 2011: *R v Grace* [2020] NZDC 13862

Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board (& ors)


Integrated Mining Vessel
RE-DEPOSITION PIPE
4M FROM SEA FLOOR
IRON ORE
10%
MAGNETIC SEPARATION
SEDIMENT
90%
BENTHIC RECOLONISATION COMMENCES SOON AFTER DEPOSITION

The statutory obligation

In order to recognize and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi, **section 59** requires the EPA to take into account the effects of activities on **existing interests**

… kaitiakitanga relationship?

Why is this case interesting for decision-makers?

- Judicial use of Treaty articles and Treaty principles
- tikanga is “other applicable law” within s 59(2)(l)

59 Marine consent authority's consideration of application

(1) This section and sections 60 and 61 apply when a marine consent authority is considering an application for a marine consent and submissions on the application.

(2) If the application relates to a section 20 activity (other than an activity referred to in section 20(2)(ba)), a marine consent authority must take into account—

(a) any effects on the environment or existing interests of allowing the activity, including—

(i) cumulative effects; and

(ii) effects that may occur in New Zealand or in the waters above or beyond the continental shelf beyond the outer limits of the exclusive economic zone; and

(b) the effects on the environment or existing interests of other activities undertaken in the area covered by the application or in its vicinity, including—

(i) the effects of activities that are not regulated under this Act; and

(ii) effects that may occur in New Zealand or in the waters above or beyond the continental shelf beyond the outer limits of the exclusive economic zone; and

(c) the effects on human health that may arise from effects on the environment; and

(d) the importance of protecting the biological diversity and integrity of marine species, ecosystems, and processes; and

(e) the importance of protecting rare and vulnerable ecosystems and the habitats of threatened species; and

(f) the economic benefit to New Zealand of allowing the application; and

(g) the efficient use and development of natural resources; and

(h) the nature and effect of other marine management regimes; and

(i) best practice in relation to an industry or activity; and

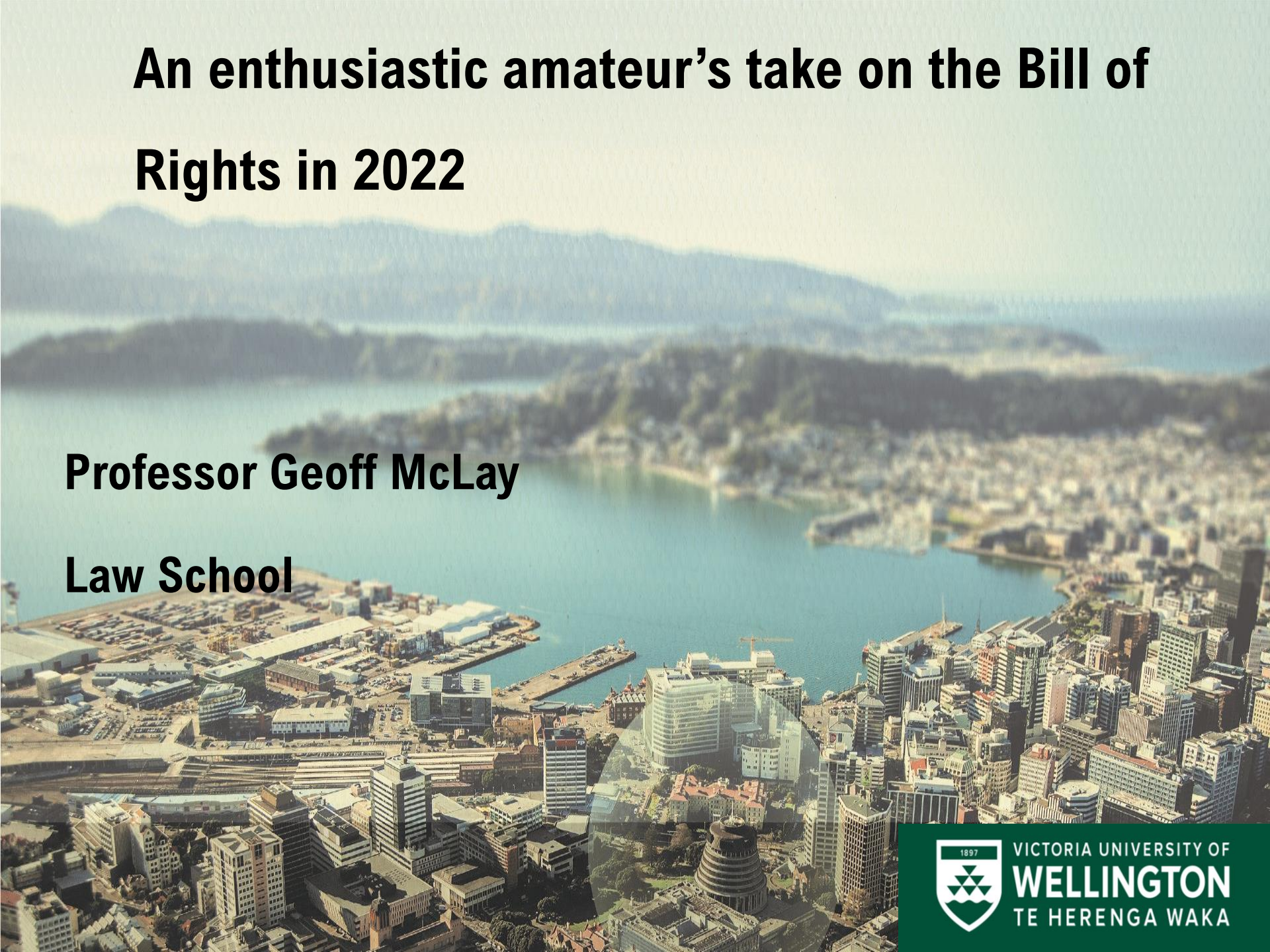
(j) the extent to which imposing conditions under section 63 might avoid, remedy, or mitigate the adverse effects of the activity; and

(k) relevant regulations (other than EEZ policy statements); and

(l) any other applicable law (other than EEZ policy statements); and

- *Ellis v R* – changes in the relationship between tikanga and common law
- *Trans-Tasman Resources* – the impact of the Treaty and tikanga on statutory decision-making

An enthusiastic amateur's take on the Bill of Rights in 2022



Professor Geoff McLay

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INTRODUCTION

- I’m not Claudia or Petra or any other kind of NZBORA expert - I struggle with section numbers

- Not a comprehensive review of cases

- Some high level comments about some really big cases

- A deeper dive into remedies

PART OF SOMETHING BIGGER THAN JUST THE NZBORA

- Has its own lingo and methodology
- Doing things that courtsd on't do otherwise

- **But** can you really understand what is going without reading other cases
- *Fitzgerald* - 2021 biggie
    - Possible to read as extraordinary bill of rights development
    - Also not that dissimilar to some other cases
    - Or just a continuation of general debates about statutory interpretation in Supreme Court , *FMV v TZB* — [2021] 1 NZLR 466

- Things are changing in the way NZ approach statutes, and the law
- Same interpretive techniques
- Need for greater sophistication/ interpretative theory

2022- THE YEAR OF NOTHING REALLY SURPRISING (BUT A LOT UNDER THE "HOOD)

Supreme Court emphatic about the centrality of rights protections and need for actual justifications under s 5

- But Mr Kim is still liable to go back to China
- Auckland didn't breach free speech rights of *Moncrieff –Spittle* those wanting to listen to outrageous Canadians
- *Chisnall* – what is going on?
- And the possible return of horizontality

MINISTER OF JUSTICE V KIM [2022] NZSC 44

- But Mr Kim is still liable to go back to China
- Peculiar 2021 decision asking Minister to address some SC concerns, but to be reviewed by SC not the HC
- SC majority just notes really that the Minister has done that
- Somewhat inevitable United Nations “appeal”
- Mr Kim is not going back to China

MAKE IT 16 [2022] NZSC 134 ?

- However, it was discriminatory for Parl to have said several decades ago that you had to be 18 to vote
- “Conflict” between minima of the section and 12 and the non-discrimination in 19
  - Majority NZBORA says what it says -
  - Kos J - NZBORA and the Electoral Act says what it is says
- Can age discrimination really be justified?
- … and the problem of time

CHISNALL

- Surprising this case is still being heard
- Seems very simple from the outside - if something sounds like a criminal sanction , it really is a criminal sanction
- But the public policy problem remains
- Court and lawyers struggling with what it really means to justify under section 5?

A POSSIBLE NZBORA BOLTER?

- *Mead* - The polyamorous marriage relationship property case
- Court of Appeal - marriage of three in fact , three couple of 2
- Court of Appeal suggested PRA should read in less discriminatory way - ie inclusive of less traditional relationships
- NZBORA not engaged as not discrimination on there basis of "family status"?

AND THE POSSIBLE RETURN OF HORIZONTALITY

- Dancing like 1999?
- Horizonality was once all the rage
- *Lange* and all that
- But why change private rights because of public norms?

AND THE POSSIBLE RETURN OF HORIZONTALITY

- Means much more interesting perhaps on how s6 ought to apply to PRA
- *Smith v Fonterra*
  - Climate change
  - Private causes of action
  - Right to life
  - Horizontal application

THE BIG CASE OF 2023? : G V COMMISSIONER OF POLICE [2022] NZHC 3514

- How express does statute have to be to breach the NZBORA
- Gywn J - it seems to have be very express
- Interim remedy

THE FIRST PARLIAMENTARY BILL OF RIGHTS FIGHT IN 2023? :RETURNING OFFENDERS (MANAGEMENT AND INFORMATION) AMENDMENT BILL

- **3AAct's provisions apply retrospectively**
- (1)A provision of this Act applies to a person after the provision's commencement even if all or any of the following occurred before the provision's commencement:
- …
- (3)This section overrides any inconsistent other law.
- (4) In particular, any **other law**, for the purposes of **subsection (3)**, includes any law in all or any of the following:
- (a)section 7 of the Interpretation Act 1999 (in force after this Act's commencement until the close of 27 October 2021):
- (b)section 12 of the Legislation Act 2019 (in force after 27 October 2021):
- (c)*G v Commissioner of Police* [2022] NZHC 3514.

3BAct's provisions override inconsistent other law

(1)This section applies to conduct—

(a)mentioned in, or otherwise necessary for carrying out, or giving full effect to, a provision of this Act; and

(b)after the provision's commencement.

(5)This section overrides any inconsistent other law.

(6)In particular, any **other law**, for the purposes of **subsection (5)**, includes any law in all or any of the following:

(a)section 6(1) and (2) of the Sentencing Act 2002:

(b)

sections 25(g) and 26(2) of the New Zealand Bill of Rights Act 1990:

(c)

G v Commissioner of Police [2022] NZHC 3514.

REMEDIES

- Declarations
- Compensation
- How many Crowns, States, New Zealands are there?

DECLARATIONS – GETTING STRONGEST

- Even got their own statute this year
- How does Parl defend itself?
  - Need to think seriously about Parl can show s 5 justifications
  - Is the Crown the natural defender of parliament's decisions
  - What about the problem of time?

COMPENSATION AKA DAMAGES

- Where we started – 2022

- Where are we going ?

- Do we really want to get there?

WHERE WE STARTED

- Difficult remedy
  - Low value of awards
  - Do not match costs
  - The judicial immunity at common law and in section 6 (5) of the Crown Proceedings Act *Chapman*
- Limited case law on limited kinds of action

AN EXPANSION IN THE KIND OF CASE

- *Pere* [2022] 2 NZLR 725
  - Negligent shooting
- *Wallace*
  - Deliberate shooting and some not great investigation
  - Self defence
  - Defects in inquiry remedied

IS THE IMMUNITY GOING?

- *Putua* [2022] 2 NZLR
  - No immunity for Registrar's non judicial mistake of noting sentences as cumulative rather
  - Judge's actual sentencing not intervening act

- *Fitzgerald* [2023] 3 NZLR
  - No immunity for prosecutor's charging decision
  - Judge's application of three strikes law seemingly not intervening

CROWN, GOVERNMENT OR STATE?

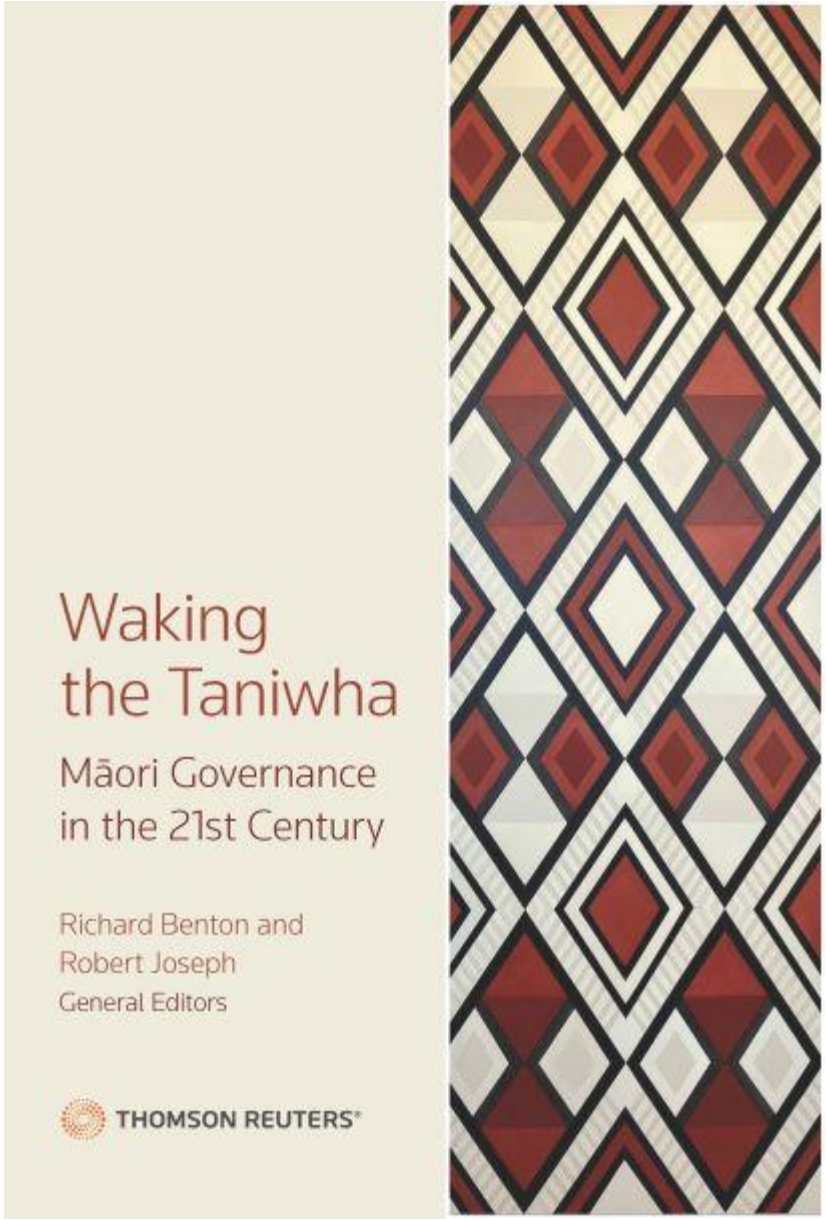
- There is no longer one Crown for the purposes of remedies
- The “Crown Proceedings Act” Crown
  - Private causes of action
  - Immunities , statute law
- The Treaty of Waitangi Crown
  - The Whakatu litigation
- The Government
  - The Bill of Rights s 3 Executive, Legislature and Judiciary
- The New Zealand State
  - Remedies in International law/fora
  - Why ought these affect domestic remedies

Discussion: Co-Governance in Aotearoa

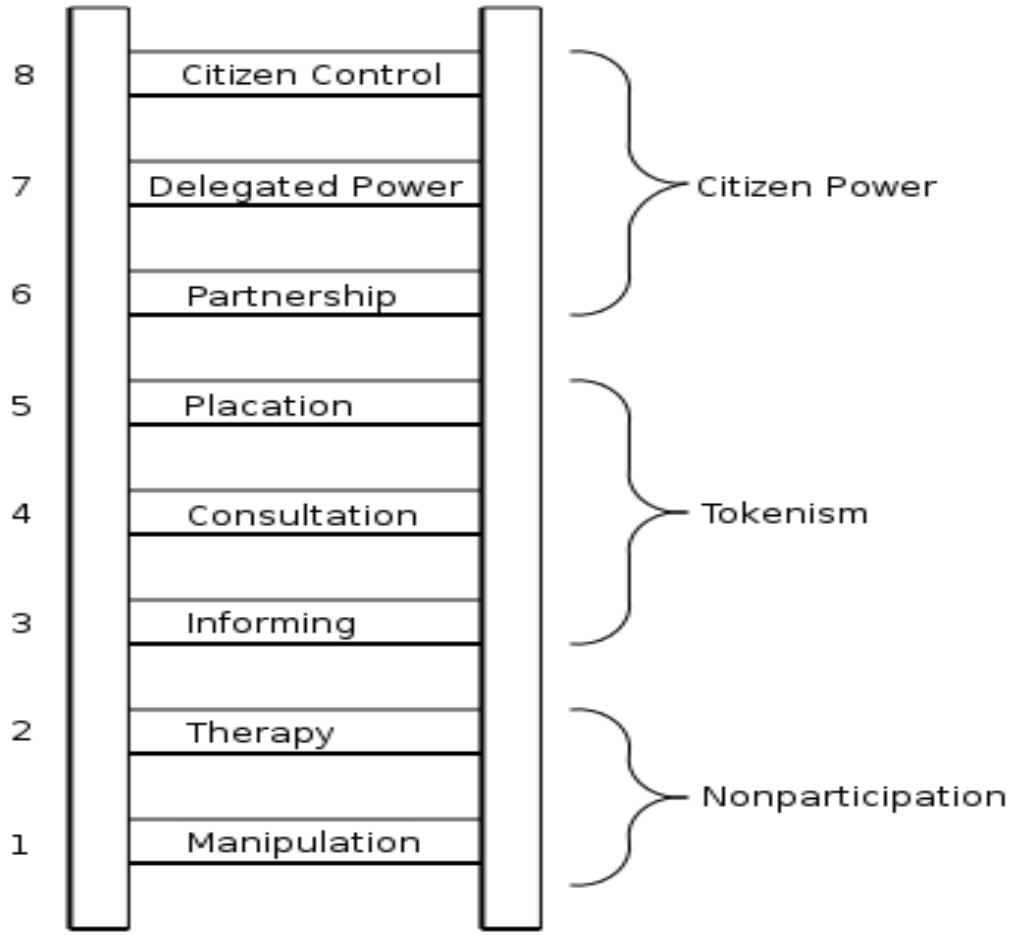
Chair—Morgan Godfery (Victoria University)

Speakers—Catherine Iorns (Victoria University)

Paul Majurey (Partner at Atkins Holm Majurey)


Waking
the Taniwha
Māori Governance
in the 21st Century
Richard Benton and
Robert Joseph
General Editors
THOMSON REUTERS®

"Eight rungs on the ladder of citizen participation"



Sherry R Arnstein "A Ladder of Citizen Participation" 34:4 JAIP 216 (July 1969).

Modified co-management ladder of participation

8	Devolution/ Community Control	Full devolution of resource ownership and management to fully resourced community.
7	Partnership	Partnership of equals; joint decision-making.
6	Management Boards	Community is given opportunity to participate in developing and implementing management plans.
5	Advisory Committees	Partnership in decision-making starts; joint action of common objectives.
4	Communication	Start of two-way information exchange; local concerns begin to enter management plans.
3	Co-operation	Community starts to have input into management; for example, use of local knowledge, research.
2	Consultation	Start face-to-face contact; community input heard but not necessarily heeded.
1	Informing	Community is informed about decisions already made.