

FOREWORD: PUBLIC LAW—INSTITUTIONS, NORMS, CULTURE

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This special issue of the *New Zealand Journal of Public and International Law* contains a set of articles originally developed as part of a postgraduate course in the Faculty of Law at Te Herenga Waka—Victoria University of Wellington.¹ The course invited students, most of whom were studying LLB(Hons) degrees, to produce a research paper on a public law topic, broadly defined; lines of enquiry that interrogated public law's institutions, norms or culture were especially encouraged.

The papers were developed over the course of the academic year, preceded by a number of activities to provide context and inspiration. Students first produced a background paper on an allocated topic in public law. Topics explored included then proposed amendments supporting parliamentary responses to declarations of inconsistency under the New Zealand Bill of Rights Act 1990;² an urgent inquiry by the Waitangi Tribunal into Oranga Tamariki (Ministry for Children);³ recently enacted legislation governing the public service;⁴ the border quarantine regime applying during the Covid-19 pandemic;⁵ the bespoke public health regime adopted to combat Covid-19;⁶ the largely unsuccessful legal challenge to the Covid-19 nationwide lockdown;⁷ the project to systemise and refine the

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1 "LAWS 522 Special Topic: Public Law Institutions, Norms, Culture" (2021) Victoria University of Wellington <www.wgtn.ac.nz>.

2 New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020 (230), since enacted as the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022.

3 Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkīnga Whāruarua: Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021).

4 Public Service Act 2020.

5 See for example Covid-19 Public Health Response (Air Border) Order (No 2) 2020; and Covid-19 Public Health Response (Isolation and Quarantine) Order 2020.

6 Covid-19 Public Health Response Act 2020.

7 *Borrowdale v Director-General of Health* [2020] NZHC 2090, [2020] 2 NZLR 864.

publication and disallowance of secondary legislation;⁸ the *Matike Mai* constitutional transformation project;⁹ ministerial intervention powers in relation to local authorities in cases of dysfunction;¹⁰ New Zealand's obligations and progress under the Open Government Partnership;¹¹ legislation reforming and centralising the power to fluoridate drinking water;¹² a privacy-based claim arising from disclosure of overpayment of superannuation to a prominent member of Parliament;¹³ changes to standing orders of the House of Representatives following systemic review;¹⁴ and the report of the inquiry into the terrorist attack on two mosques in Christchurch.¹⁵ The background papers exposed students to a range of contemporary developments in the discipline, providing potential lines of enquiry for their later research papers. The exercise also allowed students to develop their descriptive writing skills: synthesising salient aspects from a large volume of material and explaining information in a concise but vivid manner.

Students then led class discussions on an assigned piece of scholarship. The subject and style of the scholarship varied; topics included constitutional conventions,¹⁶ migration of constitutional ideas,¹⁷ unwritten constitutions,¹⁸ *te Tiriti o Waitangi* (Treaty of Waitangi) and constitutionalism,¹⁹ judicial review's innominate "wrongness" ground,²⁰ administrative law's values,²¹ the public-private

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- 8 Legislation Act 2019; Legislation (Repeals and Amendments) Act 2019; and Secondary Legislation Bill 2019 (199), since enacted as the Secondary Legislation Act 2021.
- 9 *He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai – The Independent Working Group on Constitutional Transformation* (January 2016).
- 10 Local Government Act 2002, pt 10.
- 11 "Open Government Partnership" Open Government Partnership New Zealand <www.ogp.org.nz>.
- 12 Health (Fluoridation of Drinking Water) Amendment Bill 2016 (208).
- 13 *Peters v Bennett* [2020] NZHC 761, [2020] 2 NZLR 699.
- 14 Standing Orders Committee *Review of Standing Orders 2020* (July 2020).
- 15 William Young and Jacqui Caine *Ko tō tātou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020).
- 16 Adam Perry and Adam Tucker "Top-Down Constitutional Conventions" (2018) 81 MLR 765.
- 17 Claudia Geiringer "When Constitutional Theories Migrate: A Case Study" (2019) 67 Am J Comp L 281.
- 18 Janet McLean "The unwritten political constitution and its enemies" (2016) 14 ICON 119.
- 19 Jacinta Ruru and Jacobi Kohu-Morris "'Maranga Ake Ai' The Heroics of Constitutionalising *Te Tiriti o Waitangi*/The Treaty of Waitangi in Aotearoa New Zealand" (2020) 48 FL Rev 556.
- 20 Dean R Knight "Contextual review: the instinctive impulse and unstructured normativism in judicial review" (2020) 40 Legal Studies 1.
- 21 Paul Daly "Administrative Law: A Values-based Approach" in John Bell and others (eds) *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, Oxford, 2016) 23.

boundary,²² the political constitution,²³ street-level bureaucracy,²⁴ Brexit,²⁵ Māori constitutionalism,²⁶ constitutional guardians,²⁷ legislative entrenchment,²⁸ and the principle of legality.²⁹ As well as giving a flavour of some of the ideas being debated in the discipline, this exercise was designed to help students practise their ability to absorb and critique scholarship. The variety in styles of analysis and argumentation in the scholarship also helped students in the process of discovering their own voice as writers; each piece of scholarship was examined for its style of storytelling, as well as its substantive analysis and argument.

Students then followed their own lines of enquiry in the second half of the course, converting problems and ideas they were curious about into research topics. Their projects were initially presented to their colleagues as short working papers, then as full draft papers, receiving feedback from their peers along the way. A writing workshop near the end of the process invited students to share their projects in the form of a "three-minute thesis" presentation.³⁰ Students also shared and discussed outstanding challenges, doubts and questions about the process of writing: from fundamental questions about how to orientate scholarship to an audience,³¹ to more mundane questions about the use of headings and topic sentences as signposts. And, even, whether the New Zealand Bill of Rights Act 1990 should be abbreviated to "BORA" or not. Some folk will know I have somewhat strong views on that: why would you make a precious constitutional instrument sound like

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- 22 Carol Harlow "Public and Private Law: A Redundant Divide" in Jason NE Varuhas and Shona Wilson Stark (eds) *The Frontiers of Public Law* (Hart Publishing, Oxford, 2020) 315.
- 23 Martin Loughlin "The Political Constitution Revisited" (2019) 30 *KLJ* 5.
- 24 Jennifer Raso "The In-between Space of Administrative Justice: Reconciling Norms at the Front Lines of Social Assistance Agencies" in Jason NE Varuhas and Shona Wilson Stark (eds) *The Frontiers of Public Law* (Hart Publishing, Oxford, 2020) 471.
- 25 Mark Elliott "Constitutional Adjudication and Constitutional Politics in the United Kingdom: The *Miller II* Case in Legal and Political Context" (2020) 16 *EuConst* 625.
- 26 Māmari Stephens "A Loving Excavation: Uncovering the Constitutional Culture of the Māori Demos" (2013) 25 *NZULR* 820.
- 27 Brian Christopher Jones "Our Forgotten Constitutional Guardians: Preserving Respect for the Law" (2021) 42 *Stat LR* 1.
- 28 Timothy Shiels and Andrew Geddis "Tracking the Pendulum Swing on Legislative Entrenchment in New Zealand" (2020) 41 *Stat LR* 207.
- 29 Hanna Wilberg "Common Law Rights Have Justified Limits: Refining the 'Principle of Legality'" in Dan Meagher and Matthew Groves (eds) *The Principle of Legality in Australia and New Zealand* (The Federation Press, Annandale (NSW), 2017) 139.
- 30 "Three Minute Thesis" <www.threeminutethesis.uq.edu.au>.
- 31 Larry McEnerney "The Craft of Writing Effectively" (recorded lecture, 27 June 2014) UChicago Social Sciences YouTube Channel <www.youtube.com/@UChicagoSSD>.

a wood-eating weevil? Often, in my view, acronyms and initialisms operate as judder bars to a reader—disrupting rhythm and obscuring meaning. Lively discussion of that and other matters of style followed, as students found their own voices, writing styles and linguistic preferences.

This issue shares some of the results of this research process. Maisy Bentley looks at expedited law-making during the recent Covid-19 pandemic and suggests ways that fast-tracking the passage of legislation during emergencies could be improved.³² Olivia Kiel tells a worrying story about the fate of queer refugees before our immigration tribunals, examining the systemically parsimonious appraisal of claims for refugee status based on sexual orientation.³³ Hanna Malloch reflects on the perennial issue of judicial diversity in Aotearoa New Zealand, but looks beyond traditional indices of gender and ethnicity—to tacit diversity arising from judges' background, skill and expertise.³⁴ The lifeblood of democratic government—confidence of the House—is tackled by Pete McKenzie, in particular, whether loss of confidence ought to be assessed on a formal basis (defeat on vote of confidence) or organically (through indications that the underlying settlement of multi-party government has changed).³⁵ Hannah Reynecke discusses instances of rivers and mountains being given legal personality as a result of Treaty of Waitangi/te Tiriti o Waitangi settlements, but floats concerns about whether the instrumental effect of these moves lives up to their much-heralded non-instrumental legal innovation.³⁶ Finally, Natalie Vaughan uses the police's armed response trial to expose the weaknesses of the policy–operational dichotomy that traditionally conditions constabulary independence, arguing the ease by which policy initiatives can be dressed up as operational matters leads to a deficit in democracy accountability for those initiatives.³⁷ Papers written by other students in the course, not reproduced here, addressed matters such as changes to parliamentary procedure to make it more inclusive; tikanga Māori and the "finality" of Treaty/Tiriti settlements; the legitimacy and accountability of spy agencies; architectural design of courthouses and open justice; pandemic border restrictions and the rights of citizens/tangata whenua; te Tiriti and constitutional transformation; the relationship between constitutional public service principles and general employment law; and accountability for human rights abuses in prisons.

32 Maisy Bentley "Expediting Democratic, Civil and Political Rights: COVID-19 and an Improved Model of Expedited Law-making" (2022) 20 NZJPIL 1.

33 Olivia Kiel "The Tribunal Does Not Accept the Appellant's Claim That He Is Gay': Queer Refugee Appellants in New Zealand" (2022) 20 NZJPIL 59.

34 Hanna Malloch "Beyond a Numbers Game: Developing a Nuanced Approach to Judicial Diversity for Aotearoa New Zealand" (2022) 20 NZJPIL 109.

35 Pete McKenzie "Building Confidence in 'The Confidence of The House'" (2022) 20 NZJPIL 147.

36 Hannah Reynecke "The Braided River of Legal Personality: Power, Property and Sovereignty" (2022) 20 NZJPIL 187.

37 Natalie Vaughan "The Thin Blue Line between Operation and Policy: Examining the Accountability Deficit in New Zealand Policing" (2022) 20 NZJPIL 225.

The papers written for the course—all papers, whether reproduced here or not—were a credit to the students who laboured over them; it was a pleasure to see the fruits of their inquiry, imagination and industry realised. Ka rawe tōu mahi e tauira! I am also grateful to the editors of the *New Zealand Journal of Public and International Law* for agreeing to publish a selection of papers so as to ensure others are able to read this exciting scholarship.

