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Climate Adaptation Law and Policy: Papers by Professor Catherine Iorns Magallanes, Professor of Law, Victoria University of Wellington

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LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS

"Adaptation to Sea-Level Rise: Local Government Liability Issues"

Victoria University of Wellington Legal Research Paper No. 62/2020

CATHERINE J. IORNS MAGALLANES, Victoria University of Wellington - Faculty of Law
Email: Catherine.Iorns@vuw.ac.nz
J STOVERWATTS, Independent

This paper addresses the legal frameworks and rules about what local and regional councils in New Zealand can and cannot do to adapt to the coastal hazards associated with sea-level rise and climate change. The focus is on what councils might be liable for in respect of housing affected by coastal hazards. It is part of a Deep South National Science Challenge program on Impacts and Implications for residential housing that is now – and in the future will increasingly be – subject to such coastal hazards. Its focus is limited to adaptation measures for residential housing; it does not address infrastructure nor commercial building or activities.

The first three chapters address background matters: an introduction and summary of the issues of residential development in coastal areas that will be subject to increased risks of flooding and likely storm damage from climate change; the types of legal instruments usually used in order to adopt climate adaptation measures and the difficulties with adopting those in New Zealand; an outline of the structure and provisions of the Resource Management Act relevant to decision-making on climate adaptation measures; and some general considerations of principle, including coastal hazards guidance from central government.

The second Part of the paper addresses specific tools that will be required to implement climate adaptation: prevention of new development or placing conditions on it, coastal protection works, and managed retreat of residences from future coastal hazard areas.

The final Part of the paper addresses the use of information instruments in order to provide relevant coastal hazard information to current and future homeowners, and then liability in negligence for council consenting decisions.

The paper is not designed to provide a legal opinion on the points discussed but to illustrate where liability may fall for loss and damage from coastal hazards, and for the decisions made in adapting to climate change hazard risks. It also identifies barriers and enablers to the adoption of adaptation measures. While this identification was not the initial aim of the report, it quickly became clear that councils do not have all the tools necessary to effectively adapt housing to coastal hazard risks, yet also that there are some potential tools that are not being used. We thus thought it worthwhile to identify these, including where central government could assist such as through legislative amendment or relevant guidance. The aim is not to recommend what should be done but to assist discussion on whether the law is adequate to enable councils to do what they will need to do in order to adapt to the coastal hazards associated with climate change to the extent necessary for residential housing. While only some of this material on barriers and enablers is concerned with liability, it is all an essential aspect of achieving the bigger goal of effective adaptation.

"Treaty of Waitangi Duties Relevant to Adaptation to Coastal Hazards from Sea-Level Rise"
Victoria University of Wellington Legal Research Paper No. 63/2020

CATHERINE J. IORNS MAGALLANES, Victoria University of Wellington - Faculty of Law
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This paper addresses duties under Te Tiriti o Waitangi/the Treaty of Waitangi (the Treaty) for protection of particular Māori interests in the face of coastal hazards associated with sea-level rise. Under Te Tiriti o Waitangi, the Crown has a duty to actively protect Māori lands, estates, forests, fisheries and other taonga, and must enable Māori to protect these taonga. It is necessary to assess what Treaty duties may exist in relation to decisions to adopt measures to adapt in an attempt to prevent the risks of damage eventuating from coastal hazards associated with sea-level rise.

Much of the climate adaptation measures that would be necessary to actively protect Māori coastal interests fall within local government authorities' jurisdictions; they are thus guided by the procedures and standards under the Local Government Act (LGA) and Resource Management Act (RMA), as well as by district and regional plans and related documents. Local government authorities are not currently directly accountable for Treaty duties when acting pursuant to these Acts; these relevant obligations are still held by the Crown, or central government. But the actions of local government, on delegated authority from the Crown, can give rise to these authorities either upholding the central government Treaty obligations or creating new, modern-day breaches of the Treaty (that the central government would have to answer for).

This paper is interested in what might be necessary in order to uphold the Crown's Treaty obligations in the area of adaptation to the coastal hazards associated with sea-level rise. The paper forms part of a New Zealand Deep South National Science Challenge project on what to do about housing that will be adversely affected by such coastal hazards. Because of the nature of Treaty interests, it is hard to limit the scope of this paper to housing only. However, housing and marae are the key focus, even while some comments may also be made on some other coastal interests protected under the Treaty. Because of the multi-layered jurisdictional approach to climate adaptation measures in law and practice in Aotearoa, such an enquiry needs to address central government rules and initiatives as well as local government actions.

"Case Studies on Insurance and Compensation after Natural Disasters"
Victoria University of Wellington Legal Research Paper No. 64/2020

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This paper is part of a Deep South National Science Challenge project on insurance and other liability for compensation for damages suffered to housing from coastal hazards associated with sea-level rise. There are a range of issues addressed in this project, presently divided into different discussion papers. This paper considers some examples of where financial risks to property have fallen both in New Zealand and overseas as a result of some natural disasters, particularly flooding. Pre-existing schemes are important for discussing possible future policy responses as they are and how they could be adapted for new and different natural hazards.

This paper examines ways that risk, damage, cost and liability currently fall under different schemes. Private insurance, state supported insurance, the Public Works Act 1981, and council liability could be used to share losses of value and utility of land. Each of them has weaknesses; however, these can be used, adapted, and/or combined to create a framework to deal with loss of value and utility of land due to sea-level rise. If any government subsidy scheme is adopted, it will need to avoid the problems of previous compensation schemes here and overseas, and be carefully designed to enable people to assess and manage the risks to their homes and communities fairly. What is fair won't be determined by analysis of what is currently legal, but needs to be the subject of a wider discussion.

"The Extent of EQC Liability for Damage from Sea-Level Rise"
Victoria University of Wellington Legal Research Paper No. 65/2020

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This paper considers the extent to which damage associated with sea-level rise is covered by insurance administered by the Earthquake Commission (EQC). EQC provides a natural disaster insurance scheme to help households recover from disaster and manage the fiscal risk to the Crown from natural hazards. While sea-level rise is not an insurable event, it will substantially increase damage from storms, flooding and landslips, which is covered by EQC.

EQC cover complements private residential building insurance by providing cover for land underneath insured buildings damaged by natural disasters, and is bundled together with private insurance, meaning that if private insurers withdraw cover due to increased risk, EQC cover is also withdrawn.

While EQC's role is in post-event recovery, it has a range of methods available for settling claims, including replacement, reinstatement, and relocation, and is able to require that claim settlement payments be used to repair damage, meaning it also has an indirect role in pre-event resilience. Further, EQC's recently adopted approach to settling claims for increased flooding vulnerability by paying the diminution of land value arguably extents its role beyond its primary focus of immediate recovery from disaster.

However, EQC does not currently have discretion to take pre-event resilience into account when electing claim settlement methods.

An inquiry into the EQC scheme is currently underway, focused on the Canterbury earthquakes, and as such the scope does not encompass climate change issues. The inquiry will inform legislative changes. While it is imperative that the inherent nature of EQC as a natural disaster insurance scheme is preserved, it is also clear that there is room to investigate changes to EQC's policies to enable it to take a direct role in supporting pre-event resilience, within its existing scope. This could be undertaken alongside the current inquiry.

EQC considers there is a time-bound dimension to managing the impacts of climate change, with the most significant effects likely to occur in the short term while longer-term planning is undertaken by local and central government. This does not preclude policy change in the short term; and reconsideration of EQC policies on relocation, replacement, and reinstatement, in particular, could also support longer-term planning by other agencies.

"Climate Change Adaptation in the Environment Court: Revisiting the 2010 Holt Case"
(2019) 50 VUWLR at 609
Victoria University of Wellington Legal Research Paper No. 66/2020

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Common law precedents for some resource consent approvals in Aotearoa New Zealand are out of date due to the rapid increase in the science and understanding of the effects of climate change. This article considers one 2010 Environment Court case on a resource consent for building in the coastal area. It examines how the case would be decided if it arose today, with the benefit of the relevant law, policies and guidance now available to decision-makers. It suggests that the option taken by the Court in 2010, whereby the owners assumed the relevant inundation risks, would not be so available to a court today. This case is thus no longer good law.

"Sea-Level Rise and Local Government: Policy Gaps and Opportunities"
Victoria University of Wellington Legal Research Paper No. 67/2020

Victoria University of Wellington Legal Research Paper No. 67/2020

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This paper identifies some barriers, gaps and opportunities in the legal and policy options available to local government when managing the effects of sea-level rise due to climate change, and outlines the challenges facing local government in adapting to sea-level rise and climate change.

Work undertaken to inform the paper includes research, engagement, and policy analysis undertaken over a two-year period, with findings tested in a survey of local authorities with coastal interface (territorial authorities) or whose authority included coastal marine area (regional and unitary councils). The range of opinions expressed through the survey process demonstrate that every region and district has its own unique characteristics and priorities.

The most prominent message from our work is the desire for more commitment and involvement from central government. While local authorities are very well engaged and generally have a clear idea of issues arising from sea-level rise and climate change, 73 percent of participants said their organisations do not receive enough direction from central government on how to respond to the effects of climate change. It is acknowledged that useful guidance has been provided, such as the Ministry for the Environment's Guidance for local government on preparing for climate change. However, territorial authorities in particular are seeking a stronger lead, such as legislative reform, clearer and more directive policy, clarification of responsibilities, guidance on the use of particular adaptation tools that currently exist, and a national environmental standard on coastal hazard management. Such direction is seen as critical not only to achieve a nationally consistent approach but also simply to achieve adoption of appropriate climate adaptation measures.

"Sea-Level Rise and Local Government: Policy Gaps and Opportunities"
Policy Quarterly, Vol. 16, p. 62, 2020
Victoria University of Wellington Legal Research Paper No. 68/2020

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Local authorities in New Zealand have a significant responsibility to their communities for managing the effects of sea level rise due to climate change. However, while most local authorities are well engaged and have a clear understanding of issues arising from sea level rise, 73% report that their organisations do not receive enough direction from central government on how to respond. Territorial authorities in particular are seeking a stronger lead, such as legislative reform, clearer and more directive policy, clarification of responsibilities, or a national environmental standard on coastal hazard management. Central government direction is seen as critical to achieve a nationally consistent and equitable approach for coastal communities. This article summarises how this could be addressed, and identifies key challenges facing local government in adapting to sea level rise and climate change.

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The Student/Alumni Series is a subseries of the Victoria University of Wellington Legal Research Paper Series. The subseries started in 2015 and publishes papers by students and alumni of Victoria University of Wellington, comprising primarily work for honours and postgraduate courses. Papers are collected into thematic or general issues.

The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to lead the Massachussetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As Baron Cooke of Thorndon, he sat on over 100 appeals to the Appellate Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the Law School has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly

fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from chimneys and vaults.

The School is close to New Zealand's Parliament, courts, and the headquarters of government departments. Throughout Victoria's history, our law teachers have contributed actively to policy formation and to law reform. As a result, in addition to many scholarly articles and books, the Victoria SSRN pages include a number of official reports.

Victoria graduates approximately 230 LLB and LLB(Hons) students each year, and about 60 LLM students. The faculty has an increasing number of doctoral students. Ordinarily there are ten to twelve students engaged in PhD research.

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