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SPECIAL CONFERENCE ISSUE
THE NEW ZEALAND BILL OF RIGHTS ACT

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Fleur Adcock
Richard Boast
Petra Butler
Andrew Geddis
Claudia Geiringer
Kris Gledhill
Rt Hon Judge Sir Kenneth Keith
Janet McLean
Rt Hon Sir Geoffrey Palmer
Alicia Cebada Romero
Hon Mr Justice Rabinder Singh

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
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NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

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

The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

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The week of twenty-first birthday celebrations at which preliminary versions of most of these articles were originally presented was hosted by the New Zealand Centre for Public Law, and was made possible with the generous support of Judge Ian Borrin and the New Zealand Law Foundation.

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FOREWORD

Petra Butler and Claudia Geiringer*******

With one exception,[1] the papers published in this special issue are the product of a week of celebrations held by the New Zealand Centre for Public Law in August 2011 to mark the twenty-first anniversary of the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).[2] The week included public lectures by Janet McLean and (now Hon Mr Justice) Rabinder Singh QC, a two-day academic roundtable at which drafts of a number of papers were presented and discussed, and a public workshop on freedom from discrimination and the jurisdiction of the Human Rights Review Tribunal.

The papers published here reflect a range of common themes and concerns, as well as points of juxtaposition and divergence. In both these respects, the papers offer an illuminating snapshot of the matters of particular concern to Bill of Rights scholars as the Act moves towards its quarter century mark. A few points are particularly worth drawing out in this respect.

First, it is notable that the papers in this volume are as much concerned with the Act's absences and omissions as with its current content and operation. Andrew Geddis' paper discusses the only civil right in the Bill of Rights Act to have, to date, attracted extensive judicial attention – the right to freedom of expression. But many of the other papers focus on textual lacunae in the Act (for example, Boast on property and Butler on privacy) or identify areas where the Act has arguably underperformed (for example, McLean on constitutional conventions, Gledhill on statutory interpretation and Geiringer on administrative law). The under-utilisation of ss 19 and 20 of the Bill of Rights Act to advance claims for Māori, which is explored in Fleur Adcock's paper, is particularly striking.

Secondly, many of the papers in this collection reflect the importance of the international and comparative context in which the Bill of Rights Act falls to be interpreted and applied. Indeed, the editors considered that broader context to be sufficiently important to have included in the collection

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1 The paper by Alicia Cebada Romero, discussed below.

2 The Act received its royal assent on 28 August 1990 and came into force 28 days later, on 25 September 1990.

two papers that focus entirely on key comparator jurisdictions (Singh on the United Kingdom and Romero on the jurisprudence of the European Court of Human Rights). All the other papers in the collection focus more specifically on New Zealand but, even so, many of them draw on relevant comparator jurisdictions in order to gain perspective on the scope and operation of the New Zealand instrument.

The comparative context is not, though, always used to similar effect. Whereas some papers draw on the experience in comparator jurisdictions to make a clear case for reform of the New Zealand instrument or for changes to the way that the Act is being interpreted and applied (most especially Gledhill on statutory interpretation) others caution the need for care in reliance on comparative materials, and suggest that the New Zealand experience ultimately has to be understood by reference to its unique constitutional and legal context (especially Boast on property and Geiringer on administrative law).

Thirdly, the volume contains no papers that focus specifically on the impact of the Bill of Rights Act on criminal procedure. For more than a decade, the Act's primary influence was in this area, and much was written on the topic. Most would now agree, though, that the Act's impact on criminal procedure has waned and that, during its third decade, its likely impact, if any, will be in other contexts. For that reason, we focussed this special issue on civil rights, and on (primarily) non-criminal enforcement contexts.[3]

A fourth comment relates to another notable omission from the collection: analysis of the right to freedom from discrimination in s 19 of the Bill of Rights Act. This was not a wilful omission. The editors acknowledge that, thanks to the 2001 amendments to the Human Rights Act (conferring on the Human Rights Review Tribunal jurisdiction to adjudicate claims of breach of s 19 of the Bill of Rights Act), the guarantee of freedom from discrimination is now generating important and ground-breaking jurisprudence that is deserving of close academic attention.[4] However, particularly in a small jurisdiction, a collection of this kind is necessarily parasitic upon the scholarship that academics are willing to offer up. We had no offers of contributions to this collection on the topic of freedom from discrimination. Accordingly, during our week of birthday celebrations, we acknowledged the importance of this right by hosting a public workshop, ably moderated by Paul Rishworth and contributed to by Martha Coleman (Crown Counsel, Crown Law Office) and David Peirse (Office of the Director of Human Rights Proceedings). This is now a fast-developing area of law and it is to be anticipated that a similar collection published for, say, the twenty-fifth anniversary of the Bill of Rights Act would be unlikely to be characterised by a similar omission.

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3 The partial exception is Andrew Geddis' article on dissent, which concerns a civil right (freedom of expression) but a criminal enforcement context (the Summary Offences Act 1981).

4 For example *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456; *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729; and *Attorney-General v Idea Services* [2012] NZHC 3229, [2013] NZLR 512.

Fifthly and finally, as might be expected in a collection of this kind, no clear consensus emerges from the papers as to the best way forward for the Bill of Rights Act and, indeed, there are some areas of open disagreement (compare, for example, Petra Butler's advocacy of an express privacy right with Sir Kenneth Keith's expression of caution on the subject). Nevertheless, reading the collection as a whole, it is striking how many of the articles evince a general sense of dissatisfaction with the Act's record in a number of areas and/or identify significant room for improvement in its performance. That is a sentiment that we doubt would have been so prevalent in a similar collection compiled, say, a decade ago.[5]

Turning, then, to the individual papers that make up the special issue, the collection is book-ended by papers written by two of the "founding fathers" of the Bill of Rights Act – Sir Kenneth Keith and Sir Geoffrey Palmer. Sir Kenneth's paper is located at the start of the collection. As is well known, Sir Kenneth was one of a small group of advisors appointed by then Minister of Justice, Geoffrey Palmer, in 1984 to draft a white paper on "A Bill of Rights for New Zealand". His paper is a personal reflection on the "thinking, debate and action" that led to the drafting of the White Paper (including an evocative reference to discussions held on Christmas Eve around the Keith's dining table).

The next two papers were first presented as public lectures during the August 2011 week of birthday celebrations, and they share a common concern with the moral or conventional force of human rights instruments. Janet McLean interrogates the role that constitutional propriety plays, or ought to play, in the operation and enforcement of the Bill of Rights Act. Drawing on United Kingdom experience under the Human Rights Act 1998 (UK), McLean argues that constitutional convention has always been an indispensable part of our constitutional tradition but that, as things stand at present, the conventions surrounding the operation of the Bill of Rights Act are comparatively weak. She suggests that institutional changes might be needed to better support the Act's operation (in particular, within the political branches).

Hon Mr Justice Rabinder Singh was one of the United Kingdom's leading human rights barristers before being sworn in as a judge of the High Court of England and Wales in October 2011. His paper focuses on the United Kingdom's Human Rights Act, arguing that the Act belongs "as much to the moral realm as to the legal" and that its influence ranges "beyond the courtroom to Parliament, the executive, the media and to the public generally". He develops this theme not only by reference to judicial and legislative practice under the Human Rights Act, but also through an exploration of the wording and philosophical underpinnings of modern human rights instruments, and through identification of underlying principles such as democracy, equality and mutual respect.

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5 Compare for example Janet McLean's concerns below about the weakness of the supporting conventions protecting the Bill of Rights with her more sanguine evaluation of the Act's performance in 2001: Janet McLean "Legislative Invalidation, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act" [2001] NZ L Rev 421.

The next pair of articles concerns two of the most important civil rights in the Act – the rights to freedom of expression and freedom of religion. Andrew Geddis writes on the extent to which the enactment of the Bill of Rights Act has impacted on the legal treatment of "dissent". He develops a particular focus on two Supreme Court decisions of recent years in which the Court has confronted the issue of dissent and its limits – *Brooker v Police* and *Morse v Police*.[6] He argues that these cases reflect an expanded (post-Bill of Rights Act) judicial role in drawing the line between acceptable and unacceptable forms of dissent, but that the Court legitimises its conclusions in this respect by presenting them as the "relatively straightforward outcome of standard forms of statutory interpretation."

The paper by Alicia Cebada Romero is the only article in the collection not to have been generated from the August 2011 birthday celebrations. The article was submitted to the journal through its general submissions process, but was included in this special issue because it cohered so well with the themes of the collection. Although it focuses on the work of the European Court of Human Rights, the class of issues that it discusses have already manifested in New Zealand in various forms,[7] and are likely to become more conspicuous as New Zealand society becomes increasingly diverse.

The article addresses the right to freedom of religion in the jurisprudence of the European Court of Human Rights, with particular reference to recent decisions relating to the wearing of religious symbols in schools. The author accepts that the Strasbourg Court must remain open to different constitutional frameworks within member states for regulating the relationship between state and religion but nevertheless argues that a principle of neutrality towards religions is an indispensable tool in guaranteeing pluralism and diversity within member states. In Romero's view, the Court has fallen short in policing that principle by offering a biased interpretation of the neutrality obligation that serves the interests of Christian churches while contributing to the negative stereotyping of the Islamic faith.

The next two articles both relate to the operational provisions in the Bill of Rights Act, and both look to the experience in comparator jurisdictions in order to illuminate the scope and application of those operational provisions. But the conclusions that the two authors draw from the comparative materials pull in somewhat different directions.

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6 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91; and *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1.

7 For New Zealand case law on the wearing of the headscarf, see *Police v Razamjoo* (2005) 8 HRNZ 604 (DC). And for recent news coverage about public friction caused by the wearing of Islamic headdress (including one article reported just as this special issue was going to press), see "Muslim woman furious at courtroom ban" *The New Zealand Herald* (online ed, Auckland, 2 September 2009); and "Woman fined for ordering student to remove burqa in Dunedin" *The New Zealand Herald* (online ed, Auckland, 24 October 2013).

Kris Gledhill uses the Supreme Court's decision in *R v Hansen* to examine the strength of the interpretive obligation in s 6 of the Bill of Rights Act.[8] As is well known, the *Hansen* Court took a more cautious approach to the intensity of the interpretive direction than had the House of Lords in relation to the similar direction in s 3 of the United Kingdom's Human Rights Act. Gledhill's starting point is that there are no meaningful linguistic differences between the two interpretive directions and so the different results reached in the two jurisdictions must be justified, if at all, by distinctions between the respective contexts in which the statutory language falls to be applied. Following an in-depth examination of possible sources of distinction, he reaches the tentative conclusion that there are no legally valid contextual differences and that, accordingly, one or other of the New Zealand Supreme Court or the House of Lords must be misguided. His view is that the erring court is the New Zealand one, and that New Zealand judges are too cautious in their approach to s 6.

The focus of Claudia Geiringer's paper is on administrative law and, specifically, on the role of the courts in enforcing the obligation of proportionality in s 5 of the Bill of Rights Act against public authorities charged with the exercise of statutory powers or discretions. She argues that, whereas the academic commentary has tended to assume that the courts can and should enforce the obligation of proportionality as against administrative decision-makers, in fact there is little evidence of the New Zealand courts actually doing so. She then suggests that there might be local factors that explain the particular resistance of New Zealand judges to proportionality review, and she explores these by reference to the experience in key comparator jurisdictions. In juxtaposition to Gledhill's article, Geiringer considers that, at least in relation to the issue that is the focus of her paper, there are salient contextual differences that have explanatory (if not justificatory) force in accounting for the different approach taken by the New Zealand courts.

Richard Boast's article shares with the one that precedes it a concern with illuminating the distinctive features of the New Zealand landscape. His focus is on property law and his launching pad, the absence of an express property right in the Bill of Rights Act. Boast does not attempt to address the question whether or not a property right should be included but, instead, explores a preliminary question: what is the content of New Zealand's "public" property law traditions? He argues that although property law is often regarded as occupying private, not public, space, in fact it has significant public law components. It follows that the precise content of a state's public law of property varies from country to country and reflects the distinct cultural and historical traditions of that country. Boast's paper identifies distinctive components of New Zealand's public property law and argues, in particular, that the exact combination of these components is unique. His argument is that a clear understanding of these components is necessary for any sensible discussion of whether property rights deserve more explicit legal recognition and protection.

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8 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

Like Richard Boast's contribution, the next two papers also address textual omissions from the Bill of Rights Act. The lacuna identified by Fleur Adcock is the absence of any reference in the Bill of Rights Act to Māori or to the Treaty of Waitangi. She reflects on whether, despite these omissions, the Bill of Rights Act nevertheless offers protection to the human rights and fundamental freedoms of Māori. She accepts that Māori enjoy benefits under the Act alongside all other New Zealanders, but asks more specifically whether the Act protects the rights of Māori "as Indigenous peoples". Her conclusion is that rights such as the right to freedom from discrimination (s 19) and the right of minorities to enjoy their culture (s 20) do offer the potential for a degree of protection, but that the protection offered is imperfect and the lack of explicit affirmation renders it vulnerable. Further, she suggests that (for a range of reasons that are explored in the paper) in practice, even that limited potential for protection has not been realised. Adcock suggests that the executive, legislature, judiciary and Māori have all missed opportunities to draw on the Bill of Rights Act in support of Māori rights, and that such opportunities should not be neglected in the future.

Petra Butler's article examines another textual lacuna in the Bill of Rights Act: the absence of an express right to privacy. Butler conducts an extensive survey of the protections given to the right to privacy (both in New Zealand and in a range of comparator jurisdictions) in order to explore how elements of privacy may be protected, and in order to assess whether New Zealand's somewhat piecemeal privacy protections would be strengthened by the inclusion in the Bill of Rights Act of an express privacy clause. The paper answers that question in the affirmative. Butler argues that a more explicit commitment to the right to privacy could add a meaningful dimension to privacy law and send a message to state actors that privacy is important to New Zealanders. In the face of such a clause, the courts would feel more confident in developing the common law to fill the gaps in legislation to protect privacy values. Further, judicial development of a right to privacy would enhance and highlight aspects of societal values and therefore contribute to building a more cohesive understanding of New Zealand society through the adjudication of privacy issues.

It is fitting that the last word in the collection should go to the Act's original sponsor, Sir Geoffrey Palmer. Sir Geoffrey's article examines the case for reform. He cautions against consideration of the impact of the Bill of Rights Act in isolation, arguing that the case for reform has to be assessed within the wider context of the New Zealand constitution, and that the ultimate question is whether the overall distribution of public powers in New Zealand is appropriate and desirable. Sir Geoffrey proceeds to undertake this task, locating the Bill of Rights Act within the broader contours of the New Zealand constitution, and examining the process of "constitutional consideration" that is currently underway. Ultimately, the author concludes that New Zealand's constitution remains unbalanced, and that there is a strong case for making the Bill of Rights Act superior law.

The editors would like to thank all the contributors to this collection and, in addition, all those who participated in the August 2011 symposium as commentators, or who presented papers but did not choose to work them up for inclusion in the special issue: Mark Bennett, Andrew Butler, Joel

Colón-Ríos, David Griffiths, Carwyn Jones, Rodger Haines QC, Selene Mize, Steven Price, Paul Rishworth, Tony Smith, Rayner Thwaites and Hanna Wilberg.

Particular thanks also go to our student editor, Amy Dixon, to the team of assistant student editors who gave up their time voluntarily to assist with the publication, and to the anonymous reviewers who peer reviewed the papers that are published here.

We would also like to express a special debt to the New Zealand Law Foundation, who funded Justice Singh's visit to New Zealand, and to Judge Ian Borrin, whose support for the law school's two journals enabled the workshop to be held and this special issue to be produced.