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Taming of MMP by the formation of a true coalition government: a view from the coalface on the impact on policy/lawmaking and the courts

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There has never been a better time to be a constitutional lawyer, given the increased level of interest in this coalition Government and its policy and law reforms. The nine reflections below derive from my experience advising at the coalface of public and administrative law, where over the last 18 months, I have experienced for the first time in my legal career, three court proceedings affected by Bills introduced into Parliament, one where urgency was threatened and another where the Bill was passed through all stages under urgency the same day it was introduced. I have also had a select committee hearing on a Bill twice scheduled and then twice cancelled by the House going into urgency. The House has also disallowed regulations for only the second time in its history. Seeking declarations of inconsistency with the New Zealand Bill of Rights Act 1990 (NZBORA) has been considered pointless by clients when the Government will not change its actions based on that declaration. Nor will it do so on the basis of reports and recommendations from the Waitangi Tribunal. And we are only halfway through this term of government.

This new Government is worth studying as a single party majority government is unlikely in future MMP elections, but future coalition governments are likely to have similar substantive policy and lawmaking agreements as well as agreements on confidence and supply and procedural motions, as with the current National/Act/New Zealand First Coalition Government if they want to get more done. The concern then is flip flopping from one set of laws which are repealed and replaced by new laws if the government changes at the next election to one led by Labour. The RMA reforms are a good example of that concern.

There are also significant international issues as to the decline and decay of democracies in the last twenty years, which are too large to cover here, but what I say below should also be considered in light of those trends (Global state of Democracy Initiative "Global Patterns, Key Findings" <www.idea.int/gsod/2023/chapters/global/>).

WHY IS THIS GOVERNMENT UNIQUE?

New Zealand's first true coalition Government, post the 2023 general elections, has greatly increased the frequency and muscularity with which the executive branch is using law reform as a problem-solving tool, often under urgency and sometimes with retrospective effect. Through coalition agreements, National, Act and New Zealand First have agreed on over 200 specified policies and law reform and together have a majority in Parliament (Geoffrey Palmer "The novel evolution of MMP under the Luxon government" [2024] NZLJ 9). The Coalition Agreement: New Zealand National Party and ACT New Zealand, 24 November 2023, House of Representatives (National & ACT Agreement) at [37] and [38] and identical provisions in Coalition Agreement: New Zealand National Party and New Zealand First, 24 November 2023, House of Representatives (National & New Zealand First Agreement) at [35] and [36]) state that "[t]he parties to this agreement recognise the Government is comprised of a coalition of three political parties — National, Act and New Zealand First. The parties agree that this agreement represents the entire agreement between the parties".

This is additional to agreement on procedural motions such as urgency, and on confidence and supply (National & ACT Agreement at [37] and [39]; National & New Zealand First Agreement at [35] and [37]). This is new as up until 23 November 2023, the minority government coalition agreements under MMP only provided that minor parties will support the major party on confidence and supply, and on procedural motions in the House.

The previous Government was a single party majority government in 2020–2023, which was also a first in the nine MMP elections to that date (John Wilson *The 2020 General Election and referendums: results, analysis, and demographics of the 53rd* Parliament (Parliamentary Services, June 2021)). The Labour Party had a Cooperation Agreement with the Green Party, where the Greens got ministerial portfolios outside Cabinet for supporting the Government on procedural motions in the House, in select committees, and on motions of confidence and supply to provide extra stability. Much of that Labour Government's term was taken up battling the COVID-19 pandemic which limited actions on other policies and law reform. The first COVID-19 case was reported in New Zealand on 28 February 2020 with the Government lifting all vaccine mandates and mask requirements on 15 August 2023. The most recent general election was then held on 14 October 2023. The other 8 MMP

elections from 1996 to 2017 were not true coalition governments as the minority governments only secured majority support on confidence and supply and sometimes procedural motions in the House, but otherwise, they governed alone. They were not coalitions which had agreed in advance to vote together on substantive policy and lawmaking matters (Stephen Church "Government Formation" in Janine Hayward, Lara Greaves, and Claire Timperley (eds) *Government and Politics in Aotearoa New Zealand* (Oxford University Press, Melbourne, 2021) 339 at 339–350).

As set out below, the Public Law Toolbox described in M Chen *Public Law Toolbox: Solving Problems with Government* (2nd ed, Lexis Nexis, 2014), is not the same under the first true coalition Government under MMP as this change impacts all parts of the toolbox.

BACK TO FIRST PAST THE POST GOVERNMENT OR A "MATURING OF MMP"?

The coalition agreements make the separation between the executive and legislative branches of government less perceptible, allowing the coalition Government to act like a single party majority government, acting in concert with separate external parties as opposed to internal factions within a party. This allows the coalition Government to push through major changes in policy and law rapidly and under urgency and with retrospective effect, even if unpopular and without consultation. Prime Minister Luxon in "Trading places: Seymour steps up, Peters gears up" (podcast, 30 May 2025) RadioNZ <rnz.co.nz/podcast/focusonpolitics> said this was just the maturing of MMP.

The blistering pace challenges quality law making. On 28 May 2025, the Attorney-General stated that "[t]hose of us involved in creating the policy underpinning the laws of New Zealand need to ensure the resulting law is precise, clear and not open to significant debate about its meaning (Neil Sands "Attorney-General lays down the law to judges, tells ministers to draft tighter legislation" LawNews 28 May 2025 <lawnews.nz/politics/attorney-general-lays-down-the-law-to-judges-tells-ministers-to-draft-tighter-legislation/>). The Attorney-General also stated on 10 June 2025 that "the Courts will sort that out" should not be a default position for a parliamentary lawmaker. We will play our part" ("Speech to the Law Association 2025" 10 June 2025 <www.beehive.govt.nz/speech/speech-law-association-2025>).

The fast pace also decreases the time available for information sharing and consultation with the public about legislative and policy proposals. It also means that even where there is consultation prior to the introduction of a Bill, or where a Bill is sent to select committee, it is hard for affected parties to submit on them all before the closing dates. An example is the coinciding of the Treaty Principles Bill select committee submissions (open 14 November 2024 — deadline 14 January 2025) with the discussion document "Have your say on the proposed Regulatory Standards Bill" (open November 2024 — deadline 13 January 2025) (Waitangi Tribunal *Interim Regulatory Standards Bill Urgent Report* (Wai 3470, 2025) at [31]).

This legislative muscularity of the coalition Government also affects tools in the public law toolbox like regulatory disallowance under s 116 of the Legislation Act 2019 (Legislation Act). The complaint made by Gary Judd KC regarding the Professional Examinations in Law (Tikanga Māori Requirements) Amendment Regulations 2022 (Amendment Regulations) has resulted in part of the regulations being disallowed by the House for only the second time in history (Regulations Review Committee *Complaint about the Professional Examinations in Law (Tikanga Maori Requirements) Amendment Regulations 2022* (March 2025)). The Regulations Review Committee (the RRC) concluded that although the Amendment Regulations did not trespass unduly on personal rights and liberties or require elucidation, it resolved, by majority, to partially uphold the complaint under Standing Order 327(2)(c) as the regulations make unusual or unexpected use of powers granted to the New Zealand Council of Legal Education by requiring tikanga to be taught as a compulsory component of every other compulsory law subject, where relevant. The majority did not, however, take issue with the Council requiring tikanga to be taught as a stand-alone compulsory law subject (at 6–7).

A notice of motion of disallowance was lodged on 7 April 2025 by National Party MP and RRC member, Joseph Mooney, to disallow the parts identified as an unusual or unexpected use of powers by a majority of the RRC. It did not further seek to disallow the requirement for tikanga Māori to be taught as a stand-alone compulsory law subject.

As the notice was given by a member of the RRC, it was retained on the Order Paper until dealt with by the House under Standing Order 329 of the 2023 Standing Orders of the House of Representatives. On 21 May, Parliament resolved to support the motion and to disallow regulation 1(3), definition of "Tikanga Māori Requirements", paragraph (a); and regulation 3(1)(a)(ii) of the Professional Examinations in Law Regulations 2008. The resolution is itself secondary legislation under s 120 of the Legislation Act and took effect on the day it was passed under s 116(2)(a) of the Legislation Act 2019.

Disallowance has only happened once before, in 2008, when a clause was revoked in a notice concerning the scope of practice of enrolled nurses and substituted with a new clause ((23 September 2008) 650 NZPD 19223). See David Wilson *McGee Parliamentary Practice in New Zealand* (5th ed, Clerk of the House of Representatives, Wellington, 2023 at [41.5.4]).

Parliament's decision to disallow part of the Amendment Regulations may not make a significant difference to how tikanga Māori is taught at law schools, including in every other compulsory law subject. Tikanga is still required to be taught as a compulsory standalone subject under the Amendment Regulations. As the Council submitted to the Committee, tikanga has been part of the common law of Aotearoa/New Zealand for over 150 years, as recognised by the Supreme Court and has also been expressly imported into statute by Parliament (see Appendix 4: "Timeline of statutory and common law engagement with tikanga" to Te Aka Matua o te Ture *He Poutama* (NZLC SP24, 2023)). Parliament has not reversed *Ellis v R (Continuance)* [2022] 1 NZLR 239, where the Supreme Court unanimously found at [19] that "tikanga has been and will continue to be recognised in the development of the common law of Aotearoa / New Zealand in cases where it is relevant". The majority of judges at [22] also accepted that "tikanga is the first law of Aotearoa/New Zealand". See *Smith v Fonterra Co-Operative Group Ltd* [2024] NZSC 5 at [183]; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801. Media reporting indicates that New Zealand law schools are not planning to change their

curriculum following the disallowance (Emma Ricketts "No law schools changing their curriculum, despite removal of tikanga requirement" *Stuff* (online ed, 7 June 2025)).

Haka in the House

Parliament's confirmation of the penalties recommended by a majority of the Privileges Committee (PC) to suspend MP Hana-Rawhiti Maipi-Clarke from the House for seven days and Te Pāti Māori co-leaders Debbie Ngarewa-Packer and Rawiri Waititi for 21 days for "acting in an manner that could have the effect of intimidating a member of the House in the discharge of their duty" is also unprecedented in terms of severity. Once again, tikanga appears to have been a fault line as the penalties were imposed on Te Pāti Māori MPs leaving their seats and doing a Haka on the floor of the House after the Speaker had directed the Clerk of the House to conduct a party vote on the question that the Treaty Principles Bill be read a first time. Ms Ngarewa-Packer also used a hand gesture similar to a finger gun towards ACT party members — twice and said "e noho" (sit down).

However, the majority on the PC (the true coalition Government parties National, Act and New Zealand First) stated the penalties were not decided on the performance of the haka but on the time at and the manner in which it was performed as it was directed at other members of the House in an intimidatory manner during the conduct of the vote, due to the lack of prior permission from the Speaker and the lack of contrition shown by the MPs (Privileges Committee, 54th Parliament, "Question of Privilege concerning the conduct of four members during the proceedings of the House — Final report," May 2025, at [7]; and Standing Orders of the House of Representatives 2023, SO 417–418).

DISTINGUISHING UNCONSTITUTIONAL FROM UNLAWFUL ACTIONS

Retrospective legislation made under urgency that discontinues live litigation may be unconstitutional, but it is not unlawful, although it does require direct and express provision to be given effect to by the courts (*D v Police* [2021] NZSC 1 at [81]; and *Attorney-General v Spencer* [2015] NZCA 143). Otherwise, s 12 of the Legislation Act states that "[l]egislation does not have retrospective effect". Section 27 of NZBORA also provides the right to natural justice, to apply for judicial review, to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

Act and New Zealand First garnered respectively 8.64 per cent and 6.08 per cent of the vote at the 2023 election (Electoral Commission, Election results 2023 — Official Result), but they have entered into coalition agreements with National which together result in a majority in Parliament so there is nothing stopping them from reflecting their electoral mandates and policy preferences under our current constitutional arrangements if that is agreed within the coalition Government partners.

The coalition Government is continuing to introduce Bills that cut across live proceedings, such as the class action lawsuit by 150,000 customers of ANZ and ASB banks (*ASB Bank v Simons et al* [2024] NZSC 186). The next step is for the plaintiffs' application for notification orders to be determined by the High Court. After notification, the plaintiffs will advance their application for summary judgment in which they will ask the Court to determine their claims and find that the banks breached s 22 of the Credit Contracts and Consumer Finance Act 2003 and must refund all costs of borrowing the plaintiffs paid during the periods the banks were in breach. The Credit Contracts and Consumer Finance Amendment Bill, introduced on 31 March 2025 and referred to select committee, is intended to limit liability for breaches of disclosure requirements with some changes intended to have retrospective effect ((20 May 2025) 784 NZPD). This law reform was not in the coalition agreements.

HAS MORE SUPPORT BEEN GENERATED FOR A SUPREME WRITTEN CONSTITUTION?

The demonstrations on the streets and the record-breaking numbers of submissions stirred up by some actions taken by this Government are signs of a healthy democracy (see for example, "42,000 join as Treaty Principles Bill hīkoi reaches Parliament" *RNZ* (19 November 2024); George Block and Cherie Howie "Fast-track Approvals Bill protest: 20,000 estimated as huge demonstration brings Auckland to standstill" *The New Zealand Herald* (online ed, 8 June 2024); Rowan Quinn "Nationwide protests erupt over government's sudden change to pay equity laws" *RNZ* (10 May 2025); and Ruth Hill "Senior hospital doctors strike in protest at stalled pay talks" *RNZ* (1 May 2025)). But has the muscular exercise of lawmaking powers often under urgency and sometimes without consultation also generated more support for an entrenched higher law written constitution that needs to be enacted by an extraordinary majority in Parliament or a majority at a plebiscite and can only be amended with the same? New Zealand, along with the United Kingdom and Israel, remain the only countries without a single written entrenched constitution.

Sir Geoffrey Palmer KC and Andrew Butler KC wrote in *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand* (Te Herenga Waka University Press, Wellington, 2018) that "[t]he difficulty with any constitutional discussion in NZ is that people struggle to see how it affects them" (at 6) and "[o]ne of the prime reasons why submitters wanted a written codified constitution was to keep Parliament in order" (at 19). Some of the actions taken by this coalition Government have affected large numbers of the public and been a master class on how our system of government should and should not work.

Are the majority of New Zealanders happy with the status quo mechanism of voting governments in or out every three years for expressing pleasure or otherwise at government/Parliamentary actions which affect rights, interests and fundamental constitutional values, or has this true coalition Government's actions grown public support to change New Zealand's unwritten constitution? Justice Matthew Palmer and Professor Dean Knight described (Matthew Palmer and Dean Knight *The Constitution of New Zealand: A Contextual Analysis* (Hart, Great Britain, 2022) at [41]):

> [The] New Zealand culture relevant to the exercise of power to be pragmatism. Grand theorising is suspicious unless it relates to something concrete. Problems should be fixed as they appear, preferably with 'number 8 fencing wire' after tinkering in the constitutional shed. Just get on with it — and 'it' is preferably something practical rather than theoretical. But they would apparently rather make up constitutional innovations on the spot than think too much about it in advance. This pragmatic element of

> New Zealand culture appears to lie behind our determined assertion that New Zealand has, and should have, an unwritten constitution.

Of relevance is the Term of Parliament (Enabling 4-year Term) Legislation Amendment Bill introduced on 27 February 2025. The Bill had its first reading on 5 March 2025, and select committee submissions closed on 17 April with report back on 5 September 2025. The Bill proposes a mechanism to extend the maximum term of a Parliament to four years, contingent on specific conditions regarding select committee membership. It would also entrench provisions inserted in the Constitution Act 1986 by pt 1 of the Bill relating to a 4-year parliamentary term and the proportionality requirement.

If New Zealand is going to move to a higher law written constitution, it is important that the public is notified and understands that this is what is in fact happening. They should be provided with public education from an independent body who can also answer their questions. The public should be given adequate time to consider the issues before they are required to vote.

MĀORI AND TREATY ISSUES

Many Māori and some non-Māori are of the view that Māori rights and interests hard won over the last 30 years are now being legislated away overnight, despite the constitutional significance of the Treaty and in our law. They are also concerned by the convergence of several measures impacting Māori rights and interests since November 2023 and there is more law reform going through Parliament at present and still to come.

The Treaty Principles Bill did not progress beyond second reading, so concerns raised by some about courts not being able to implement its provisions leading to them being "constitutionally ineffective" are moot ("Treaty Principles Bill: Bill of Rights Act advice 'quite damning' — academic" *RNZ* (14 November 2024)). The Treaty Principles review promised in the National Party & New Zealand First Agreement is, however, still ongoing.

The Marine and Coastal Area (MACA) Bill is still awaiting second reading, despite earlier statements by the Justice Minister that it would be enacted by the end of 2024 ("Changes to Marine and Coastal Area Act pass first reading" *RNZ* (25 September 2024)). The Bill would affect a number of proceedings where the judgment had not been released at the time of the announcement of the forthcoming reform, even if hearings had already been held, requiring them to then be re-heard under the new law. Announcement time was defined in the Bill as 25 July 2024. The MACA Bill was introduced on 24 September 2024, passed through first reading and referred to the Justice select committee. However, on 2 December 2024 the Supreme Court released its decision in *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira O Waioweka* [2024] 1 NZLR 857, [2024] NZSC 164. The Justice select committee reported back on the Bill on 3 December 2024, but it has not yet been brought for second reading. The Bill has apparently now been paused to determine the implications of the Supreme Court's decision on its content ((10 April 2025) 783 NZPD). There is also a second Supreme Court decision on the same matter still to come which could further affect the final content of the MACA Bill (see *Edwards* at [5]).

The Regulatory Standards Bill as introduced to Parliament on 19 May 2025 is a pale shadow of the Member's Bill introduced by Hon David Seymour in 2021 and that consulted on in the Discussion Document from the Ministry for Regulation in November 2024. The real issue is whether its passage will have any impact on improving the quality of lawmaking, but it will create confusion as it overlaps significantly with extant regulatory mechanisms and the duplication will be costly (M Chen, expert opinion to assist the Finance and Expenditure Committee, attached to submission to FEC from Raukura Hauora o Tainui, 16 June 2025).

The view of some Māori is that these actions are death by a thousand cuts. The coalition Government's approach also contrasts with the amount of direct contact and influence Māori had with senior ministers in the previous government. That is why the reaction to every new action affecting the Treaty and Māori by the coalition Government needs to be viewed in that wider context, and not as individual actions.

There have been very strong reactions in many in the Māori population, which Census 2023 tells us is now over a million New Zealanders and growing. Their average age is younger, and their birth rate is higher. This matters as democracy and Parliament's ability to pass law is all about the numbers. Many iwi and hapū now have more resources to fight back, including from the approximately 100 Treaty of Waitangi settlements worth about $2.2 billion (One News, 25 May 2025). It is estimated that the Māori economic contribution to the New Zealand economy grew from $17 billion in 2018 to $32 billion in 2023 and the Māori asset base had grown from $69 billion in 2018 to $126 billion in 2023 (Business and Economic Research Limited *Te Ōhanga Māori 2023 (the Māori Economy 2023)* (Ministry of Business, Innovation and Employment, 2024)). The result is more impetus for constitutional change, but for Māori, this is not necessarily a desire for a higher law written constitution which incorporates the Treaty.

As Professor Claire Charters stated, "having a single document, or not, isn't really the issue. The fundamental problem in New Zealand is that we don't have a constitution based on what was agreed in Te Tiriti o Waitangi, which was shared power between Māori and the state" (Siena Yates, "Claire Charters: Let's imagine a new constitution" *E-Tangata* (7 April 2024)). That may require a written constitution but definitely requires greater checks on parliamentary and executive power. Professor Charters spoke of shared governance, as laid out in the Matike Mai report (*The Report of Matike Mai Aotearoa — The Independent Working Group on Constitutional Transformation* (January 2016)), and recognition of Māori authority, so tikanga regulates Māori. She also spoke of the value of greater representation of Māori and a greater understanding of Māori forms of governance in the "kāwanatanga space".

THE SEPARATION OF POWERS DOCTRINE MEANS THERE WILL BE TENSION BETWEEN EXECUTIVE/PARLIAMENTARY BRANCHES OF GOVERNMENT AND THE COURTS

The separation of powers doctrine works by each branch checking the other. However, the coalition agreements allow the executive and legislative branches of government to be effectively merged, which leaves only the judiciary to check those other two branches of government (Philip A Joseph "Separation of Powers in New Zealand" (2018) 5 JICL 485). That is a feature of the Westminster parliamentary system, as s 6(1) of the Constitution Act 1986 restricts the appointment

of ministers and members of the Executive Council to persons who are elected members of Parliament. MMP was supposed to create more separation between the executive and legislative branches of government, which was achieved by the minority coalition Governments prior to the last two Governments in 2020 and 2023.

There have also been criticisms of judges by Ministers in the coalition Government and by Government MPs in Parliament. But this has also resulted in a response by the Attorney-General, and strong push back from the New Zealand Law Society (NZLS) and the New Zealand Bar Association (NZBA) about the need to protect the critical constitutional role played by an independent judiciary.

The Attorney-General Hon Judith Collins KC's letter of 15 March 2024 to her cabinet colleagues spoke of her role "as the constitutional link between the judiciary and executive government," and of "upholding and protecting the judiciary, as an institution". It concerned the convention of comity between the branches (the legislature, the executive, the judiciary) whereby each part of government respects the boundaries of the other institutions of government. The Attorney-General wrote:

> It is a critical feature of our system of government that there is an independent body of government that holds the Executive to law. ... The cabinet Manual assists in maintaining the important balance between different spheres of government. ... paragraphs 4.12–4.16. The Manual provides sound advice for how Ministers navigate such matters and counsels caution in commenting on matters before the Court or from the Court. In the House, Standing Orders cover similar territory — but within Parliament's jurisdiction ... Relevant to my reminder to you is the well-accepted contempt that is conduct that "tends to undermine public confidence in the judicial system.

The Parliamentary Privilege Act 2014 further provides in s 4(1)(b) that:

> [t]his Act must be interpreted in a way that—
>
> ... (b) promotes the principle of comity that requires the separate and independent legislative and judicial branches of government each to recognise, with the mutual respect and restraint that is essential to their important constitutional relationship, the other's proper sphere of influence and privileges.

Also important is Standing Order 118 that: "[a] member may not use offensive words against the House or against any member of the judiciary".

The Chief Justice, the Rt Hon Dame Helen Winkelmann, stated at the Law Association's Wellington Breakfast, 5 July 2024, that:

> [i]t was heartening to hear the importance that the Attorney-General attaches to the relationship between these branches of government. ... I should acknowledge, as some of you are probably running through the headlines in your head at this very moment, that from time to time there may be flare-ups that delineate the spheres of responsibility between the judicial and executive branches but what is vital is that the importance of these lines is understood and reasserted when it needs to be.

Asked if Collins' speech signalled there were tensions between the executive and judiciary, the Chief Justice said "[f]or my part I didn't see it as surprising. I spoke to the chairs of Select Committee about the principle of comity the year previously ... It's a key organising principle of our constitution. The judiciary often speak about it in their judgments, and I welcomed the Attorney-General speaking about it".

The NZLS President stated in response to criticism of an 'activist judiciary' against the Supreme Court's decision in *Smith v Fonterra Co-Operative Group Ltd* [2024] NZSC 5 at [183] that the court (Frazer Barton, "Attacks on judges risk weakening the justice system" *New Zealand Law Society* (19 April 2024)):

> ... has simply allowed the claim to proceed to a full hearing. The courts have always had a role in the development of the law, and it is the Supreme Court's job to consider novel questions of law.

The Honourable Justice Tompkins may have said it best 30 years ago, when he said "I do not for a moment suggest that a Judge is to be immune from public criticism. On the contrary, any person, including politicians, should feel free to comment adversely, if that is what they think, on any Judge's decision. But a general attack on the judiciary as a whole strikes at the very root of that public confidence that is so essential to the judicial system".

The NZBA President stated on 29 August 2024 that the NZBA (Maria Dew "Bar Association raises concerns about attacks on our judiciary" *New Zealand Bar Association* (29 August 2024)):

> ... has observed a recent increase in comments and public statements by Ministers about Judges that go much further than criticisms or discussion of judgments. ... This cannot be explained away as simply "political rhetoric" by politicians, when Ministers of the Crown owe duties to uphold the role of judges. ... It is fundamental for our democracy that judges are not the subject of personal attack or criticism by Ministers that may risk Judges being restricted in their role. Judges must be capable of being able to freely play their independent constitutional role in Aotearoa New Zealand. ... The legal profession has a statutory obligation to promote the rule of law, and this involves speaking in defence of the judiciary and our legal system, where needed. We consider this is one of those occasions.

See also Te Hunga Rōia Māori's letter to the Prime Minister about Hon Shane Jones' criticisms of the Waitangi Tribunal, 17 April 2025.

In *Skerret-White v Minister for Children* [2024] NZCA 160, [2024] 2 NZLR 493 at [114]–[115], the Court of Appeal said in allowing the appeal against a High Court decision setting aside a summons to the Minister for Children to give evidence before the Waitangi Tribunal's inquiry under s 6(1)(c) of the Treaty of Waitangi Act 1975 into the coalition Government's repeal of s 7AA of the Oranga Tamariki Act 1989 on "Duties of chief executive in relation to Treaty of Waitangi (Tiriti o Waitangi):

> It is not clear to us why the constitutional relationship between the Crown and the Tribunal should prevent the Tribunal from asking for information that would, in its view, assist it to carry out the Inquiry. The question of the relevance of evidence from the Minister was properly one for the Tribunal. Even if comity did apply, the principle must involve obligations of both "actors": the Tribunal and the Crown. We consider the process followed in this

> case was characterised on both sides by the kind of cooperation and candour that was appropriate, given the nature of the Inquiry and its importance, together with the Crown's Treaty obligations.

The Courts have continued setting down new hearings under the Marine and Coastal Area (Takutai Moana) Act 2011, and to determine ongoing cases despite the Marine and Coastal Area (Takutai Moana) (Customary Marine Title) Amendment Bill (MACA Bill) going through the House to amend that Act. As Harvey J stated in a minute (*Tamihana Paki & Others v Attorney-General* CIV-2017-404-305, 7 August 2024, Minute of Harvey J (footnotes omitted).

> Counsel underscored that given the recent announcement by the Government to amend the legislation, it would a waste of the parties and the Court's time and resources to embark upon a hearing that would then be subject to a significant law change clarifying the tests set out in s 58 ...
>
> I acknowledge the arguments that Court time is valuable and should not be wasted. Similarly, the costs to the taxpayer and the parties, including the interested parties, are substantial. I appreciate the point that once the hearings had concluded, and there was a change to the legislation altering the tests set out in s 58, inevitably this would require the matter to be re-heard, wholly or in part ... The Court must deal with the legislation enacted by Parliament. It cannot take account of announcements and must apply the existing statutory provisions. If and when that changes, then the parties will have the opportunity to make submissions on the effect of those changes.

The cases referred to by Harvey J in the minute are *Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-op Group Ltd* [2014] NZHC 1681; *Reihana v Rakiura Titi Committee* [2016] NZAR 1491; *Kidd (Trustees Of The Whenuanui Trust) v Registrar-General of Land* [2021] NZHC 1747; *Pascoe v Environment Court* [2024] NZHC 87, *Fitzgerald v Muldoon* [1976] 2 NZLR 615 at 622–623; *Ngāti Whatua Orakei Trust v Attorney-General* [2019] 1 NZLR 116; *R v Morgan* [2021] NZHC 3352 at [27]; *Re Ngāti Pāhauwera* [2022] NZHC 394 (8 March 2022) at [27] and [28]; *Hata v Attorney-General* [2023] NZHC 2919 (18 October 2023).

At the same time, the Courts have avoided trespassing into areas within the remit of Parliament's lawmaking processes as in *Te Rūnanga o Ngāti Whātua v Attorney-General* [2024] NZHC 2271, [2024] 3 NZLR 218.

Any question as to whether the doctrine of parliamentary sovereignty means that Parliament can pass any law which cannot then be challenged in court (Philip A Joseph, above) is not well answered in the absence of a legal challenge framed around specific facts. Speculating about what the courts might do if they received such a challenge is unhelpful.

THE COST/BENEFIT ANALYSIS WITH APPLYING FOR DECLARATIONS OF INCONSISTENCY

A declaration of inconsistency would serve as a formal notice that the legislation limits rights in a way that the courts consider cannot be "demonstrably justified in a free and democratic society" (s 5, NZBORA), but most clients think it is only worth the cost of bringing such legal proceedings if the government is prepared to change the law.

Despite the enactment of the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022 which requires the Attorney-General to notify Parliament of the declaration of inconsistency and requires the responsible minister to report to Parliament on the Government's response to the declaration within 6 months of the notice at the latest (ss 7A and 7B of the NZBORA), no one has yet filed an application for a declaration of inconsistency that any enactment passed by this coalition Government is inconsistent with the NZBORA.

A successful declaration does not overturn the enactment, as in Canada and the United States, and this coalition Government has not acted on two previous declarations of inconsistency detailed below.

In *Make it 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683 the Supreme Court issued a declaration of inconsistency that the provisions of the Electoral Act 1993 and of the Local Electoral Act 2001 which provide for a minimum voting age of 18 years are inconsistent with the right in s 19 of NZBORA to be free from discrimination on the basis of age, and cannot be justified under s 5 of NZBORA (at [72]).

In response, the previous Labour Government introduced the Electoral (Lowering Voting Age for Local Elections and Polls) Legislation Bill on 15 August 2023 which would have lowered the voting age for local elections but not for general elections. The new coalition Government terminated and discharged the Bill while it was being considered by the Justice select committee in January 2024 as a "costly distraction" for councils with no "convincing reason" for the change (Hon Simeon Brown, "Government withdraws voting age bill," press release, 26 January 2025).

A 2010 amendment to the Electoral Act 1993 removed the right to vote for persons sentenced to less than three years in prison. In *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 793 the High Court at [79] issued a declaration that s 80(1)(d) of the Electoral Act 1993 (as amended by the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010) is inconsistent with the right to vote affirmed and guaranteed in s 12(a) of the NZBORA and cannot be justified under s 5 of NZBORA.

The Supreme Court in *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 confirmed that there was jurisdiction to make such a declaration of inconsistency. In response, the previous Government passed the Electoral (Registration of Sentenced Prisoners) Amendment Act 2020 to restore voting rights to such persons (Andrew Little "Prisoner voting rights to be restored ahead of the 2020 General Election" (press release, 23 November 2019)). But this coalition Government has decided it will introduce legislation to reinstate the voting ban for all prisoners in 2025 (Hon Paul Goldsmith "Government to reinstate prisoner voting ban" (press release, 30 April 2025)).

REVIEWING THE USE OF URGENCY

The use of urgency should be reviewed by the Standing Orders Committee and the Office of the Clerk of the House, especially where the change has retrospective effect and cuts across ongoing court proceedings. The Standing Orders of the House of Representatives 2023, SO 57 currently state that ministers can make a motion to use urgency, if passed by a simple majority. Ministers must "inform the House with some particularity of the circumstances that warrant the claim for urgency". And SO 61 allows a motion for extraordinary urgency after an urgency motion has been moved may only take effect if the speaker agrees that the business to be taken justifies it.

Even though there is not much more legislation being introduced this term of Parliament, Government Bills are being pushed through more urgently. To date, 22 Bills have been passed under urgency, which is nearing the 17-year record of 28 Bills being passed this way in one term of government, while we are only halfway through the term ("Urgency under scrutiny as pay equity changes rushed through", *1News* (online ed, 11 May 2025)). The record was set by the single party majority Labour Government in the 53rd Parliament ((22 November 2022) 764 NZPD).

The Deputy Clerk of the House has provided information on 3 March 2025 by email to the author that there are many more first readings of Government Bills under urgency (95 compared with 72 and 74 under the previous two Parliaments over similar periods) and a continuing trend of increasing use of urgency for first and second readings — from 4 to 12 to 21 over the last three Parliaments.

The current Parliament has also shortened the period of select committee consideration of Bills, constraining the time for the public to make submissions and for the select committees to consider them before report back to the House and second reading. Six-month referrals used to be the case for three quarters of Bills — now it is less than half. The result is huge pressure on the lawmaking process/system, including the Parliamentary Counsel Office and the Office of the Clerk.

COALITION AGREEMENTS AND QUARTERLY ACTION PLANS

The clear statement of what the coalition Government intends to do in the coalition agreements provides some certainty which is helpful for New Zealanders to plan their lives. Even those opposing such actions are assisted by the clear nailing of colours to the mast which can help mobilise opposition (Siena Yates, above: "Margaret Mutu says, if David Seymour has achieved one thing, it's that he's united us. The level of resistance to this government, the level of kōtahitanga that we feel in te ao Māori, together with tāngata Tiriti who support us, is more than I've felt since the foreshore and seabed movement").

The Government's quarterly action plans announced by the Prime Minister also give greater visibility of what policy and lawmaking will be progressed in the next 90 days. For example, the Government Action Plan released on 2 April 2024 listed 36 priorities to be completed by 30 June 2024; and the latest action plan of 7 April 2025 listed 36 action points, many of which concern policy and law making. Prior to this, most governments had an initial 100-day plan but did not issue quarterly plans on an ongoing basis (for example, the press release from the Rt Hon Jacinda Ardern on 1 February 2018 "We did this! 100 Day Plan complete").

I say some, as not all changes are in the coalition agreements nor signalled in the Prime Minister's Quarterly Action Plans, such as the amendments to the Equal Pay Act 1972. The factual accuracy of what the coalition agreements state is the purpose and effect of the agreed actions is also contested, which is not a new development.

Select committees have been receiving more written submissions than ever before in this term of Parliament, and heightened levels of submissions are now being normalised (figures provided by the Deputy Clark of the House in an interview with the author on 11 March 2025). The 303,500 submissions made on the Principles of the Treaty of Waitangi Bill is the all-time standout. The prior record was 107,000 submissions on the Conversion Practices Prohibition Legislation Bill, and before that, the record was 33,000 submissions for the End-of-Life Choice Bill; and before those 20,000 submissions on the Marriage (Definition of Marriage) Amendment Bill.

The submissions on the Principles of the Treaty of Waitangi Bill also evidence greater participation by all parts of NZ — Māori, pākehā and the superdiverse (Katy Watson "Thousands of Māori bill protesters reach New Zealand parliament" *BBC News* (online ed, 18 November 2024). Many had to learn about how Parliament and select committees worked to make submissions, enhancing public understanding of how our constitution works. The submissions I read and the oral submissions I heard discussed fundamental constitutional values, parliamentary sovereignty and what the courts had determined about the meaning and status of Treaty of Waitangi, as reflected in the report back from the Justice Committee on the Bill (Justice Committee, *Principles of the Treaty of Waitangi Bill 94-1 and two related petitions* (4 April 2025)).

LOBBYING FOR CHANGES TO POLICY AND LEGISLATION IS HARDER

Lobbying for changes in policy and lawmaking has limited effect in a true coalition government as the deals have already been struck and cannot be changed as they are the conditions of forming the coalition Government. This means that lobbying needs to happen earlier in the (previous) election cycle. Also, adding an extra commitment to the agreed list of policy and law reforms in the coalition agreements is difficult, unless a crisis or emergency requires it. The exception is if one of the coalition partners is prepared to champion *changes* to an agreed commitment, but getting that commitment scrapped altogether will not be possible.

Policy negotiations on the details of what has already been agreed in the Coalition Agreements do go on between the coalition parties, but it is behind closed doors consistent with the operating procedures in the appendices at the back of the Coalition Agreements. There is also a Cabinet Office Circular ("National, ACT and New Zealand First Coalition Government: Consultation and Operating Arrangements" (25 March 2024) CO 24/2) that provides guidance for Ministers and agencies on the consultation and operating arrangements agreed to by the coalition Government (National Party, the ACT Party, and the New Zealand First Party). And the Cabinet Manual discusses "agree to disagree" processes, paragraph 5.29 stating that:

> Ministers from parliamentary parties supporting the government may be bound by collective responsibility only in relation to their particular portfolios, including any specific delegated responsibilities. Political parties may by agreement specify the circumstances in which a Cabinet or Cabinet committee minute records that a decision relating to the Minister's portfolio area is not consistent with a party's position. Outside of any such agreement, when such Ministers speak about issues within their portfolios, they speak for the government and as part of the government. When they speak about matters outside their portfolios, however, they may speak as political party leaders or members of Parliament rather than as Ministers, and do not necessarily represent the government position.

Continued on page 214

6.6 per cent of the total tax revenue collected by the government in 2023 and would be sufficient to enable material tax cuts in other areas ("Financial Statements of the Government of New Zealand for the Year Ended 30 June 2023" New Zealand Treasury (2023) at 9). This revenue, TOP argued, would provide the opportunity to restructure existing income tax brackets, and provide a tax-free $15,000 income threshold. Access to a greater portion of their income would allow lower and middle income households the cashflow necessary to pay tax levied on their land. Furthermore, the tax would operate in a proportional manner, as landowners with larger and more valuable plots of land would pay a greater share and effectively fund tax breaks in other areas. A land tax implemented in this way, would target the effects of economic segregation as lower income households will have greater access to disposable income and, therefore, greater access to wealth and wealth-creating opportunities.

While a land tax implemented in this way would facilitate the lessening of the wealth gap by allowing lower and middle income households greater disposable income, equity concerns remain when considering the disproportional impact it may have on certain groups. Low-income earners with highly valuable land assets, such as the elderly, would be impacted as they would be unlikely to have sufficient cash on hand to pay the land tax. Another group who may be disproportionately impacted are renters. Landlords facing higher costs could pass these on, resulting in higher rents. Ultimately, equity concerns related to a land value tax would increase political pressure to exempt certain groups or forms of land from land tax liability.

Although exemptions may be required to ensure equity concerns are met and mitigate political pressure, historically, exemptions to land taxes in New Zealand have shown to drastically reduce their effectiveness. By 1982, only 5 per cent of land in New Zealand was taxed due to various exemptions (Jonathan Barret and John Veal "Land Taxation: a New Zealand Perspective" 10(3) eJlTaxR 573 at 578). By 1991, a year before the tax was abolished, it only accounted for 1 per cent of the government's total tax revenue ("Report of the Task Force on Tax Reform" (April 1982) IRD at 230). While some exemptions, such as on Māori, public and conservation land, may be a political necessity, other politically popular exemptions such as an exemption on principal residences should be avoided. An exemption on all residential property would reduce the potential tax base by over 38 per cent ("Land Tax" (September 2009) Tax Working Group at 3). However, based on 2010 figures, if only the above exemptions are provided, the tax could still produce revenue of $3.8 billion (at 6).

While exemptions may be important from an equity and political plausibility perspective, historically, they have undermined the tax base to the point to where a land tax was largely ineffective. Exemptions, therefore, should be limited. Any equity concerns could be addressed through material tax cuts in other areas, ensuring the tax does not disproportionately impact those unable to pay. For example, notwithstanding lower to middle income earners being subject to a new tax, they could take home a greater portion of their pay through cuts in income tax.

ADDITIONAL SUPPORTING CRITERIA

Efficiency

Compared to other base-broadening measures, such as a capital gains or property tax, a land tax has much higher efficiency. Where a property tax may incentivise landowners not to make improvements or a capital gains tax may distort investment choices, a land tax targets the value of unimproved land, so it would have little impact on how landowners decide to use the land or other economic behaviour regarding it. However, it would undoubtedly incentivise landowners to make productive use of the land to fund the liability. Furthermore, land is a fixed resource, so a tax on it cannot affect its production. Unlike other base-broadening alternatives, a land tax would cause little or no deadweight loss.

Revenue integrity

As a fixed resource, land cannot be concealed or relocated to other jurisdictions, making it difficult for avoidance strategies to be successful. With minimal exemptions and a uniform rate across all types of land, a land tax would achieve high levels of revenue integrity.

Convenience

Because of the existing land valuation built into local government rating systems, a land tax would be convenient to implement. A land tax, therefore, could be introduced at a far lower administrative cost to the government than other base-broadening alternatives. Furthermore, the fact landowners in New Zealand already pay rates indicates that a shift to a land tax would not be as politically unfavourable as the introduction of a new tax. If framed in such a way as a reorientation of the rates system rather than a new tax, a land tax may receive less voter backlash than a capital gains tax has received in the past.

CONCLUSION

Provided a land tax is introduced with a broad base, few exemptions and at a uniform rate, it has the potential to alleviate financial burdens on lower to middle income households. Through the redistribution of financial capital held by New Zealand's most wealthy, it may also assist in narrowing economic segregation and ensure equitable access to wealth and wealth creating opportunities across households at all levels of income. Furthermore, a land tax's efficiency, revenue integrity and convenience would likely make its implementation far more favourably politically than other base broadening alternatives. ❐

Continued from page 190

As we enter the second half of this true coalition Government's term, we are likely to see more use of the agree to disagree provisions as the parties seek to differentiate themselves in advance of the next general election in 2026. Whether this results in all parties staying in the coalition Government full term or departures resulting in the calling of an early election, as in the past coalitions with minor parties, remains to be seen. ❐