

Kerrin Eckersley

Parliament v The Judiciary:

The curious case of Judicial Activism

**LLM RESEARCH PAPER
LAWS 549: THE JUDICIARY**

**VICTORIA UNIVERSITY OF WELLINGTON
FACULTY OF LAW
2015**

Contents

<i>Abstract</i>	iii
<i>I INTRODUCTION</i>	1
<i>II NEW ZEALAND'S CONSTITUTIONAL STRUCTURE</i>	2
A Parliamentary Sovereignty	2
B Rule of Law and Judicial Independence	2
C Separation of Powers	3
<i>III JUDICIAL ACTIVISM</i>	4
A The Origins of Judicial Activism in New Zealand	5
B The Supreme Court Debate	8
<i>IV AN ACTIVIST SUPREME COURT?</i>	9
A NZBORA: Declarations of Inconsistency	10
B NZBORA: Damages	11
C Room for Improvement	12
D Parliamentary Response	13
E Conclusion	14
<i>V FEARING JURISTOCRACY</i>	14
<i>VI CONCLUSION</i>	17
<i>VII BIBLIOGRAPHY</i>	19

Abstract

In 2004 amidst much controversy the Supreme Court was established by way of the Supreme Court Act 2004. The controversy that surrounded this event related in part to Ministerial concern that “Judicial Activism” would abound. This paper sets out to re-examine the concept of judicial activism in relation to New Zealand’s constitutional arrangement and considers whether in the 11 years since the Supreme Court’s establishment the decisions that have eventuated can be said to be evidence of an activist judicial bench.

The conclusion reached is that New Zealand does not have an activist judiciary, especially not in the sense imagined by some parliamentary representatives. The Supreme Court decisions to date evidence a conservative and deferential judiciary. If judicial activism were to exist it is difficult to conceive of such activism having any meaningful effect without a NZBORA which allows for the judiciary to strike down inconsistent legislation. This author believes that New Zealand should not fear increasing judicial power in that way as any increase is unlikely to awaken judicial activism.

Word length

The text of this paper (excluding abstract, table of contents, title page and bibliography) comprises 7,572 words.

Subjects and topics

Parliament

Judiciary

Judicial Activism

Supreme Court

I Introduction

At the start of the 21st Century significant debate arose concerning “Judicial Activism”, a politically constructed term arising from perceived threats from the Judiciary to Parliamentary Sovereignty.

This debate was ignited by two polarising events. Firstly, the decision of the Court of Appeal in *Attorney General v Ngati Apa*¹ which resulted in the Government breaking with convention and openly criticising the courts² and secondly, the abolishment of the right to appeal to the Privy Council and the associated creation of the New Zealand Supreme Court, which raised concern that “repatriating our final court would encourage ‘judicial activism’ or ‘judicial supremacism’”.³

This paper re-examines the idea of judicial activism in New Zealand and queries whether the Supreme Court has risen to the levels of activism so feared by some in Parliament.

The first part of this paper discusses the relevant constitutional arrangements in New Zealand. From this platform, the development of perceived judicial activism is explored with specific reference to the debates that preceded the Supreme Court Act 2003.

In the third part of this paper a selection of substantive appeal decisions from the Supreme Court are examined in order to assess whether activist intent is present. In the authors opinion the fear of judicial activism most commonly arises where judgments touch on issues that are of public, and thus political importance. For that reason judgments of that nature are primarily discussed.

In the fourth section the fear of judicial activism is considered, with reference to why vesting higher law making power in the judiciary is so contentious. Arguments for and against this proposition are discussed.

The conclusion reached is that the Supreme Court has adopted a largely conservative approach which may be reflective of the unstable political footing upon which the Court was founded. There is no activism, as envisaged by Parliament, present in the decisions issued to date and if there were, without the New Zealand Bill of Rights Act 1990 (NZBORA) as supreme law, such activism would be of little effect. On that point, this author believes that New Zealand should be less fearful about empowering the judiciary to strike down legislation

¹ *Attorney-General v Ngati-Apa* [2003] 3 NZLR 643 (CA).

² Ruth Betty “Cullen’s attack draws criticism” *The New Zealand Herald* (online ed, Auckland, 2 June 2004).

³ Terence Arnold “Parliament and the Courts: Arm Wrestle or Handshake?” (2005) 3 NZJPIL 45 at 45.

which is NZBORA inconsistent as such empowerment is unlikely to awaken dormant judicial activism.

II New Zealand's Constitutional Structure

To appreciate why judicial activism incites controversy it is important to understand the constitutional arrangements that exist in New Zealand.⁴

A Parliamentary Sovereignty

The guiding principle is the sovereignty of Parliament which is preserved in the Constitution Act 1986 and confirms that Parliament continues to have full power to make full laws.⁵ As was commented on by McGrath J in his final sitting in the Supreme Court; that Act “recognises, with clarity, that Parliament is the supreme law making power of the nation”.⁶

The supremacy of Parliament was again legislatively confirmed by the addition of section 3(2) of the Supreme Court Act 2003 which states that “nothing in this Act affects New Zealand’s continuing commitment to the rule of law and the sovereignty of parliament”.⁷ Although, interestingly this particular provision does not form part of the Judicature Modernisation Bill, which if passed will replace, among other legislation, the Supreme Court Act 2003.⁸

While the supremacy of Parliament may at times have felt under threat it is still the case that in New Zealand, for now, the doctrine of Parliamentary Sovereignty is preserved.⁹

B Rule of Law and Judicial Independence

The judiciary are tasked with upholding the rule of law and in so doing are “subject to nothing other than the law”.¹⁰ Judicial Independence is guaranteed by security of tenure and

⁴ Although judicial activism is by no means a term exclusive to New Zealand.

⁵ s 15(1).

⁶ John McGrath, Retired Judge of the Supreme Court “Final Sitting Speeches for Honourable Justice John McGrath” (Supreme Court, Wellington, 6 March 2015) at 21.

⁷ s 3(2).

⁸ Judicature Modernisation Bill 2013 (178-2).

⁹ See Jeffrey Goldsworthy “Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty” (2005) 3 NZJPIL 7 at [37] where Goldsworthy concluded that whilst Parliament presently retains sovereignty whether it will in the future is impossible to predict.

¹⁰ Aharon Barak “A Judge on Judging: The Role of a Supreme Court in a Democracy” (2002) 116 Harvard Law Review 16 cited by Sian Elias, Chief Justice of New Zealand “Challenges for Judicial Legitimacy in Modern Democracy” (JD Guest Lecture, University of Melbourne, Australia, 8 October 2003).

salary¹¹ and “by constitutional conventions which prevent the executive directing the judiciary or criticising the judiciary. Parliament only directs the judiciary by legislation”.¹²

Judicial Independence is described as “a cornerstone of our system of government in a democratic society and a safeguard of the freedom and rights of the citizen under the rule of law”.¹³

C Separation of Powers

In order to give effect to Parliamentary Sovereignty and Judicial Independence; all branches of government are restricted by the doctrine of separation of powers. Simply put the doctrine “provides that the executive should design laws, the legislature should enact them, and Judges should enforce them in individual cases”.¹⁴ Whilst there is a degree of overlap between the executive and the legislature “the judiciary is generally considered more separate”.¹⁵

To preserve the separation of powers constitutional conventions are in place that prohibit Members of Parliament, except by leave and at the discretion of the Speaker, from discussing any matter that is awaiting or under adjudication by any New Zealand Court.¹⁶ In determining whether to exercise discretion to allow discussion the Speaker must:¹⁷

...balance the privilege of freedom of speech against the public interest in maintaining confidence in the judicial resolution of disputes, and takes into account the constitutional relationship of mutual respect that exists between the legislative and judicial branches of government ...

It must be noted however that this prohibition on comment ceases to have effect “in any case where the verdict and sentence have been announced or judgment given”.¹⁸ If members of Parliament do proceed to comment on judicial decisions they are prohibited from making any offensive comments against any member of the judiciary.¹⁹ As will be evident from the discussion to follow, these conventions are not always strictly adhered to.

¹¹ Constitution Act 1986, s 24 states that the “... salary of Judges of the High Court shall not be reduced during the continuance of the Judge’s commission”.

¹² Guidelines for Judicial Conduct (Reviewed 2013) at [15].

¹³ Judicial Conduct, above n 12 at [11].

¹⁴ Thomas Gibbons “Criticising Judges: constitutional tensions” [2003] 10 NZLJ 418 at 420.

¹⁵ Gibbons, above n 14.

¹⁶ Standing Orders of the House of Representatives 2014, SO 115.

¹⁷ SO 115(3).

¹⁸ SO 116(2).

¹⁹ SO 117.

The reciprocal duties of the judiciary towards Parliament are enshrined in The Guidelines for Judicial Conduct. It is stated that whilst Judges “cannot avoid entering upon politically contentious matters” if they are properly brought before them in legal proceedings that any comments “should be measured”.²⁰

III Judicial Activism

It is accurate to state that “tensions between the appellate courts and the other two branches of government, the executive and legislature, over the development and application of the law are inevitable and healthy”.²¹ However it must equally be accepted that at the point where such “tension” spills into allegations of “judicial activism” that New Zealand’s constitutional structure becomes threatened.²²

It is a well-established constitutional convention that politicians should not criticise judges. To do so may damage the independence of the judiciary and public confidence in the legal system. When MP’s make comments to the extent of those made by Franks and Cullen, they breach the separation of powers and step outside their constitutional role; they act in a manner which is, in a sense, “activist”.

It is generally accepted that the judiciary in exercising the judicial function make law, albeit in an incremental fashion and within the confines of the common law.²³ Part of this role has included the discretion conferred by Parliament to interpret generally worded provisions in NZBORA, Human Rights Act 1993 and with respect to the Treaty of Waitangi. In so doing Parliament has implicitly required a more active judiciary.²⁴

Therefore judicial activism must speak to something more than incremental law-making and whilst clearly a pejorative term it remains an ill-defined concept as accurately demonstrated here:²⁵

Used pejoratively it suggests that the ethical judge is a passive, mechanical creature, a rather unflattering picture of judicial work. Used eulogistically it seems to imply that bold and creative judges are akin to political activists, a not very reputable bunch and another unwelcome judicial image. And if all ‘judicial activism’ refers to is the institional law-making aspect of judging then it is no big deal these days And if none of these is what ‘judicial activism means then we have a hopelessly imprecise,

²⁰ Judicial Conduct, above n 12 at [16].

²¹ Bruce Harris “Judicial Activism and New Zealand’s Appellate Courts” in B Dickinson (ed) *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, Oxford, 2007) 273 at 275.

²² Thomas Gibbons “Criticising Judges: further comments” [2004] 6 NZLJ 245 at 246.

²³ Campbell T “Judicial Activism – Justice or Treason” [2003] 2 Otago LR 307 at 310.

²⁴ Terence Arnold, Judge of Supreme Court, “Update on the Supreme Court” (Legal Research Foundation Annual General Meeting, Wellington, 7 August 2003).

²⁵ Campbell T, above n 23 at 310.

ambiguous and unhelpfully emotive term that reeks of journalism rather than dispassionate analysis.

Elias CJ has described judicial activism as an “easy ... and damaging” label.²⁶ In a speech given in 2004 her Honour strongly disavowed the term and stated:²⁷

Some people seem to use the term to describe the author of any judgment they do not like. That is simply abusive. Others apply it to those they consider crusaders for particular causes. When used in this way, it is effectively a charge of bias and an attack on the observance of the judicial oath. More moderately the term may be used to describe a judge who is thought to be too ready to overturn precedent or fill a need in the law that would be better left to Parliament. That is a claim of judicial imperialism, insufficiently deferential to democratic process.

Whilst a helpful legal definition is available;²⁸ where this paper is concerned it is the emotive definition that seems to have permeated the Parliamentary debates and is therefore most relevant.

A The Origins of Judicial Activism in New Zealand

The fear of judicial activism and thus threat to Parliamentary supremacy was acute during the passage of NZBORA. In its original form NZBORA was stated to protect the fundamental rights of New Zealanders against the power of the state, with such protection being “enforced by the courts as supreme law”.²⁹ If the Bill had been passed as supreme law the courts would have been empowered to declare legislation “of no effect” for inconsistency with NZBORA.³⁰

A concern which therefore permeated this intended purpose was the effect of transferring power to the judiciary.³¹ In order to ensure passage of the Bill through Parliament its supreme status was deleted meaning that even if legislation is deemed inconsistent with NZBORA the Government of the day is not obliged to amend or repeal that statute or the provision thereof.

²⁶ Sian Elias, Chief Justice of New Zealand “The Next Revisit: Judicial Independence 7 years on” (8th Neil Williamson Memorial Lecture, Christchurch, 30 July 2004).

²⁷ Elias, above n 26.

²⁸ See Campbell T, above n 23 at 311 “...a judicial activist is essentially (a) a judge who does not apply all and only such relevant, existing, clear, positive law as is available; and (2) a judge who makes such decisions by drawing on his or her moral, political or religious views as to what the content of the law should be”.

²⁹ Geoffrey Palmer “What the New Zealand Bill of Rights Act aimed to do, why it did not succeed and how it can be repaired” (Presentation to the Legal Research Foundation Conference, Auckland, 25 September 2015 at 6.

³⁰ *Taylor v Attorney-General* [2015] NZHC 1706 at [6].

³¹ Palmer, above n 29 at 6 and 8.

Despite the limited judicial powers conferred, in 1997 it was stated that NZBORA was being used “by the judiciary to strengthen its hand against the legislature”³² and that “judicial activism is a fact of life in New Zealand”, a state of affairs which was likely to have “undesirable long-term consequences” said to include “a more uncertain legal system and a weakened democracy”.³³

The case which caused the controversy was *Simpson v Attorney General (Baigent’s Case)* where the Court of Appeal confirmed that damages are available for breaches of NZBORA.³⁴ The justification for deeming it judicial “activism” was two-fold: (a) that NZBORA contained no provision for remedies and (b) that Parliament had in fact deliberately removed a remedies provision from earlier drafts of the Bill.³⁵ The judgment in *Simpson* was said to have “... made it apparent that the New Zealand Judiciary is prepared to give the Bill of Rights Act an elevated status and influence that its framers explicitly rejected”.³⁶

The Presiding Judge in *Simpson v Attorney General* was the jurist who was likely considered to be the most “activist” during his time on the bench, the late Lord Cooke of Thorndon.³⁷ That Lord Cooke was open to questioning the supremacy of Parliament was earlier observed by his comments in, among other cases, *Taylor v New Zealand Poultry Board* where he suggested that “some common law rights ... lie so deep that even Parliament could not override them”.³⁸ As a result of this case and comments made in earlier cases,³⁹ Lord Cooke was described in a subsequent article as being a “major proponent”⁴⁰ for the alternative theory of judicial supremacy which would involve that “all legislation be subject to review in the courts to ensure its compliance with the constitution”.⁴¹

In her Eulogy for Lord Cooke however Elias CJ questioned the reputation that Lord Cooke had garnered and stated:⁴²

³² James Allan “The Rise of Judicial Activism in New Zealand” (1997) 4 *Agenda* 465 at 466.

³³ Allan, above n 32 at 473.

³⁴ *Simpson v Attorney General* [1994] 3 NZLR 667.

³⁵ Allan, above n 32 at 468.

³⁶ Allan, above n 32 at 469.

³⁷ Lord Cooke was appointed to the High Court [formerly Supreme Court] in 1972, moved to the Court of Appeal in 1976 and served as President of the Court of Appeal from 1986 to 1996.

³⁸ *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at [8].

³⁹ See *L v M* [1979] 2 NZLR 519 (CA) where Sir Robin Cooke stated “It would be a strange step for Parliament to attempt to confer on a body other than the Courts power to determine conclusively whether or not actions in the Courts are barred. There is even room for doubt whether it is self-evidence that Parliament could constitutionally do so” and *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA) where he stated: “It is arguable that some common law rights go so deep that even Parliament cannot be accepted by the Courts to have destroyed them”.

⁴⁰ Matthew D J Conaglen “Judicial Supremacy: An Alternative Constitutional Theory” (1992 – 1995) 7 *AULR* 665 at 675.

⁴¹ At 672.

⁴² Sian Elias, Chief Justice of New Zealand “Eulogy for Lord Cooke “ (St Pauls Cathedral, Wellington, 4 September 2006).

Contrary to folklore, Lord Cooke believed that it is not the role of the judge to mould society – other forces lie at the root of social change. In that regard, as in most others, the Judge has at best an identifying and balancing function.

Following *Simpson v Attorney-General* was the decision of the Court of Appeal in *Moonen v Film and Literature Board of Review* where the Court, presided over by Chief Justice Elias, confirmed that if a Court were to determine that a limitation on a right or freedom was unjustified and therefore inconsistent with s 5 of the New Zealand Bill of Rights Act, then:⁴³

... the Court may declare this to be so ... the Court having the power, and on occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, if it is inconsistent with the Bill of Rights in that it constitutes an unreasonable limitation on the relevant right or freedom which cannot be demonstrably justified in a free and democratic society ... New Zealand society as a whole can rightly expect that on appropriate occasions the Courts will indicate whether a particular legislative provision is or is not justified thereunder.

That *Moonen* was presided over by Elias CJ is a point not lost in the debate on judicial activism,⁴⁴ as it is the Chief Justice who has been most accused of judicial activism and being open to challenging Parliament's supreme law making powers. The Chief Justice's reputation as an activist appears to have arisen from: (a) her participation in the *Ngati-Apa* case; and (b) comments made in an address given at the University of Melbourne which seemingly questioned the validity of Parliamentary sovereignty. Her Honour commented: "Parliamentary sovereignty is an inadequate theory of our constitution. An untrammelled freedom of Parliament does not exist".⁴⁵

Subsequent to those events it was said that senior Government members were heard to talk of the need to "Sian-proof" legislation in order to leave as "few ambiguities and loose ends in legislation ... as possible in order to leave no room for later judicial activism".⁴⁶ The suspicion of the judiciary was said to be due to the "belief that those who would dismiss [parliamentary sovereignty] are often activist and more likely to deliver decisions of the foreshore ilk – with a devil may care attitude to its consequences".⁴⁷

⁴³ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [19] to [20].

⁴⁴ Although when it comes to declarations of inconsistency the Chief Justice in *Hansen v R* [2007] NZSC 7 at [6] considered the utilisation of s 5 of NZBORA to be a "soft form of judicial review" inconsistent with s 4 of NZBORA. However her Honour went on to confirm at [8] that she was inclined to think that it would be available to a Court to formally declare whether a limit is justifiable under s 5 in appropriate cases.

⁴⁵ Sian Elias, Chief Justice of New Zealand "Another Spin on the Merry-Go-Round" (Address for The Institute for Comparative and International Law, 2003, University of Melbourne, Australia, 19 March 2003).

⁴⁶ "Elias – top judge and judicial activist" *The New Zealand Herald* (online ed, Auckland, 29 March 2005).

⁴⁷ *Ibid.*

Thus the introduction of a Bill intended to create a final appellate court with ostensibly, the Chief Justice at the helm not surprisingly became the subject of significant Ministerial concern.

B The Supreme Court Debate

The Supreme Court Bill 2003⁴⁸ was introduced into Parliament on 9 December 2002. Subsequent to a First Reading the Bill was referred to the Justice and Electoral Committee. At committee stage 312 written submissions were received with the majority of submitters opposing the establishment of the Supreme Court.⁴⁹

For the purposes of this paper the most relevant aspect of the Select Committee Report was the recommendation that the purpose clause be expanded to include “New Zealand’s commitment to the rule of law and the sovereignty of Parliament”.⁵⁰ The inclusion of this recommendation resulted from concerns by National and ACT Party Members regarding the potential for judicial activism if the subservience to Parliamentary Sovereignty were not explicitly noted.⁵¹

An issue that permeated the debates related to judicial appointments to the Supreme Court and the fear that the Labour Government would be stacking the bench in their favour. During the second reading debate the Hon Richard Prebble, then Leader of ACT NZ stated:⁵²

... we now have unelected judges prepared not to interpret the law but to make it ...
... I say that Margaret Wilson and Helen Clark, when putting forward this Supreme Court Bill, know that they are establishing a court that will pass laws that even they cannot get through the Labour Party caucus ... I say to this House that the Marlborough court case will turn out to be just the start of a series of cases by unelected judges not interpreting the law but creating it.

During the third reading debate the Hon Bill English, the then Leader of the Opposition, warned “if any of them think they are going to do a Lord Cooke and put five of them on there, they are wrong, because that approach will certainly lead to a clash with this Parliament”.⁵³

⁴⁸ Supreme Court Bill 2003 (16-2).

⁴⁹ Justice and Electoral Committee, Supreme Court Bill (16 September 2003) at 5.

⁵⁰ Justice and Electoral Committee, above n 49 at 22.

⁵¹ Petra Butler “Human Rights and Parliamentary Sovereignty in New Zealand” (2004) 35 VUWLR at 342.

⁵² (7 October 2003) 612 NZPD 8905.

⁵³ (14 October 2003) 612 NZPD 9098.

Interestingly it was Labour party member David Parker who gave a lengthy warning to the courts on the limitations of their powers and cautioned “that [the Court] should not play with fire, but should leave law making, including laws relating to the treaty, to Parliament”.⁵⁴

In perhaps a veiled response to some of the Ministerial criticisms raised, the Chief Justice in her speech during the First Sitting of the Court commented:⁵⁵

If we have not entirely eliminated the unintended consequences of hasty legislation, in the company of the Minister of Justice and the Secretary of Justice it may be polite to express confidence that this courtroom is unlikely to see many such examples.

Despite the tenor of the Parliamentary debates, the Supreme Court Act 2003 was passed by a marginal majority⁵⁶ and the Court began hearing cases on 1 July 2004.

IV An Activist Supreme Court?

The Supreme Court sets its own agenda by way of the broad discretion provided by s 13 of the Supreme Court Act 2003 which provides guidance on when a grant of leave to appeal can be made.⁵⁷ In addition to the s 13 provisions, Blanchard J has confirmed that the Supreme Court imposes an additional test of “arguability” and in 2008 commented:⁵⁸

... the Court has from the outset taken the stance that it cannot be in the interests of justice that a second appeal be permitted in order to ventilate an argument which is quite obviously hopeless – where the result is plainly right and the reasons given are supportable. It is implicit in section 13 that the matter of public or general importance must be a matter which is truly arguable.

Since its inception the Court has received 1,311 applications for leave and from those filings has granted leave on 335 occasions. As at 12 October 2015 the Supreme Court had issued 296 substantive appeal decisions.⁵⁹

⁵⁴ (14 October 2003) 612 NZPD 9108.

⁵⁵ Sian Elias, Chief Justice of New Zealand “Address by the Right Honourable Dame Sian Elias, Chief Justice of New Zealand” (First sitting of Supreme Court, Wellington, 19 February 2010).

⁵⁶ Only 63 out of 120 votes.

⁵⁷ Supreme Court Act 2003, s 13(1) states that leave to appeal is not to be given unless “it is necessary in the interests of justice”. Section 13(2) confirms that it is in the “interests of justice” if the appeal involves a matter of general or public importance; or if a substantial miscarriage of justice has occurred or may occur unless the appeal is heard; or if the appeal involves a matter of general commercial significance. Section 13(3) confirms that a significant issue relating to the Treaty of Waitangi is a matter of general or public importance. Section 13(5) extends the Court’s discretion by stating that the guidance set out in section 13(2) does not limit the “generality” of section 13(1).

⁵⁸ Peter Blanchard, Retired Judge of the Supreme Court “The Early Experience of the Supreme Court” (2006) 6 NZJPIL 175 at 189.

⁵⁹ Interview with Gordon Thatcher, Supreme Court Registrar (Supreme Court, Wellington, 12 October 2015).

As noted at the outset, in researching judicial activism and its development in New Zealand, it became apparent that claims of this nature arise most often in response to decisions touching on matters of public, and thus political importance, such as human rights issues.⁶⁰ It is therefore primarily issues of that tenor which are discussed in this part.

A NZBORA: *Declarations of Inconsistency*

The most effecting decision where NZBORA is concerned is *Hansen v R* which remains the leading authority on the operation of sections 4, 5 and 6 of the Act.⁶¹ In the context of judicial activism however it is most relevant in the restraint exercised by the judiciary in not making a declaration of inconsistency.⁶² In particular McGrath J appeared to be at pains to acknowledge the acute limitations of the judiciary in comparison to the supreme law making powers of the other branches of government.⁶³

The role of the Courts is, however, limited to ascertaining the meaning of legislation in accordance with the statutory directions and does not extend to the responsibility that Courts assume in jurisdictions where human rights are protected by a supreme law. Nor does the role allow the Courts to apply common law powers to effect the implied repeal of legislation or otherwise to disapply or render its provisions ineffective. As a result, it is to be expected that New Zealand Courts from time to time will be constitutionally bound, applying s 4 of the Bill of Rights Act, to give effect to legislation which they have concluded is not capable of being read consistently with the Bill of Rights. In such instances it is the constitutional responsibility of the Court to indicate in its judgment that it has relied on s 4 of the Bill of Rights Act to uphold an inconsistent provision in another statute.

There has been no legislative response to *Hansen* despite the finding that the “reversal of the legal burden of proof ... offends against the presumption of innocence” and in fact Parliament has continued to include reverse onus provisions in proposed and enacted legislation.⁶⁴

⁶⁰ Petra Butler “Bill of Rights” in MR Russell and M Barber (eds) *The Supreme Court of New Zealand 2004 - 2013* at 255 states: “Human rights issues have been a significant feature of the Supreme Court’s jurisprudence and their nature is such that they force, probably more than any other area of the law, each judge to confront the essence of his or her conception of the judicial role”.

⁶¹ *Hansen v R* [2007] NZSC 7.

⁶² See Petra Butler “It Takes Two to Tango – Have They Learned Their Steps?” 4 VUWLRP 136/2014 at 31 where Butler commented: “To the surprise of many, however, the Court stopped short of issuing a declaration of incompatibility despite the majority’s conclusion that the reverse onus provision was an unjustified limitation on the right to be presumed innocent ... if there was a case which would have warranted a declaration of incompatibility than it would have been *Hansen*”.

⁶³ *Hansen v R*, above n 62 at [259].

⁶⁴ Butler, above n 62 at 23. See also Misuse of Drugs (Classification of BZP) Amendment Bill 2007 and The Criminal Proceeds (Recovery) Act 2009, s 53.

The Supreme Court had earlier declined to express any opinion on whether declarations of inconsistency were within the jurisdiction of the courts but did indicate that if such jurisdiction existed it was likely to come within the High Court's general jurisdiction.⁶⁵ Expanding on that indication the Supreme Court in a later case opined that if declarations of inconsistency were available, it was only by institution of civil proceedings.⁶⁶

Although the Supreme Court has resisted advancing in a conclusive way the law on declarations of inconsistency, this has not prevented the High Court from making the first declaration of inconsistency in the 25 year lifespan of NZBORA.⁶⁷

B NZBORA: Damages

The finding of the Court of Appeal in *Simpson v Attorney-General* that damages for NZBORA breaches are available was not overturned nor challenged by Parliament.⁶⁸ It is generally accepted therefore that such relief is available and the Courts have awarded damages for violations of NZBORA rights. The following two Supreme Court case examples provide insight into the Court's approach to damages.

In *Attorney-General v Chapman* the Court limited the availability of *Baigent* damages to transgressions by the executive or legislative branches of government and held that damages were not available for judicial breaches of NZBORA. In coming to this conclusion McGrath and W Young JJ called on the importance of preserving judicial independence:⁶⁹

All in all, allowing compensation claims for judicial breach of the Bill of Rights Act would be as inimical to judicial independence as permitting claims to be advanced against judges personally.

...

For the reasons we have outlined, we hold that the public policy reasons which support personal judicial immunity also justify confining the scope of Crown liability for government breaches of the Bill of Rights Act to actions of the executive branch. Such liability should not be extended to cover breaches resulting from the actions of the judicial branch.

...

As discussed, the finality in litigation and the importance of judicial independence and public confidence in that independence are here of particular importance.

⁶⁵*Taunoa v Attorney-General* [2006] NZSC 95 at [8].

⁶⁶*Belcher v The Chief Executive of the Department of Corrections* [2007] NZSC 54 at [6].

⁶⁷*Taylor v Attorney General*, above n 30 at [79].

⁶⁸*Butler* above n 62 at 21 – 22.

⁶⁹*Attorney-General v Chapman* [2011] NZSC 110 at [192] and [204].

In *Taunoa v Attorney-General* the majority of the Court reduced the amount of *Baigent* damages awarded in the Court of Appeal to prisoners subject to a prison regime deemed inconsistent with the right to be treated with humanity and dignity.⁷⁰ The awards were reduced by almost half in each case, although in her dissent Elias CJ confirmed that she would have upheld the damages awarded in the lower Court.⁷¹ Whilst this case prompted a legislative response by way of the Prisoners and Victims' Claims Bill 2004.⁷²

C Room For Improvement

In other areas the Supreme Court has been criticised for not doing more to develop and expand the law. For example, an area where activist intent could perhaps have been exercised is in the law relating to judicial review, however as recently noted by Matthew Palmer QC the “most salient feature of the Supreme Court’s judicial review jurisprudence to date is the lack of it”.⁷³

One example of the Courts foray into judicial review is the case of *Prebble v Huata* where the Court determined what conduct by a Member of Parliament could effect “the proportionality of political party representation in Parliament as determined at the last general election”.⁷⁴ In their judgment the Court employed standard statutory interpretation techniques with little creative or activist moment and found that Ms Huata by continuing as an independent member of Parliament for parliamentary purposes had acted “in a way that distorted the proportionality of political party representation in Parliament”.⁷⁵ This decision was described as “markedly deferential” but that may have been due to the fact that the legislation in question would lapse at the 2005 election.⁷⁶ One Minister who, subsequent to this decision, had a particular reversal in his view of the Supreme Court was Mr Prebble who commented, in response to a criticism of the Supreme Court judiciary:⁷⁷

Will the Attorney-General take the opportunity to repudiate ... the comments made by Mr Trevor Mallard criticising Her Majesty’s Supreme Court judges in light of the excellent judgment shown by those judges in their first case *Prebble v Huata*?”.

⁷⁰ *Taunoa v Attorney-General* [2007] NZSC 70.

⁷¹ At [114] to [118].

⁷² See Butler, above n 62 at 35 who noted that this action was contrary to the view that “Parliament should, where appropriate, await the Judiciary’s response on a particular issue” in order to give effect to the “desirability of co-operation with the courts”.

⁷³ Matthew Palmer “Judicial Review” in MR Russell and M Barber (eds) *The Supreme Court of New Zealand 2003 – 2014* (Thomson Reuters, Wellington, 2015) 158 at 160.

⁷⁴ *Prebble v Huata* [2005] 1 NZLR 289 (SC) at [24].

⁷⁵ At [55].

⁷⁶ Andrew Geddis “MP’s had better keep their leaders happy” *The New Zealand Herald* (online ed, Auckland, 25 November 2004).

⁷⁷ (30 November 2004) 622 NZPD 17218.

Whilst the Supreme Court has without doubt enhanced access to justice for criminal defendants, the Courts approach to criminal law issues has been characterised by “a tenacious adherence to the language of the statute”⁷⁸ and where Evidence Law is concerned the Court has been criticised for “murky reasoning” and not doing enough to develop the law and elaborate on clear legal principles.⁷⁹

In contrast an example of where the Court has significantly expanded an area of law, is the case of *Allenby v H*.⁸⁰ In that case the Court somewhat controversially expanded the scope of cover under the Accident Compensation Act 2001 by interpreting the meaning of “personal injury” to include pregnancy as a result of medical misadventure and rape. This was despite the removal of pregnancy, as an example of personal injury, from the 1992 and later Accident Compensation legislation. There has been no legislative response to this decision but that may be a result of advice provided by the ACC to the Transport and Industrial Relations Select Committee that claims for pregnancy cover and associated costs were not expected to be significant.⁸¹

D Parliamentary Response

In *Ye v Minister of Immigration* the Court considered a removal order under s 58 of the Immigration Act and effectively settled the law around the “administrative processes that the Immigration Service must undertake in reaching a decision to grant or cancel removal orders for persons unlawfully in New Zealand”.⁸² The Court confirmed the following tripartite test in order to assist officials to make those decisions:⁸³

- (i) [The presence of] exceptional circumstances;
- (ii) Of a humanitarian nature;
- (iii) That would make it unjust or unduly harsh for the person to be removed from New Zealand.

Sections 177(3) and 476(6) of the Immigration Act 2009 encapsulate Parliament’s response to this decision and further evidence of that response is seen in a speech given during the third reading of the Immigration Bill, which highlighted the “practical implications” of the

⁷⁸ “The New Zealand Supreme Court – the first ten years” *Law News* (online ed, Auckland, 5 December 2014).

⁷⁹ *Ibid*.

⁸⁰ *Allenby v H* [2012] NZSC 33.

⁸¹ Transport and Industrial Relations Select Committee “ACC response for Financial Review” (February 2013) at 145. This indication may have been premature as in a recent District Court decision, *J v ACC* [2015] NZACC 222 Powell DCJ found at [19] that a Mother who had become pregnant and given birth after a failed sterilisation was entitled to weekly compensation because she is unable to work while caring for her dependent child. In addition his Honour indicated that other entitlements such as child care costs may be available. The ACC have filed an appeal of this decision.

⁸² *Ye v Minister of Immigration* [2009] NZSC 76 cited in Philip A Joseph “Public Law” in MR Russell and M Barber (eds) *The Supreme Court of New Zealand 2003 – 2014* (Thomson Reuters, Wellington, 2015) 196 at 212.

⁸³ *Ye v Minister of Immigration* [2009] NZSC 76 at [34].

Court's decision in *Ye*, which was felt to require an immigration officer applying a complex legal case to decision making which was a state of affairs deemed to be impractical.⁸⁴

A second example of legislative change is effectively demonstrated subsequent to the decision in *Attorney-General v Leigh* where the Court was faced with a defamation claim by Ms Leigh relating to comments made by a Deputy Secretary orally and in writing to the Minister for the Environment.⁸⁵ The Deputy Secretary claimed that the comments were protected by absolute privilege and sought that the claim be struck out. The Court dismissed the appeal and held that the communication was not protected by absolute privilege. In response Parliament commissioned a report from the Privileges Committee which led to the introduction of the Parliamentary Privilege Act 2015 the driver of which “was the need to restore Parliament’s privilege of freedom of speech to the position occupied pre-*Leigh*”.⁸⁶

E Conclusion

Although a complete review of all substantive decisions from the Supreme Court is outside the scope of this paper, what can be seen from the limited review completed is that the Supreme Court has not established itself to be judicially activist⁸⁷ and in fact, in the most comprehensive study completed to date, it has been described as “conservative” and “seemingly reluctant to veer from a steady-as-she-goes approach”.⁸⁸

Whilst the “conservative” and “unadventurous” nature of the Supreme Court may be disappointing to those hoping for more advancement in New Zealand’s jurisprudence, an explanation may be found in the unsteady political ground upon which the Court was founded.⁸⁹ There may be hope for a less conservative approach as the Court develops.

V Fearing Juristocracy

The term ‘juristocracy’ was adopted by Ran Hirschl to refer to the rapid transference “of an unprecedented amount of power from representative institutions to judiciaries”.⁹⁰ Hirschl cited New Zealand as an example of a jurisdiction heading towards “new constitutionalism” due to the enactment of NZBORA which he described as marking “an abrupt change in the

⁸⁴ Butler, above n 62 at 43.

⁸⁵ *Attorney-General and Anor v Leigh* [2011] NZSC 106.

⁸⁶ Philip A Joseph “Public Law” in MR Russell and M Barber (eds) *The Supreme Court of New Zealand 2003 – 2014* (Thomson Reuters, Wellington, 2015) 196 at 222.

⁸⁷ Butler, above n 60 at 274 concludes “The Court has not been a human rights activist as some might have feared”.

⁸⁸ Mary Rose Russell “Introduction” in MR Russell and M Barber (eds) *The Supreme Court of New Zealand 2004 – 2013* (Thomson Reuters, Wellington, 2015) at li.

⁸⁹ Matthew Palmer, above n 73 at 159 and 170.

⁹⁰ Ran Hirschl “Towards Juristocracy: The Origins and Consequences of the New Constitutionalism” (Harvard University Press, London, 2004) at 1.

balance of power between the judiciary, the legislature and the executive ... and symbolized the demise of the ‘last Westminster system’”.⁹¹ Hirschl did however acknowledge that due to NZBORA’s non-entrenched status that “the judicialization of politics ... has occurred at a more moderate scale ...”.⁹²

Ostensibly the next step towards “new constitutionalism” is “to entrench the guaranteed rights against amendment by simple majority, and authorise the courts to strike down inconsistent legislation as unconstitutional and invalid”.⁹³ There is significant opposition to this movement and as recently stated, New Zealand is:⁹⁴

... a jurisdiction that [has] previously rejected a proposal to adopt supreme law because of suspicions of unelected judges and ... has consistently demonstrated, over the past fifty years of its law reform, a preference for administrative over judicial decision making. Judicial power is simply not part of New Zealand’s constitutional culture.

The leading criticism against increasing judicial power is that this elite group have not been elected by the New Zealand public and therefore any substantial transference of power would be undemocratic. Inherent in this opposition however is the assumption that the elected Parliament is representative of the New Zealand electorate. If the 2014 election statistics are consulted this is arguably not the case.

In the 2014 Election a 77.9% voter turnout was recorded.⁹⁵ Of that turnout, 47% of voters voted for the National Party.⁹⁶ Effectively therefore the National Party was voted into Government by 36.6% of eligible voters. Thus it is questionable as to whether the Parliament in which we have vested supreme law making powers is in fact representative of the New Zealand electorate.

This low voter turnout is reflective of a generally disengaged public when it comes to matters of governance. This raises a further question of whether, if judicial activism does exist, it can be in any way effective *without* an engaged public. If a judgment is considered activist, in the sense of finding a statute or provision inconsistent with NZBORA, a way of having Parliament react to that state of affairs would logically be by pressure from the electorate. Absent an engaged public however, there is no impetus on Parliament to respond and the judiciary remain powerless, without a supreme NZBORA, to effect positive change.

⁹¹ Hirschl above n 84 at 83.

⁹² Hirschl above n 84 at 27.

⁹³ John Smillie “Who wants juristocracy?” (2006) 11 Otago LR 183.

⁹⁴ Matthew Palmer, above n 73 at 159.

⁹⁵ www.elections.org.nz

⁹⁶ *Ibid.*

A secondary argument often made is that:⁹⁷

... increasingly frequent and open involvement in controversial moral and political issues will result in judges being identified with particular philosophies, interests and causes, and this will lead inevitably to a decline in public confidence in the impartiality of the judiciary and a loss of respect in the court system generally.

With respect this commentary does not address the fact that even without the ability to strike down inconsistent legislation, the judiciary are increasingly engaged in cases which raise moral and political issues. In addition the ability to declare provisions inconsistent,⁹⁸ if utilised more freely in the future, could lead to this result in any event, although this author believes that an encroachment on judicial impartiality and lack of confidence in the courts is unlikely to eventuate. As Elias CJ noted:

Saying what the law is remains the responsibility of Judges even if the formal omnipotence of Parliament is respected. And it is their responsibility under an unwritten constitution as it would under a written constitution. Those who fear empowering judges miss the point.

While many of these objections appear to arise from a fear that New Zealand is moving towards a constitutional structure where “judges of the highest court have the final say on controversial issues of morality and social policy”⁹⁹ there is a middle-ground that can be reached which will give more meaning to NZBORA whilst still deferring to the doctrine of Parliamentary sovereignty.

It was this course of action that was recently proposed by Sir Geoffrey Palmer:¹⁰⁰

The solution advanced, building on the long tradition of the entrenched provisions of the Electoral Act going back to 1956, is to give the Bill of Rights greater weight, so giving courts power to declare provisions invalid as infringing the Bill of Rights, while allowing Parliament to override the judicial decision by a special majority of 75 per cent or a referendum of the electors by a simple majority.

In the author’s opinion absent a NZBORA which empowers the judiciary to strike down inconsistent legislation, the rights and freedoms contained in NZBORA do not provide full protection to New Zealand citizens. In addition the claim that judicial activism will abound if

⁹⁷ John Smillie above n 93.

⁹⁸ It must be noted however that Mr Simllie, above n 93, did, in his article, advocated for the repeal of NZBORA and the abolition of the Supreme Court and therefore declarations of inconsistencies themselves would be felt to erode confidence in the judiciary.

⁹⁹ John Smillie, above n 93.

¹⁰⁰ Geoffrey Palmer, above n 29 at 2.

the judiciary were entrusted with such power can be alleviated when the following facts are acknowledged:

1. The Supreme Court has proved to be conservative and deferential.
2. It has taken 25 years for the first declaration of inconsistency to be made.

In addition there is a persuasive argument in favour of increasing judicial powers where it may encourage the legislature to abide more resolutely with the Attorney-General's s 7 NZBORA Reports, because as recently noted "67 such reports have occurred in the life of the Bill of Rights Act On thirty-eight occasions parliament has passed Acts with provisions that contained in the opinion of an Attorney-General a breach of the Bill of Rights".¹⁰¹ If inconsistent legislation could be struck down, the s 7 reports would have much more utility in framing legislation before enactment.

An issue that will of course accompany any change in judicial power is the judicial appointments process but that is a matter outside the scope of this paper.

VI Conclusion

Judicial activism speaks of something more than judges simply fulfilling the role conferred upon them by Parliament which includes interpreting legislation consistently with NZBORA. It is an allegation that the judiciary are going beyond the scope of interpretation and are veering into making or re-writing laws in a way which encroaches on Parliamentary sovereignty.

Judicial activism however, with regard to the legal definition or the more pejorative injunction, is not evident in the Supreme Court decisions issued to date. In fact the Supreme Court has maintained conservative deference to Parliament's sovereign power. In addition, even if judicial activism were to be present, it is unlikely to be of any effect with (a) a disengaged public and (b) Parliament's ability to overturn any decision issued by the Courts.

That Parliament retains sovereign powers is demonstrated by the examples discussed of legislative change in the face of contentious Supreme Court decisions and by the marked silence of Parliament in the face of the first declaration of inconsistency issued in 25 years.

Judicial activism is largely therefore a politically constructed term which has the damaging effect of creating a fear of an empowered judiciary. This is unfortunate as rather than bringing to life an otherwise dormant activist judiciary, this author believes that empowering the judiciary to strike down legislation that is inconsistent with NZBORA will have the

¹⁰¹ Geoffrey Palmer, above n 29 at 12.

positive effect of, among other things, greater adherence by Parliament to Attorneys-General's Reports. To this end New Zealand should be less afraid of an "activist" judiciary.

VII BIBLIOGRAPHY

PRIMARY SOURCES

A Legislation

Constitution Act 1986

Supreme Court Bill 2003

Supreme Court Act 2004

Judicature Modernisation Bill 2013 (178-2).

B Cases

1 New Zealand

Allenby v H [2012] NZSC 33.

Attorney-General v Chapman [2011] NZSC 110.

Attorney-General and Anor v Leigh [2011] NZSC 106.

Attorney-General v Ngati-Apa [2003] 3 NZLR 643 (CA).

Belcher v The Chief Executive of the Department of Corrections [2007] NZSC 54

Brader v Minister of Transport [1981] 1 NZLR 73

Condon v R [2006] NZSC 62.

Fraser v State Services Commission (CA 28/83) 21 December 1983

Hamed v R [2011] NZSC 101.

Hansen v R [2007] NZSC 7.

Haronga v Waitangi Tribunal [2011] NZSC 53.

L v M [1979] 2 NZLR 519

McGrath v Accident Compensation Corporation [2011] NZSC 77.

Moonen v Film and Literature Board of Review [2000] NZLR 9 (CA).

New Zealand Drivers Association v New Zealand Road Carriers [1982] 1 NZLR 374

Prebble v Huata [2005] 1 NZLR 289 (SC).

Simpson v Attorney-General [1994] 3 NZLR 667.

Taunoa v Attorney-General [2006] NZSC 95.

Taunoa v Attorney-General [2007] NZSC 70.

Taylor v New Zealand Poultry Board [1984] 1 NZLR 394.

Ye v Minister of Immigration [2009] NZSC 76.

C Parliamentary and Government Materials

Justice and Electoral Committee *Supreme Court Bill* (16 September 2003).

Hansard Debate (7 October 2003) 612 NZPD.

Hansard Debate (14 October 2003) 612 NZPD.

Hansard Debate (30 November 2004) 622 NZPD.

Guidelines for Judicial Conduct (Reviewed 2013)

Report of the Privileges Committee, Hon Christopher Finlayson QC, Chairperson “Question of privilege concerning the defamation action *Attorney-General and Gow v Leigh*” (June 2013)

Justice and Electoral Committee *Judicature Modernisation Bill* (13 June 2014).

Standing Orders of the House of Representatives, 2014.

D *Texts*

Ran Hirschl *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, England, 2004).

“Judicial Activism in Common Law Supreme Courts” B Dickinson (ed) (Oxford University Press, Oxford, 2007).

“The Supreme Court of New Zealand 2004 – 2013” MR Russell and M Barber (eds) (Thomson Reuters, Wellington, 2015).

E *Journal Articles*

Matthew Conaglen “Judicial Supremacy: An Alternative Constitutional Theory” [1992 – 1995] 7 AULR 665.

James Allan “The Rise of Judicial Activism in New Zealand” (1997) 4 Agenda 465.

Thomas Gibbons “Criticising Judges: constitutional tensions” (2003) NZLJ 418.

T Campbell “Judicial Activism – Justice or Treason” (2003) 10 Otago LR 307.

Thomas Gibbons “Criticising Judges: further comments” (2004) NZLJ 245.

Petra Butler “Human Rights and Parliamentary Sovereignty in New Zealand” (2004) 35 VUWLR.

Stephen Franks “Political criticism of Judges” (2004) NZLJ 11.

Jeremy Waldron “Compared to What? Judicial Activism and New Zealand’s Parliament” (2005) NZLJ 441.

Terence Arnold QC “Parliament and the Courts: Arm Wrestle or Handshake?” (2005) 3 NZJPIL 45.

Jeffrey Goldsworthy “Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty” (2005) 3 NZJPIL 7.

John Smillie “Who Wants Juristocracy?” (2006) 11 Otago LR 183.

Peter Blanchard “The Early Experience of the New Zealand Supreme Court” (2008) 6 NZJPIL 175.

Petra Butler “It Takes Two to Tango – Have They Learned Their Steps?” (2014) 4 VUWLRP 136/214.

Brice Dickinson “Activism and Restraint within the UK Supreme Court” (2015) 21 EJoCLI 1.

F ***Speeches***

Sian Elias, Chief Justice of New Zealand, “Another Spin on the Merry-Go-Round” (Speech for the Institute for Comparative and International Law, University of Melbourne, Australia, 19 March 2003).

Terence Arnold “Update on the Supreme Court” (Legal Research Foundation Annual General Meeting, Wellington, 7 August 2003).

Sian Elias, Chief Justice of New Zealand, “Challenges for Judicial Legitimacy in a Modern Democracy” (JD Guest Lecture, University of Melbourne, Australia, 8 October 2003).

Sian Elias, Chief Justice of New Zealand, “Superior Courts in Transition” (Address Given to the Anglo-Australasian Society, London, 13 May 2004).

Sian Elias, Chief Justice of New Zealand, “The Next Revisit”: Judicial Independence 7 years on” (8th Neil Williamson Memorial Lecture, Rydges Hotel, Christchurch, 30 July 2004).

Sian Elias, Chief Justice of New Zealand, Eulogy for Lord Cooke (St Paul’s Cathedral, Wellington, 4 September 2006).

John Priestley, High Court Judge “Chipping Away at the Judicial Arm” (Harkness Henry Lecture, Waikato Law School, Hamilton, October 2009).

Sian Elias, Chief Justice of New Zealand “Address by the Right Honourable Dame Sian Elias” (First Sitting of Supreme Court, Wellington, 19 February 2010).

Sian Elias “Fundamentals: a constitutional conversation” (Harkness Henry Lecture, University of Waikato, Hamilton, 12 September 2011).

Andrew Tipping, Retired Judge of Supreme Court “Final Sitting Speech” (Supreme Court, Wellington, 17 August 2012).

Lord Dyson, The Master of the Rolls “Criticising Judges: Fair Game or Off-Limits” (The Third Annual Bailii Lecture, England, 27 November 2014).

John McGrath, Retired Judge of Supreme Court “Final Sitting Speeches for Honourable Justice John McGrath” (Supreme Court, Wellington, 6 March 2015).

Geoffrey Palmer “What the New Zealand Bill of Rights Act aimed to do, why it did not succeed and how it can be repaired” (Presentation to the Legal Research Foundation Conference, Auckland, 25 September 2015).

G *Media Articles*

Ruth Berry “Cullen’s attack draws criticism” *The New Zealand Herald* (online ed, Auckland, 2 June 2004).

Andrew Geddis “MP’s had better keep their leaders happy” *The New Zealand Herald* (online ed, Auckland, 25 November 2004).

“Elias – top judge and judicial activist” *The New Zealand Herald* (online ed, Auckland, 29 March 2005).

“The New Zealand Supreme Court – the first ten years” *Law News* (online ed, 5 December 2014),

H *Interviews*

Gordon Thatcher, Registrar of Supreme Court (Supreme Court, Wellington, 9 October 2015).