Constitutional Law

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I Introduction

This review continues the practice that was established following the first mixed-member proportional (MMP) elections in 1996. These reviews have recorded each of the MMP election results and the governments that were formed, and traced the transformation from formal party coalitions to the looser support arrangements under confidence and supply agreements (see respectively [1997] NZ L Rev 209 at 209-216, [2000] NZ L Rev 301 at 301-307, [2003] NZ L Rev 387 at 388-393, [2006] NZ L Rev 123 at 124-130, [2009] NZ L Rev 519 at 520-524, [2012] NZ L Rev 515 at 516-519). This review summarises the 2014 election results and records the configuration of government under National Prime Minister, Rt Hon John Key. The commentaries have progressively shortened in length with each election as the vagaries of government formation under MMP have been ironed out. The exception was the election commentary that followed the 2005 elections, when Prime Minister Helen Clark jettisoned the formal coalition model and settled on the current configuration organised around confidence and supply agreements. This configuration has become the norm under the successive National Governments (2008-2011, 2011-2014, 2014 -) that succeeded Clark.

The review will then examine seven public law developments from 2013-2015: three statutory, two judicial, one statutory inquiry and one non-statutory inquiry. The topics are:

- the report of the Constitutional Advisory Panel
- the Inquiries Act 2013
- periodic reviews of the security and intelligence agencies
- the New Zealand Public Health and Disability Amendment Act 2013
- the Parliamentary Privilege Act 2014
- the question whether the Crown can be a fiduciary owing duties to Maori, and
- the position of minor political parties that are excluded from televised election debates.

One reform that is before Parliament will be deferred until the next review, when it will have come into effect. The Judicature Modernisation Bill 178-1 (2013) portends a major restructuring of the courts. Part I will establish an umbrella statute reconstituting the superior courts (re-designated "senior courts"), which includes the High Court, the Court of Appeal and the Supreme Court. Part II will replace the District Courts Act 1947 with a new District Court Act establishing a single, unitary District Court, and Part III will re-enact the Judicature Amendment Act 1972 using modernised language. The Bill will create "a more people-centred, modern and accessible justice system by improving the transparency, flexibility and relevance of [the] courts [sic] … processes for court users" (Judicature Modernisation Bill 178-1 (2013), Explanatory Note at 1).

II The 2014 elections

A *The electoral results*

The 2014 elections were held on Saturday 20 September 2014. The following records the results for parties that gained representation in the House of Representatives. Parties that win five per cent or more of the party vote, or one or more electorate seats, satisfy the electoral threshold for gaining representation. Each party is allocated a proportion of seats in the House relative to its share of the overall party vote (Electoral Act 1993, s 191 (4)).

Party	**per cent of party votes**	**Electorate seats**	**List seats**	**Total seats**
National Party	47.04	41	19	60
Labour Party	25.13	27	5	32
Green Party	10.7	0	14	14
New Zealand First	8.66	0	11	11
Māori Party	1.32	1	1	2
ACT New Zealand	0.69	1	0	1
United Future	0.22	1	0	1

The National Party increased its number of seats by one from the previous Parliament but remained one seat shy of winning an historic absolute majority (61 seats in a 121 member House). No party has won the right to govern alone under the MMP voting system. On election night it appeared that National had won that right but its 61 seats on election night dropped to 60 seats once the special votes were counted. This necessitated the support of one or more minor parties to shore up National's vote on confidence and supply. Within days of the election, the party had entered into confidence and supply agreements with the same three support parties from the previous

Parliament. Agreements with the ACT and United Future parties were concluded on 29 September, and an agreement with the Māori Party was concluded on 5 October. Such arrangements were never in issue. Following the initial election-night count, when it appeared that National had the seats to government alone, John Key announced that he would still work to secure support agreements with National's former support parties.

The Key Government was sworn in at Government House on 8 October 2014. Twenty ministers were appointed to Cabinet (as is customary) and seven were appointed ministers outside Cabinet. These included five National Party members and the leaders/co-leaders of the United Future and Māori parties respectively (Hon Peter Dunne and Hon Te Ururoa Flavell)). David Seymour, the leader of the third support party (ACT), was appointed Parliamentary Under-Secretary to the Ministers of Education and Regulatory Reform. It would have been premature had Seymour been offered a ministerial post as it was his first term as a member of Parliament. The first cabinet meeting was on 13 October, and the State Opening of Parliament followed on 21 October.

B *Collective responsibility*

Under the convention of collective ministerial responsibility, it is necessary to distinguish between ministers inside Cabinet and ministers outside Cabinet. The convention has been re-interpreted from 2005 so as to mean collective *cabinet* responsibility. Cabinet ministers must publicly support cabinet decisions across all theatres of government but ministers outside Cabinet are not so constrained. The collectively principle applies only in respect of each minister's particular portfolio responsibilities. The support party leaders, Dunne and Flavell, must publicly support and/or implement cabinet decisions affecting their portfolios, but they are otherwise free to act as opposition members and criticise the government of which technically they are members. The five National ministers outside Cabinet are government members who will naturally support Cabinet's collective decision-making, irrespective of the licence that the convention now offers.

In my previous review ("Constitutional Law" [2012] NZ L Rev 515 at 518), I observed that the configuration of the National-led government under John Key now represents the norm under MMP. This configuration was settled upon following the 2005 elections, when the electoral outcome frustrated Prime Minister Helen Clark's plans for Labour to enter into a three-way coalition with the Progressive and Green parties. The Green Party failed to win sufficient seats to secure for the coalition the confidence of the House. Instead, Clark negotiated confidence and supply agreements with the New Zealand First and United Future parties to secure the 61 votes needed for Labour to govern. The support party leaders, Winston Peters and Peter Dunne, were appointed ministers

outside Cabinet, which released them from the discipline of collective responsibility. They were constrained to toe Cabinet's party line only in respect of their respective portfolio responsibilities.

John Key has continued the model that the 2005 precedent established. The advantage of this model is the stability it offers in government, while preserving the electoral integrity and voting base of the support parties. During each of the first three MMP Parliaments (1996-1999, 1999-2002, 2002-2005), the junior coalition partner was enveloped in what became known as the "coalition bear hug", which squeezed the electoral life out of the smaller party. Junior coalition ministers were members of Cabinet and were forced to accept equal responsibility for unpopular policies, which quickly eroded the party's electoral capital.

Would a future centre-left government comprising Labour and the Greens continue that configuration of government? The Green Party has never been in government and might conceivably desire a stronger bargaining plank than the current support arrangements offer. They might demand greater influence as cabinet ministers around the oval table, although at a very real potential cost if recent history is any guide. MMP politics from 1996-2005 were particularly bruising for junior coalition parties, which invariably lost traction in the polls as the parliamentary term progressed.

III Report of the Constitutional Advisory Panel

A *Establishment of the Panel*

The Constitutional Advisory Panel ("the Panel") was established in August 2011, following agreement reached between the National and Māori parties after the 2008 elections. It was agreed that the Panel would be established "by no later than early 2010" (*Relationship and Confidence and Supply Agreement between the National Party and the Māori Party*, 16 November 2008). In fact, the Panel was not established until many months later.

The ministers responsible for the Panel, Deputy Prime Minister Hon Bill English and Minister of Māori Affairs Hon Dr Pita Sharples, expressed lofty aspirations for the initiative. Engaging in a national conversation would provide, they believed, "a platform for debate that will inform and stimulate New Zealand's interest in our constitution". The Panel's work would provide "an enduring reference point for New Zealand's constitutional development" (letter of the ministers to the Panel,

29 August 2011, Constitutional Advisory Panel Report, *New Zealand's Constitution: A Report on a Conversation*, New Zealand Government, November 2013, at 2 ("Panel's Report")). Stimulating national debate on this topic was avowedly ambitious. New Zealanders have never taken a keen interest in constitutional matters. Discussions about statecraft are about as natural as discussions about nuclear physics. Attitudes have bordered on indifference, even apathy (see the writer's *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014 at 148-149). Twenty-one months on from the delivery of the Panel's report, one cannot discern any greater interest in constitutional matters than previously. Nor, it might be added, will the current initiative on changing the national flag stimulate any lasting interest in constitutional reform. The release of the shortlisted designs and choice of the final four did excite a flurry of attention but it is unlikely this will translate into any deeper interest in constitutional matters.

B *Constitutional conversation*

The Panel's task was to initiate a "constitutional conversation" with as wide a range of New Zealanders as possible (Panel Report, at 10). The report itself was subtitled "A Report on a Conversation". The object was to (Panel's Report, at 9):

- stimulate public debate about and awareness of New Zealand's current constitutional arrangements
- provide ministers with an understanding of New Zealand's perspectives on those arrangements, including the views of Māori
- report to ministers with advice on the constitutional topics, including any points of broad consensus where further work might be recommended.

The conversation was launched in February 2013 and concluded when the Panel reported to the Government in December 2013. A summary booklet about current constitutional arrangements was published in September 2012 (*New Zealand's Constitution: The conversation so far*), and made widely available to inform the conversations. Panel members attended or supported over 120 hui, community-hosted meetings and events covering the length and breadth of New Zealand. Information resources and a submission guide were posted on the Panel's website to assist individuals and groups making submissions, and to support communities intending to host their own conversations (Panel Report, at 10). A national media campaign in April 2013 and ongoing media releases raised awareness of the national conversation an opportunity to participate. When

submissions closed at the end of July, the Panel had received 5,259 submissions reflecting a diversity of views.

C *Terms of reference*

The Panel had set terms of reference, listing topics for discussion, but the Panel did not view these as setting jurisdictional boundaries. The topics and materials that the Panel supplied "sparked rich, wide-ranging and passionate conversations" (Panel Report, at 19), extending beyond the selected topics. The terms of reference were intended to initiate and steer, not control or inhibit, the conversation. The terms of reference were grouped under three headings:

Electoral matters

- size of Parliament
- length of the term of Parliament and whether or not the term should be fixed
- size and number of electorates, including the method of calculating electorate size
- electoral integrity legislation

Crown-Māori relationship matters

- Māori representation, including the Māori Electoral Option, Māori seats in Parliament and local government
- role of the Treaty of Waitangi within New Zealand's constitutional arrangements

Other constitutional matters

- Bill of Rights issues, including property rights and entrenchment issues
- question of a written constitution

D *Recommendations*

The recommendations tended to be neither categorical nor determinative but exploratory of the options available. The emphasis was on continuing the national conversation so as to explore further the range of options. Co-chairs of the Panel, Professor John Burrows and Sir Tipene O'Regan, wrote that their report "summarises the conversation, discusses common themes and makes recommendations on each topic" (Co-chairs' letter to the responsible ministers, undated, Panel Report, at 3). The report's key recommendations were twofold: (i) that the Government actively

support a continuing conversation about the constitution, with additional information provided about the current constitutional arrangements and possible options, and (ii) that the Government develop a national education strategy for civics and citizenship education in schools and the wider community (Panel Report, at 16).

The Panel's specific findings under each of the topics listed for discussion were:

A written constitution

- there was no broad support for a supreme law constitution, although there was support for entrenching elements of the constitution
- there was a consensus that the constitution should be made more accessible and understood, with a suggestion that our constitutional protections might be consolidated within a single statute
- there was a consensus that more information was required for the people to make an informed judgment on whether change was needed: in particular, information about the respective advantages and disadvantages of written and unwritten constitutions
- there was support for the national conversation to continue once the requisite information was available

Role of the Treaty of Waitangi

- the Government should continue to affirm the Treaty as the country's founding document
- there was support for a Treaty education strategy in order that the people might better understand the current role and status of the Treaty and the Treaty settlements process, and the rights and obligations under the Treaty
- there was support for continuing to develop the role and status of the Treaty as has occurred over the past few decades
- there was support to develop a range of options for the future role of the Treaty, including under existing constitutional arrangements and under arrangements where the Treaty is made the foundation document
- there was a consensus for the people to continue the conversation about the place of the Treaty in the constitution

Māori representation

- the Panel advised that the Government should retain current arrangements for the representation of Maori in Parliament (including the separate Maori seats) while the conservation continues
- there was support for investigating ways of improving Maori representation in Parliament and local government, having regard to a range of options, including Māori political structures and local and international models

New Zealand Bill of Rights Act 1990

- there was support to establish a public process to explore the options for amending the Act and improving its effectiveness, such as:
  - (i) adding economic, social and cultural rights, property rights and environmental rights
  - (ii) improving compliance by the executive and Parliament with the standards in the Act
  - (iii) giving the judiciary powers to declare whether legislation is consistent with the Act
  - (iv) entrenching all or part of the Act

Size of Parliament

- there was no support to explore further the size of Parliament

Term of Parliament

- there was discernible support for a longer parliamentary term than three years
- there was support for exploring what additional checks and balances might be desirable were a longer term implemented
- many believed that a change to a longer term should be accomplished by a national referendum rather than by a special majority in Parliament (both methods being available under s 268 of the Electoral Act 1993)

Fixed election date

- there was support to establish a public process to explore a fixed election date (as in the United Kingdom), alongside exploring the question of a longer parliamentary term

Size and number of electorates

- many believed that the discrepancy in geographic size of electorates compromised the representation of people in larger electorates, particularly in Māori and rural electorates
- there was support to set up a public process to explore ways to address the discrepancies and representational deficit

Electoral integrity legislation

- concerns were expressed about members of Parliament leaving the parties under which they were elected but there emerged no consensus on an appropriate response

Other issues

- the Panel recommended that Parliament should differentiate between different types of urgency called in debates and should minimise the use of urgency truncating select committee consideration of bills
- the Panel recommended that the following topics be explored in any further consideration of New Zealand's constitutional arrangements:
  - (i) the status and functions of local government and its relationship to central government
  - (ii) the role of He Whakaputanga o te Rangatiratanga o Nu Tireni (the Declaration of Independence)
  - (iii) the role and functions of the public service
  - (iv) the distinct interests of citizens of countries within the Realm of New Zealand
  - (v) the role and functions of the Head of State and symbols of state
  - (vi) an upper house of Parliament

E *Comment*

The range of topics the Panel explored and reported on was a smorgasbord: "a table assortment of hors d'oeuvres and many other dishes to which one helps oneself" (*The Chambers Dictionary* (New Edition, Chambers Harrap Publishers, Edinburgh, 1993)). The Panel's hors d'oeuvres were the expansive range of constitutional issues it supped upon. Almost all of these topics remain contestable rather than clear-cut and obvious. The few exceptions can be listed summarily: first, there is no case to support a return to the electoral integrity legislation that was in force from 2001-2005. The Electoral (Integrity) Amendment Act 2001 had a chequered life and should not be revived.

The arguments opposing such legislation are well documented (see the earlier edition of PA Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2001) at [10.0.5(3)] and the further references therein). Nor, secondly, is there need to revisit the question of an upper house of Parliament. Again, the arguments are well documented (see *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [11.8.2]). And nor, thirdly, is there any groundswell for tampering with the size of Parliament. Reducing the size of Parliament, as some have urged, would render unworkable the principle of proportionality under MMP.

Conversely, there is a demonstrable and clear-cut case to lengthen the parliamentary term to four years (with or without a fixed election date) (see PA Joseph "The Future of Electoral Law" in C Morris et al (eds) *Reconstituting the Constitution* (Springer-Verlag, Berlin, 2011) 219 at 237-240). However, previous referenda outcomes on the question do not provide encouraging reading: in 1967 68.1 per cent of voters opposed extending the term to four years, and in 1990 69.3 per cent of voters opposed the same. In "The Future of Election Law" at 239, I concluded: "New Zealanders' innate suspicion of politicians and governments militates against any extension of the term." Considerations of voter sovereignty trump the public interest in effective and efficient government.

IV Inquiries Act 2013

A *Introduction*

The Inquiries Act 2013 had its genesis in a 2008 Law Commission report, *A New Inquiries Act* NZLC R102. The initial impetus for the Commission's inquiry arose out of the outdated and confusing provisions of the Commissions of Inquiry Act 1908, under which Royal Commissions and Commissions of Inquiry operated. The Explanatory Note to the Inquiries Bill 283-1 (2008) observed that the 1908 Act had added cost and delay to commission inquiries, and had hindered rather than facilitated their purposes. In addition, there was a need for a flexible form of inquiry that ministers could convene for less complex, discrete issues that require independent investigation. The declared purpose of the Inquiries Act 2013 was to reform and modernise the law in a way that would promote flexible, effective and efficient inquiries within an appropriate legal framework (Inquiries Act 2013, s 3(1)).

B *The statutory scheme*

The Act provides for two types of inquiry: a public inquiry and a government inquiry (s 6(1)). Royal Commissions established under the authority of the Letters Patent are treated as public inquiries, and are accordingly made subject to the Act's procedures (s 6(1)(a)). Different appointments mechanisms attach to the two types of inquiry, reflecting their respective standing. The Governor-General establishes public inquiries by Order in Council, and ministers establish government inquiries by notice in the *Gazette* (6(2)(3)). The reporting function also captures the different standing of the inquiries. Persons conducting public inquiries report to the Governor-General and persons conducting government inquiries report to the appointing minister (s 12(1)). Once the report of a public inquiry has been presented to the Governor-General, the appropriate minister then presents the report to the House of Representatives (s 12(3)). There is no comparable requirement for government reports to be laid before the House for public scrutiny.

Persons conducting inquiries under the Inquiries Act 2013 may determine their own procedure, subject to the terms of reference of their inquiry (s 14(1)). The establishment instrument (the Order in Council or notice in the *Gazette*) must notify the terms of reference, including the matter of public importance that is the subject of the inquiry, the person or persons appointed to the inquiry, the chairperson where more than one person is appointed, and the date when the inquiry may commence. The instrument might also specify any matters relevant to the scope and purpose of the inquiry, any administrative or procedural matters, and a reporting date, provisional reporting date, or process for determining a reporting date (s 7).

The Inquiries Act 2013 sets out in detail the duties, powers, immunities and privileges of inquiries (see Part III). Inquiries and each of their members must act "independently, impartially, and fairly" (s 10) and comply with the principles of natural justice where persons may be adversely affected (s 14(2)(3)). Inquiries may: conduct interviews, call witness, hold hearings, receive evidence or submissions, or allow or restrict cross-examination of witnesses (s 14(4)). The inquiry may prohibit publication, in whole or part, of any evidence or submissions presented, or the name or other particulars likely to lead to the identity of a witness, or restrict public access to the inquiry, or hold the inquiry, or any part of it, in private (s 15). Inquiries have powers to summon witnesses (ss 23-24), take evidence on oath or affirmation (and to administer such oath or affirmation) (19(b)), compel persons to produce documents (s 20), or order persons to disclose to any person participating in the inquiry any specified document or information (s 22). Persons who fail or refuse

to comply with an order of the inquiry commit an offence punishable upon conviction to a fine not exceeding $10,000 (ss 29-30).

General machiney provisions further facilitate inquiries under the Inquiries Act 2013. The Solicitor-General may appoint legal counsel to assist an inquiry where the nature of the subject-matter so warrants (s 13). An inquiry may also recommend to the chief executive of the relevant department that funding be granted to provide legal representation for a person involved in the inquiry (s 18). Persons appointed to an inquiry enjoy a general immunity against criminal or civil action for things said or done in the course of the inquiry (unless done in bad faith) (s 26), and all participating persons and witnesses have the same immunities and privileges as if they were appearing in civil proceedings before a court of law (s 27(1)). Conversely, persons may be adjudged in contempt of an inquiry if they obstruct its due expedition (s 31). The Solicitor-General, at the request of an inquiry or on the Solicitor's own initiative, may commence proceedings in the High Court to exact the appropriate retribution.

C *"Covers the field"*

This section asks the question: Does the Inquiries Act 2013 "cover the field" so as to oust any residual freedom of the Crown to establish government-initiated inquiries? The answer is almost certainly "yes". In the absence of a separate authorising statute, all inquiries must now be constituted under the Inquiries Act 2013.

Inquiries or reviews independently constituted by statute do not raise questions of legality. What a statute enacts cannot be unlawful (*Cheney v Conn* [1968] 1 ALL ER 779 (ChD) at 782). Statutory provisions specifically authorising inquiries will prevail over the provisions of the Inquiries Act 2013. However, questions of legality may arise where government-initiated inquiries are established without a statutory foundation. The law recognises that the Crown qua executive (the *government*) enjoys a residual freedom to perform acts of government without positive authorisation of the law (*Ngan v R* [2007] NZSC 105, [2008] 2 NZLR 48 at [45]-[46], [93]-[98]; *Lorigan v R* [2012] NZCA 264, (2012) 25 CRNZ 729 at [37]; *Minister for Earthquake Recovery v Fowler Developments Ltd* [2013 NZCA 588 at [75]-[88]: but compare PA Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014, at [18.3.3]). The only restraints on the Crown's residual freedom are twofold: its exercise must not encroach on private rights or legally

recognised interests, and Parliament must not have legislated prescriptively for the activity in question. This comment addresses the latter restraint.

Statute displaces the Crown's residual freedom to act where legislation "covers the field" (*Minister for Earthquake Recovery v Fowler Developments Ltd* [2013 NZCA 588 at [79]-[80]); *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27 at [109]-[112]). The Crown may not dispense with the laws of Parliament under either its prerogative powers (*R (Shrewsbury and Atcham Borough Council) v Secretary of State for Communities and Local Government* [2008] EWCA 148, [2008] 3 All ER 548 at [50]-[51]) or its residual freedom to act *(Minister for Earthquake Recovery v Fowler Developments Ltd* [2013 NZCA 588 at [79]-[80]). The Inquiries Act 2013 is a comprehensive statute for constituting, regulating and empowering government-initiated inquiries. In short, it "covers the field" (*Quake Outcasts* (at [109]-[112]). Most, if not all, government-initiated inquiries fall within the statutory definition of a "public inquiry" or a "government inquiry".

Section 6(1) of the Inquiries Act 2013 is cast in peremptory language. It reads:

> **6 Types of inquiry**
>
> (1) This Act applies to the following types of inquiry:
>
> (a) Royal commissions established under the authority of the Letters Patent …, and this Act applies to Royal Commissions as if they were public inquiries:
>
> (b) public inquiries, which are established in accordance with subsection (2):
>
> (c) government inquiries, which are established in accordance with subsection (3).

The operative words are: "This Act applies to the following types of inquiry ..." Public and government inquiries are established "for the purpose of inquiring into, and reporting on, any matter of public importance" (s 6(2)(3)). All government-initiated inquiries, it seems, are established for that purpose. Consequently, inquiries not established under the Inquiries Act 2013 or some other statute will lack lawful authority.

The provisions of the Inquiries Act 2013 are couched in the language of a code. The Act is made expressly binding on the Crown (s 5) and the purpose section declares the Act's comprehensive coverage, namely: "to reform and modernise the law relating to inquiries" (s 3(1)(c)). The Act defines the duties, powers, immunities and privileges of inquiries in order to facilitate that statutory

purpose, and it stipulates how members of an inquiry must conduct their inquiries. It would be a strained interpretation to conclude that the Act's provisions were permissive so as to accommodate extra-legal inquiries.

V Periodic reviews of the security and surveillance agencies

A *Perplexing precedent*

The Inquiries Act 2013 is a generic statute applying across the entire theatre of public administration. Its standardised procedures were intended to apply to all government-initiated inquiries. Yet, some inquiries – even crucially important inquiries – are independently constituted under other statutes and are not subject to the standardised procedures. A perplexing example is the periodic review of New Zealand's surveillance and security agencies (the Government Communications Security Bureau and the New Zealand Security Intelligence Service).

The requirement to conduct periodic reviews was inserted by amendment to the Intelligence and Security Committee Act 1996 in 2013 (ss 21-27). These reviews must be conducted every 5-7 years (s 21). They were intended as an accountability mechanism to guard against clandestine activities in an age of extraordinary electronic surveillance capabilities. Citizens' personal autonomy must be guaranteed and not exposed to invasion by the surveillance and security agencies. But, for reasons not entirely clear, the law mandating the periodic reviews was tacked on to a statute that is of questionable utility in securing the agencies' operational accountability. The Intelligence and Security Committee Act 1996 established a parliamentary select committee to examine the administration and expenditure of the agencies, conduct annual financial reviews, and consider any bill, petition or other matter relating to an agency that the House refers to the committee. These matters pertain principally to the agencies' administration and expenditure, not their operational integrity and accountability. The committee is expressly withheld any power of inquiry concerning the agencies' activities that are "operationally sensitive" (s 6(2)).

The periodic reviews were for strengthening the agencies' public accountability. The Explanatory Note read: "to improve the [Intelligence and Security Committee's] ability to provide effective oversight and accountability of the intelligence agencies" (Government Communications Security Bureau and Related Legislation Amendment Bill 109-1 (2013)), Explanatory Note). But what the Act gives with the one hand, it takes with the other. The committee's jurisdiction (including its

jurisdiction to examine matters the House refers to it) is expressly made subject to s 6(2)(b). This provision prohibits the committee from "inquiring into any matter that is operationally sensitive, including any matter that relates to intelligence collection and production methods or sources of information". Under this statutory direction, the committee could not examine and/or report on the findings of a periodic review that addressed operationally sensitive matters. The House could not authorise such an examination even upon a referral. The House is but a constituent element of Parliament and may not override an Act of Parliament (*Stockdale v Hansard (*1839) 9 Ad & E 1, 112 ER 1112 (DC); *Bowles v Bank of England* [1913] 1 Ch 57).

C *Machinery provisions*

No explanation was given as to why the periodic reviews were not constituted as public inquiries under the Inquiries Act 2013. The 2013 amendment was passed just one month after the Inquiries Act 2013 had received the royal assent. The matter becomes more perplexing when one examines the machinery provisions for conducting periodic reviews. These are woefully deficient. The reviewers are granted two machinery provisions: they may request information from two sources – from chief executives of intelligence and security agencies and from the Inspector-General of Intelligence and Security (s 23) – and the Ministry of Justice must provide such administrative, secretarial and other support as may be needed (s 26). There is no other machinery available. Periodic reviews lack any compulsion or sanction. None of the powers, privileges or procedures available to inquiries under the Inquiries Act 2013 is available. Reviewers might request information or documents, or request persons to provide evidence or submissions, but they have no power to compel disclosure, and no power to compel the production of evidence. Access to information is key and it seems nonsensical not to arm an inquiry with the necessary powers.

D *Comment*

The 2013 precedent provides valuable insight. Governments should desist from promoting inquiries that are not constituted under the Inquiries Act 2013. This Act is a carefully devised statute, containing standardised procedures for promoting robust and effective inquiries. The statute had been fully investigated by the Law Commission, and it was on the statute book when the 2013 amendment was made. Why, then, were the Act's powers and procedures not utilised? Under the Act, periodic reviews would have ample powers for protecting sensitive security or surveillance information, such as holding inquiries in private, prohibiting publication of evidence or submissions,

or withholding the names of witnesses or the particulars that might lead to their identification (Inquiries Act 2013, s 15). The terms of reference of a periodic review conducted under the Act might also make whatever provision were thought necessary to protect sensitive information.

VI New Zealand Public Health and Disability Amendment Act 2013

A *Introduction*

The New Zealand Public Health and Disability Amendment Act 2013 ("the Amendment Act") raised serious rule of law concerns. The Key Government introduced the Amendment Act in response to the Human Rights Review Tribunal decision in *Atkinson v Ministry of Health* [2010] NZHRRT 1, and the Ministry's unsuccessful appeals to the High Court (*Ministry of Health v Atkinson* (2010) 9 HRNZ 47 (HC)) and Court of Appeal (*Ministry of Health v Atkinson* [2012] NZCA 184; [2012] 3 NZLR 456). Both courts upheld the Tribunal's declaration that the Ministry of Health's disabled care policy of excluding payment for family carers was unlawfully discriminatory on the ground of family status.

Atkinson was a test case. It was the first decision of the Human Right Review Tribunal ("the Tribunal") to review a government policy for inconsistency with the right to freedom from discrimination under s 19 of the New Zealand Bill of Rights 1990 ("the NZBORA") (*Ministry of Health v Atkinson* (2010) 9 HRNZ 47 at [5]). Previous Tribunal rulings had all entailed challenges to legislation, for which the only remedy is a declaration of inconsistency under the Human Rights Act 1993 (s 92J). Such declarations are of formal effect only. The Act declares that a declaration of inconsistency does not affect the validity, application or enforcement of a discriminatory enactment, or of any act, activity or policy carried out or adopted under it (s 92K). However, a discriminatory policy that is not premised on a discriminatory enactment can be declared unlawful and invalid. *Atkinson* threw down the gauntlet: how was the Government to react to a Tribunal declaration that a government policy was unlawfully discriminatory under the NZBORA?

Following the Court of Appeal decision, the Government announced it would not seek leave to appeal to the Supreme Court (Ministry of Health "Govt will not appeal family carers decision" (press release, 12 June 2012)). This left the Government three options: amend and rectify the discriminatory policy (which would have been the simplest response), legislate to validate the policy for all future claims of discrimination by family carers, or legislate to validate the policy retrospectively and prohibit all existing and future claims of discrimination by family carers. The

Government plumped for the third option and introduced the New Zealand Public Health and Disability Amendment Bill (No 2) 118-1 (2013). The object: to validate the policy retrospectively and end all current and future claims before the Tribunal. The only exception the Act made was for the nine claimants who were party to the *Atkinson* litigation. Their claim could be continued or settled as if the Amendment Act had not been enacted (s70G(1)).

B *The litigation*

The Tribunal granted a declaration that the Ministry of Health's policy of excluding payment for family carers was unlawfully discriminatory. The policy contravened the right to freedom from discrimination under the NZBORA on the ground of family status and was not a justified limitation under s 5. The Tribunal rejected each of the arguments the Ministry advanced: that paying family members to care for disabled family members would distort the familial relationship; that the "social contract" placed family support providers under a duty to care for disabled family members; that the family context promoted the concept of "natural support" as distinct from the concept of "disability support"; and that extending payment of disability support services to family members would be fiscally unsustainable. None of those arguments persuaded the Tribunal that the Ministry's policy was a justified limit on the right to freedom from discrimination.

The Ministry appealed unsuccessfully to the High Court and Court of Appeal. The High Court held that the blanket ban on recompensing family disability carers was disproportionate to the objectives of publicly-funded disability support. A more tailored scheme might well have satisfied those objectives: for example, where family carers were remunerated on condition they submit to a ministry interview and an appropriate selection process, or undertake ministry training and be subject to on-going mentoring (*Ministry of Health v Atkinson* (2010) 9 HRNZ 47 (HC) at 282). Nor was the Ministry's argument determinative, that remunerating family care providers would be fiscally unsustainable. The Ministry's calculations had not been based on any reliable fiscal research and any additional costs incurred would be but one among several factors to be weighed under the justified limitations clause (s 5). Any addition cost was "entirely relevant" but "not conclusive": "Cost is only a factor to be considered in the mix" (*Ministry of Health v Atkinson* (2010) 9 HRNZ 47 (HC) at [280]).

C *The Amendment Act*

From time to time, constitutional improprieties are so palpable they eschew any mincing of words. The Amendment Act must be called for what it is: constitutionally *objectionable*. Not illegal or invalid, but objectionable. It violated that ultimate principle of legality that unites liberal democracies around the world – the rule of law. It sought to deny citizens who had been wronged by government action their right of recourse to the courts for redress. The Attorney-General, Hon Chris Finlayson QC, warned the House of Representatives but to no avail. He reported under s 7 of the NZBORA that the New Zealand Public Health and Disability Amendment Bill (No 2) 118-1 (2013) was an unjustified breach of s 27(2) of the NZBORA, guaranteeing the right to judicial review of government action. How did the Government respond? With contumelious disregard, it has to be said. The Minister of Health introduced the Bill under urgency and set it down for all three readings on the one sitting day (16 May 2013).

Ironically, as fate would have it, the Government failed to achieve all of its unconscionable purposes. Related litigation in *Attorney-General v Spencer* [2015] NZCA 143 exposed shortcomings in the Amendment Act which allowed complainants to pursue their claims under the *Atkinson* family care policy. That was a fortuitous consequence of flawed drafting but there was no mistaking the Government's intentions. In *Spencer* the Court of Appeal dispassionately reflected on the objectionable features of the Amendment Act (at [84]):

> "It contained a number of features that are traditionally regarded as being contrary to sound constitutional law and convention – on the Ministry's interpretation it has retrospective effect, authorises discriminatory policies, withdraws rights of judicial review and access to the Tribunal, and did not go through the normal Parliamentary Select Committee and other processes."

The Amendment Act introduced a new Part 4A into the principal Act (the New Zealand Public Health and Disability Act 2000 ("the NZPHDA")). As the dictum from *Spencer* confirms, Part 4A set out to do three things: retrospectively reverse the *Atkinson* decision (albeit not for the actual parties to the decision), retrospectively affirm the legality of the Ministry's family carer policy (notwithstanding the Tribunal and court decisions), and foreclose access to the Human Rights Commission or the courts for actions for redress by persons unlawfully discriminated against. The purpose section gives legislative endorsement to the two main arguments that the Ministry unsuccessfully advanced in *Atkinson*. Section 70A(1) declares the need to keep disability support services provided by family

members "within sustainable limits", and it affirms the social contract argument that "families generally have primary responsibility for the well-being of their family members".

Section 70E is constitutionally repugnant. This enacts a privative clause that denies citizens' access to the Human Rights Commission, the Tribunal or the courts to seek redress for unlawful discrimination under a family care policy. No such proceedings may be brought or continued in any court or tribunal, and no complaint of unlawful discrimination may be made to the Commission. The Government had intended the privative clause to apply retrospectively so as to disadvantage all persons who had complained to the Human Rights Commission about the Ministry's policy. Fifty-six complaints in total had been lodged with the Commission. Twenty complainants had had their complaints suspended pending the outcome of the *Atkinson* case, and a further number had allowed their complaint files to be closed in the belief that the *Atkinson* decision would allow them to seek relief through their own efforts (*Spencer v Attorney-General* [2013] NZHC 2580, [2014] 2 NZLR 780 at [89]-[90]).

Section 70E made exception for the nine plaintiffs in the *Atkinson* proceedings, who were not barred from pursuing their claims. The Commission had believed that the other complainants, who were not joined to the *Atkinson* proceedings, would not be disadvantaged because discrimination complaints involved a two-step process: the substantive proceedings in *Atkinson* would determine whether or not the Ministry's policy was discriminatory, and all complainants who had been disadvantaged could then claim compensation pursuant to that decision (*Spencer v Attorney-General* [2013] NZHC 2580, [2014] 2 NZLR 780 at [91]). Obviously, the Commission had not anticipated Part 4A of the NZPHDA.

D *The* Spencer *decision*

In *Spencer* the High Court and Court of Appeal upheld the claimants' right of action under the *Atkinson* family care policy, notwithstanding the passage of the Amendment Act (*Spencer v Attorney-General* [2013] NZHC 2580, [2014] 2 NZLR 780; *Attorney-General v Spencer* [2015] NZCA 143). Part 4A had failed to achieve its intended purposes. Both courts engaged orthodox principles of statutory interpretation but there was no mistaking the forces at play: namely, the normative pull of constitutional principle and the commitment to protect basic rights against legislative abrogation. The Court of Appeal observed: "While … the courts must respect and apply pt 4A … if the words have

not achieved the result which its promoters intended the courts should not seek to fill the gaps as a means of dealing with inadequate drafting" (*Attorney-General v Spencer* [2015] NZCA 143 at [84]).

The court upheld the High Court ruling, that the *Atkinson* family care policy imposed a blanket prohibition on remunerating family disability carers. This placed the policy outside the definition of a "family care policy" under Part 4A (s 70B(1)). A "family care policy" means a policy "that permits … persons to be paid, in certain cases, for providing support services to their family member". The *Atkinson* policy did not contemplate payment under any circumstances, whereas the statutory definition did ("in certain cases"). It was a "no exceptions policy" (*Attorney-General v Spencer* [2015] NZCA 143 at [68]) and did not fall within the statutory definition.

Both courts appealed to constitutional principle. Section 6 of the NZBORA commended the narrower interpretation of the statutory definition, as did the principle of legality at common law (*R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 131; *R v Pora* [2001] 2 NZLR 37 (CA) at [52], [56]). Parliament must use explicitly clear words to override or abrogate rights protected by the NZBORA, and Parliament had failed to do that when it enacted Part 4A (*Attorney-General v Spencer* [2015] NZCA 143 at [83]):

> "Part 4A was, we accept, Parliament's response to the *Atkinson* decisions. However, if … the legislature intended as a component of that response to overrule the *Atkinson* declaration and give the *Atkinson* policy retrospective authority, it could have and should have said so. In other contexts Parliament has done just that."

The Ministry failed to persuade the court that s 70D(2) had retrospectively validated the policy. That provision was directed at a family care policy as defined, which the *Atkinson* policy was not. In consequence, the plaintiff in *Spencer* was entitled to join the proceedings in *Atkinson* and have the Tribunal deal with her claim on its merits. However, s 70E remains objectionable for family carers who are discriminated against under the Ministry's new family care policy, which became operative from 1 October 2013. The new policy provides for payment of some family carers but not others (spouses, civil union partners and de facto partners of disabled people) ("The Funded Family Care Notice" (26 September 2013) 131 *New Zealand Gazette* 3670). This policy avoids the *Spencer* loophole as it is not a blanket prohibition on paying all family disability carers. The privative clause under s 70E remains effective for family carers who find themselves excluded under the new policy.

E *Comment*

The decisions in the *Atkinson* and *Spencer* cases must be commended for their robust defence of basic rights (freedom from discrimination) and constitutional principle (access to the courts). Every so often, the courts thrust a stake in the ground. The *Atkinson* and *Spencer* decisions exemplify the role of the courts when the ebb and flow of pragmatic politics threaten constitutional proprieties.

The New Zealand Public Health and Disability Amendment Act 2013 was unmeritorious legislation. Even the manner of its enactment left much to be desired. On 15 May 2013, one week before the *Spencer* application was set down for hearing in the High Court, the Minister of Health introduced under urgency the Amendment Act, inserting Part 4A into the principal Act. The Bill passed through all three readings in the House on the one sitting day. The Bill's Regulatory Impact Statement contained 16 paragraphs on the government's legislative options, but all 16 paragraphs were redacted on the ground of legal professional privilege (Ministry of Health *Regulatory Impact Statement: Government Response to the Family Cares Case* (15 March 2013) at [85]-[101]). The Bill, in consequence, was rushed through the House without meaningful scrutiny and in disregard of the Attorney's s 7 report. These tactics were standard under first-past-the-post politics (see JF Burrows and PA Joseph "Parliamentary Law Making" [1990] NZLJ 306) but they were not expected to survive the transition to proportional representation. It seems even MMP politics have not culled entirely such parliamentary abuses.

VII Parliamentary Privileges Act 2014

A *Genesis of the legislation*

The Parliamentary Privilege Act 2014 took the unusual step of declaring its purpose thus: "to alter the law in the decision in *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713" (s 3(2)(c). The Act was the legislative sequel of that decision, enacted to "reaffirm and clarify the nature, scope, and extent of the privileges, immunities, and powers exercisable by the House of Representatives, its committees, and its members" (s3(1)(a)). Its primary provisions – including the critical definition of "proceedings in Parliament" – draw directly on the Australian Parliamentary Privileges Act 1987 (Cth), which was enacted to avoid a repetition of the New South Wales decision in *R v Murphy* (1986) 5 NSWLR 18 (NSWSC). In *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC) at 7, the

Privy Council commended the Australian definition of "proceedings in Parliament", as representing "the true principle to be applied".

The decision in *Attorney-General v Leigh* was subjected to sustained academic criticism, principally, it has to be said, by the writer (PA Joseph "Constitutional Law" [2012] NZ Law Rev 515 at 527-533; PA Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, 2014) at [13.1], [13.5.12]). I described the decision as "troublesome" (at [13.1]), "deeply flawed" (at [13.15.12]), and as throwing Parliament's privilege of freedom of speech "in jeopardy" (at [13.1]). The decision had a "chilling effect" on consumers of the privilege (ministers, members of Parliament, parliamentary staffers and members of the public who participate in parliamentary proceedings) and left the law in a "hapless state" ("Constitutional Law" at 531).

The Privileges Committee met in late 2012 to examine *Leigh* and its implications for the House (Report of the Privileges Committee *Inquiry into a question concerning the defamation action Attorney-General and Gow v Leigh* (I17A, June 2013)). The terms of reference called for examination of the "desirability of possible legislative reform of … the law of parliamentary privilege … in the light of issues raised during the [*Leigh*] inquiry and in recent reports of the Privileges Committee". Recent reports had examined the effective repetition principle under the law of defamation, and its potential to inhibit political debate and the free flow of information (see PA Joseph *Constitutional and Administrative Law in New Zealand* (4th ed) at [13.1] for the three relevant reports). These reports recommended amending the Legislature Act 1908 so as to override the principle in its application to Parliament. The Privileges Committee expressed disagreement with the *Leigh* decision and recommended that the House of Representatives introduce legislation for the general reform of the law of parliamentary privilege. The Parliamentary Privilege Bill 2013 (179-1) was introduced in the House on 2 December 2013, received select committee examination and passed through all stages to become operative on 8 August 2014.

B *Suite of reforms*

The Parliamentary Privileges Act 2013 has four broad purposes: to override the *Leigh* decision and reaffirm the existing law of parliamentary privilege; to oust the effective recognition principle in its application to the House of Representatives; to consolidate and modernise the remaining provisions of the Legislature Act 1908 dealing with parliamentary privilege; and to make provision for such sundry matters as the power of the House to fine for contempt. The Act must be interpreted in a

way that: (a) promotes the principle of comity that joins the legislative and judicial branches, and (b) recognises each branch's independence and proper sphere of influence. The statutory direction makes explicit reference to the mutual respect and restraint that is essential to "their important constitutional relationship" (s 4(1)(b)). The suite of reforms includes:

- the enactment of a clear statement of the purpose of parliamentary privilege (that it operates to uphold the integrity of the House and to secure its independence in the discharge of its functions, not confer personal benefits or immunities on members (s 7));
- the enactment of an avoidance-of-doubt definition of "proceedings in Parliament" as that phrase appears in art 9 of the Bill of Rights 1688 (Eng), codifying Parliament's privilege of freedom of speech (s 10);
- the provision of statutory guidance on how to interpret "impeaching and questioning" as those words appear in art 9 of the Bill of Rights 1688 (Eng) (ss 11, 15);
- the abolition of the effective repetition principle under the law of defamation as it has been applied to proceedings in Parliament (no member or person who affirms or adopts what was said in the House or its committees may be liable to civil or criminal action, unless the statement in and of itself could be actionable) (s 3(2)(d));
- the consolidation under the Act of the provisions of the Legislature Act 1908, the Legislature Amendment Act 1992 and s 13 of the Defamation Act 1992 so far as those provisions affect the law of parliamentary privilege (ss 8, 9, 17, 19, 20, 24-31);
- the conferral on the House of the power to fine for contempt of Parliament (s 22);
- the conferral on the House of the power to administer oaths or affirmations to witnesses giving evidence before select committees (s 24);
- the consolidation and clarification of the law of absolute or qualified privilege under the law of defamation regarding media reporting of Parliament and the official broadcasts of its proceedings (ss 18-21);
- a confirmation that the House has no power to expel its members following the enactment of the Electoral Act 1993, which codified the grounds on which members are deemed to vacate their seats (s 23).

To the writer's knowledge (as at August 2015), no court had been called upon to examine and/or apply the Parliamentary Privileges Act 2014.

VIII The Crown, Māori, and fiduciary obligations

A ***Background***

It remains a matter of conjecture whether, and, if so, in what sense, the Crown occupies the position of fiduciary in its relations with Māori. The issue has arisen on several occasions in the courts but without any dispositive ruling as would place the law beyond doubt. There are suggestions that the Crown may bear fiduciary obligations under the law of aboriginal title (*Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) at 655; *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General [*1994] 2 NZLR 20 (CA) at 24) but that it bears no such obligations as a signatory party under the Treaty of Waitangi (*New Zealand Māori Council v Attorney-General* (the *FOMA* case) [2007] NZCA 269, [2008] 1 NZLR 318 at [62]-[76]).

The courts seem diffident when reasoning by analogy from the equitable doctrine. Judges have used words such as "analogous" and "akin" to fiduciary duties when describing the Crown's obligations to Māori (*New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (HC & CA) at 644; *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 at [104]). The Court of Appeal has questioned whether relational duties of good faith might describe the Treaty relationship more empathetically than the language of fiduciary duty (*Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 at [106]-[111]). Fiduciary duty was inherently paternalistic, implying the superior position of the Crown over Māori, which was fundamentally contrary to the Treaty relationship (at [103]). Other courts, too, have expressed qualified support for the concept of a relational duty of good faith in the context of Crown-Māori relations (*Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 at [155] (Elias CJ), [187] (McGrath J) and [257] (William Young J). In *Proprietors of Wakatū v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298, the Court of Appeal again expressed qualified support for the concept (at [120], [219]) but also explored whether, and under what circumstances, the Crown might bear fiduciary obligations to Māori.

B *Proprietors of Wakatū v Attorney-General*

Wakatū sought a declaration that the Crown had acted in breach of its duties as a fiduciary to protect the legal and customary rights it had in its land. It claimed that a fiduciary obligation arose out of the Crown's role as agent in acting on behalf of the Tenths owners in creating the Nelson Tenths and occupation reserves. Wakatū argued that the Crown undertook to represent or protect the Tenths owners' interest in their pre-existing customary property rights. The undertaking was

inherent, Wakatū claimed, in the relevant Crown grant in 1845 and the Crown's interposition of itself between Māori vendors of land and settler purchasers.

The court was unanimous that the Crown's historical dealings with Wakatū did not make the Crown a fiduciary. Any agreements made between the Crown and Wakatū in the 1840s were of a political rather than legal nature to be realised in legislation (at [123] per Ellen France J). However, their Honours offered several observations on the elements of fiduciary duty and its relevance to Crown-Māori relations. The court acknowledged that a claim of fiduciary duty could not be founded on the Treaty of Waitangi. That instrument was part of the factual context for the recognition of such a duty but the instrument itself was not the source of the duty (at [98], [118]). The Treaty was non-justiciable in the absence of legislative incorporation and could not support enforceable duties at law (see the *FOMA* case). Any fiduciary duty as existed arose out of the customary title of indigenous peoples and the Crown's dealings with them (at [98], following *Guerin v The Queen* [1984] SCR 335 (SCC)).

The court held that the standard elements of fiduciary duty applied to Crown-Māori relations. In *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [72]-[75] and [80], the Supreme Court identified two situations that might give rise to a fiduciary relationship: where the relationship is inherently fiduciary (for example, the relationship of solicitor and client, trustee and beneficiary or principal and agent), or where the particular characteristics of a relationship justify it being so classified. There was no single test for determining the latter (at [77]), although the usual characteristics of a fiduciary relationship include the following: an undertaking to act for or on behalf of another, circumstances giving rise to a relationship of trust and confidence, and an obligation of loyalty on the part of a fiduciary (*Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) at 18, followed in *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 at [269]) and *Wakatū* at [116]).

In *Paki* (at [155]), Elias CJ had suggested that an obligation of loyalty did not apply when determining whether the Crown was a fiduciary in its relations with indigenous peoples. McGrath J, too, suggested departing from the elements of fiduciary duty in private law. He raised the spectre of a sui generis fiduciary duty between the Crown and Māori, "in the circumstances of particular situations, and against the background of the relationship constituted by the Treaty of Waitangi" (at 210]). However, each of the judgments penned in *Wakatū* endorsed the element of loyalty, as an indelible characteristic of the fiduciary relationship in the context of Crown-Māori relations (at [115],

[118], [143] per Ellen France J, [208], [211] per Harrison and French JJ). The uniquely indigenous nature of Crown-Māori relations was "not decisive": "Without a requirement of loyalty, the relationship cannot be properly characterised as one of absolute trust and confidence" (at [211]). This approach comports with the orthodox view of fiduciary relations.

C *Comment*

Claims to establish fiduciary duties in the context of Crown-Māori relations will seldom succeed. The obligation of loyalty raises an almost insurmountable hurdle. The Crown's constitutional obligations are owed to all citizens, in whose collective interests the Crown must act. It cannot single out one group for preferential treatment over all others. "[I]n the absence of an express undertaking," observed Harrison and French JJ (at [209]), "implicit acceptance of an absolute duty of loyalty to one group alone would negate an essential element of the Crown's constitutional responsibilities." Situations where the Crown would not be required to balance competing interests will be rare. The Canadian decision of *Guerin v The Queen* [1984] SCR 335 (SCC) was a notable exception, where, on the facts, there was no risk of conflict of interest involving competing claims. In *Wakatū* the claim of fiduciary duty failed as the Crown was "balancing interests of a truly competing nature" (at [209]). Any attempt to develop this area of the law will invariably confront this obstacle.

Claims that the Crown is a fiduciary arising from contemporary arrangements will always trigger the constitutional objection. The Crown qua executive cannot disclaim its constitutional obligations that it owes to all citizens. But, as the Court of Appeal observed (at [204]-[205], the question of whether or not a fiduciary duty is owed is context-specific, depending on the particular facts. While claims based on modern arrangements are likely to fail, the context of Crown-Māori relations in the 1840s may have been very different from those of today. During those years, the Crown actively asserted its right of pre-emption over the purchase of Māori land. This right existed at common law but was also guaranteed under art 2 of the Treaty of Waitangi. Through exercise of this right, the Crown was the sole source of title at law (*R v Symonds* (1847) NZPCC 387 (SC)). No title could be acquired through land dealings directly with Māori, which forced the settler community to deal through the Crown. Consequently, it seems at least plausible, in that particular setting, that the Crown might act on behalf of Māori, under obligations of confidence and loyalty, to facilitate the sale and purchase of their land. The Crown's right of pre-emption made it an intermediary between willing sellers and willing purchasers.

It is not fanciful that such historical arrangements might have made the Crown a fiduciary. In the 1840s the Governor, with the assistance of a few Crown officials, ran the colony. In that environment, it is difficult to envisage what conflicting duties might arise as would negate a fiduciary's obligation of loyalty. Government was "local" rather than national, involving the personal interventions of the Governor. However, there is one problem claimants will always face: the lack of systematic historical records that might verify the actual dealings involving the alienation of Māori land. Fiduciary duty is context-specific and factually grounded, and is in need of a sound evidentiary foundation.

D *Supreme Court appeal*

The *Wakatū* litigation is not at an end. On 8 May 2015, the Supreme Court granted leave to the applicants to appeal the Court of Appeal decision. The fixture is set down for a full four days beginning 12 October 2015. The Court approved five grounds of appeal: Is the Crown in breach of any fiduciary obligations? Does the Crown have defences to the action through lapse of time? Do the three applicants each have standing to bring the action? What relief is appropriate if the action succeeds? Is relief barred by the relevant Treaty settlement legislation? For the reasons assayed above, it is not out of the question that the Crown was a fiduciary owing obligations to the Māori vendors. That said, the passage of time and paucity of relevant historical information may prove difficult to overcome. The Court might find it is unable to rule whether a genuine relationship of trust, confidence and loyalty existed.

IX Minor parties and televised election debates

A *Craig's complaint*

The High Court decision in *Craig v MediaWorks Ltd* [2014] NZHC 1875, [2014] NZAR 973 was a bold one but not without precedent. It was an oral judgment of Gilbert J that ran to just four pages of transcript. His Honour granted the leader of the Conservative Party, Colin Craig, an interim injunction to restrain TV3 from screening an election debate on "The Nation" the following morning. The planned debate included the leaders of six minor parties (the Green Party, New Zealand First, the Internet Mana Party, the Maori Party, United Future and the ACT Party) but excluded Craig. The invitations to participate were based on whether a party had won a seat in Parliament at the previous election. Craig claimed that excluding him from the debate was arbitrary and

unreasonable. His party polled higher at the last election than four of the parties that were participating, and had continued to poll higher throughout the parliamentary term. Moreover, he observed, the ACT Party no longer had a sitting member of Parliament. John Banks had resigned over the mayoral election expenses scandal two months earlier.

MediaWorks responded that its decision on who to invite to the debate was not reviewable. In televising the debate, it was not performing a public function or exercising powers of a public nature having important public consequences (the threshold for review laid down in *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR (CA) 1 at 11). MediaWorks also argued that its selection criteria were reasonable and that its decision to exclude Craig was neither unreasonable nor arbitrary. Nor, it claimed, would Craig be unfairly or unreasonably prejudiced. The debate had been allocated 34 minutes, leaving each speaker around only five minutes of speaking time.

B *Was the decision reviewable?*

The threshold for interim relief is an arguable case and Gilbert J concluded it was at least arguable that the impugned decision was reviewable. He followed the decision of Ronald Young J in *Dunne v CanWest TVWorks Ltd* [2005] NZAR 577 (HC) at [36], which represented an almost identical factual scenario. There was clearly a public interest in the proposed leaders' debate. It would provide an opportunity for the minor party leaders to promote their policies and for the electorate to consider and evaluate them (at [6]).

C *An arguable case?*

Craig satisfied the substantive threshold of a seriously arguable case. The public interest was in hearing from leaders of parties which had a realistic prospect of gaining representation, and any decision to invite party leaders to participate had to weigh that prospect. Whether or not a party had won a seat at the previous election may have little or no bearing on its electoral prospects at the forthcoming election. Nor would it serve the public interest to invite a party that had won a seat if that party was not intending to contest the next election (at [8]). Events and trends that had occurred since the last election were relevant considerations and MediaWorks had failed to take these considerations into account (at [9]). Gilbert J placed reliance on the Conservative Party's polling since the last election and the fact that one of the invited parties (ACT) did not have a sitting member. It was "at least arguable", he held, that the decision to exclude Craig was (a) unreasonable

and (b) reached in disregard of relevant considerations (at [10]). Gilbert J cautioned that he was not required to determine whether the decision was substantively unreasonable; he merely had to decide whether it was arguably so.

D *Balance of convenience?*'

The court determined that the balance of convenience supported the grant of interim relief. Both parties stood to suffer some harm or inconvenience, depending on the outcome of the case, but Craig stood to lose more. Excluding him from the debate would diminish his and his party's prospects at the election, resulting in irreparable damage that could not be adequately compensated by a damages award. "The public will gain the impression," the court observed, "that Mr Craig does not 'make the cut' and is not eligible to participate in the minor leaders' debate" (at [12]). The damage to Craig outweighed the additional cost and inconvenience to MediaWorks of rescheduling the debate at another venue (at [16]). Its in-house resources and facilities could not accommodate more than six participants, which meant that funding an alternative venue would exceed MediaWorks' budget.

E *Comment*

On one level, the *MediaWorks* decision could be seen to be quite exceptional: a decision of a limited liability company plying for profit was judicially reviewable. We ordinarily associate the province of judicial review with the decision-making of public bodies exercising public powers under statute. But, on another level, the decision was not exceptional. The review threshold is couched in the alternative: the exercise of power is reviewable if it is "in substance public" or has "important public consequences" (*Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR (CA) 1 at 11). Decisions concerning televised electoral debates have obvious public consequences for representative democracy. Televised debates are the primary medium for gaining public exposure, demonstrating political adroitness and garnering electoral support.

The decisions in *Dunne v CanWest TVWorks Ltd* [2005] NZAR 577 (HC) and *MediaWorks* are timely reminders of the constitutional role of the Fourth Estate. There are two avenues for exacting public accountability: through Parliament and through the media (the metropolitan papers, radio and the electronic media). The television networks and parliamentary press gallery bear particular responsibility to cover current affairs and interrogate the issues of the day. Their job is to expose

the failings of public figures and hold governments to account. From time to time, questions are raised whether they are satisfactorily discharging their responsibility: syndicated press releases often substitute for investigative reporting and television news bulletins give current affairs often cursory coverage. Reporting on current affairs requires journalistic persistence and in-depth analysis but the Fourth Estate may lean more today towards reality television, social media and the cult of celebrity. The demise of “Campbell Live” on the TV3 network was particularly concerning.