Constitutional and Administrative Law in New Zealand

4th Edition

Philip A Joseph

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PREFACE

Public law is like rust: it never sleeps. It marches resolutely on, stamping its mark in response to needs. This edition straddles the many developments in public law since the third edition was published in 2007. It contains a thorough updating and revision of materials, incorporating all relevant post-2007 legislation and decisions of the courts. Some developments are very recent. The Parliamentary Privilege Bill was introduced before the Christmas recess (December 2013) to reform the law of parliamentary privilege in New Zealand (see [13.1], [13.2] and [13.5.12]). This Bill remains before the House of Representatives as this edition goes to press. Other legislative and judicial developments are integrated throughout the discussions, as part of the general exposition of public law principles. This edition retains the basic format of the previous edition, except it introduces a new chapter on the sources of the constitution. This material was formerly examined as part of the opening chapter, "Study of the Constitution".

As with any new edition of an established text, this edition critiques received doctrines that seem no longer to provide optimal solutions to legal problems. It singles out four doctrines in particular. Chapter 18 (see [18.3.3]) advances the "positive empowerment theory" of government. This theory rejects the accepted understanding that the Crown qua executive enjoys the same residual freedom as private individuals to do anything which the law has not prohibited. The rule of law requires that all government action be positively empowered by law. Chapter 23 (see [23.2.2(2)]) revisited the principle established in *Attorney-General v Ireland* [2002] 2 NZLR 220 (CA) and proposes that it gave unwarranted latitude to decision-makers intent on pursuing unauthorised purposes. The Court's ruling represented a wrong turn in the law and should be overruled. The Crown's historical immunity from the mandatory orders in public law litigation remains a perennial issue. Chapter 27 (see [27.2.2(1)–(2)]) distinguishes between the Crown's distinct persona – the Crown qua Sovereign and the Crown qua executive – and proposes that the historical immunity be confined strictly to the Crown qua Sovereign. There is no theoretical or practical justification for the Crown qua executive (the government) to claim the protection of the immunity. Chapter 27 (see [27.3.4(3)]) examines the Supreme Court decision in *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 464, which withheld the remedy of *Baigent* damages for judicial breach of the New Zealand Bill of Rights Act 1990. The examination concludes that there is no plausible justification for restricting the remedy; that *Baigent* damages should be available whenever any of the branches of government (including the judiciary) breaches the Bill of Rights Act.

The Supreme Court decision in *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713 is critiqued in [13.5.12]. This decision would also have been included in the above developments but for the Parliamentary Privilege Bill that is before the House of Representatives. This Bill was introduced to negate the substantive effect of *Leigh* for future proceedings in Parliament. Other developments chronicled include the sharp correction in the exercise of remedial discretion in judicial review (see [27.4.1]), and the re-evaluation of

the rule of law as a foundational norm and principle of legality (see [7.2]–[7.3]). In addition, this edition (see [22.2.4], [23.2.3(4)]) records a strengthening of judicial disciplines on public decision-making. Recent decisions of the courts indicate more intensive scrutiny of the cognitive processes of decision-making when decision-makers must weigh mandated relevant considerations. There is now little patience for "tick-box" decision-making. Decision-makers must exhibit genuine evaluation of the criteria hedging decision-making, using open and transparent reasoning, or risk judicial review. Other areas of public law are likewise revised to capture the mood of public law developments since the previous edition was published.

The ongoing disruptions that the Christchurch earthquakes caused delayed the publication of this edition by over a year. For lengthy periods following the February 2011 quake, the Canterbury Law Faculty was housed in temporary accommodation, without access to library materials, while the law building was remediated, then refitted to house additional staff from another college. The disruptions were frustrating and enervating in equal measure, causing the extended gestation of this edition. So, I am particularly grateful for two small mercies accorded me. For three months from September 2013, I had the wonderful opportunity of taking up a visiting fellowship at the University of Cambridge, based at Trinity College. Trinity is a truly marvellous place, and I am grateful to the college and its fellows for the warm welcome they extended. These three months of uninterrupted research enabled me to complete the revisions to the standards I set myself. Secondly, I am indebted to my commissioning editor, Renay Taylor, of Thomson Reuters, for her unflinching patience and understanding in the aftermath of the earthquakes. I confess to experiencing despair at times as my progress slowed, but Renay remained reassuring and encouraging.

I acknowledge two other people who provided invaluable assistance. My book editor, Clare Barrett, was a joy to work alongside. Clare has an uncanny ability to combine true professionalism and genuine wit and humour. In the closing months of the project, Clare buoyed me and lifted my spirits. Secondly, my good friend Dr Gerard McCoy QC plied me with many interesting cases and useful insights or suggestions. Gerard proofed the manuscript and corrected occasional errors in referencing, and added references for recently reported decisions. I extend my thanks to both Clare and Gerard.

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6 February 2014

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