

SPEAKERS



Helen Aikman QC, Wellington

Helen is a barrister and part-time Law Commissioner in Wellington. She was Deputy Solicitor General (Constitutional) until October 2003 and previously Crown counsel in the Treaty Team and Team Leader of the Commercial Regulatory Team. Before joining the Crown Law Office, Helen worked as the Principal State Solicitor in the Attorney General's Department in Samoa and in private practice in Wellington.



Allison Bennett, Associate Crown Counsel, Wellington

Allison is an Assistant Crown Counsel at the Crown Law Office working in the Human Rights Team. That team provides advice across Government and conducts litigation involving a broad range of human rights issues. Prior to commencing at Crown Law, Allison had been employed in a range of roles at the Ministry of Justice for almost ten years, including policy work in the human rights area and the provision of advice to the Attorney-General on the consistency of policy and legislative proposals with the New Zealand Bill of Rights Act 1990.



Richard Best, State Services Commission, Wellington

Richard has worked in the litigation departments of Bell Gully (Wellington) and Ashurst (London and Frankfurt), as well as for the Commerce Commission and now the State Services Commission. A significant portion of his litigation experience has involved judicial review and related proceedings, both for and against public bodies. Judicial review and similar proceedings in which Richard has been involved include the *Roussel v Pharmac* litigation, *Electoral Commission v Cameron*, *R v Independent Television Commission*, *ex parte TVDanmark*, an appeal (on judicial review grounds) against a decision of the UK's National Institute for Clinical Excellence and, most recently, the *Powerco and Vector v Commerce Commission* proceedings.



Karen Clark QC, Wellington

Karen was Deputy Solicitor-General for four years until she commenced practice as a barrister sole in March 2007. As Deputy Solicitor-General she was responsible for the Public Law Group in the Crown Law Office. Prior to appointment as Deputy Solicitor-General Karen led the Commercial and Public Commercial Teams within the Crown Law Office. She has represented the Crown's interests in commercial, immigration, human rights, tax, constitutional and resource management litigation in first instance and appellate jurisdictions including the Privy Council. She was appointed Queen's Counsel in May 2007.



Francis Cooke QC, Wellington

Francis has an LLB with Honours from Victoria University, and a First Class Masters Degree from Cambridge University. After periods with Ashurst Morris Crisp in London and Chapman Tripp in Wellington, he commenced practice as a barrister in 1993, and was appointed Queen's Counsel in 2004. He specialises in public and commercial law. A major part of his practice is made up of judicial review cases, acting both for and against public bodies.

SPEAKERS



Ailsa Duffy QC, Wellington

Ailsa took silk in 1998. She has a public and civil litigation practice with an emphasis on commercial judicial review involving regulatory authorities. Her practice includes advising public law decision-makers on the exercise of their powers, and appearing as counsel in judicial review proceedings. She has acted as counsel in a number of leading decisions. Ailsa has presented seminars for various bodies as well as for the NZLS.



David Goddard QC, Wellington

David has a wide ranging commercial litigation practice with an emphasis on competition law and regulation, public law, company law, contract law, and international law. His public law practice includes advising decision-makers in connection with the exercise of their powers, and appearing as counsel in judicial review proceedings for decision-makers and for affected parties. David also has a substantial involvement in law reform in New Zealand and overseas. He publishes and speaks regularly in his areas of specialisation, including presenting a number of seminars for the NZLS, and has taught at universities in New Zealand, Australia and England.



Cheryl Gwyn, Crown Law, Wellington

Cheryl Gwyn is Deputy Solicitor-General (Constitutional). Before joining the Crown Law Office in December 2003 she was Deputy Secretary for Justice (Public Law). Cheryl began her legal practice at Chapman Tripp in Auckland, where she became a litigation partner and was later a partner at Russell McVeagh in Wellington.



Paul Radich, Minter Ellison, Wellington

Paul specialises in public law dispute resolution. He assists public and private entities, here and in the Pacific, in resolving decision-making issues and appears for those entities in public law proceedings. Paul is an assistant author of the New Zealand text *Judicial Review*, the author of public law commentary in *McGechan on Procedure* and has conducted seminars and workshops for the New Zealand Law Society on public law and advocacy skills.



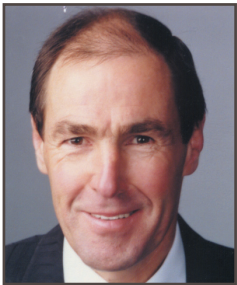
Justin Smithg, Barrister, Wellington

Justin handles general commercial litigation and has been involved in numerous judicial reviews. He is a former Crown Prosecutor (1982 - 1986), was a partner at Kensington Swan (1988 - 1994) and then a partner at Russell McVeagh (1994 - 2007). He went to the independent bar in 2007. He has represented numerous clients, from individuals to the largest national and international corporates, at all levels.



Professor Mike Taggart, University of Auckland, Auckland

Mike has taught at the University of Auckland Law School since 1982, and is the first holder of the Alexander Turner Chair in Law. He has written extensively on administrative and public law, privatisation and the public/private law divide. He is co-editor of Public Law Review and since 2000 has contributed a biennial survey of New Zealand developments in Administrative Law to the New Zealand Law Review.



The Hon Justice Wild, High Court, Wellington

Justice Wild commenced practice as a staff solicitor at Bell Gully before going to the bar in 1976. In 1993 he took silk. He was elected President of the New Zealand Bar Association in 1998, the same year as he was appointed to the bench of the High Court. He is the author of McGechan on Procedure.

CONTENTS

THE SCOPE OF JUDICIAL REVIEW – SCALPEL OR CHAINSAW?.....	1
WHO IS SUBJECT TO REVIEW, ON WHAT GROUNDS AND WHAT ARE THE BOUNDARIES?.....	1
Introduction.....	1
The Development of Judicial Review.....	1
Who is reviewable?.....	3
WHO IS NOT SUBJECT TO REVIEW? - THE BOUNDARIES OF JUSTICIABILITY.....	7
Parliamentary sovereignty and privilege.....	7
Conclusion.....	10
GROUND OF CHALLENGE	11
ILLEGALITY.....	11
Rigid application of a pre-determined policy.....	13
Acting under dictation.....	13
Unfairness.....	14
Natural Justice.....	15
Legitimate expectation.....	16
Consultation.....	17
Substantive Unfairness.....	18
Conclusion.....	18
1. PROPORTIONALITY, DEFERENCE, WEDNESBURY	21
INTRODUCTION.....	21
Wednesbury as residual “safety net”.....	23
Classic model of administrative law.....	23
Developments since the 1960s.....	25
Breakdown of law/discretion divide.....	25
The principle of legality.....	26
The “righting” of administrative law.....	27
Variable intensity of Wednesbury unreasonableness.....	27
PROPORTIONALITY IN UK LAW.....	29
Continental European origin.....	29
Daly’s case.....	31
PROPORTIONALITY IN NEW ZEALAND LAW.....	33
Disproportionate penalties.....	33
Wolf v Minister of Immigration.....	34
Different constitutional drums.....	36
VARIABLE (WEDNESBURY) REASONABLENESS REVIEW IN NEW ZEALAND.....	37
Case law.....	37
Deference as submission.....	43
Deference as respect.....	45
Reasons for deference.....	45
Constitutional methodology.....	48
Justification.....	48
Impact on classic model of administrative law.....	50
“RIGHTS” AND “PUBLIC WRONGS”.....	51
Proportionality is a sliding scale.....	51
Proportionality should subsume variable Wednesbury unreasonableness.....	51
A BI-FURCATED ADMINISTRATIVE LAW?.....	55
Arguments pro & con.....	55
LORD COOKE & PROFESSOR CRAIG ON THE MIDDLE GROUND.....	58
MY VIEW.....	60
APPENDIX.....	62
“Standards of Review: All the Colours of the Rainbow”.....	62
REVIEW FOR ERROR OF LAW – SOME COMMENTS	69

INTRODUCTION	69
ERROR OF LAW AS A GROUND OF REVIEW	70
STANDARD OF REVIEW – INTERPRETATION OF LEGISLATION	70
RELEVANCE OF STATUTORY PURPOSE PROVISION	72
ASKING THE RIGHT QUESTION – JUST ANOTHER WAY OF ASKING ABOUT RELEVANT/IRRELEVANT CONSIDERATIONS?	72
ASKING THE WRONG QUESTION, BUT GIVING A PERMISSIBLE ANSWER	73
RELEVANT MATERIAL, WHEN ASKING IF THE RIGHT QUESTION WAS ASKED	74
FINAL COMMENTS	75
APPENDIX: SELECTED EXTRACTS FROM LEADING CASES	76
LEST WE FORGET	83
NEWTON’S LAW	84
THE TRUTH.....	85
CONSULTATION.....	88
THE IMPORTANCE OF SUBSTANCE	89
BEACONS OF HOPE	90
CONCLUSION.....	91
DISCOVERY & EVIDENCE IN THE CONTEXT OF JUDICIAL REVIEW	95
INTRODUCTION	95
BACKGROUND – DISCOVERY IN JUDICIAL REVIEW	96
SECTION 10 JUDICATURE AMENDMENT ACT 1972	97
APPROACH TAKEN BY THE COURTS TO DISCOVERY IN JUDICIAL REVIEW	97
EVIDENCE	100
CONCLUSION.....	101
ACHIEVING OUTCOMES IN PUBLIC LAW DISPUTES	105
INTRODUCTION	105
OBTAINING INFORMATION	105
<i>Official Information Act</i>	106
<i>Discovery</i>	107
ALTERNATIVE DISPUTE RESOLUTION AND PUBLIC LAW	107
<i>Interim orders</i>	113
<i>Substantive remedies</i>	120
<i>Compensation or damages as an alternative?</i>	123
SECTION 27 (1) NEW ZEALAND BILL OF RIGHTS ACT: MODIFYING OR RECOGNISING NATURAL JUSTICE AS WE KNOW IT?	127
INTRODUCTION	127
NATURAL JUSTICE.....	128
<i>What does it mean? When does it apply?</i>	128
<i>What are the rules of natural justice?</i>	129
<i>The nature of the decision-maker</i>	131
COURTS’ APPROACH TO NATURAL JUSTICE IN CONTEXT OF S 27(1)	132
ILLUSTRATION OF JUDICIAL APPROACH TO S 27(1)	133
WHAT DRIVES THE “ADJUDICATIVE” ANALYSIS?	137
THE CONSEQUENCE OF THE “ADJUDICATIVE” REQUIREMENT	138
THE PROPER APPROACH TO S 27(1)	139
THE FUTURE OF THE “ADJUDICATIVE” MODEL OF ANALYSIS	140
CONCLUSION.....	142
COMPENSATION UNDER THE NEW ZEALAND BILL OF RIGHTS ACT 1990 FOR BREACH OF PROCESS RIGHTS.....	145
APPROACH TO REMEDIES UNDER THE BORA	145
AVAILABILITY OF BORA COMPENSATION FOR BREACH OF S 27(1).....	146
<i>The orthodox position regarding damages in administrative law</i>	146
<i>An award of BORA compensation for breach of s 27(1)</i>	147
<i>Other policy considerations</i>	148
THE ANALOGY OF FAIR TRIAL RIGHTS	148
RECENT UK JURISPRUDENCE	149

<i>Who is the appropriate defendant where the alleged breach arises from acts/omissions of the judicial branch?</i>	150
<i>What did Baigent's case establish?</i>	150
<i>Judicial independence</i>	151
<i>No concept of "State liability" in New Zealand</i>	152
WHAT IS THE RELEVANCE OF JUDICIAL IMMUNITIES?.....	154
OTHER PROBLEMS WITH A STAND-ALONE CAUSE OF ACTION FOR BREACH OF S 27(1) OF BORA	155
CONCLUSION	156
CASE STUDY: PUTTING IT INTO PRACTICE	159
INTRODUCTION	159