Dame Helen Winkelmann, Chief Justice of New Zealand

The Supreme Court: A View from the Top

Conference to Mark the 20th Anniversary of the Supreme Court, held at the Pullman Hotel, Auckland

Friday 16 February 2024

The focus of this paper is set at the systemic level — on the functioning of the Supreme Court as a final court of appeal within a system of courts, and within our constitutional order. I will not be discussing judgments in any detail. I consider that is best left to others. Instead, I bring to bear perspectives of a judge of the Court, who is also its leader, and the Chief Justice.

I want to touch briefly upon four broad themes:

(1) The Court and access to justice.
(2) The Court as an institution.
(3) The role of a final appellate court.
(4) Is the Court a constitutional court?

These seemed fitting topics given the anniversary nature of this conference. They pick up on topics that were on the minds of those who promoted or debated the Court's creation. Would the Court indeed improve access to justice? Would it contribute to the development of New Zealand as an independent nation? Would a final court staffed by New Zealand-grown, New Zealand-based judges do as good a job as — maybe even a better job than — the Privy Council of developing a law fit for this place? And would the Court radically alter our constitutional order? They were on the minds of those who presented papers at the 10th anniversary conference, and they are themes that have been touched upon at this conference.

Access to justice

The results are in, and we can say with confidence that the existence of the New Zealand Supreme Court has increased the volume of cases disposed of at the level of a final court of appeal.[1] Measured numerically, the increase in access is dramatic.

But access to justice is not just about numbers. When we measure the Court's performance in this area, it is necessary to think about the type of claims that are coming to the Court, about the quality of the decisions that are made, and about the contribution they make to the law in those areas. As to this last point, when I speak of contribution to the law, I mean contribution not only to how well the law operates, but also to public understanding of the content of the law, and of courts as an institution.

[1] According to data from the Supreme Court registry, 244 appeals were heard by this Court in its second decade. By comparison, the Privy Council heard an average of 24 New Zealand appeals per decade in the 20th century: see data in JJ McGrath *Appeals to the Privy Council: Report of the Solicitor-General to the Cabinet Strategy Committee on Issues of Termination and Court Structure* (Crown Law Office, May 1995) at Appendix E; and Office of the Attorney-General | Te Toa Ture Tianara *Discussion Paper: Reshaping New Zealand's Appeal Structure* (December 2000) at [9].

The first session of the conference raised the issue of the significance of the contribution the Court can make, given the way our appellate structure operates. Justice Miller made the point that, because of the low volume of cases the Supreme Court deals with, we cannot expect it to carry the load of the development of the law — and for that reason lower courts, and in particular the Court of Appeal, must be prepared to be more active in engaging with the detail of the reasoning of this Court, distinguishing where necessary or building upon that reasoning.[2]

I agree with the Judge that this is a critical role for the Court of Appeal, and indeed the High Court, each as intermediate appellate courts. The issues he has described are not, by and large, unique to New Zealand — all final courts have an output in judgments that is small measured in comparison with the output of the courts overall, or with the range of pressing legal issues. The Supreme Court of Canada, for example, issued only 34 decisions in 2023.[3] It is for this reason that the decisions of other appellate courts have an important contribution to make.

There are several qualifications or additions I would make in relation to this issue, however. In my view, far more important than the number of cases for which leave is sought, is the nature of those cases. The reality is that the cases for which leave to appeal is sought may not, and probably will not, be the ones that will settle law of the greatest significance to New Zealanders. We seldom see cases about employment, leases, or oppressive lending practices; never see cases about residential tenancies; seldom see cases about sale and purchase of houses, or social welfare law; and rarely see cases about minor criminal offences. Leave criteria cannot fix the problem — they cannot conjure into being issues that do not present in the body of proceedings that make their way to the leave process.

In New Zealand, there are some claims for which there is no appeal pathway to the Supreme Court.[4] But even putting that to one side, the problem I identify is inherent in the common law system — the development of the law largely depends upon privately funded individuals bringing and persisting with their claims. It is a problem that affects the development of the law at all levels but becomes more pressing the further we get up the appellate tree. The cost of pursuing claims to the final court is, for most, prohibitive. We have been told in a number of hearings that counsel is acting pro bono in order that they and their client can bring a case to the Court that raises important issues of application beyond the case in question.

There are also substantive barriers to access to justice — to obtaining a just outcome even if you make it through the Court's doors. The law itself can be one such barrier. If the law does not function in a just manner, that is a barrier to access to justice. The same is true of its processes. The basic infrastructure of the law — the systems the law sets — must be fit to produce just outcomes.

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2 See Forrie Miller "Reflections on the Roles of Apex and Intermediate Courts in New Zealand" [2022] NZ L Rev 261 at 286–291.

3 Supreme Court of Canada "Supreme Court Judgments: 2023" <https://scc-csc.lexum.com>.

4 There are over 20 statutes which provide that the Court of Appeal's decision is final in certain proceedings. A list is provided in the appendix to this paper. There are other statutory provisions preventing appeals from decisions of the High Court (see, for example, Broadcasting Act 1989, s 19; and Local Government Act 2002, s 219 and sch 5 cl 2(2)) and others still preventing appeals from the District Court (see, for example, Building Act 2004, s 211(4); and Motor Vehicle Sales Act 2003, s 67(2) and sch 1 cl 16(5)).

These additional points I raise make the case, I hope, as to how important systemic issues are within our legal system. The Supreme Court has important work to do in superintending these aspects of the system, and it has been active in this regard.

Systems-focused judging

I highlight several decisions of the Supreme Court that bear on the issue of how the adjudicative system operates.

The first is *Abdula v R*, in which the Court found that the rights guaranteed by the New Zealand Bill of Rights Act 1990 to a fair trial, to be present at one's trial and to the assistance of an interpreter required interpretation of sufficient quality.[5] A defendant had a right to know in full detail and contemporaneously what was happening at the trial. For this reason, consecutive interpretation was desirable.[6] This ended what had been a common practice of the interpreter attempting to interpret at the same time as the evidence was being given or submissions were being made.

In *Osborne v Worksafe New Zealand* the Supreme Court judicially reviewed WorkSafe's prosecutorial decision to offer no evidence in support of prosecutions arising out of the Pike River mine disaster.[7] The wide discretion available to prosecutors is only exceptionally the subject of successful judicial review. But in *Osborne* the Court allowed the review of a decision not to proceed with the prosecution of the Chief Executive Officer of the mining company, finding it had been made in response to an offer of payment conditional on the charges not proceeding. That, the Court said, was an unlawful bargain to stifle prosecution.[8]

The next in chronological order is *Sena v Police.*[9] This was an appeal against a criminal conviction following a judge-alone trial. The issue arose under s 232(2)(b) of the Criminal Procedure Act 2011, which set the issue for the appeal Court as whether:

> … in the case of a Judge-alone trial, the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred …

It is a feature of judge-alone trials that judges must give reasons for the verdicts they issue.[10]

Prior to this decision, s 232(2)(b) was interpreted as preserving the standard of appellate review that had applied to crimes charged on indictment prior to the enactment of the Criminal Procedure Act. In *Gotty v R* the Court of Appeal had found that, when considering challenges to factual findings by the judge, the appeal court should treat the judge's factual findings as equivalent to a jury verdict.[11] This therefore subjected the judge's reasons to a much lesser level of appellate scrutiny than would be the case if the judgment resolved a civil dispute.

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5 *Abdula v R* [2011] NZSC 130, [2012] 1 NZLR 534 at [42]–[44]; and New Zealand Bill of Rights Act 1990, ss 24(g) and 25(a) and (e).

6 At [60].

7 *Osborne v Worksafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447.

8 At [95] per Elias CJ, William Young, Glazebrook and O'Regan JJ.

9 *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575.

10 Criminal Procedure Act 2011, s 106(2).

11 *Gotty v R* [2017] NZCA 528 at [14].

The Supreme Court in *Sena* found that s 232(2)(b) required that appeals against a conviction following a judge-alone trial should proceed by way of rehearing. In reaching this view, the Court took into account that "there is no sensible policy reason why the approach to appellate review of decisions made by a judge should be less intensive in criminal cases than in civil cases".[12]

Another decision is *Uhrle v R*, in which the Court addressed the grounds upon which a court should recall a criminal judgment.[13] Prior to this decision there had been doubt whether the civil standard for recall, as articulated in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No 2)*,[14] should apply in the criminal context. *Saxmere* had confirmed the categories articulated by Wild CJ in *Horowhenua County v Nash (No 2)*:[15]

> [F]irst, where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority; secondly, where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason justice requires that the judgment be recalled.

The Court of Appeal in *Uhrle* had described a narrower standard — necessary, it said, because of the principle of finality that had to be weighed in the criminal context.[16] The test in the criminal context, it said, should be limited to errors of process as follows:[17]

(a) a "fundamental error in procedure";
(b) a substantial miscarriage of justice if the error is not corrected; and
(c) the absence of an alternative effective remedy.

The Supreme Court rejected the narrow approach. It said:[18]

> [29] As to the test to be applied, we consider that this should be formulated to make clear the decision to reopen an appeal is an exceptional step, but also to ensure the court remains able to respond to the wide variety of circumstances that may necessitate that step in order to avoid injustice. We are content that these concepts are sufficiently captured within the three grounds for recall articulated in *Horowhenua County* and approved in *Saxmere (No 2)*, and in particular in the third ground: whether for any very special reason justice requires the judgment to be recalled. It is the third ground that is likely to be the most relevant in the criminal jurisdiction.

The Court thereby ensured that the interests of justice remain the touchstone. It later reasserted that approach in *Jolley v R*[19] — rejecting further articulation and complication of

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12 *Sena*, above n 9, at [30].
13 *Uhrle v R* [2020] NZSC 62, [2020] 1 NZLR 286.
14 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76.
15 At [2], citing *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633.
16 *Lyon v R* [2019] NZCA 311, [2019] 3 NZLR 421 at [10]–[14] and [26]–[27].
17 At [27].
18 *Uhrle*, above n 13 (footnotes omitted).
19 *Jolley v R* [2022] NZSC 150, [2022] 1 NZLR 595.

the principles that had developed through two decisions of the Court of Appeal.[20] The Court said:

> [13] As we read the judgments, the Court of Appeal in *Lyon* and in the present case has retreated somewhat from the test in *Uhrle*. The differences no doubt reflect, as the respondent submits, the wish to provide further guidance for that Court in grappling with applications like the present. But, in doing so, the Court has added further barriers to an application for recall. Those additional barriers are neither necessary nor consistent with *Uhrle* …

The Court thereby rejected complication of the *Uhrle* test, which it said was deliberately a simple and flexible one to enable justice to be done.[21]

Both *Sena* and *Uhrle* can be seen as levelling up the quantity of procedural justice allocated to civil and criminal proceedings — eliminating unjustified distinctions that had grown up and persisted over generations.

Deng v Zheng was a different kind of case, but no less significant in terms of the just functioning of the system.[22] The case was at its heart a dispute over whether a partnership existed between the parties. However, the parties conducted their dealings with each other — the dealings that gave rise to the dispute — in Mandarin, and within a cultural and legal framework different to the Judges'. This presented a challenge to the standard fact-finding methodology employed by judges, a methodology in which the judge calls upon their own sense of how things happen. The importance of this issue is, I hope, apparent, given the rapid increase in the diversity of cultures in New Zealand over the last 20 years. Courts must provide just outcomes in accordance with the law for people from all backgrounds. The advice the Court offered was critical:[23]

> (a) Cases in which one or more of the parties have a cultural background which differs from that of the judge are common in New Zealand courts and are likely to become more common in the future.
>
> (b) Judges should approach such cases with caution. This has been well explained by Emilios Kyrou, writing extra-judicially, in his advice to judges to develop:[24]
>
> > … a mental red-flag cultural alert system which gives them a sense of when a cultural dimension may be present so that they may actively consider what, if anything, is to be done about it.
>
> (c) A key to dealing with such cases successfully is for the judge to recognise that some of the usual rules of thumb they use for assessing credibility may have no or limited utility. For instance, assessing credibility and plausibility on the basis of judicial assumptions as to normal practice will be unsafe, if that practice is specific to a culture that is not shared by the parties.

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20 *Lyon v R* [2020] NZCA 430; and *Jolley v R* [2022] NZCA 295.

21 *Jolley*, above n 19, at [15].

22 *Deng v Zheng* [2022] NZSC 76, [2022] 1 NZLR 151.

23 At [78] (some footnotes omitted).

24 Emilios Kyrou "Judging in a Multicultural Society" (2015) 24 JJA 223 at 226.

The Court addressed the circumstances in which:[25]

> … judges need to take care to employ general evidence about social and cultural framework to assist in, rather than replace, a careful assessment of the case specific evidence. Assuming, without case-specific evidence, that the parties have behaved in ways said to be characteristic of that ethnicity or culture is as inappropriate as assuming that they will behave according to Western norms of behaviour.

Finally, there is *Ellis v R* and *Hall v R*.[26] I identify these cases as examples of the Court taking on cases with systemic implications. I mention them because miscarriages of justice have implications for the system. Addressing a miscarriage of justice can assist in identifying systemic failure. It also can avoid the corrosion of public confidence in our justice system that can occur if a miscarriage of justice goes unaddressed. When the Court operates in its criminal jurisdiction, the important consideration of finality is squarely in play. The Court explains in *Ellis v R (Continuance)* why that value cannot deter the Court where there is evidence that a serious miscarriage of justice has occurred.[27] In granting leave in such circumstances, the Court is playing one of its critical roles of maintaining confidence in our system of justice and, in so doing, upholding the rule of law.

In exercising this role of oversight of how the system is operating, the Supreme Court is far better placed than the Privy Council and has acted in this capacity far more frequently.[28] It is better placed by reason of the greater volume of proceedings it engages with — and here the leave applications are significant. It is better placed, as the promoters of the Court had anticipated, because of the judges' proximity to the operation of that system, and to New Zealand society more generally.

With a little help from others

The work of the Court is a collaborative effort. It requires that the lawyers pleading the case include the relevant causes of action and that counsel arguing the case at first instance call the relevant evidence; that first instance judges make the factual findings the cause of action depends upon, and map out and navigate the law; and that on appeal counsel make arguments, tied to the facts and pleadings in their case, which expose the tensions or gaps in the law. There are, however, other parts of the system that need to operate well. As Justice Miller observed, it is critical that judges at all levels engage in a discerning way, and in keeping with standard common law method, with the judgments of the Supreme Court. The principles established in those judgments are for lower courts to interpret and apply as the full implications of the principles are tested and understood. Of course, standard common law method includes the techniques of distinguishing the precedent and reasoning by analogy. The Court is assisted by this kind of engagement with its decisions.

There are also other actors in the system whose role is critical.

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25 *Deng v Zheng*, above n 22, at [80].

26 *Ellis v R* [2022] NZSC 115, [2022] 1 NZLR 338; *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239; *Hall v R* [2022] NZSC 71, [2022] 1 NZLR 131; and *Hall v R (Jurisdiction)* [2022] NZSC 98, [2022] 1 NZLR 144.

27 *Ellis (Continuance)*, above n 26, at [198]–[201] per Winkelmann CJ, [73]–[74] per Glazebrook J and [240]–[242] per Williams J.

28 *R v Taito* [2003] UKPC 15, [2003] 3 NZLR 577 is the only decision that comes to mind where the Privy Council decision engaged with systemic issues.

(a) Counsel

Advocacy in the Supreme Court requires different skills to those required in other courts — different even to those required of counsel in the Court of Appeal. Because of the focus of the Court upon deciding cases of general or public importance, we have expectations of counsel beyond mastery of the case before them. We expect that counsel will have thought through how the positions they argue for, if accepted, would fit within the broader landscape of the law. We expect them to have considered how justice and policy sit with their argument. Counsel should expect to be asked questions directed to those matters.

We expect that comparative law will be addressed. The common law provides many models. It is a rich treasure trove of ideas. It is a common language between nations that trade. Although law in New Zealand will by necessity, on occasion, diverge from the law in other jurisdictions, it must do so with knowledge of those other models.

We also expect counsel to have taken the time to understand whether there are international conventions or treaties that bear upon the issues before the Court. New Zealand has bound itself to a world order based upon a rule of law which is underpinned by conventions and treaties. It is remarkable how often counsel fail to identify relevant obligations New Zealand has undertaken in international law that bear upon the issue before the Court — whether it be relevant to statutory interpretation or to the judicial review of administrative action.[29]

In the paper he presented for the 10th anniversary of this Court, Justice Peter Blanchard observed that the Court has been to a degree handicapped in its work by the variable quality of the arguments presented to it, noting that the quality of judgments tends to reflect not only the quality of the judges but also the quality of counsel.[30] He suggested that the Court would be assisted by a specialist appellate bar, but in the meantime proposed as a partial solution that legal aid authorities restrict grants of legal aid to senior counsel and others certified by the Court as competent to argue appeals before it.

Ten years on we are beginning to develop an appellate bar with knowledge of these requirements. We see counsel who understand the systemic and comparative analysis that will be expected, and we are greatly assisted by them. Even so, it has been necessary at times to adjourn proceedings to allow arguments to be further researched or, following hearing, to seek further argument on significant points that have not been identified by counsel — such as statutory provisions which govern the issue.

The Court has a role in supporting training in appellate advocacy. Should we also pursue the legal aid pathway suggested by Sir Peter Blanchard? This is a rare occasion on which I find myself at odds with Sir Peter. I do not believe that appearances before the Court should be restricted to senior counsel. Indeed, the Court has introduced a policy rather to the

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29 The United Nations has criticised New Zealand courts for failing to refer to international instruments where relevant. See, for example, Committee against Torture *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Concluding observations on the seventh periodic report of New Zealand* UN Doc CAT/C/NZL/CO/7 (24 August 2023) at [8]; and Committee on the Elimination of Discrimination against Women *Convention on the Elimination of All Forms of Discrimination against Women: Concluding observations on the eighth periodic report of New Zealand* UN Doc CEDAW/C/NZL/CO/8 (25 July 2018) at [9].

30 Peter Blanchard "The Supreme Court: A Judge's View" in Andrew Stockley and Michael Littlewood (eds) *The New Zealand Supreme Court: The First Ten Years* (LexisNexis, Wellington, 2015) 57 at 73.

contrary of that — encouraging the allocation of responsibility for part of submissions to junior counsel.[31] Here the Court has in mind the importance of supporting a profession that provides fair opportunity to its members, and that also supports the development of counsel with an understanding of the requirements of advocacy before a final appeal court. I know that some of us also have in mind that often the best answers are to be had from junior counsel, who will usually have had significant responsibility for the preparation of the submissions. In my view it is also valuable to have counsel before us, at least in the team, who have been involved in the case in the lower courts. Often that knowledge will be important to understanding the issues as they arise.

Nevertheless, I do agree that the grant of leave should have implications for the grant of legal aid. It follows from the grant of leave that the Court considers it is in the interests of justice to hear and determine the appeal. That is a powerful indication that if legal aid is needed to engage counsel, it should be available.[32] And given the standard of advocacy required, in some cases it might be thought to indicate a need for senior counsel. Someone writing a history of miscarriages of justice in New Zealand would, I have no doubt, quickly identify the significant role played by refusal of legal aid in a portion of those miscarriages.[33] Again, how the system operates has powerful implications for the pursuit of justice.

Part of the answer lies also in the Court being assertive in what it requires of counsel. As was remarked by one Judge, when what is at issue is important questions of public rights, the forensic choices made by parties may not be allowed to dictate the outcome.[34] For this reason we have on occasion given notice to counsel that we will address issues and arguments not advanced by them in their written material, providing an opportunity for them to prepare and present additional submissions. We have adjourned hearings to seek intervention when it has become apparent that necessary perspectives are absent, or to allow reformulations of appeal grounds. Obviously, the interests of justice may weigh against the further expense and delay this approach will occasion, and so the Court will proceed on a case-by-case basis. But what counsel can expect to see is the Court being more assertive in its requirements of counsel so that it can fulfil its role as a final appellate court.

As to this, Dr Andrew Butler KC has raised the desirability of reasoned leave judgments where leave is granted.[35] He notes that the Court often sets the question for the purposes of leave as whether the Court of Appeal was wrong. The Court has adopted that approach because experience has been that defined leave questions can create procedural tangles. But the point Dr Butler makes is a fair one, and the Court has recently adopted the practice of identifying in leave judgments the points that the Court is interested in, and what it is not.

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31 Courts of New Zealand | Ngā Kōti o Aotearoa "Role of Junior Counsel" (21 June 2022) <www.courtsofnz.govt.nz>.

32 Subject, of course, to eligibility requirements being met.

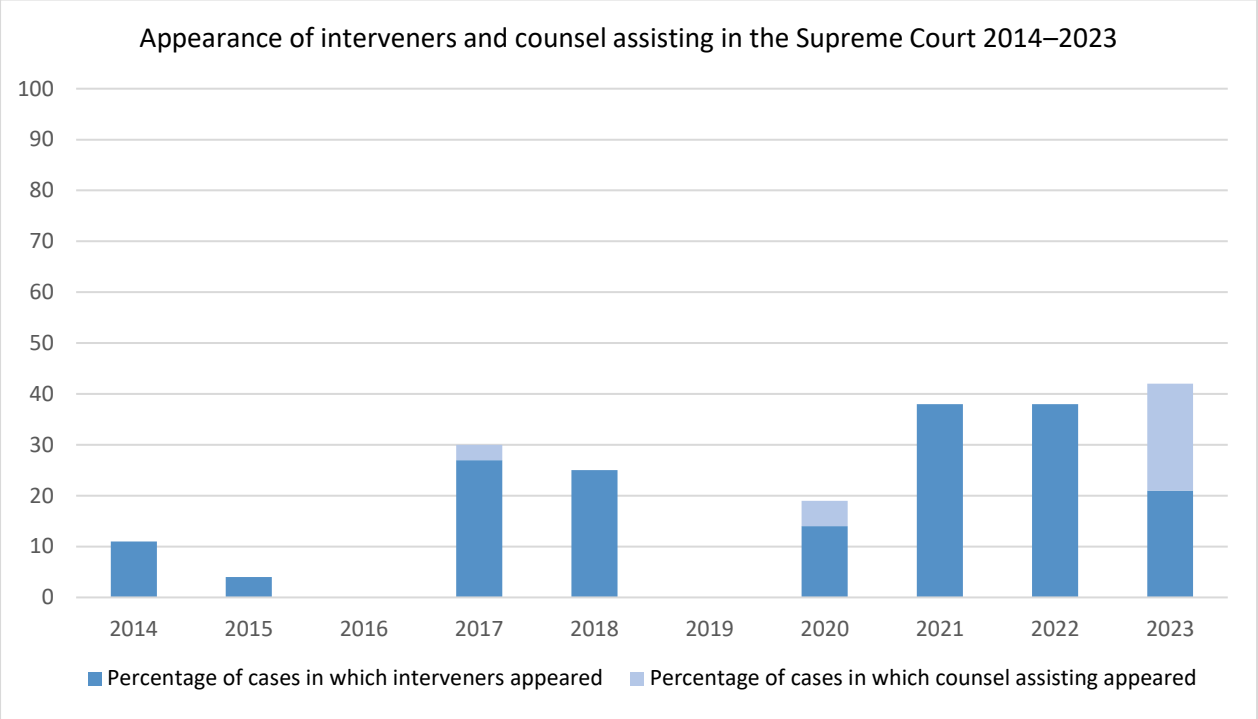
33 See, for example, *Taito*, above n 28; and Nigel Hampton "Doing Law Differently – Keynote from Annual Conference" (speech to the New Zealand Bar Association 2023 Annual Conference, Christchurch, 15–16 September 2023).

34 *Make It 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683 at [76] per Kós J.

35 Andrew S Butler "Twenty years of the New Zealand Supreme Court: another advocate's perspective" (forthcoming).

(b) Interveners and counsel assisting

As can be seen in the chart below, a developing trend over the last 10 years has been the appearance of interveners in appeals and, to a lesser extent, the appointment of counsel to assist. I use, in keeping with practice, "intervener" to refer to a party that seeks (sometimes following an invitation issued by the court) to intervene in a proceeding, either as an interested party or as a party that can bring to the attention of the court important information. The name "counsel assisting", or "amicus curiae", is used to refer to counsel who is appointed to ensure that issues are fully argued before the court. Counsel to assist is appointed when it is considered that the normal processes relied upon in the adversarial process will not achieve that.



Both procedural devices have supported the Court in fulfilling the role of a final appellate court — clarifying and bringing certainty to the law, and developing a law fit to meet the needs of society. The involvement of interveners, and the use of counsel assisting, can go a little way to addressing the effect of the resource constraints for litigants I referred to earlier. It can be useful because the particular case, or the arguments advanced by counsel for the parties, may not be such as to make apparent the values, the tensions, or even the issues in play in the particular area of the law. This includes the systemic issues to which I have already referred. Those tensions and issues may nevertheless have implications for how the law should develop, and how the system should operate.

Interveners can be invaluable in ensuring that those issues are aired and explored. In *Deng v Zheng*, for example, the Court invited the New Zealand Law Society | Te Kāhui Ture o Aotearoa to consider intervening after consultation with NZ Asian Lawyers.[36] It noted that the appeal might necessitate the Court exploring cultural factors that were part of the

[36] See comments in the leave judgment: *Deng v Zheng* [2021] NZSC 43.

background to the business relationship in issue, and so it considered that the Court could be assisted by broader perspectives.[37]

The Court is therefore in large part permissive of interveners where they will be of assistance in ensuring that necessary perspectives are brought to bear and the issues are fully ventilated. They have in fact appeared in 17 per cent of the cases heard in this Court over the last 10 years. Yet there is little developed jurisprudence on the issue. Applications for intervention are often dealt with by way of minute. There is also little academic study of the issue in New Zealand — although it is surely an area worthy of study given its implications for access to justice and the development of the law. To date my research suggests that the leading authority on the point is *Ngāti Whātua Ōrākei Trust v Attorney-General*, in which the Court summarised the relevant principles as follows:[38]

(a) The power is broad in nature but should be exercised with restraint to avoid the risk of expanding issues, elongation of hearings and increasing the costs of litigation.
(b) In an appeal involving issues of general and wide importance the court may grant leave when satisfied that it would be assisted by submissions from the intervener.
(c) The fact that the case raises issues of [principle] transcending the particular facts is not in itself sufficient to extend rights of hearing beyond the parties.
(d) The [c]ourt will take into account the relevant expertise or the unique position of an intended intervener as well as the impact of the intervention on appeal.

As I set those principles out in this paper it seemed to me that they were principles enunciated for an intermediate appellate court, and it may be as well for our Court to develop its own principles to provide guidance to would-be interveners. Or perhaps to create a rule to regulate the grant of leave.

The United States Supreme Court has such a rule, Rule 37, which regulates intervention.[39] In its jurisprudence the material produced by interveners is called an amicus brief. Rule 37 stipulates that the purpose of an amicus brief is to bring the attention of the Court to relevant matters which may be of considerable help but have not already been brought to the Court's attention by the parties to the proceeding.

The use of this procedural device has been the subject of extensive study in the United States. That study has shown that the rate of amici participation in the United States Supreme Court increased rapidly during the 20th century to the point that, in 2000, more than 90 per cent of cases before the Supreme Court were accompanied by amicus filings, many with multiple signatories.[40] Of course there is also a cautionary tale to be drawn from

37 At [1]–[2].

38 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZCA 183, [2017] NZAR 627 at [11] (footnotes omitted).

39 Rules of the Supreme Court of the United States 2019.

40 Paul M Collins Jr "Lobbyists before the US Supreme Court: Investigating the Influence of Amicus Curiae Briefs" (2007) 60 Political Research Quarterly 55 at 55.

this. Research shows the extent to which powerful elites can seek to shape the jurisprudence of the Court.[41]

Another issue in relation to intervention is whether it should be granted at the leave stage. Leave to intervene is not typically granted at the leave stage, but in *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* leave to intervene at the leave stage was granted where the interveners had participated in the Court of Appeal phase of the hearing.[42] As a matter of simple logic, intervention at the leave stage could assist the Court with the decision whether to grant leave. That assistance could be desirable where, as is evident from the progress of the case to that point, the broader implications of a decision are not understood by the parties.

A final issue is the funding available for interveners. Given the assistance interveners can provide the Court, and the fact that sometimes the Court invites them to intervene, it might be thought fair that interveners should not always have to bear the cost of their interventions. Section 178 of the Senior Courts Act 2016 permits the Court to make orders for the payment of the costs incurred by interveners and counsel assisting — payable either by a party to the proceedings or out of public funds. This issue has not been pursued with us by interveners — and the Court's standard practice has been to grant leave to intervene on the condition that the intervener will not be entitled to costs.[43]

(c) Crown counsel

The Court is also assisted by the appearance of Crown counsel. Crown counsel have a particular role before a final court of appeal. They have knowledge of how the criminal justice system and administrative state operate that can be important to informing the Court as to the systemic implications of issues before the Court. As advocates representing the Crown, Crown counsel come to the Court conscious of their obligation to behave as a model litigant. The *Attorney-General's Values for Crown Civil Litigation* are instructive as to what this means.[44] The Crown will "[a]pply a fair and objective approach in the handling of litigation, promoting the just and fair application of the law to all".[45] It will "[t]ake and defend litigation in accordance with the rule of law".[46] Where a proceeding bears upon the just functioning of the adjudicative system, the Court therefore expects Crown counsel to squarely address those systemic issues, in accordance with their heightened obligations.

(d) The academy

Finally, the Court is assisted by the work legal academics do in analysing and commenting upon the Court's decisions. The critiques are appreciated. They can assist in suggesting implications of the decision not raised in argument — points which can be picked up by counsel in later cases. For the Court they are the only doctrinally reasoned refutation there will likely be by way of response to the judgments issued — a consequence of being the final

41 See, for example, Paul M Collins Jr, Pamela C Corley and Jesse Hamner "The Influence of Amicus Curiae Briefs on US Supreme Court Opinion Content" (2015) 49 L & Soc'y Rev 917 at 938–939.

42 *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* SC 53/2019, 26 August 2019 at [4].

43 See, for example, *Chamberlains v Lai* [2005] NZSC 32 at [5]; and *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 20 at [9].

44 *Attorney-General's Values for Crown Civil Litigation* (Te Tari Ture o te Karauna | Crown Law, 31 July 2013).

45 At [5.3].

46 At [5.1].

court. Whilst not always comfortable, the tendency of refutation to provoke and challenge inevitably assists with further thought and on occasion, where the refutation is persuasive, better reasoning in the future. The work of academics is also enormously important in the commentary and explanation they provide in relation to the Court's judgments, a point relevant to the next topic.

The Court as an institution

The Court sees itself as having an institutional role that is not exhausted by the release of its judgments, but entails the provision, by a variety of means, of information about the law, its processes and about the Court. I would group the informational needs the Court attempts to address as follows:

(a) To support access to justice: People must have information about their rights and obligations under law, and about how to access and enforce those rights, if those rights and obligations are to be meaningful.
(b) To build understanding of the courts as an institution: The legitimacy of the judiciary depends upon people being given access to information so that they can understand how the courts function and scrutinise how they work.
(c) To support understanding of the functioning of an adversarial system, and the role of counsel within it: This encompasses the development both of appellate advocates and of law students.

Each of these needs is important and the Court is very deliberate in the actions it takes to meet them. As the apex Court, dealing with matters of high public interest, it is well placed for this role.

Professor Knight and Pita Roycroft, in their excellent paper on the Court's voice beyond its judgments,[47] have described many of the steps the courts have taken to address these informational needs. What I can usefully do is explain the Court's thinking behind some of these initiatives.

We are supported in our thinking by the work of Huakina kia Tika, the judiciary's Open Justice Committee, which until recently has been chaired by Justice Mark O'Regan. They have helped shape the Court's existing initiatives and added more ambitious ones.

In advance of hearing, the Court issues a synopsis of the case to enable people to engage with the argument presented at hearing. The Court also enables access to written submissions, chronologies and outlines of argument for all appeal hearings except pre-trial criminal appeals or where the Court directs otherwise.[48] We provide material, in the form of press summaries, to enable understanding of what can be quite complex issues. We have instituted live streaming to facilitate engagement by resource-poor media and greater engagement by the public. In complex or particularly high-profile matters, we use an embargo process, whereby the parties and media are given the judgment a short time in advance of public release (seldom more than a day) in order to enable comprehension of the judgment before it is publicly described in the media.

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47 Dean Knight and Pita Roycroft "A Supreme Voice: Non-adjudicative Expression by the Supreme Court" (forthcoming).

48 Courts of New Zealand | Ngā Kōti o Aotearoa "Supreme Court Submissions Practice Note" (5 July 2023) <www.courtsofnz.govt.nz>.

In our engagement with the media, we are supported by the Media and Courts Committee. This Committee enables judges to engage directly with leaders within the media so that we each — the media and the courts — have processes that support accurate media reporting. It is an important forum where perspectives and frustrations can be discussed, at least at a general level.

The Court's outreach programme is another important part of the Court's work programme in this regard. When the Court goes on circuit, sitting in Auckland and in Christchurch, events are organised that enable law students to engage with the appeals to be heard. With the assistance of counsel, a video is prepared in advance of the hearing, which outlines the issues to be traversed at the hearing. Then, after the hearing, we hold a session at which students can speak with the judges and with counsel. Having done a few of these, I have been struck by how valuable the contribution of counsel is, and how interesting it is to have counsel and judges engage in the same room about how they see the skill of advocacy and the dynamics of a hearing.

The role of a final appellate court

In preparing this paper I anticipated that there would be discussion — perhaps a great deal of discussion — at this conference about how well the Supreme Court is fulfilling its role as a final appellate court.

At the 10th anniversary conference, Dr Andrew Stockley said that the Court should:[49]

> … select important cases and then clearly articulate and explain what it determines the law is. It should do so in a manner that ensures consistency and coherence while also according with contemporary social values.

That is a view of the role of the Court that I share, and I believe it is a statement that all members of the Court would sign up to.

However, Dr Stockley cautioned that "[t]his does not mean that it can go beyond what is needed in the circumstances of the particular case."[50] He said "[o]ur common law system is justifiably wary of declaring general, abstract principles."[51]

This statement is capable of more than one construction. At one extreme it could be read as limiting the Court to error correction, and at the other simply cautioning the Court against the issue of advisory opinions or attempts at judicial codification. I do not mean any criticism of Dr Stockley, because I think he was right to try to capture somehow the tensions that a final court of appeal must navigate — tensions that can present in an individual case between the demands of consistency and coherence, and of allowing the law to develop.

It may be of use, if for no other reason than debate at the 30th anniversary, to say something of how the Court conceptualises and approaches its role.

As the Court approaches its workload in general, and individual cases in the specific, we are aware of and discuss the overarching purpose the Court plays as the final court in a

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49 Andrew Stockley "The Role of the Supreme Court: A Comparative Perspective" in Andrew Stockley and Michael Littlewood (eds) *The New Zealand Supreme Court: The First Ten Years* (LexisNexis, Wellington, 2015) 21 at 26.

50 At 26.

51 At 26–27.

hierarchy of courts. We are aware of the Court's history, and of the purpose for which the Court was set up. For my part, I have s 3 of the Supreme Court Act 2003 to hand in my office. Amongst the purposes it stated for the establishment of the Court were:

(i) to recognise that New Zealand is an independent nation with its own history and traditions; and
(ii) to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions; and
(iii) to improve access to justice …

I was disappointed to see that section was not carried forward into the Senior Courts Act 2016, but it remains as a legislative fact to remind us of the purpose for which the Court was created.[52]

The Court is also aware that part of the thinking for the creation of the Court was to have a permanent court of judges who work collegially with each other, and who are part of the community and familiar with New Zealand's social and legal history.[53]

The Court sees its role as overseeing the development of the common law and, as part of that role, charting its development. But it will not be the source of all new pathways in the common law. As Dame Sian Elias said, "[t]he Supreme Court is not the place for first thoughts on new directions" — laying down a challenge, echoed by Justice Miller in his paper, for the Court of Appeal to be more innovative.[54]

Contact with judges from other final courts of appeal is also important. This is for two reasons. First, we can discuss and reflect upon the role of a final court of appeal, and how that is put into effect through the cases we hear and the judgments we write. Judges of the Supreme Court regularly meet with judges from the High Court of Australia, from the Supreme Courts of the United Kingdom and Canada, and from the Court of Final Appeal of Hong Kong and the Court of Appeal of Singapore.

The second reason it is important is that the common law that is applied in New Zealand is not sourced just from this place. It has antecedents in the law of the United Kingdom and has close family today across the common law world. The common law is legal Esperanto — it enables and eases the exchange of ideas and concepts between jurisdictions. And zooming out from my occupational focus, the common law in this transnational sense supports an international rule of law enabling trade and supporting peace. In this regard, the common law has antecedents in the international conventions to which New Zealand and other nations are signatories.

For this reason, we also take opportunities to meet with judges from international courts, such as the European Court of Human Rights and the International Court of Justice, and with judges from constitutional courts in other jurisdictions such as the Federal Constitutional Court of Germany (Bundesverfassungsgericht), the Constitutional Court of Korea, the Supreme Federal Court of Brazil and the Constitutional Court of Colombia.

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52 Section 66(1) of the Senior Courts Act 2016 is the provision which replaces s 3 of the Supreme Court Act 2003.

53 Te Aka Matua o te Ture | Law Commission *The Structure of the Courts* (NZLC R7, 1989) at [497].

54 Sian Elias "Judgery and the Rule of Law" (2015) 14 Otago LR 49 at 56.

How does this all express itself in the way the Court works and in the judgments that the Court issues? It is expressed in several ways:

(1) The Court quite consciously operates in a collegial manner. There is brief discussion prior to the hearing, not to discuss the merits, but rather to discuss any outstanding procedural issues and to identify any issues we wish to hear from counsel on that need clarifying or that are not addressed in written submissions. There is extensive discussion post-hearing to clarify where there is consensus and where there are different points of view. Once drafts are exchanged there is further engagement to distil and make clear points of difference. The Court works hard to produce a single set of reasons because we are conscious of our role in clarifying the law. But, as I touch on below, not all appeals are appropriately resolved within a single set of reasons. Even when not joining in with another's reasons, judges will still constructively engage with each other's drafts, identifying points missed or unclear expression. This seems to me to be what is expected of a multi-member appellate court — working collegially to improve the quality of the reasoning of the judgments that are issued by it.

(2) There is no guiding or overarching philosophy as to the level at which judgments should be pitched in terms of the generality of the principles established or explored. There are some cases where it would be wrong to attempt to capture a broad statement of principles. This may be because the law is in the early stages of development in the area and should be allowed to continue to develop by application in individual cases. It may be because the case before the Court has not exposed the issues sufficiently to enable the Court to state the principles to be applied. In such cases the Court may consider it premature to attempt a definitive statement of the law, and prudent for the Court to only state those principles necessary to dispose of that particular case. Sometimes the consensus that emerges in the Court around incompletely theorised agreements is more constructive of clarity and certainty in the law than the rigorous exploration of the doctrinal issues in play.[55]

(3) There are other areas where it is right for the Court to state what is sufficient by way of principles to bring clarity and certainty to the area of the law. Examples of cases in this category include *Synlait Milk Ltd v New Zealand Industrial Park Ltd*, *Bathurst Resources Ltd v L&M Coal Holdings Ltd* and *Yan v Mainzeal Property and Construction Ltd (in liq)*.[56] In each of these cases the Court could be satisfied that cases in the lower and appellate courts had sufficiently exposed the range of issues, including the legal policy issues in play, to enable the Court to move with some confidence. The Court is conscious of not over-theorising its judgments and thereby creating procedural thickets. It is conscious too of the need to resist the temptation to attempt codification of areas of law, which can have the effect of limiting the Court's ability to respond to different circumstances or, on occasion, to information about how new developments in the law are operating.

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55 Cass R Sunstein *Designing Democracy: What Constitutions Do* (Oxford University Press, New York, 2001) at 63.

56 *Synlait Milk Ltd v New Zealand Industrial Park Ltd* [2020] NZSC 157, [2020] 1 NZLR 657; *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696; and *Yan v Mainzeal Property and Construction Ltd (in liq)* [2023] NZSC 113, [2023] 1 NZLR 296.

(4) For this reason, the Court may be assisted if it hears more than one appeal in the area. There have been recent examples of this — *Madsen-Ries (as liquidators of Debut Homes Ltd (in liq)) v Cooper* and *Mainzeal*, cases concerning directors' duties;[57] and *Berkland v R* and *Philip v R* on the relevance of personal circumstances to sentencing.[58]

(5) Even where the Court proceeds to decide a case narrowly, there are certain burdens it must still accept. It must make clear the basis upon which it has decided the case, and in particular the principle or principles it has applied in reaching its decision. A fundamental imperative for the Court is clarity in its judgments — clarity of expression, and clarity as to the principles established. HLA Hart said of the great American jurist Oliver Wendell Holmes that, although sometimes he was clearly wrong, when this was so he was always wrong clearly.[59] Clarity in the law is, he said, a sovereign virtue. The Court will have failed in its task if judgment leaves doubt as to the principles it applies in resolving the case before it.

(6) The Court identifies those appeals which are of systemic effect — such as cases on matters of trial procedure, or on the civil side, by way of example, contract interpretation — and in those cases places particular emphasis on achieving consensus and clarity.

(7) It remains a matter for each judge as to whether they write separately. Judicial independence necessitates that judges be free to decide the case in accordance with how they see the law and the facts. Indeed, appeal courts are multi-membered because of the variety of views a panel of judges will inevitably produce. The common law is evidence of the value that there is in this. Dissenting reasons are important to the common law method as they trace out pathways in the law that can be picked up in the future. Dissenting reasons are important to a democracy as they acknowledge and give voice to different views, and they remind us of underlying values that the majority reasons may have overlooked or discounted.

(8) Nevertheless, the Court is conscious of the need — even where there are multiple sets of reasons — to be clear as to the principles that have emerged. Concurrences are typically confined to expressing the point of difference in reasoning and so too with dissents. We avoid unnecessary repetition. Moreover, where there is more than one set of reasons, the Court has developed a practice of placing a summary of the principles established by majority as an introduction to the judgment. Examples of this can be seen in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* and *Ellis (Continuance)*.[60]

(9) As mentioned earlier, as it develops its jurisprudence, the Court reminds itself that the common law is a common language between many countries, and that it forms the basis not just for international commerce, but also for an international order based upon the rule of law. In keeping with this, and with the imperatives of consistency and certainty, the Court is interested to know how the issues on appeal

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57 *Madsen-Ries (as liquidators of Debut Homes Ltd (in liq)) v Cooper* [2020] NZSC 100, [2021] 1 NZLR 43; and *Mainzeal*, above n 56.

58 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509; and *Philip v R* [2022] NZSC 149, [2022] 1 NZLR 571.

59 HLA Hart "Positivism and the Separation of Law and Morals" (1958) 71 Harv L Rev 593 at 593.

60 *Trans-Tasman Resources Ltd v Taranaki Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [1]–[13]; and *Ellis (Continuance)*, above n 26, at [1]–[23].

sit in terms of consistency with related principles. There is little that is new, or for which a good analogy does not exist, in the common law.

(10) The Court places a high value upon comparative jurisprudence. The Court also looks beyond the common law world to the jurisprudence of civil law countries and of international courts. This jurisprudence is increasingly called upon by the courts as we consider the implications that New Zealand's international undertakings have for domestic law. The judgments of other jurisdictions are helpful, particularly where Parliament has used the legislation of that nation as a model (such as is the case with the Canadian Charter of Rights and Freedoms, which was the model for parts of the New Zealand Bill of Rights Act),[61] or where legislation or a common law principle shares the same ancestry. But even where that is clearly so, local circumstance, local context and local values may dictate different or new approaches. The law, after all, must meet the needs of New Zealand.

The local conditions and circumstances of course include the customs and usages of this place. In *Ellis (Continuance)* the Court discussed the place of tikanga, as the first law of this country, in the development of the common law. As to this it is interesting to note that the Ministerial Advisory Group set up to advise the Government on the purpose, structure, composition and role of a final appellate court recommended that there should be a convention that at least one member of the Supreme Court should be well versed in tikanga Māori (which would have made it likely that at least one member of the Court would be Māori).[62] It recommended also that the criteria for leave include whether the proceedings raise a significant issue involving tikanga Māori.[63] Neither recommendation was proceeded with.

A constitutional court?

At the 10th anniversary, there was some discussion of whether the Supreme Court had proved itself to be a constitutional court. Again, I anticipated such discussion at this conference. On this topic, there are definitional issues in play which are worth clearing away at the outset. The New Zealand Supreme Court is not a "constitutional court" in the sense that nomenclature is used internationally. Harding, Leyland and Groppi, in their comparative study of constitutional courts across the globe, define a constitutional court as "a *specialist* court having *only* 'constitutional' jurisdiction".[64] The New Zealand Supreme Court can be distinguished in this sense from constitutional courts such as those that exist in

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61 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at 65.

62 *Report of the Advisory Group: Replacing the Privy Council: A New Supreme Court* (Office of the Attorney-General, April 2002) at [3.2].

63 At [12.5].

64 Andrew Harding, Peter Leyland and Tania Groppi "Constitutional Courts: Forms, Functions and Practice in Comparative Perspective" in Andrew Harding and Peter Leyland (eds) *Constitutional Courts: A Comparative Study* (Wildy, Simmons & Hill Publishing, London, 2009) 1 at 3 (emphasis in original).

South Africa,[65] Germany,[66] and Austria.[67] These are courts which exclusively deal with constitutional matters.

There are other distinctions to be made. Like our Supreme Court, the final courts of appeal of Canada and Australia also exercise a hybrid jurisdiction, but they have the power to invalidate legislation.

New Zealand's final court of appeal is most comparable to that of the United Kingdom. Both operate without a constitution codified into a single document. Neither court has the power to declare primary legislation invalid,[68] but each has the power to declare legislation inconsistent with protected rights.[69] And both are courts exercising general jurisdiction.

For my part it is obvious that the Supreme Court of New Zealand is a constitutional court, notwithstanding the absence of a power to invalidate legislation, and notwithstanding its general jurisdiction — indeed in part because of the latter.

Paul Rishworth was surely right when, at the 10th anniversary conference in 2014, he said that although this Supreme Court would not have the power to invalidate enactments, at its inception it was inevitably a constitutional court:[70]

> As the embryonic Supreme Court was designed and debated, it was axiomatic it would be a "constitutional court". Lawyers knew what that meant, even in the land of the so-called unwritten constitution. The new Court would select cases based on their "general or public importance". They would include cases of constitutional import — defining the rights of citizens, the powers of government, the status of the Treaty of Waitangi, and so on.

This was no new departure for the final court of appeal — the description he offers of the new Court's jurisdiction could as well be applied to the Privy Council. Although the Privy Council heard very few appeals from New Zealand, it nevertheless issued decisions of constitutional significance — which, it is worth remembering, sometimes led to public controversy. Decisions such as *Nireaha Tamaki v Baker* and *Wallis v Solicitor-General for New Zealand* (finding issues of native title justiciable before the court, departing from the decision in *Wi Parata v The Bishop of Wellington*) were of profound significance to the legal

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65 For an explanation of the workings of the Constitutional Court of South Africa, see Heinz Klug "South Africa's Constitutional Court: Enabling Democracy and Promoting Law in the Transition from Apartheid" in Andrew Harding and Peter Leyland (eds) *Constitutional Courts: A Comparative Study* (Wildy, Simmons & Hill Publishing, London, 2009) 263.

66 For an explanation of the workings of the German Federal Constitutional Court, see Donald P Kommers and Russell A Miller "*Das Bundesverfassungsgericht*: Procedure, Practice and Policy of the German Federal Constitutional Court" in Andrew Harding and Peter Leyland (eds) *Constitutional Courts: A Comparative Study* (Wildy, Simmons & Hill Publishing, London, 2009) 102.

67 For an explanation of the workings of the Constitutional Court of Austria, see Anna Gamper and Francesco Palermo "The Constitutional Court of Austria: Modern Profiles of an Archetype of Constitutional Review" in Andrew Harding and Peter Leyland (eds) *Constitutional Courts: A Comparative Study* (Wildy, Simmons & Hill Publishing, London, 2009) 31.

68 New Zealand Bill of Rights Act, s 4; and Human Rights Act 1998 (UK), ss 3(2)(b) and 4(6).

69 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213; and Human Rights Act (UK), s 4.

70 Paul Rishworth "The Supreme Court and the Bill of Rights" in Andrew Stockley and Michael Littlewood (eds) *The New Zealand Supreme Court: The First Ten Years* (LexisNexis, Wellington, 2015) 169 at 169 (footnote omitted).

and economic substratum of Māori and broader New Zealand society.[71] Of course, the latter decision led to the protest of bench and bar.[72] In *Lesa v Attorney-General of New Zealand* the Privy Council ruled that all persons born in Samoa between 1924 and 1948 were British subjects with the consequence that they and their descendants had become New Zealand citizens.[73] And in *Petrocorp Exploration Ltd v Minister of Energy* the Privy Council allowed an appeal from the Court of Appeal, constraining the scope of judicial review.[74]

I think that Andrew Geddis is right when he says that, while parliamentary sovereignty in New Zealand is a "foundational given", how the constitutional system operates is inevitably more complicated than emerges from a simple account of a sovereign Parliament that makes law for the country's courts that is then applied.[75]

The very nature of the work of the courts is constitutional. The courts have their own constitutional role and duty to uphold the rule of law — it is difficult to think of a duty more constitutional in nature than that.

Discharge of this duty entails the courts interpreting legislation as it is applied in individual cases. This interpretive role encompasses the duty imposed by Parliament to give legislation a rights-consistent interpretation where that is possible.[76] It further entails interpreting legislation to enable New Zealand to meet its international obligations. And it entails the application of common law principles of statutory interpretation — most significantly, the principle of legality.[77]

The courts also have the constitutional role to declare the law.[78] At times the exercise of this role in the individual case takes the court into constitutional waters — whether it is issuing a declaration of inconsistency with the Bill of Rights Act for the first time,[79] or deciding where the lines of comity between the judiciary and Parliament lie.[80]

In pursuance of upholding the rule of law, the courts also exercise the power of judicial review, ensuring that public power, including powers exercised by the executive, is exercised lawfully.

The foregoing is a description of the work of the courts as a whole.[81] As the final appeal court, the Supreme Court has additional responsibilities. It has the role of overseeing the

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71 *Nireaha Tamaki v Baker* (1901) NZPCC 371 (PC); *Wallis v Solicitor-General for New Zealand* [1903] AC 173 (PC); and *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC).

72 "*Wallis v Solicitor-General*: Protest of Bench and Bar, April 25, 1903" [1840–1932] NZPCC Appendix 730.

73 *Lesa v Attorney-General of New Zealand* [1983] 2 AC 20 (PC).

74 *Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 641 (PC).

75 Andrew Geddis "Parliament and the Courts: Lessons from Recent Experiences" in John Burrows and Jeremy Finn (eds) *Challenge and Change: Judging in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) 135 at 136–139.

76 New Zealand Bill of Rights Act, s 6.

77 See *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [51]–[57] per Winkelmann CJ, [207]–[215] per O'Regan and Arnold JJ and [251] per Glazebrook J; and *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [75]–[76] per Winkelmann CJ and O'Regan J.

78 Declaratory Judgments Act 1908.

79 *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791; aff'd *Taylor*, above n 69.

80 See, for example, *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116; and *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142, [2022] 1 NZLR 767.

81 Although the jurisdiction to judicially review the exercise of public power is only exercised by the Senior Courts.

application and development of the law. As a matter of context it will inevitably be exercising this jurisdiction in important cases of general or public importance — including legal matters relating to the Treaty of Waitangi.[82] As it does so, it must ensure the law is applied and developed in a way which respects the constitutional underpinnings of our society, promotes social and economic stability and enhances the law's clarity and coherence.

To all of this is to be added the additional responsibility for the Supreme Court of overseeing the administration of justice to ensure that it operates in accordance with our constitutional settlement, in accordance with the rule of law, and in a way which is fair and just.

These are responsibilities of constitutional moment.

[82] See Supreme Court Act, s 3(1)(a)(ii); and Senior Courts Act, s 66(1).

Appendix: Statutory provisions precluding appeal to the Supreme Court

Statute	Summary of effect
Accident Compensation Act 2001, s 163(4)	Appeals against the review of decisions made by the Accident Compensation Corporation can go no further than the Court of Appeal.
Residential Tenancies Act 1986, s 120(5)	Appeals against decisions of the Tenancy Tribunal can go no further than the Court of Appeal.
Tokelau Amendment Act 1986, s 4(2)	Appeals against judgments, decrees or orders of the High Court in the exercise of its jurisdiction over Tokelau can go no further than the Court of Appeal.
Land Valuation Proceedings Act 1948, ss 13(3) and 18A(4)	A decision by the Court of Appeal is final in referrals to that Court under the Act and in appeals against orders of the Land Valuation Tribunal (or the High Court when exercising the powers and functions of that Tribunal).
Civil Aviation Act 1990, s 70(3)	Appeals against decisions made by the Director of Civil Aviation under the Act can go no further than the Court of Appeal. **Note:** to be replaced by Civil Aviation Act 2023, s 457(3) from 5 April 2025.
Maritime Transport Act 1994, s 428(3)	Appeals against decisions made under the Act can go no further than the Court of Appeal.
Human Rights Act 1993, s 126(5)	A decision by the Court of Appeal is final in referrals to that Court of proceedings under ss 92T (referrals to the High Court on the granting of remedies) and specified proceedings under 123 (appeals to the High Court from certain Human Rights Review Tribunal decisions).
Passports Act 1992, s 29(4)	Appeals against decisions of the Minister made in relation to travel documents under Part 1 of the Act can go no further than the Court of Appeal.
Medicines Act 1981, s 93(5)	A decision by the Court of Appeal is final in appeals against the following: (a) a decision of the Minister refusing, revoking, or suspending any consent or approval, or imposing, varying, or adding to any conditions, under ss 20, 23, 24, and 35 of the Act; (b) a decision to issue a notice under ss 36(3) or 37(1), or the imposition, variation, or addition of conditions under that section; or (c) a decision of the Medicines Review Committee made under s 88. **Note:** to cease to have effect from 1 September 2026 at the latest.
Gas Act 1992, s 15(5)	Appeals against decisions on applications for injunctions under s 14(3) of the Act, and originating in the District Court, can go no further than the Court of Appeal.
Electricity Act 1992, s 14(5)	Appeals against decisions on applications for injunctions under s 13(3) of the Act, and originating in the District Court, can go no further than the Court of Appeal.

Employment Relations Act 2000, s 213(4)	A decision by the Court of Appeal is final on applications for review under the Judicial Review Procedure Act 2016 or proceedings seeking a writ or order of, or in the nature of, mandamus, prohibition, or certiorari, or a declaration or an injunction, in relation to proceedings before the Employment Court.
Real Estate Agents Act 2008, s 120(3)	Appeals against decisions of the Real Estate Agents Disciplinary Tribunal can go no further than the Court of Appeal.
Forests Act 1949, s 63ZG(3)	Appeals against the review of certain decisions made by the Forestry Authority can go no further than the Court of Appeal.
Family Violence Act 2018, s 179(3)	Appeals against decisions to (a) make or refuse to make an order, (b) dismiss proceedings, or (c) otherwise finally determine proceedings under the Act can go no further than the Court of Appeal.
Health Act 1956, s 92ZU(3)	Appeals against orders imposed or refused by the District Court under Part 3A of the Act can go no further than the Court of Appeal.
Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 134(3)	Appeals against orders imposed or refused by the Family Court under the Act, or against decisions otherwise determining or dismissing a proceeding, can go no further than the Court of Appeal.
Lawyers and Conveyancers Act 2006, s 254(4)	Appeals against orders imposed or decisions made by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal under Part 7 of the Act can go no further than the Court of Appeal.
Railways Act 2005, s 72(3)	Appeals against decisions made by the New Zealand Transport Agency or Director of Land Transport under the Act can go no further than the Court of Appeal.
Insurance (Prudential Supervision) Act 2010, ss 43(4) and 225(4)	• Appeals against decisions of the Reserve Bank to remove directors or relevant officers of a licensed insurer from their position can go no further than the Court of Appeal. • Appeals against the imposition or refusal of orders banning persons from participating in insurance business by the District Court can go no further than the Court of Appeal.
Non-bank Deposit Takers Act 2013, s 63(4)	Appeals against decisions of the Reserve Bank concerning a person's suitability to be a director or senior officer of a non-bank deposit taker can go no further than the Court of Appeal. **Note:** to cease to have effect from 6 July 2029 at the latest.
Land Transport Act 1998, s 111B(4)	Appeals with respect to offences specified in Part 6A (relating to transport services and penalties) of the Act can go no further than the Court of Appeal.
Resource Management Act 1991, s 149V(8)	No appeal may be made against a decision of the Court of Appeal determining an appeal remitted to that Court by the Supreme Court under s 149V(7) of the Act.
Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 113H(3)	No appeal may be made against a decision of the Court of Appeal determining an appeal remitted to that Court by the Supreme Court under s 113H(2)(c) of the Act.