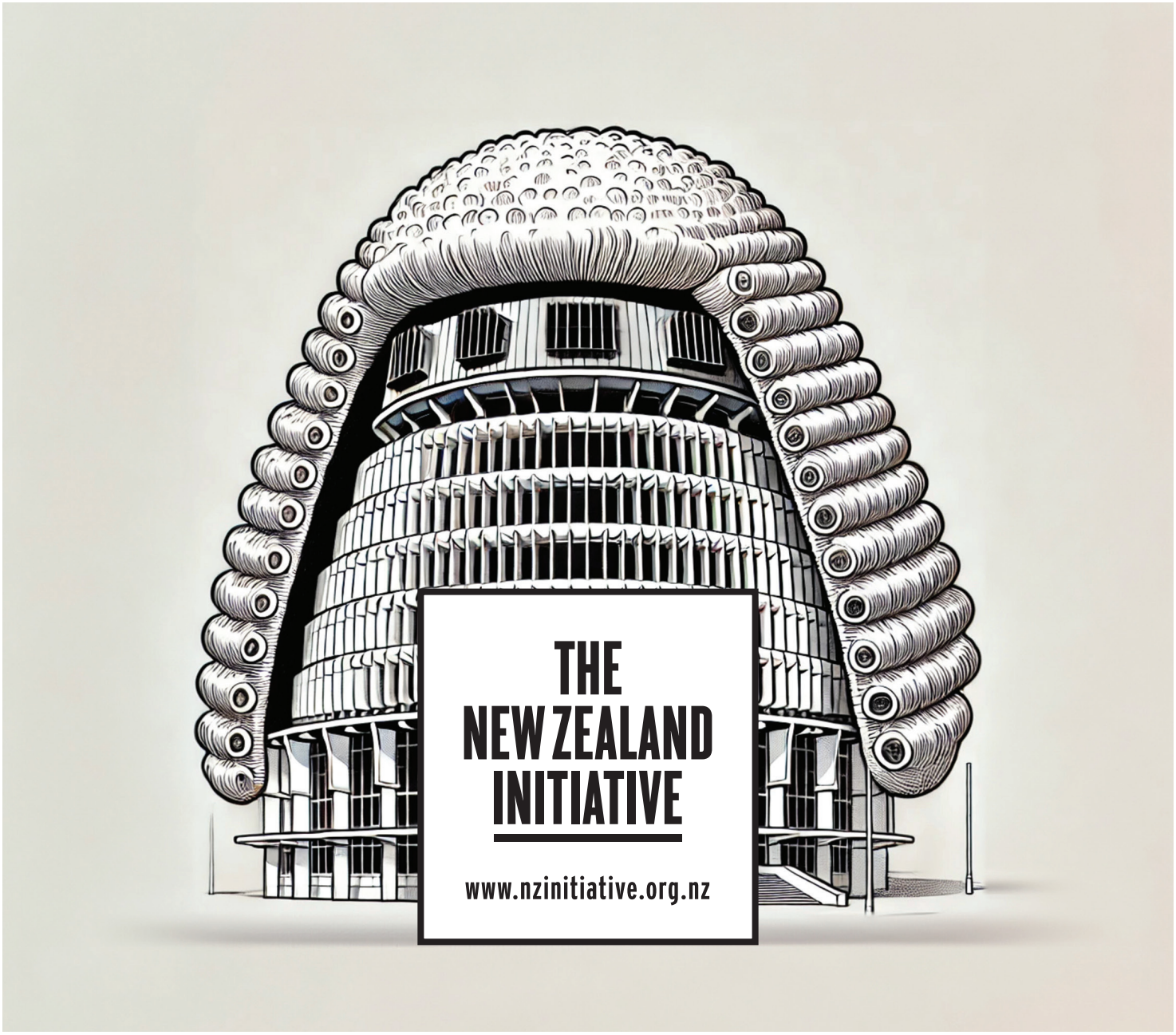
POLICY

WHO MAKES THE LAW?

Reining in the Supreme Court

Roger Partridge
Foreword by Professor Richard Ekins KC



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The New Zealand Initiative is an independent public policy think tank supported by chief executives of New Zealand businesses. We believe in evidence-based policy and are committed to developing policies that work for all New Zealanders.

Our mission is to help build a better, stronger New Zealand. We are taking the initiative to promote a prosperous, free and fair society with a competitive, open and dynamic economy. We are developing and contributing bold ideas that will have a profound, positive and long-term impact.

ABOUT THE AUTHOR

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Foreword

In creating the New Zealand Supreme Court and ending appeals to the Privy Council, Parliament aimed in part to recognise "that New Zealand is an independent nation with its own history and traditions", in the words of section 3(1)(a)(i) of the Supreme Act 2003. But Parliament also aimed to affirm "New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament", as section 3(2) puts it. Like other important constitutional developments in New Zealand history, the 2003 Act was a change made within the framework of the Westminster constitution, a constitution that New Zealand inherited from Britain and has long since made its own.

The twin pillars of the Westminster constitution are parliamentary sovereignty and responsible government. The King-in-Parliament is free to make any law and the government is formed by parliamentarians who enjoy the confidence of the House of Representatives. Parliament's centrality to New Zealand's governing arrangements make it possible for New Zealand to be well governed and, crucially, for New Zealanders to share in self-government. Roger Partridge's new report defends Parliament's long-established and indispensable constitutional role. His concern is that the Supreme Court's recent jurisprudence is liable to unsettle the balance of the constitution.

The proper constitutional role of the courts is a subject of sharp debate in many parts of the common law world. The United States is a cautionary tale. For decades, conservatives railed against judicial activism, with liberals and progressives affirming the United States Supreme Court's far-reaching power. Now that conservatives enjoy a firm Supreme Court majority, many liberals and progressives decry judicial overreach. The Court's outsized role in public life has distorted legal reasoning and national politics, politicising the legal system ever more widely.

The United Kingdom's Supreme Court is neither as political nor as powerful as its American counterpart. Still, the power of courts, domestic and European, has increased sharply in Britain across recent decades, at times distorting parliamentary democracy and chipping away at the rule of law. From afar, I had thought that the expansion of judicial power had run less far in New Zealand than elsewhere. However, Roger Partridge's new report makes a powerful case that the New Zealand Supreme Court is departing from long-standing, well-settled constitutional limits. His report builds on, and complements, Jack Hodder KC's incisive critical review of the first twenty years of the Supreme Court's jurisprudence.[i] It also brings to bear in the New Zealand context the many insights of Professor John Finnis's magisterial Gray's Inn lecture, which articulates the common law constitutional tradition that New Zealand and Britain, amongst other countries, share.[ii]

The foundation of Partridge's report is his critical analysis of the New Zealand Supreme Court's new approach to statutory interpretation and to common law development. His critique of the *Fitzgerald* judgment,[iii] in which the majority of the Court eviscerated the "three strikes" legislation, is compelling. There are strong reasons to oppose that legislation, which I set out in detail with Professor Warren Brookbanks when Parliament was contemplating its enactment.[iv] But it clearly lies within the power of Parliament to enact such legislation, the remedy for which should be amendment or repeal by Parliament itself – not judicial misinterpretation. Partridge's analysis

of the *Ellis* judgment is also compelling, rightly drawing the reader's attention to the host of problems that are to be found with the majority's reasoning and that arise in its wake.

The remainder of the report builds on this foundation by outlining what Parliament should do in response. Partridge sets out five options that Parliament should consider, each of which he argues would help to restore the balance of the constitution. His proposals are well-considered and thought provoking, even if, as Partridge himself makes clear, they no doubt require further elaboration before they would be fit for enactment.

The first and most direct course of action that Partridge recommends is for Parliament to enact legislation that responds to specific judgments in which the courts misinterpret legislation or unsettle the common law. Such legislation has been enacted in the past and it is always open to a sovereign Parliament to respond to a judgment with corrective legislation. In the United Kingdom, Parliament has in recent years enacted legislation changing the law in response to a number of significant Supreme Court judgments. Some of these changes have been controversial, such as the legislation concerning the last government's Rwanda plan, but not all – legislation restoring the *Carltona* principle was adopted by both Houses of Parliament without division.[v]

Still, it is likely that some jurists will automatically oppose any corrective legislation, on the grounds that it is somehow unconstitutional for Parliament to legislate in response to a judgment. Nothing could be further from the truth. Parliament should evaluate every legislative proposal carefully, of course, and should certainly be slow to strip a particular litigant of the fruits of litigation. But it is without question constitutionally legitimate for Parliament (a) to conclude that a court, including the Supreme Court, has misinterpreted legislation or has "developed" the common law in an unhelpful way and (b) to legislate to make the law that which Parliament thinks it ought to be.

Likewise, Parliament is entitled to make general changes to the law that help restore principled limits on judicial power. Partridge's report outlines several possible changes, including specification of the meaning of "the rule of law" in relevant legislation and amendments to the Legislation Act 2019 and New Zealand Bill of Rights Act 1990. Affirming the rule of law in general terms is a thoroughly bad idea, as recent British case law demonstrates, and Partridge's legislative proposal is framed with these problems in mind. I agree with him that it would be useful for Parliament to make clear that legislation is to be interpreted in the context of enactment, as opposed to the context of adjudication, and agree further that legislation is required to prevent radical rights-consistent interpretation, which departs from legislative intent. The New Zealand courts once firmly rejected the British jurisprudence of rights-consistent interpretation and it is deeply alarming to see that New Zealand courts now, in *Fitzgerald*, are going even further. It would be more than reasonable for Parliament to reverse this judgment and to restore the antecedent legal practice.

Roger Partridge's paper is a powerful critique of the Supreme Court's new jurisprudence and sets out an intelligent, thoughtful programme of action that would help to put it right. I commend The New Zealand Initiative for publishing this paper and hope that New Zealand's parliamentarians, who are responsible for maintaining the balance of the constitution, study it closely.

Richard Ekins KC
Professor of Law and Constitutional Government, University of Oxford

Executive Summary

Recent decisions from New Zealand's Supreme Court have sparked widespread alarm. They show a court that has misunderstood its role and overstepped its bounds.

The Court's approach raises a very serious question for voters: Just who makes the law in New Zealand? Is it democratically elected politicians or unaccountable judges?

At the heart of our legal system is a delicate balance of power between the three branches of government: Parliament, the courts and the executive. This balance is anchored in the idea of the 'separation of powers'. This idea assigns distinct responsibilities to each branch.

The role of judges is primarily backward-looking. It is to adjudicate historical disputes between parties about their existing legal rights and obligations. Judges do this by applying the law as it stood when the dispute arose to the facts agreed by the parties or found by the court.

In contrast, Parliament's role is forward-looking. The legislature is responsible for making new laws and amending existing ones to shape our legal commitments for the future. In our legal pecking order, Parliament is also 'sovereign' or 'supreme', sitting above even the Supreme Court.

When each branch of government stays in its lane, the country's constitutional machinery operates smoothly. But when these boundaries are crossed, the engine of government begins to falter.

In recent cases, the Supreme Court has been actively stepping out of its lane, blurring the traditional separation between the roles of judges and Parliament. This shift represents a significant departure from the Court's proper constitutional function.

The Supreme Court's overreach is having serious consequences. By mixing judging and lawmaking, the Court has strayed into shaping policy. This is properly the role of Parliament. Because judges lack the political accountability of politicians, the Court's approach undermines the democratic legitimacy of the law.

The Court's approach has also made the law more uncertain and unpredictable. As the Court reinterprets legislation and reshapes common law principles, individuals and businesses can no longer rely on clear statutory language or stable precedents. Yet, certainty and predictability are fundamental requirements of what lawyers call 'the rule of law'.

The Supreme Court's departure from these fundamental principles shows up in two key areas.

First, the Court has adopted a loose approach to interpreting laws passed by Parliament. Increasingly, it is stretching or even ignoring clear statutory language. Effectively, the Court has granted itself the power to rewrite legislation it does not like. This oversteps Parliament's rightful role.

Second, the Supreme Court has changed how it handles the 'common law'. Common law is the body of rules judges have made through court rulings over centuries. However, the Supreme Court now acts more like Parliament in this area. It has dropped the traditional approach of gradually adjusting the common law to fix mistakes or handle novel situations. Instead, the Court favours a radical new approach of reshaping common law rules to match its views of today's 'social values'.

The Supreme Court's ruling in the 'three strikes' case of *Fitzgerald* shows the first of these two problems. Regardless of what one thinks of the 'three strikes' law, it is obvious to any independent observer that the Court rewrote clear statutory language to avoid what it saw as a clash with the New Zealand Bill of Rights Act 1990.

The Supreme Court's decision in the *Peter Ellis* case is a good example of the second problem. The *Ellis* case had no Māori link. Yet, the Court took it upon itself to consider tikanga Māori in deciding that Ellis's appeal against his convictions could carry on despite his death. This decision overturned longstanding rules for recognising tikanga as law. And it did so without providing a clear new framework. This has created a legal vacuum undermining the certainty and consistency required by the rule of law.

The *Ellis* decision shows the problem with a Court that sees its role as 'developing' the law to reflect changing societal values. At the time, Parliament had asked the Law Commission to study tikanga's role in our legal system. By rushing ahead, the Supreme Court sidestepped this careful, democratic process. There could hardly be a clearer example of a court overstepping its bounds – and with unfortunate consequences.

The Supreme Court's overreach challenges the proper constitutional balance between the judicial and legislative branches. If left unchecked, it will turn the judiciary into a powerful policymaking body, unaccountable to voters. This would represent a fundamental shift in how we run our country, one that Parliament has not sanctioned and the public has not approved.

As the highest lawmaking body, Parliament needs to act. It must reassert its sovereignty by redrawing the lines that hold up our way of governing.

To address these concerns, this report proposes five options to restore the balance to our legal system.

First, Parliament could use targeted legislation to clarify what the law means. It could also overturn the Court's worst decisions, misinterpreting the law. This has been done before. Not long ago, Parliament passed legislation under urgency to reverse the effect of the Supreme Court's decision regarding the Child Protection (Child Sex Offender Registration) Act 2016. It is not surprising that the current Government is thinking about taking this course in response to troubling court rulings on the Marine and Coastal Area Act 2011. This shows how timely and practical this recommendation is.

Second, Parliament could change the Senior Courts Act 2016 to set out more clearly what it means by the 'rule of law'. Setting out a narrow or 'formal' meaning of the rule of law would help restrain the courts from judicial overreach.

Third, Parliament could change the Legislation Act 2019 to include tighter rules for the courts when interpreting statutes. These changes would rein in the judiciary's loose approach to interpreting Parliament's words. They would require judges to stick more closely to the text and purpose of legislation passed by Parliament.

Fourth, Parliament could consider amending or repealing section 6 of the New Zealand Bill of Rights Act 1990. The courts have used this section to justify big shifts from clear statutory language. Fixing this could help stop judges from rewriting laws.

Finally, changes could be introduced to how senior appellate judges are selected. New criteria could favour candidates who show judicial restraint and respect for Parliament. Parliament setting fixed terms for Supreme Court judges could also help. These changes could help guard against our most senior judges gaining an exaggerated view of their role.

These options give Parliament several ways of tackling judicial overreach. None of them threaten judicial independence or the rule of law. Instead, they aim to protect these fundamental values. They will help make sure the courts stay within their proper bounds. When the judiciary oversteps its role and takes over Parliament's job, it harms the foundations of the rule of law it is meant to uphold.

Parliament reasserting its rightful place will strengthen the backbone of our democracy. It leaves the courts to play their key role in settling rights and dealing out justice within the framework of laws made by Parliament. This ensures courts continue to protect rights in specific cases. But the wider choices about the scope and balance of rights stay with elected politicians answerable to voters.

Constitutional change tends to be slow and thoughtful. However, the urgency of the situation means Parliament must act quickly and decisively. It must stop the current drift towards 'judicial supremacy'.

The Supreme Court's recent decisions have raised alarm across the legal and political spectrum. Public trust in the impartiality and legitimacy of the courts is at stake. By taking the measures outlined in this report, Parliament could start to address these concerns and restore the proper balance.

The alternative is a slow but steady erosion of our constitutional foundations. An activist judiciary will gradually supplant the democratic process. This is not the system of government our constitution envisions. Parliament must act now to maintain the integrity of our legal system for generations to come.

CHAPTER 1
Introduction

Concern about New Zealand's courts – particularly the Supreme Court – may never have been greater. And for good reason. A growing body of Supreme Court decisions shows a court that has misunderstood its role and overstepped its constitutional bounds.

At the heart of our constitutional order lies a delicate balance of power between the three branches of government: Parliament, the courts, and the executive. The balance is anchored in the idea of the 'separation of powers'. It assigns distinct responsibilities to each branch.

When each branch sticks to its role, the country's constitutional machinery operates smoothly. But when the boundaries are crossed, the engine of government begins to falter.

The courts play a key role in our system of government. But their power has limits. Oxford's Professor John Finnis KC explains the courts' job in his well-known lecture, *Judicial Power: Past, Present and Future*.[1] The court's task is to settle disputes between parties about their current legal rights and duties. Courts do this by applying the law as it was at the time the dispute began to the facts agreed by the parties or found by the court.

Parliament, on the other hand, looks to the future. Its job is to make new laws or change old ones to shape our legal duties going forward. As the supreme lawmaking body under the principle of 'parliamentary sovereignty', Parliament has the ultimate authority to create, modify, or repeal any law.[2] This power is the cornerstone of our constitution. It comes from the idea that Parliament speaks for voters and is accountable to them.

The executive branch – i.e., cabinet and public servants – is charged with implementing the laws, as defined by Parliament and enforced by the courts, in the present.

The 'rule of law' is the bedrock of our system. It means laws must be clear, steady, and applied equally to everyone. If laws fall short of this, people lose faith in them. They cannot trust the law to guide their actions. Courts play a key role in upholding the rule of law by interpreting and applying the law impartially.[3]

Over recent decades, the Supreme Court has slowly stepped beyond these usual bounds. It has grown the power of the courts bit by bit, blurring the line between what courts do and what Parliament does. This judicial expansion shows up in two main areas. First, the courts have adopted a loose approach to interpreting laws passed by Parliament. Second, they have been taking a more activist approach to 'developing' the common law.

Recent decisions from the Supreme Court indicate that this trend has reached a tipping point. The Court is now boldly crossing lines that kept judges and lawmakers apart. This marks a significant shift away from the Supreme Court's proper role.

This shift could change the courts from what Alexander Hamilton famously termed the 'least dangerous branch' of government into a powerful policy-making institution, unaccountable to voters.[4]

This Supreme Court's overreach has sparked alarm among legal scholars, legal practitioners, politicians, and the public. They fear the Court is making decisions that should be left to elected lawmakers.

King's Counsel and former Law Commissioner Jack Hodder KC has provided the strongest criticism of the Court's failings. Speaking at a Legal Research Foundation conference early in 2024 to mark the 20th anniversary of the Supreme Court's formation, Hodder warned of a coming time of "unprecedentedly sharp political debate" about the role of the Court.[5]

Former Otago University Law Professor James Allan has also voiced concern. Writing last year as a guest contributor in the New Zealand Universities Law Review's 60th-anniversary edition, Allan raised a related concern about the Supreme Court's willingness to intervene in patently political matters.

Allan's comments centred on the Supreme Court's 2022 *Make it 16* decision concerning voting age.[6] "To be blunt," Allan stated, "it strikes me that if the facts in this *Make It 16* case are not sufficient to push the judges to leave well enough alone and forebear from treating this as a justiciable (rather than solely political) matter, then no plausible set of facts will suffice."[7]

Allan wrote about the Supreme Court for a wider audience later in 2024. He referred to an emerging "imperial judiciary… where the top judges… are giving themselves newfound power at the expense of the elected branches of government. Under the cover of purportedly applying the law, they are usurping power to themselves."[8]

The most recent high-profile example of the Supreme Court's expansive approach is its 'climate change' decision earlier this year in *Smith v Fonterra*.[9] The case involves a Māori elder, Mr Smith, seeking injunctions against seven of New Zealand's largest companies to stop them from contributing materially to climate change. Mr Smith claims these companies have damaged his land and sea, including places of cultural and spiritual significance. Despite New Zealand's total emissions being only a tiny fraction of global emissions (17 parts in ten thousand) and the existence of a government-regulated emissions trading scheme, the Supreme Court overturned a unanimous decision of the Court of Appeal striking out the claim.

The Court of Appeal had observed that:[10]

> "… the magnitude of the crisis which is climate change simply cannot be appropriately or adequately addressed by common law court claims pursued through the courts. It is quintessentially a matter that calls for a sophisticated regulatory response at a national level supported by international coordination."

The Supreme Court felt no such restraint and allowed the claim to proceed to trial. The outcome will see months of court time and millions of dollars in legal fees consumed in a symbolic hearing, with the Supreme Court substituting the judiciary into a role more suited to Parliament.

Politicians have expressed similar concerns. Following the Supreme Court's decision in *Fitzgerald v R* concerning the controversial 'three strikes' laws (*Fitzgerald*),[11] the then Opposition Spokesperson for Justice spoke out strongly. He said the decision was part of a growing pattern. He claimed New Zealand judges were pushing against Parliament and reading laws in new ways. And he said the Court was "taking powers they never had before."[12]

The Shadow Attorney General voiced similar concerns. He said that "a number of judges in senior courts have indulged in activism against the relevant provisions of the Sentencing Act – provisions passed by a democratically elected Parliament in May 2010."[13]

The Supreme Court's overreach has serious consequences. By extending its reach into matters of policy, the Court has blurred the line between judging disputes and making the law.

Because judges lack the political accountability of politicians, the Court's approach undermines the democratic legitimacy of the law. It raises a very serious question for voters of just who makes the law in New Zealand. And of who should make it. Is this a role for democratically elected politicians or unaccountable judges?

The Court's approach has also made the law less certain and predictable. As the Court reinterprets legislation and reshapes common law principles, individuals and businesses can no longer rely on clear statutory language or stable precedents. Yet certainty and predictability are fundamental requirements of the rule of law.

The problems derive from two related judicial misconceptions. The first is the licence the Supreme Court has given itself when interpreting statutes. The Court's approach involves stretching or even ignoring clear statutory language the Court does not like. In so doing, the Court is not simply interpreting and applying the law as enacted by Parliament. It is effectively rewriting legislation to align with its view of the demands of justice. This takes power away from Parliament, which should be making our laws. It also makes it harder for people to know what the law says before they act.

The second misconception relates to the common law – the body of law developed by judges over many centuries through deciding cases. The Supreme Court has come to believe its role is to 'develop' the common law to give effect to its perception of contemporary social values and attitudes.

On this view, the common law is not a framework of predictable, stable rules built up incrementally by the courts over generations. Instead, it becomes a malleable instrument to be reshaped by judges to reflect their assessment of society's changing needs and expectations.

By appointing itself the arbiter of societal needs and values, the judiciary risks politicising itself. To fulfil such a role, judges must make the types of policy judgments that are properly the role of Parliament as the elected branch of government.

The Court's approach also introduces substantial uncertainty into the law. This means the public can no longer rely on the common law as a predictable guide for their actions. Instead, the public must try to anticipate how judges might remake the law to reflect their views of shifting social currents.

More fundamentally, the courts have upended their constitutional role. The courts' function is to provide an impartial forum for resolving disputes by applying settled legal rules. It is not to act as a catalyst for social change.

Of course, the courts *do* have constitutionally appropriate means to address perceived legal anomalies without overstepping their bounds. For instance, they can signal in their decisions where Parliament's intervention might be beneficial. This approach respects the separation of powers while allowing judges to highlight areas needing parliamentary attention.

This report analyses the source of the misconceptions that underlie the Supreme Court's overreaching approach. It then sets out a menu of options for Parliament to rein in the Court's activist tendencies. Five options are discussed:

a. Using targeted legislation to overturn specific aberrant decisions;
b. Amending the Senior Courts Act 2016 to provide a formal definition of the 'rule of law';
c. Amending the Legislation Act 2019 to introduce stricter guidelines from Parliament to the courts when interpreting statutes;
d. Amending or repealing section 6 of the New Zealand Bill of Rights Act 1990; and
e. Reforming judicial appointment processes.

These actions, alone or together, would send a clear message to the Supreme Court. They would remind the Court to respect the separation of powers and Parliament's right to make laws. They would encourage the Court to show restraint, uphold the rule of law and not stray from its proper role.

Proposed legislative interventions, such as those in response to court decisions on the Marine and Coastal Area Act, show how urgent these issues are. The Government's plans highlight the clash between how judges are interpreting the law and what Parliament meant. This demonstrates the need to look closely at how Parliament can restore the right balance between the courts and the legislature.

Some may think an activist court is a safeguard from bad laws. But this view misses the point of our democracy. It means unelected judges have the power to overrule what voters want. This weakens our democracy and makes the law less clear. It means the laws become subject to judges' personal views rather than Parliament's legislative intent. Such uncertainty can paralyse individuals and businesses from making decisions. Judicial overreach also turns courts into political arenas and erodes public trust in judicial impartiality. In the end, we risk being ruled by unaccountable judges instead of by politicians we elect.

This report focuses mainly on the Supreme Court because its decisions have the most significant impact. However, the concerns and recommendations discussed apply to all courts.

CHAPTER 2

The Problem: An Overreaching Supreme Court

The Supreme Court's recent decisions suggest that it has lost sight of the fundamental principles that shape our system of government: the separation of powers, Parliamentary sovereignty, and the rule of law. The Court has blurred the lines between the role of the courts in judging disputes and Parliament's lawmaking role.

In doing so, the Court has strayed into shaping policy. This should be Parliament's job. The Court's actions risk weakening our democracy and the legitimacy of the law. They also risk making the law less clear and predictable. Yet clear and predictable laws are vital for the rule of law.

The Supreme Court's boldness is, therefore, deeply troubling.

Parliament set up the Supreme Court just over two decades ago when it passed the Supreme Court Act 2003. Prior to this, New Zealand's highest court of appeal was the Judicial Committee of the Privy Council, based in London.

As a creature of statute, the Supreme Court gets its powers from Parliament. In the legal hierarchy, this means Parliament sits above the Supreme Court and is 'sovereign'. Parliament, therefore, has the final say on the content of our laws. Indeed, the 2003 law that created the Court explicitly stated this would not change "New Zealand's ongoing commitment to the rule of law and the sovereignty of Parliament."[14] Parliament said this again in section 3(2) of the Senior Courts Act 2016, which superseded and consolidated the 2003 Act.

Yet, even as the Supreme Court was being set up, some in Government were concerned the Court might challenge Parliament's power. In a 2004 speech, Deputy Prime Minister and Attorney-General Michael Cullen warned that for the courts to "find" that a "higher law exists which modifies the constitutional status of the New Zealand Parliament" would "amount to constitutional change by stealth".[15] He said that if constitutional change were to occur, it should be "subject to the democratic process – as it has been in the past – and not through decisions of appointed judges. It is for the people to grant the courts a broader constitutional mandate."[16]

Despite the clear statutory affirmations of the Supreme Court's function, the Court's activist tendencies have seen it stray beyond these bounds. This troubling trend is evident in two key areas of the Court's approach.

First, the Court has embraced a very loose or 'liberal' approach to interpreting laws passed by Parliament. This approach involves the Court narrowly interpreting, 'stretching' or even ignoring clear statutory language the Court does not like. Through this process, the Court has essentially granted itself the power to rewrite laws made by Parliament.

Second, the Supreme Court has changed its approach to the 'common law' - the body of law developed by judges over many centuries. The Court now thinks its role is to reshape or 'develop' the common law's legal principles to give effect to what it thinks are contemporary social values. This means that unelected judges are making policy decisions that would traditionally have been left to Parliament.

Each of these troubling developments is discussed below.

a. Subverting Parliament: The Supreme Court's approach to statutes

Given the Supreme Court's subservience to Parliament, one might expect its primary duty would be to give full and fair effect to laws passed by Parliament. And, indeed, that is the orthodox view.[17]

The Court's duty when interpreting Parliament's words is codified in section 10(1) of the Legislation Act 2019. Section 10(1) directs the courts as follows: "The meaning of legislation must be ascertained from its text and in the light of its purpose and its context."

Parliament has granted the courts limited discretion to depart from this approach to give statutes a meaning that is consistent with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 (Bill of Rights). Section 6 of the Bill of Rights states, "Wherever an enactment can be given a meaning consistent with the… Bill of Rights, that meaning shall be preferred to any other meaning."

As we will see in Chapter 3, the Supreme Court has recently treated section 6 as giving it a broad licence to rewrite Parliament's words. But, regardless of the scope of section 6, it does not permit the courts to take the same licence when interpreting Acts of Parliament that do not infringe on rights protected by the Bill of Rights.

Yet, several Supreme Court decisions have asserted an equivalent common law right to read down – or 'side-step' – Parliament's words if they clash with what the Court believes are 'fundamental rights'.[18]

The principle of legality

When interpreting statutes, the courts have always been careful about assuming Parliament intends to override well-established rights unless the law clearly says so.[19] The courts apply longstanding rules or 'presumptions' to help with this. For example, they read criminal laws narrowly to favour the accused. They also protect people's right to a fair trial and to use the courts. And they protect the confidentiality of communications between clients and their lawyers.[20] This careful approach is sometimes called 'the principle of legality.'

The traditional view is that this principle cannot override clear statutory language, context and purpose.[21] Instead, the courts traditionally used these presumptions as 'tie-breakers' or default rules to resolve ambiguities in the words used by Parliament. But they could not use them to override clear wording.[22]

Seen this way, Oxford Professor (and former Auckland Law School graduate) Richard Ekins says the principles have "a kernel of good sense."[23] The courts should be slow to infer that Parliament means to depart from long-standing constitutional rules and practice.

However, recent decisions of the Supreme Court have, at best, paid lip service to this limit. The Court has become increasingly bold, cutting across or reshaping Parliament's words.[24]

New Zealand's Supreme Court is not alone in misusing the principle. The more overreaching approach started in the House of Lords (whose appellate functions are now exercised by the United Kingdom Supreme Court). Lord Hoffmann controversially described the idea as follows:[25]

> "Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have been unnoticed in the democratic process. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament,

> apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

Lord Hoffmann's description of the principle of legality significantly broadens the licence courts can take when interpreting Parliament's words compared with earlier understandings.

His approach suggests that the courts should ignore even clear language that limits basic rights. This approach gives courts much more freedom to interpret laws as they see fit. It also makes it harder for Parliament to pass laws that conflict with what courts think are basic rights. To avoid this outcome, on Lord Hoffman's approach, Parliament must clearly state that it means to override those rights.

In simple terms, Lord Hoffmann's approach turns the presumptions from tie-breakers into trump cards. In his view, courts can ignore Parliament's clear words and apparent intention in the name of protecting rights. This is a significant shift in the balance of power between Parliament and the courts in the realm of statutory interpretation.

As Hodder points out, Lord Hoffmann's language is "remarkably disrespectful of the democratic process."[26] Yet, our Supreme Court has embraced this idea without question. It seems to have eluded our highest court that Hoffmann's reasoning ignores the New Zealand context, specifically the safeguards built into the Bill of Rights to protect rights enshrined in the Bill of Rights.

The safeguards arise under section 7 of the Bill of Rights. Section 7 requires the Attorney-General to tell Parliament if a proposed law might clash with the Bill of Rights. This process occurs during the legislative stage. It makes sure that Parliament is alerted to potential rights issues before passing laws.

This built-in safeguard makes the Court's broad approach to statutory interpretation even less justifiable in the New Zealand context.

More modern 'presumptions'

Even more troubling is the Supreme Court adopting other 'presumptions' – beyond those in the principle of legality – with which the Supreme Court requires laws to comply. As Hodder observes:[27]

> "Governments and legislatures could justifiably query the cumulative effect of the relatively modern presumptions that legislation will not be interpreted according to its plain meaning and purpose unless it passes a series of presumptions of compliance with: (1) Treaty principles; (2) international instruments; (3) the NZBORA [the New Zealand Bill of Rights Act]; and (4) rights within the principle of legality."

This report does not address the 'Treaty principles' presumption. It requires a separate, in-depth analysis that is beyond this report's scope.[28] But, to lay the foundations for recommendations in Chapter 3, it is necessary to say something about a presumption that is said tobe "gaining strength".[29] This is the presumption that Parliament does not mean to legislate contrary to New Zealand's international law obligations.

In this context, "international law obligations" means commitments New Zealand has made through international treaties and agreements. However, it is important to understand that these commitments are *not* part of our domestic laws unless Parliament makes them so.

Writing outside her court role, the Supreme Court's Justice Glazebrook notes that on the traditional view, an apparent ambiguity was required to "trigger the presumption [of compliance with international obligations]."[30] The New Zealand Court of Appeal had previously held that "an open-ended administrative discretionary power could not be confined by implied limits

derived from international law."[31] However, as Justice Glazebrook observed, "This is no longer the case and the courts have read open-ended administrative discretionary powers as being subject to the limits of international law."[32]

The approach Justice Glazebrook describes is indisputably controversial. The controversy was helpfully highlighted in an exchange between Justice Glazebrook and Professor Finnis in 2018. Professor Finnis was responding to comments provided by Justice Glazebrook on his *Judicial Power* lecture referred to in Chapter 1.[33] Justice Glazebrook's comments were titled *Mired in the past or making the future*,[34] and prompted a refreshingly direct response from Professor Finnis.[35]

Finnis points out that, over the last 20 or 30 years, the judges *themselves* have created or strengthened the new approach to international law Justice Glazebrook relies on.[36] Finnis argues that Justice Glazebrook's comments simply show the courts are claiming a right to make political decisions.

It is hard to disagree. And it is precisely this that Finnis's *Judicial Power* lecture warns against.[37] Instead of acting as tiebreakers in cases of ambiguity, the courts have granted themselves the right to use international law to override clear statutory language.

The Supreme Court's reliance on judge-made presumptions to qualify clear statutory language raises serious concerns about the separation of powers. When judges invoke presumptions to read down – in the sense of narrowly interpreting or 'side-stepping' – clear legislative text, they weaken Parliament's authority to make laws. This undermines the democratic legitimacy of the legislative process. It is also inconsistent with the court's duty to faithfully interpret and apply the law as enacted.

The Court's approach in relation to international law also raises a second problem. It can give rise to what is known as an 'ambulatory' approach to statutory interpretation. Under this ambulatory approach, the meaning of laws changes over time as international laws change. This change might involve new interpretations of international treaties or emerging global norms. And it can take place even without explicit Parliamentary approval. In other words, as international law changes, the interpretation of domestic statutes is expected to change with it.

However, this approach effectively transfers lawmaking power from Parliament to the courts. As courts reinterpret laws to align with evolving international standards or norms, they are changing the law without Parliament acting.

The ambulatory approach also makes laws less certain and predictable. If laws can change meaning over time based on developments in international law, it becomes hard for individuals and organisations to know what the law means at any given time.

So, this ambulatory approach poses significant challenges to parliamentary sovereignty, to legal certainty, and to the rule of law.

Parliamentary pushback

Not surprisingly, the string of decisions in which the Supreme Court has presumed to know better than Parliament has sparked annoyance among lawmakers. Hodder calls this "small stirrings of legislative irritation".[38]

After the Supreme Court's decision in *D v The Police*, Parliament passed new legislation under urgency. This law reversed the Court's analysis, holding it did not match Parliament's original and ongoing intent.[39]

The case was about whether the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 applied to D, who had been convicted of a qualifying offence before the Act came into effect.

The Supreme Court allowed D's appeal by a majority, with three judges allowing the appeal and two dissenting. The majority applied a presumption against retrospectivity to reach their decision. They concluded that, despite Parliament's apparent intention for the Act to apply to past cases, the words used by Parliament were not clear enough to rebut this presumption.

The Chief Justice and Justice O'Regan delivered the leading judgment. They held that the presumption against retrospective penalties was a basic legal principle also found in the Bill of Rights. Applying the principle of legality, they said Parliament needed to use very clear words to override this rule and the Bill of Rights. They found that, while there were indications that Parliament had intended the Act to apply retrospectively, it had not used clear enough language to achieve that result.

Parliament then responded with urgent legislation to 'clarify' that it meant what it said in 2016. This effectively reversed the Supreme Court's decision. One Government MP bluntly answered the question, "Who makes the rules?" saying, "Obviously, Parliament ... is supreme."[40] Parliament may well wonder if the Supreme Court understands this.

The most notorious instance of the Supreme Court circumventing Parliament's wishes is the Court's 'three strikes' decision in *Fitzgerald*, discussed in more detail in Chapter 3.[41] In a split decision (three judges against two), the Supreme Court allowed Mr Fitzgerald's appeal. The judges in the majority effectively rewrote the 'three-strikes' maximum sentence provision in the Sentencing Act 2002.

The *Fitzgerald* decision may be remembered as a high watermark of judicial activism. It suggests that not even clear wording is enough to override what the Court regards as basic rights. Instead, it seems the Court will insist on clear evidence that Parliament has deliberately confronted the possibility of these basic rights being set aside before it will follow Parliament's words.

It is easy to understand why Hodder says the Supreme Court's approach has turned statutory interpretation into a "quiet constitutional battlefield."[42]

b. Legislating from the bench: The Supreme Court's common law activism

The Supreme Court's approach to the 'common law' is also deeply troubling.

To the non-lawyer, the common law is a curious beast. In contrast to the laws passed by Parliament, the common law refers to the body of law developed by judges through court decisions over centuries. It is characterised by the doctrine of precedent (or 'stare decisis'), where judges are largely bound to follow the reasoning used in prior decisions when the material facts are the same. This adherence to precedent provides stability and predictability in the law, a fundamental aspect of the rule of law.

The common law reflects an organic, bottom-up process whereby the law develops incrementally through judicial decisions. This evolutionary approach is often described as the 'common law method'. It allows the law to provide practical, predictable justice. It does this by establishing fundamental principles governing relationships between individuals without attempting to regulate every aspect of social interaction.[43]

Examples of 'judge-made' common law include the rules that certain promises give rise to enforceable obligations (contracts), laws relating to trespass and other civil wrongs (called 'torts'), and requirements that state officials act fairly when exercising powers over the public.

Because Parliament is supreme, legislation can override the common law, and much of the

common law has now been codified in statutes that replace or take precedence over it.

The common law originated in England. It was introduced in New Zealand by the passage of the English Laws Act 1858, which deemed English laws existing as of 14 January 1840, including the English common law, to be in force in New Zealand from that date onwards "insofar as it is applicable to the circumstances of New Zealand." Successive Acts of Parliament, most recently the Imperial Laws Act 1988, have maintained that position. Section 5 of the 1988 Act provides:

> "**5 Application of common law of England**
> After the commencement of this Act, the common law of England (including the principles and rules of equity), so far as it was part of the laws of New Zealand immediately before the commencement of this Act, shall continue to be part of the laws of New Zealand."

Because the common law is judge-made, lawyers endlessly debate the extent to which courts may 'make' new law. Such debates over the limits of the common law method can be polarising. At one end of the spectrum, no one would doubt the legitimacy – or indeed the need – for judges to extend, say, rules relating to the acceptance of a contractual offer by post to cover emails and text messages. Nor would many doubt the legitimacy of judges drawing on the principles or 'values' of the common law to apply them in new or novel situations.

But what are the limits on judges changing the principles themselves?

Until the latter part of the 20th century, the orthodox view emphasised the 'declaratory' nature of the common law method. This is that judges 'find' rather than 'make' the law. However, in his 1972 article, *The Judge as Lawmaker,* Lord Reid, a member of the House of Lords in England, famously likened this view to a "fairy tale."[44] Since then, courts in common law countries, including New Zealand, have gladly accepted the lawmaking licence that Lord Reid's remarks implied.

However, Lord Reid's remarks were controversial when he made them, and they have not ceased to be so. Lord Reid arguably confused the difference between judges having to settle the many unanswered questions arising from human interaction and judges actively changing established law.

The declaratory theory has recently received persuasive support from Professor Finnis in his *Judicial Power* lecture. For Finnis, "To state... that the common law is declared rather than made is no mere 'fairy-tale', unless the statement is mistakenly asserted or heard as a description of the history of the common law. It is not a description or prediction, fictionalising that history by overlooking the many changes made by the courts, but a statement of judicial responsibility: to identify the rights of the contending parties now by identifying what were, in law, the rights and wrongs, or validity or invalidity, of their actions and transactions when entered upon and done."[45]

On this view, the common law method, properly understood, provides principled 'guardrails' against judicial legislation. It focuses the judicial task on a retrospective inquiry into the parties' existing rights and obligations under the law as it stood when their dispute arose.

It allows judges to depart from prior precedent, but only when it is out of line with what should be judged now (and should have been then) to be the proposition that best coheres with other parts of the law. It does not allow judges to 'update' the law to conform to their conception of 'contemporary social values.' It recognises that far-reaching forward-looking legal reforms to reshape future social relations should be enacted by Parliament. Such reforms should not be imposed retroactively by courts under the guise of 'developing' the common law.

For Finnis, the high bar this sets against changing the law is justified by the propensity even of able judges to err when reforming the common law. As Finnis notes, judges can be misled by counsel's "seductive slogans", by the "tangles of precedent", by "blind spots in legal learning", and by litigation's procedural limitations.[46]

Furthermore, as lawmaking involves taking responsibility for the future, Finnis contends that Parliament is better suited for this task than the courts. This is because Parliament has superior fact-finding abilities, a capacity to consult widely and democratic accountability.[47] Courts risk unfairness by changing the law under the guise of declaring existing rights. The proper judicial role is to look backwards at parties' rights and wrongs under accepted principles prevailing at the time, not to craft and apply new, forward-looking rules.[48]

Finnis advocates for a strict declaratory approach. But even those who take a broader view of judicial lawmaking recognise the need for judges to exercise restraint. Lord Bingham, at the time a Senior Law Lord of England's highest court, articulated a more expansive but still cautious approach to judicial lawmaking in 1997. In an essay honouring New Zealand's most well-known judge, Justice Robin Cooke (later Lord Cooke of Thorndon), Lord Bingham outlined five situations where judges should exercise particular restraint in making new laws.[49]

Those situations were, first, where right-minded citizens have legitimately ordered their affairs based on a certain understanding of the law. Second, where a legal rule which is accepted as defective requires replacement by a detailed legislative code with qualifications, exceptions and safeguards, and that code requires research and consultation that judges are not equipped to perform. Third, where the question involves an issue of current social policy on which there is no consensus in the community. Fourth, where the issue is currently being addressed by Parliament. And finally, where the issue is far removed from ordinary judicial experience.

Even on Lord Bingham's wider approach, recent statements from New Zealand's Supreme Court judges – both in judgments of the Court and their extra-judicial writings – are deeply worrying. Members of our highest bench have repeatedly asserted that the Court's role is (somehow) to divine 'changing societal values' and use them to 'develop' the common law.

Of course, the Supreme Court Act does not refer to 'development.' Rather, as noted earlier, it refers to a continuing commitment to the rule of law and parliamentary sovereignty. As Hodder observes, "together, those references connote values of stability and predictability of the law…" and not some preconceived, court-led development or journey.[50]

Nevertheless, Supreme Court judges have become quite entrenched in their view that the Court is allowed to take the common law on a 'journey'. For example, in *Attorney-General v Family First New Zealand*, the majority defined the common law method as "incremental development of the law to adjust to societal changes."[51]

The majority's decision echoes the Court's earlier decision in *Lai v Chamberlain*, where Justice Tipping stated, "We are changing the law because of a change in perceptions over time of what public and legal policy require."[52]

But, as Hodder questions of the claimed changes, "Whose perception? When and why did any such change occur? What evidence? And what accountability?"[53]

This approach to 'developing' the common law raises serious concerns about the separation of powers. When judges reshape the law based on their perception of changing social values, they assume a role constitutionally reserved

for Parliament. As Professor John Finnis explains in *Judicial Power: Past, Present and Future:*[54]

> "The judicial responsibility is to adjudicate between parties who are in dispute about their legal rights and obligations by applying — to facts agreed between them or found by the court after trial — the law that defined those rights and obligations at that time past when the matter of their dispute (the cause in action) arose."

In contrast, "The legislature's responsibility is to make new or amended public commitments about private rights (and public powers) for the future."[55]

Crucially, the legislature is better equipped to discharge this responsibility of "taking responsibility for the future" and "making new or amended public commitments." In Finnis' words:[56]

> "For discharging this responsibility, the institutional design of serious legislatures is broadly superior to the institutional design and procedures of even sophisticated appellate courts — not least because bearers of judicial power are rightly made immune from any requirement to answer for their judgments, and from almost any liability for them."

New Zealand, with its unicameral Parliament, is in an especially powerful position to change the law when this is necessary.

The Supreme Court's 2022 decision in the *Peter Ellis case (Ellis)* is perhaps the most well-known and controversial example of the Court's expansive approach.[57] Despite the *Ellis* case having no Māori connection, the Court – at its own instigation – took into account tikanga Māori considerations in deciding that Peter Ellis's appeal against convictions could continue despite his death. Three justices went further, indicating that *any* issue of law before the courts may need to be addressed in the light of tikanga.

Until *Ellis*, the status of tikanga in New Zealand's legal system was relatively well understood.[58] Tikanga was relevant to Māori customary property rights.[59] Such customary rights could affect non-Māori, and the fruits of them could be assigned to non-Māori. But for tikanga to take effect as law, there must have been some factual connection with Māori.

Tikanga had also been recognised explicitly by Parliament in a range of statutes, including the Resource Management Act 1991. The courts had, from time to time, also accepted tikanga considerations as relevant to the exercise of discretionary powers. For more than a century, tikanga-based custom had also been recognised in the common law as giving rise to enforceable rights and obligations in the same way the common law recognises other local or special customs as law.

In relation to this final category, the common law has *always* been informed by customary practices. Indeed, as every law student learns, there are three authoritative sources of law: legislation, case law (i.e., the common law), and 'customary usage.'[60]

The common law distinguishes between two types of customs. 'General' customs apply to all persons within a jurisdiction. In contrast, 'local' or 'special' customs apply only to a particular locality or group.[61] In either case, for a custom to be recognised as law, it must have the essential attributes of antiquity, continuance, certainty, and reasonableness.[62]

And so it had been with tikanga – until *Ellis*. The leading case was *The Public Trustee v Loasby*,[63] a 1908 decision relating to the payment of debts incurred for a Māori chief's funeral. The Court recognised tikanga as a form of local custom that met the common law requirements for recognition as law. This recognition enabled the court to enforce the payment of the chief's funeral expenses against

the wider Māori community, in line with their customary practice of collective responsibility for such costs.

The Court in *Loasby* made clear that it was recognising a local custom *specific to Māori*, not a general custom applying to all."[64] But in its approach, the Court treated tikanga as a local custom that the common law could recognise because it met the necessary requirements in the same way it would non-Māori customs.

All this changed with the Supreme Court decision in *Ellis*. Despite the long-standing requirements for the recognition of local or general customary practices as law, a majority of the Supreme Court justices overruled the *Loasby* 'rule of recognition' of tikanga as law. Instead, the Court decided that tikanga could apply to *any* dispute before the courts, whether or not there was any connection to the facts that involved Māori or issues specifically relevant to Māori.

Justice Glazebrook delivered the leading judgment. Chief Justice Winkelmann and Justice Williams concurred.[65] Two of the five Supreme Court judges – Justices Arnold and O'Regan – dissented. I will comment on their reasons for dissent later in this Chapter.

The majority's decision in *Ellis* raises three troubling problems:

- The Court's complete indifference to – or ignorance of – the status Parliament has conferred on the common law New Zealand inherited from England;
- The vacuum of principle the Court's decision has created regarding the recognition of tikanga within the common law; and
- The Court's incoherent and unconstrained approach to the common law method, which offends both the rule of law and at least two of Lord Bingham's five 'no-go' zones for the courts.

Each of these problems is discussed below.

New Zealand's common law inheritance

Justice Glazebrook's leading judgment held that the rules for the incorporation of tikanga into the common law applied in *Loasby* should no longer apply. According to Justice Glazebrook, the rules "import notions of 'judging' tikanga and operate on the mistaken assumption of the superiority of Western values and a view that the common law inherited from the United Kingdom should be presumptively dominant."[66]

However, Justice Glazebrook's reasoning here is flawed. The "dominance" of the English common law is not based on a "view." It is based on legislation passed by Parliament: the English Laws Act 1858 and its successor statute, the Imperial Laws Act 1988, discussed earlier in this Chapter.

That is not to say the common law inherited from England cannot be expanded or modified following the common law method. But unless it is, the common law *is* "presumptively dominant". Not because of any so-called "presumption of the superiority of Western values" but because Parliament has repeatedly said so.

Had Parliament intended the common law's rule of recognition concerning customary usage to be inapplicable in New Zealand, it would doubtless have specified this. But it did not.

The Supreme Court's failure to acknowledge the common law's dominance is not just inconsistent with the Imperial Laws Act 1988. It is inconsistent with the commitment affirmed in the Senior Courts Act to the sovereignty of Parliament.

A principles-free vacuum

Having overturned the rule in *Loasby* for the recognition of tikanga as law, the Court went on to replace it with… nothing. Or at least nothing that could satisfy the rule of law's requirements of certainty and consistency.

"I do not attempt a reformulation of the test for the inclusion and application of tikanga in the common law", Justice Glazebrook cavalierly stated.[67]

Instead of certainty and consistency, the relationship between tikanga and the common law is to be determined on a case-by-case basis that will depend heavily on context. As the Chief Justice put it:[68]

> "…the task of describing how tikanga will [now] contribute to the development of the common law is not straightforward because of the infinite variety of factual circumstances in which it may arise for consideration. There may be circumstances in which tikanga values have no relevance. Tikanga values or concepts may clash with other values in society, existing principles of the common law or indeed statutory provisions. That conflict will have to be worked through."

Justice Glazebrook's own views were even more vague:[69]

> "…tikanga principles and values may have an influence on the development of the common law. They can also provide a new vocabulary or new way of thinking about new concepts of law or a new intellectual framework for those concepts."

Justice Williams added a further complicating observation, saying that while the courts "may apply tikanga in appropriate cases, they must also understand that they cannot authoritatively declare it for general purposes."[70]

Victoria University Law Professor Dean Knight and Otago University Law Lecturer Mihiata Pirini have summed up the outcome as follows:[71]

> "Unquestionably, this aspect of the case has reset the parameters of the common law-tikanga relationship; these parameters are now confirmed to be highly contextual and *not determinable by precise rules of recognition"* (italics added)

Knight and Pirini did not spell out the implications of this. However, the implications need to be stated: By failing to articulate a clear and coherent framework for recognising tikanga as law, the Court has created a legal vacuum that is the very antithesis of the rule of law.

The requirements of the rule of law are covered in more depth in Chapter 3. For present purposes, two observations will suffice. First, an essential characteristic of laws – and of the rule of law – is that they provide certainty, consistency and predictability. Yet, by leaving the relationship between tikanga and the common law to be determined on an ad hoc, case-by-case basis, the Court has created a recipe for uncertainty, inconsistency, and arbitrary decision-making. This undermines the rule of law's most fundamental requirements.

Second – and as a consequence – the Court's approach is inconsistent with the continuing commitment to the rule of law affirmed by Parliament in the Senior Courts Act 2016.

The rule of law problems arising from the majority's approach did not go unnoticed in the minority decision of Justices Arnold and O'Regan. The dissenting judges noted that the Court had not addressed a number of "difficult issues of both legal and constitutional significance."[72] These include:[73]

- How can the court identify when tikanga is relevant to the case at hand and when it is not?
- If it is relevant, how should it be addressed?
- Whether tikanga is a separate or third source of law?
- How the relevant tikanga should be brought to the Court's attention (noting the acknowledgement in the reasons of Justice Glazebrook that the process used in *Ellis*, "though commendable thorough and authoritative, will not be able to be followed in more run-of-the-mill cases")?

- How the application of tikanga in one area of the law affects the common law in another area?
- How to avoid tikanga being distorted by the courts?
- How to address the fundamental difference in approach to wrongful conduct and issues of social order between tikanga Māori and the common law?

The minority noted they were conscious that the New Zealand Law Commission was in the process of producing a detailed study paper examining tikanga Māori and its place in the legal landscape of New Zealand.[74]

Perhaps also mindful of Lord Bingham's guidelines on the limits of legitimate judicial lawmaking, Justices Arnold and O'Regan thought "it better to allow that process to proceed without the intervention of obiter pronouncements from this Court, given the factors just discussed.[75]

Indeed. The shortcomings in the majority's judgment suggest a Court less concerned about New Zealand's continuing commitment to the rule of law and the common law method than captivated by the allure of making a grand symbolic gesture.

Ironically, the Court's failure to specify a new 'rule of recognition' for tikanga may have resulted in what Knight and Pirini describe as a "loss of status for tikanga." That is because, post-*Loasby*, tikanga is now "less an independent source of law…".[76]

The Law Commission's 2023 He Poutama Study Paper on tikanga also appears to recognise this consequence. In Chapter 8, the Law Commission observes, "The majority opinion [in *Ellis*] addressing tikanga issues did not go on to articulate a replacement test… Nevertheless, we do not read the Supreme Court's decision… as preventing further 'custom law' claims."[77]

The hopeful tone of this second quoted sentence speaks volumes about the shortcomings of the majority's decision. Yet the Commission's "reading" of the majority decision seems hard to reconcile with Justice Williams's observation that the courts "cannot authoritatively declare [tikanga] for general purposes."[78] If they cannot, how can tikanga have the status of law?

The Supreme Court's approach creates uncertainty and represents a troubling encroachment on Parliament's legislative role. By leaving the relationship between tikanga and the common law to be determined *ad hoc*, the Court has awarded itself the power to shape the law according to the judges' perception of cultural values. However, that role is properly one for a democratically elected Parliament.

'Developing' the common law

As noted earlier, an underlying theme of the judgments of the majority in *Ellis* is that they are taking the common law on a 'journey.' In Justice Glazebrook's view:[79]

> "…the function of this Court is to declare the law of Aotearoa/New Zealand and we must be mindful of the values that in combination give us our own sense of community and common identity… [T]ikanga is part of the values of the New Zealand variety of the common law. The consideration of common values is important when applying the common law to new or novel situations or *when considering the need (or otherwise) to develop or modify the common law."* (italics added)

Chief Justice Winkelmann likewise claimed the Court's role was to 'develop' the law. After a relatively orthodox description of the 'common law method' involving applying the principles that can be extracted from the cases on a case-by-case basis, the judge then veered off in a radical departure from orthodoxy. The Chief Justice claimed that "[W]hen there is a need for the law to develop to meet a different or changed

situation" the Court "may look to the values in society – which are, of course, themselves shaped by the law, but are also shaped by other forces at work in our society."[80]

Justice Williams, the third majority judge, made similar observations. He said, "The common law tends not to develop in leaps and bounds, but it must also respond to societal change if it is to maintain relevance."[81]

No explanation is given of the "different or changed situation" the Court felt it had to confront in *Ellis*. When the outcome of the case, in the end, did not turn on the application of tikanga, it is hard to comprehend how there could have been one.[82]

What we are left with is the majority's assertion that the Court can change the common law when it discerns a change in "societal values."

Yet, as Hodder questions, "By what logic or training or experience and by which evidence do the courts identify and weigh inconsistent 'values' in applying and developing the common law?"[83]

These are good questions. Indeed, the majority's references in *Ellis* to the law adjusting to "changing societal values" are deeply hubristic. They contain no sign of Lord Bingham's caution where cases raise current social policy issues on which the community has no consensus. They assume judges can identify society's changed values and declare appropriate responses. Yet, judges do not have the tools, the democratic mandate, or the political accountability to perform this function.

An obvious concern is that the judiciary's views of "changing societal values" may simply be the judges' own values. Yet, such an approach is contrary to the rule of law's requirements for certainty and consistency. It also conflicts with the expected impartiality of the judicial role. A court that imposes the values of its judges is not impartial. Consequently, the approach *politicises* the judiciary. Yet, the courts lack democratic legitimacy or accountability for political decision-making. That is the role of Parliament.

As Hodder observes, acceptance of judicial decisions depends on their legitimacy. But "in large part, [the courts'] legitimacy depends on [them] remaining within areas where they have institutional competence, and where democratic legitimacy and accountability are not expected."[84]

The Supreme Court's approach is even more presumptuous when we remember, as Hodder notes, New Zealand's Parliament has often passed laws to meet changing social and political needs.[85]

Indeed, as the minority decision in *Ellis* noted, at the very time when the Supreme Court was deliberating on its decision in *Ellis*, The New Zealand Law Commission was considering the interaction of tikanga and the general law at the request of the Minister of Justice. The Commission's He Poutama Study Paper on tikanga,[86] referred to above, was published eleven months after the *Ellis* decision. The 300-page Commission's Study Paper was the culmination of two years of research and consultation of the very type that Lord Bingham warned, "judges are not equipped to perform."

While the two judges in the minority in *Ellis* recognised the Court should hold back and allow Parliament and the executive to grapple with the complexities involved in changing the relationship between tikanga and the common law, the majority showed no such restraint.

In doing so, they have adopted a legal method that is both radical and dangerous. It is radical because it is premised on a mistaken view that the judiciary's task is to take the law on a journey and because it has introduced tikanga into the common law when tikanga is intimately

connected only to Māori. It is dangerous because it threatens the rule of law's fundamental requirements of consistency and predictability and because it risks undermining public confidence in the impartiality of the judiciary.

Against this background, it is hard not to conclude that the Supreme Court is departing from its lane.

CHAPTER 3

How should Parliament or the Executive Respond?

As we saw in Chapter 2, the Supreme Court's overreach challenges the proper constitutional balance between judges and Parliament. By stepping into policymaking, the Court has blurred the line between judging and Parliament's role as lawmaker. This weakens the separation of powers and the democratic legitimacy of the law.

This blurring also makes the law less clear and predictable. As the Supreme Court rewrites legislation and reshapes the common law to reflect its views of society's values, the public cannot rely on clear words or stable past decisions to guide their actions. This undermines the rule of law's requirement that laws be clear, predictable, and consistently applied.

If left unchecked, the Court's approach could turn our courts from the 'least dangerous branch' into a powerful policy-making body, unaccountable to voters. This shift in power between courts and elected politicians represents a fundamental shift in how we govern ourselves. It is a change that Parliament has not approved and the public has not agreed to.

Legal economist Robert Cooter has argued that courts will push the boundaries of their proper role if they believe Parliament is unlikely to challenge their decisions.[87] As the top lawmaking body, it is, therefore, vital that Parliament pushes back. Parliament must reassert its sovereignty, restore the right balance between judges and Parliament, and reaffirm the boundaries of our constitutional order.

By quickly and consistently using its powers to stop the Supreme Court from overreaching, Parliament can reshape the Court's incentives and constrain its discretion. This will limit the Court's tendency to make decisions that stray beyond its proper role.

Fortunately, there are a range of tools available to Parliament to rein in an overreaching judiciary. This Chapter outlines five options:

a. Passing legislation to overturn aberrant judicial decisions and ensure the courts give effect to Parliament's wishes.
b. Adding 'guard rails' in the Senior Courts Act by defining the meaning of the rule of law to limit the Court's activist tendencies.
c. Amending the Legislation Act 2019 to constrain the Court's loose approach to statutory interpretation and to require judges to adhere more closely to statutory text.
d. Repealing or amending provisions like section 6 of the Bill of Rights Act that invite judicial rewriting of statutes the courts do not like.
e. Reforming judicial appointment processes to emphasise judicial restraint and respect for the sovereignty of Parliament and the rule of law and limit the terms of Supreme Court Judges.

Each of the options is examined below.

a. Legislative intervention

Parliament's most blunt response to judges overstepping their bounds is statutory. In the legal hierarchy, Parliament is supreme, and it can pass legislation to clarify the law to ensure that the courts give effect to its wishes.

Parliament also has a more direct option. In the words of Professor Paul Rishworth KC in a presentation to Parliament's Legislative Design and Advisory Committee, "[T]here is no legal impediment to enacting a law to validate an action held by a court to be invalid ...".[88] The same is also true of Parliament invalidating an action a court has held to be valid.

Parliament is generally reluctant to interfere in court proceedings because of principles relating to the separation of powers. Consequently, past interventions have not been common. But that is because erroneous court decisions have historically been more accidental than consciously radical. A court that adopts a 'transformative' role can expect more frequent correction.

An example of the first approach is Parliament's Child Protection (Child Sex Offender Registration) Act 2016, discussed in Chapter 2. In response to the Supreme Court's decision in *D v The Police*, Parliament passed legislation under urgency reversing the Supreme Court's analysis as inconsistent with Parliament's original (and continuing) intent.[89]

The Supreme Court's decision in *Fitzgerald* in relation to the 'three strikes' provisions of the Sentencing Act did not suffer the same fate. That was because, following the change of Government in 2020, the provisions were repealed. However, the coalition agreements of the (now) National-led Government provide for their reinstatement. New legislation will now squarely address the Bill of Rights rather than simply referring to "any other enactment."

A further example is the commitment in the coalition agreement between National and New Zealand First to amend the Marine and Coastal Area (Takutai Moana) Act 2011 to "make clear Parliament's original intent". The Act enables iwi to claim "customary" marine or coastal title. Parliament stipulated that to succeed, iwi must establish "continuous" and "exclusive" use of a marine or coastal area since 1840. However, in a majority decision in *Re Edwards*, the Court of Appeal held that overlapping exclusive use sufficed and that continuity of exclusive use from 1840 should not be taken literally.[90]

In July 2024, the Minister of Justice announced proposed legislation to address the Court of Appeal's decision in *Re Edwards*.[91] This legislative intervention aims to 'clarify' Parliament's original intent regarding the test for customary marine title under the Act. The statutory amendments are likely to make clear that when Parliament said "exclusive", it meant exclusive, and that when it said "continuous", it meant continuous.

The Minister's announcement also indicated the proposed amendments would include inserting a declaratory statement explicitly overturning the Court of Appeal's reasoning.

If this proposed legislation is passed, it will be a clear example of Parliament asserting its sovereignty to correct what it perceives as judicial overreach. Such a legislative response aligns perfectly with the approach outlined above.

What more should Parliament do?

Parliament should not hesitate to 'correct' other court decisions that go too far.

The *Ellis* decision dealing with tikanga is a prime candidate for a response from Parliament. Though couched in polite language, the Law Commission's 2022 Tikanga Study Paper reveals the Supreme Court blundered by overruling *Loasby* and not specifying an alternative 'rule of recognition' for tikanga within the common law. As Knight and Pirini have observed, without a rule of recognition, the status of tikanga is diminished by the law.[92]

A legislative 'fix', therefore, seems both necessary and appropriate. It is necessary because of the

significant disruption and uncertainty the *Ellis* decision has created. It is appropriate because legal clarity is needed.

Potential options for Parliament to consider include:

1. Passing legislation that effectively overrules the majority in *Ellis* and reinstates the approach from the earlier case of *Public Trustee v Loasby*. This approach would re-establish the common law position that tikanga can only be recognised as part of the common law if it meets the longstanding requirements for the recognition of customs as law – namely antiquity, continuity, certainty and reasonableness.
2. Introducing a comprehensive statutory framework for how and when tikanga should be considered by courts. This framework could specify the areas of law in which tikanga is relevant, set out principles for its proof and application, and delineate its status vis-a-vis statute and common law. Such a framework could help provide much-needed clarity while still allowing an appropriate role for tikanga, calibrated by Parliament.

Whichever path is chosen, a direct statutory response would reassert Parliamentary sovereignty over this issue and provide an authoritative, democratically legitimate settlement of the complex legal and constitutional questions raised by *Ellis*.

b. A rule of law amendment to the Senior Courts Act 2016

Parliament could also legislate to introduce more clearly defined 'guardrails' in the Senior Courts Act 2016.

Helpfully, the Act refers to New Zealand's "continuing commitment" to both the rule of law and the sovereignty of Parliament.

There is no doubt about the meaning of "parliamentary sovereignty". It means Parliament sits above the courts.[93] But nowhere in the Act is the term "rule of law" defined. And while it has an orthodox meaning, unless defined, it is susceptible to manipulation.

Under the orthodox approach, the rule of law relates to the 'formal' characteristics of laws and the legal system. These include laws being publicly accessible, predictable, stable, coherent and impartially applied. They describe the characteristics that laws must possess to guide conduct effectively without making any sort of judgment about the moral or substantive content of the law.

This 'thin' or formal conception of the rule of law has a long pedigree in legal philosophy and constitutional theory. Its origins can be traced back to the writings of Aristotle, but its modern conception derives from the work of 19th-century legal scholar and philosopher AV Dicey. Dicey described three core elements of the rule of law: the supremacy of regular law as opposed to arbitrary power, equality before the law, and the incorporation of constitutional rights through the ordinary law of the land.[94]

More recently, legal theorists such as Joseph Raz have articulated similar formal accounts of the rule of law, emphasising features such as generality, publicity, prospectivity, clarity, consistency, and congruence between official action and declared rule.[95]

However, some legal theorists have argued that the rule of law should extend beyond 'formal' components to include 'substantive' entitlements, including social, political, and economic rights.[96]

This expanded approach, sometimes described as the 'thick' version of the rule of law, contrasts with the traditional 'thin' version.[97] Proponents of a 'thick' conception argue that the rule of law requires not just the formal virtues of legality but

also the realisation of substantive values such as social justice.[98]

In practice, a 'thick' conception of the rule of law would involve judges not just applying the law as written but also interpreting and applying it in ways that promote these substantive values. This might involve, for example, using the law to promote the Court's view of social justice and equality, such as by ensuring access to basic services like housing.

While this perspective has gained traction in some academic circles, it remains controversial. Critics argue that it risks politicising the judiciary and blurring the line between law and politics. They maintain that the rule of law should be a neutral, formal concept and that substantive values should be promoted through the democratic political process rather than through judicial interpretation.

Nevertheless, at least one member of the Supreme Court has advocated publicly for this 'thick' approach in New Zealand. In a 2021 Waikato Law School lecture, the Supreme Court's Justice Glazebrook claimed the meaning of the rule of law is still evolving.[99]

In advocating for its expansion, Justice Glazebrook concluded:[100]

> "… until we complete the process of decolonisation, the rule of law can only be considered a work in progress. The new place of the Treaty and Tikanga in the law is a start... The rule of law is a guiding principle as long as it includes human rights, access to justice, and I would add, redress for historical disadvantage. If that is the case, it is also an appropriate catchcry for a better and more just world."

Justice Glazebrook's sentiments are doubtless well-meaning. However, the Judge's expansive approach was plainly *not* Parliament's intention when referring to "New Zealand's continuing commitment to the rule of law …" in the Supreme Court Act 2003.

What is more, the Judge's formulation is a recipe for the sort of judicial overreach outlined in Chapter 2. A court that believes it can discern "changing societal values" will not hesitate to impose them under the guise of upholding a 'thick' version of the rule of law.

The requirements of the rule of law then become whatever the Supreme Court wants them to be. That is the antithesis of 'law'. It turns the judicial role into an explicitly political one. Yet judges lack the democratic mandate or accountability necessary to exercise political power.[101]

By politicising itself, the judiciary also encourages politicisation of the judicial appointment process. This risks further undermining respect for the law.

What should Parliament do?

Parliament should introduce a traditional, 'thin' definition of the rule of law into section 3 of the Senior Courts Act.

An amendment could be to the following effect:

> Section 3 of the Senior Courts Act 2016 is amended by inserting the following after subsection (2):
>
> "(3) For the purposes of subsection (2)(a), the 'rule of law' refers to the formal characteristics of the law and legal system, which require that:
> (a) laws are publicly promulgated, clear, accessible, and generally applicable to all persons;
> (b) laws are prospective, stable, and applied consistently and impartially by officials and the judiciary;
> (c) the process by which laws are enacted, administered, and enforced is accessible, fair, efficient, and congruent with the declared rules;
> (d) justice is delivered in a timely manner by competent, ethical, and independent representatives, with courts being accessible to all;

(e) laws are not arbitrary and do not confer unfettered discretionary powers on government officials.

(4) For the avoidance of doubt, the definition of the "rule of law" under subsection (2)(a) does not:

(a) give rise to actionable rights; or

(b) require, empower or permit the courts to disregard the substantive content, wisdom, or policy of legislation; or

(c) permit the courts to develop the common law in ways that purport to give effect to a more substantive conception of the rule of law; or

(d) affect the duty of the courts to interpret legislation in accordance with section 10 of the Legislation Act 2019; or

(e) diminish or qualify the principle of Parliamentary sovereignty or the power of Parliament to make or unmake any law."

This draft articulates the core formal elements of the rule of law, drawing on standard accounts in legal philosophy and constitutional theory.[102] The key features are that laws must be public, clear, stable, and applied equally and impartially through fair and accessible procedures.

Importantly, subsection (4) makes explicit that this 'thin' conception of the rule of law does not invite the courts to engage in substantive review of the content of laws or to develop the law to give effect to rights or values not already recognised by statute or common law. This is intended to preclude the kind of expansive 'thick' conception of the rule of law advocated by Justice Glazebrook and others.[103]

The amendment would make clear that Parliament's reference to the rule of law in the Senior Courts Act is not a mandate for judicial activism or lawmaking but rather an injunction to uphold the formal virtues of legality that enable the law to guide conduct effectively.

Of course, the precise wording may benefit from further refinement, but this draft provides a starting point for articulating a 'thin' definition of the rule of law that would constrain judicial overreach while still upholding the law's essential formal characteristics.

Enacting such a definition would, on its own or in tandem with some of the other measures discussed in this Chapter, send a clear signal to the Supreme Court not to stray from its constitutional bounds.

c. Amending the Legislation Act 2019

A third option is for Parliament to set stricter statutory guidelines for the courts when interpreting Parliament's words.

Amendments should address *at least* two problems. First, Parliament must scotch the idea that the courts can take the ambulatory approach to interpreting statutes discussed in Chapter 2. Statutes mean what they say when Parliament passed them. They should not be given some invented meaning based on what a future court thinks Parliament might have said at some later date. That is a legislative function for Parliament.

Secondly, Parliament should rein in the licence the courts have granted themselves with the growing number of presumptions discussed in Chapter 2. It should make clear that presumptions, including the principle of legality, are more tie-breakers than trump cards.

How Parliament might go about making these changes is discussed below.

Parliament's guidelines to the courts

To the non-lawyer, legislative guidelines for the interpretation of statutes might seem unnecessary. Surely, Parliament's words mean what they say?

Unfortunately, sometimes the words used in statutes are ambiguous. Does a prohibition on 'hunting' include 'fishing'? Is a 'bicycle' a 'vehicle'? As the Law Commission noted in its 1990 report, *A New Interpretation Act to Avoid Prolixity and Tautology*, for as long as there have been texts, their meaning has generated dispute.[104]

When setting guidelines, Parliament can choose how much leeway to grant the courts to 'make the legislation work.' Too little leeway, and Parliament will find itself endlessly amending statutes every time an ambiguity arises. Too much leeway, and Parliament risks the courts substituting their own views for those of Parliament.

For more than a century, successive Parliaments have progressively given the courts greater leeway when interpreting the legislature's words. The current guidelines in the relatively recently enacted Legislation Act 2019 are more permissive than ever.

Section 10(1) of the Legislation Act 2019 says, "The meaning of legislation must be ascertained from its text and in the light of its purpose and its context."

The words "and its context" in section 10 were first mooted by the Law Commission in its 1990 report.

The primary goal was to recognise that the 'factual matrix' of social and economic factors that existed at the time of a statute's enactment may be key to understanding what meaning Parliament intended from the words it used. In the famous words of Lord Blackburn:[105]

> "In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used."

Nevertheless, in 1999, Parliament rejected the Commission's recommendations to permit the courts to refer to 'context' when it passed the Interpretation Act 1999. Section 5(1) of that Act is in the same terms as section 10(1) quoted above – but without the words "and its context."

The Explanatory Note to the Bill said the words "in light of its context" had been omitted because "the term ... is imprecise" and "suggests a meaning that might well go beyond the approach of the Courts currently in interpreting legislation."[106]

Much has been written and said, both by academics and the judges, about whether the absence of an express licence to consider "context" was effective *as a matter of practice* to limit the court's consideration of the external context in deciding a statute's meaning.[107]

Perhaps recognising the impracticality of preventing courts from considering context, when the National-led Government introduced the Legislation Bill to amend and consolidate the Interpretation Act 1999 into a new "Legislation Act" in 2017, section 10 of the Bill proposed the addition of the words "and its context" into the operative section. The Legislation Act was duly passed in this form by the Labour-led Government in 2019.

The troubling ambulatory approach

When advocating the potential importance of the courts considering 'context' in interpreting Parliament's words, it is abundantly clear that the Law Commission had in mind the *historical* context. That is, the matrix of facts that existed *at the time the legislation was passed*.[108]

Yet, the wording in section 10(1) of the Legislation Act does not refer to 'historical' context, just to 'context.'

At least one leading text on statutory interpretation argues that the 'modern' (i.e. contemporary) context is just as important. Burrows and Carter states:[109]

> "Just as important as the circumstances surrounding the passing of the statute is the social and economic context in which it must continue to operate. In other words, it would seem that in appropriate cases, the Court should be informed not just of historical context but also matters of modern context. The social policy implications of alternative interpretations are surely important."

This is an unquestionably radical suggestion. The notion that Courts should consider the *contemporary* social context when interpreting statutes amounts to an open invitation to judicial activism. It would encourage judges to substitute their own policy preferences for those of Parliament under the guise of 'interpretation.'

Allowing such an 'ambulatory' approach to interpretation permits the court to adopt meaning that changes with the times and also untethers legislation from its democratic anchor. It replaces the judgment of Parliament with the preferences of unelected judges.

Yet, as we saw in Chapter 2, Justice Glazebrook, writing extra-judicially, has endorsed this ambulatory approach to statutory interpretation.[110] The Judge's view is based on section 6 of the Interpretation Act 1999 – now section 11 of the Legislation Act 2019. It states that "Legislation applies to circumstances as they arise."[111] Justice Glazebrook contended that the requirement to apply legislation to "circumstances as they arise" mandates interpreting statutes in light of evolving societal attitudes and values.[112]

However, the Judge's views do not stand up to even the gentlest scrutiny.

As Professor Finnis points out in his response to Justice Glazebrook's comments, section 11 has a narrow, technical meaning about construing the present tense as including the future tense. It does not justify interpreting statutes in light of contemporary social mores.[113]

Finnis is clearly correct. Section 11 (and its predecessor, section 6) traces back to a series of earlier interpretation statutes, including the Acts Interpretation Act 1924. The relevant section in the 1924 Act (section 5(d)) stated:[114]

> "The law shall be considered as always speaking, and whenever any matter or thing is expressed in the present tense the same shall be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof according to its spirit, true intent, and meaning."

The key phrase "shall be applied to the circumstances as they arise" (which is echoed in the current Legislation Act) was originally intended to address a narrow, technical issue of verb tense. It clarified that the present tense used in statutes should also be construed as including the future tense.[115]

In other words, this provision was meant to ensure that statutes are read as "always speaking" so that they continue to apply to new situations falling within the ordinary meaning of the statutory language, even if those exact situations were not contemplated when the statute was enacted.

So, section 11 would allow the courts to interpret a law written in the 1980s referring to 'computers' as applying to smartphones, even though smartphones did not exist in the 1980s.

But section 11 does not justify interpreting statutes dynamically to reflect (judges' conceptions of)

evolving social attitudes or understandings that depart from the original meaning of Parliament's words.[116]

Had Parliament wished to confer the power Justice Glazebrook so ambitiously claims on the courts, it would have expressly said so. The absence of language requiring or permitting an ambulatory approach in either the Legislation Act 2019 or the New Zealand Bill of Rights Act 1990 further undermines the case for Justice Glazebrook's favoured approach.[117]

Without such clear language, the courts should not assume an ambulatory intent, especially as doing so effectively transfers lawmaking power from Parliament to the judiciary.

The same objection can be made in relation to the potentially ambulatory effect of the court's use of presumption relating to compliance with international law discussed in Chapter 2.[118] As Professor Finnis points out, acute issues arise when the ambulatory approach is coupled with a presumption that Parliament does not intend to legislate contrary to international law.[119] It creates an almost unrestricted licence to invoke international law to displace statutory text and purpose.

Finnis rhetorically asks: "[D]oes not the generalised subjection of New Zealand law to 'international obligation' confer on the executive an unconstitutional power to change citizens' rights by prerogative without parliamentary authorisation?"[120] Yet, the courts assuming the power to reinterpret statutes to comply with international instruments entered into by the executive is *precisely* the effect of the Supreme Court's articulation of the presumption of compliance with international law.

It should be obvious that such an outcome is constitutionally problematic. And not for this reason alone. It also undermines the separation of powers by allowing the courts to prefer international legal sources over the clear intent of the domestic legislature. It also subverts democratic self-government by subjecting legislation enacted by Parliament to vague and evolving international norms over which New Zealand has very little control.[121] The vast body of international law is often ambiguous, contested, or not directly applicable to domestic circumstances. Using it to modify domestic law introduces a new source of legal indeterminacy and uncertainty.

In short, Finnis provides compelling, principled reasons for rejecting an ambulatory approach to statutory interpretation in New Zealand unless legislation expressly requires it.[122] His arguments reinforce the case for constraining judicial interpretive discretion and upholding the primacy of the words used by Parliament in discerning Parliament's intent.

The overreaching application of the principle of legality

As discussed in Chapter 2,[123] the Supreme Court's approach to the principle of legality has significantly expanded the judiciary's power to read down or disregard clear statutory language.

Far from resolving ambiguities, the principle has been invoked to override clear language, context and purpose.[124]

This 'judicial supremacy' in statutory interpretation raises serious concerns about the separation of powers and the rule of law. When courts invoke common law presumptions to read down clear legislative text, they undermine Parliament's constitutional authority to make laws and the democratic legitimacy of the legislative process. They also introduce significant uncertainty into the law.

What should Parliament do?

Recent scholarship has proposed specific measures to address the expansion of judicial power through the principle of legality in the United Kingdom.

In a submission to the UK Parliament, Professor Ekins argues for legislation to "discipline the misuse of the principle of legality, affirming the priority of legislative intent in statutory interpretation."[125] His proposals offer a framework for potential parliamentary action in this area in New Zealand.

Ekins suggests that Parliament should clarify that the principle of legality is about inferring legislative intent, not a free-standing ground for the courts to override clear statutory language.[126]

Ekins recommends amending the Interpretation Act 1978 (UK) to clarify how the principle of legality should be properly understood and applied. This could include specifying that the principle is a presumption about Parliament's intent, not a tool for the courts to override clear statutory language.[127]

Ekins's ideas for the UK Parliament on how to fix judicial overreach are helpful for dealing with the two issues discussed here.

To restore the proper balance between the judiciary and Parliament:

1. Parliament should pre-empt the suggestions from Burrows and Carter and Justice Glazebrook and amend section 10(1) of the Legislation Act by inserting after the words "and its context" the words "at the time the legislation was enacted." This would stop the courts from taking an ambulatory approach to deciding on the meaning of Parliament's words.

2. At the same time, Parliament should amend section 10(1) to make expressly clear that, when considering the implications of international law on the meaning of a statute, the courts may only have regard to international laws or norms in existence at the time the legislation was enacted. This would reverse the presumption's claimed ambulatory approach.

3. Parliament should act to check the drift to judicial power introduced by the Supreme Court's approach to the principle of legality. It should amend section 10 by adding a subclause expressly limiting the principle of legality. The subclause should make it clear that the courts cannot use common law presumptions to displace or qualify clear statutory words, adopt meanings inconsistent with statutory purpose or adopt unreasonable interpretations.

Reforming legislation to this effect would help ensure that courts do not take over Parliament's role under the guise of 'interpretation'. It would help restore the proper balance between the roles of Parliament and the courts. It would eliminate the spectre of 'common law constitutionalism' by making clear that judge-made laws must always give way to laws made by Parliament.

Some may object that removing this tool from judges will mean fewer protected rights. However, this overlooks the reality of modern New Zealand. Rights are robustly protected through the democratic process and by statutory measures like the Bill of Rights Act's section 7 procedure. Allowing 'judicial amendment' of legislation is not necessary to secure adequate rights protection. And it poses its own risks to individual liberty by undermining democratic self-government and the rule of law.

d. Amending the New Zealand Bill of Rights Act 1990

The New Zealand Bill of Rights has had a profound effect on the way the courts interpret Parliament's words.

The Bill of Rights protects certain civil and political rights that Parliament has decided are key to our society. These include the right to a fair trial, freedom of expression, freedom of religion, the right to be free from unreasonable search and seizure, and the right to be free from discrimination.

The Bill of Rights provides this protection as an ordinary statute rather than a 'supreme law'. Consequently, courts cannot strike down laws that are inconsistent with the Bill of Rights.

Indeed, section 4 of the Bill of Rights expressly states that:

> "No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
> (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
> (b) decline to apply any provision of the enactment —
> by reason only that the provision is inconsistent with any provision of this Bill of Rights."

The approach in section 4 contrasts with countries with written constitutions, like the United States, which allow courts to invalidate laws conflicting with the constitution.

Nevertheless, the Bill of Rights still requires courts to prefer rights-consistent interpretations of statutes where possible. Most relevantly, section 6 of the Bill of Rights provides that:

> "Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning."

Over the nearly three-and-a-half decades since the enactment of the Bill of Rights, the courts have developed considerable jurisprudence on the operation of these clauses. Unfortunately, it is impossible to do justice to all this legal thinking in this short report.

Instead, this report will simply focus on the licence the courts have decided section 6 of the Bill of Rights gives them to rewrite Parliament's words – and whether something needs to be done about that.

The troublesome section 6

Section 6 undoubtedly enables the courts to change the meaning of Parliament's words. No Act of Parliament is spared – or at least, no Act of Parliament that touches on rights protected by the Bill of Rights. Not even Acts of Parliament passed before the Bill of Rights came into effect in 1990.

While section 6 specifies that the courts may only adopt an interpretation of a statute that the words "can" bear, the section gives the courts a lot of leeway. Just how much leeway had been open to debate. However, with the Supreme Court's decision in *Fitzgerald*, the debate has been settled, at least from the perspective of the Supreme Court.

But first, some history on the application of section 6.

In the two decades or so following the enactment of the Bill of Rights, the New Zealand courts had taken a cautious approach when deciding the meaning they "can" prefer to the plain meaning of Parliament's words.

In the early years of the Bill of Rights, the President of the Court of Appeal, Justice Cooke, said:[128]

> "The preference will come into play only when the enactment can be given a meaning consistent with the rights and freedoms [protected by the Bill of Rights]. This must mean, I think, can reasonably be given such a meaning. A strained interpretation would not be enough."

This restrained approach contrasted with the approach taken by the courts in the United Kingdom concerning the UK's equivalent of the Bill of Rights, the Human Rights Act 1998 (UK). Section 3 of the UK Act requires the courts to interpret domestic legislation consistently with the European Convention on Human Rights "so far as it is possible to do so." The House of Lords has suggested these words "may require a Court to depart from the unambiguous meaning the legislation would otherwise bear."[129]

Writing extra-judicially, Lord Philips, a past Law Lord and past President of the UK Supreme Court, said that the UK courts "have taken upon themselves a revising role that goes beyond mere interpretation" and one that "permit[s] a court to disregard an unambiguous expression of Parliament's intention."[130]

As recently as 2007, our Supreme Court in *R v Hansen* made it clear that the New Zealand courts would not follow the radical approach of the UK Supreme Court.[131] In *Hansen*, the Court emphasised that section 6 only authorised a "reasonably available" interpretation of statutory language. The justices described such interpretations as "tenable" or "genuinely open", having regard to the words used by Parliament. Justice Tipping described the UK Supreme Court's approach as a kind of "concealed legislative tool" unsuitable for New Zealand purposes.[132]

But that was then, with a differently constituted Supreme Court led by a different Chief Justice. (Chief Justice Elias, rather than the Supreme Court's present Chief Justice Winkelmann.) Fast forward to 2021, and the Court's decision in *Fitzgerald* and the Winkelmann-led Court decided to escape its shackles.

As noted in Chapter 2, the *Fitzgerald* case concerned an appeal against conviction for a 'third strike' offence under the then National-led Government's 'three strikes' sentencing legislation. Mr Fitzgerald's 'third strike' offence was categorised as a relatively low-level indecent assault. Without consent, he had kissed a woman on the cheek.

Such an offence would normally have involved no more than a short prison sentence (if any). But the three strikes provision of the Sentencing Act, section 86D, provided that:

> "Despite any other enactment… the High Court must sentence the offender to the maximum term of imprisonment prescribed for [the] offence."

Mr Fitzgerald was duly sentenced to the maximum term of seven years.

On appeal in the Supreme Court, the Crown conceded that the sentence imposed was in breach of section 9 of the Bill of Rights. Section 9 affirms that everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment. The Crown accepted the appellant's sentence was disproportionately severe compared to the seriousness of the offending.

The issue, then, was whether the three strikes regime bound the sentencing judge to impose that sentence or whether the Bill of Rights permitted the court to interpret its way around the regime.

The majority of the Supreme Court decided it could do the latter. In her decision, Chief Justice Winkelmann expressly disapproved of the Supreme Court's earlier approach in *Hansen* to the effect that only "reasonable" meanings were available to the courts under section 6. On the contrary, the Chief Justice explicitly referred to and endorsed the approach of the UK Supreme Court. The only limits on judicial interpretation were that "the meaning arrived at cannot amount to a refusal to apply the enactment, and nor can it amount to treating the enactment as invalid, ineffective, impliedly repealed or revoked."[133]

The three other Supreme Court Justices making up the majority were not quite as assertive as the Chief Justice. However, they did not accept that Parliament could have intended "to impose sentences that are so grossly disproportionate that they shock the national conscience and breach s 9 of the Bill of Rights."[134]

Only Justice Young dissented. Justice Young described the decision of the majority as interpreting section 86D as if it included the italicised words below:[135]

> "Despite any other enactment *(but not including the New Zealand Bill of Rights Act 1990)*, if, on any occasion, an offender is convicted of 1 or more stage-3 offences other than murder, the High Court must sentence the offender to the maximum term of imprisonment prescribed for each offence *but must not do so if this would result in disproportionately severe punishment under s 9 of the New Zealand Bill of Rights Act."*

Justice Young held that the first (italicised) exception "is a flat contradiction to the generality of the words 'Despite any other enactment'." His Honour said, "The expressions 'Despite any other enactment', 'on any occasion' and 'the High Court must' seem to me to admit of no ifs and no buts."

Justice Young also observed that during the parliamentary process, it was recognised that, under the regime then proposed, there was scope for second and third-strike sanctions to be imposed on some who might not be in the group of offenders intended to be targeted. The response was to put administrative arrangements in place to ensure a screening by Crown Solicitors of prosecutions with respect to strike offences. Justice Young said:[136]

> "I have distinct reservations as to whether this was a sensible and principled way of addressing concerns about inappropriately harsh outcomes. But more importantly for present purposes, the apparent acceptance of this arrangement by Parliament reinforces the view that s 86D should be construed as meaning what it says. If Parliament's understanding (and its purpose) was that sentencing judges must not impose disproportionately severe maximum sentences, there was little need for upstream administrative screening by Crown Solicitors. And if the parliamentary purpose had been to set the courts as a long-stop against the possibility that the Crown Solicitor might get it wrong, that would have been provided for in the legislation."

In these circumstances, Justice Young concluded:[137]

> "The difference between my approach and that of the majority turns on me having a more restricted view of what constitutes a reasonably possible interpretation. I see this as limited to what can be justified by reference to the text of the statute, allowing for purpose and applying ordinary principles of interpretation. If the interpretation contended for is not a starter on that approach, *I see its adoption via s 6 as statutory revision, not interpretation.*" (italics added)

Whatever one thinks about the 'three strikes' legislation, it is almost impossible to disagree.

As noted in the introduction, the Supreme Court's decision in *Fitzgerald* prompted a fiery debate in Parliament, with Opposition MPs accusing the Court of judicial activism, departing from conventional interpretations of parliamentary statutes and asserting powers they had never previously possessed, thereby challenging the authority of the democratically elected legislature.[138]

What should Parliament do?

Section 6 encourages courts to depart from Parliament's plain meaning. This might have been justified for Acts passed before 1990, as they were not drafted with the Bill of Rights in mind. However, any Act passed since then has been reviewed by the Attorney General for consistency with the Bill of Rights.[139] This raises the question of whether – more than three decades after the passage of the Bill of Rights – section 6 is now more trouble than it is worth.

In light of the Supreme Court's approach in *Fitzgerald*, a good case can be made for repealing or at least amending the section. As interpreted by the Court in *Fitzgerald*, it has become a tool for judicial overreach, allowing judges to substantially rewrite legislation under the guise of interpretation.

Parliament should consider repealing section 6 altogether. Alternatively, it should at least clarify that courts cannot adopt meanings inconsistent with statutory purpose or adopt unreasonable interpretations, effectively reinstating the approach in *Hansen*. This would help ensure that courts respect parliamentary sovereignty and do not usurp the legislature's lawmaking function under the guise of interpretation.

In his paper, *Thoughts on a Modern Bill of Rights*, Professor Ekins proposes similar reforms to section 3 of the UK Human Rights Act, the equivalent to our section 6.[140] Ekins argues that there is a strong case for simply repealing the UK's section 3 but that specifying an interpretive rule might be safer than leaving it to judicial elaboration.

He suggests that any amendments should make it clearer to the courts that the interpretive rule informs a process of inference about the meaning of the statutory text and, thus, about the meaning Parliament intended to convey by enacting that text in its context. Ekins contends that such changes are needed to stabilise the statute book and prevent judicial overreach.[141]

Similar amendments to the Bill of Rights to constrain judicial interpretive discretion would be an important step in upholding the proper constitutional balance between the branches of government in New Zealand.

e. Judicial appointment processes

Despite the executive branch's control over judicial appointment processes, New Zealand has a long-standing tradition of an apolitical judiciary.

Governments from across the political spectrum have appointed judges based on their legal expertise and standing rather than political affiliations or views.

However, as discussed in this report, there are strong reasons to be concerned about increasing judicial overreach. While successive governments have expressed disquiet about this trend, they may not have always been sufficiently attentive to the judicial philosophy and constitutional values of prospective judicial appointees.

An overly activist judiciary risks politicising itself and undermining public confidence in the impartiality and legitimacy of the courts. When judges are perceived to be pursuing political agendas or consistently privileging their own policy preferences over those of the elected Parliament or well-established common law principles, this erodes public confidence in the legal system.

What should Parliament do?

To address these concerns, the judicial appointment process could be reformed. More focus could be given to the approach of candidates to judicial decision-making and to their understanding of the proper constitutional relationship between the branches of government.

This does not mean appointing judges based on partisan political views. Rather, it means ensuring that appointees, especially to the senior courts, demonstrate a commitment to orthodox constitutional principles, including:

- Respect for the sovereignty of Parliament and the democratic process;
- Adherence to the text and purpose of statutes, rather than strained interpretations to achieve preferred policy outcomes;
- Recognition of the limits of the judicial role and the superior institutional competence of Parliament in matters of social and economic policy; and
- Commitment to incremental development of the common law, consistent with the doctrine of precedent, rather than radical departures based on judges' perceptions of changing social values.

These principles could be made explicit in the criteria for judicial appointments. Appointments should be made on merit, but merit should be understood to include a proper conception of the judicial role and a commitment to upholding the constitutional balance.

While reforming the appointment process is crucial, structural changes that could help maintain judicial restraint and perspective over time are also worth considering. One such proposal would be to implement fixed terms for Supreme Court judges.

Under such a system, Supreme Court judges could serve for a set period (say, 5–7 years) before returning to the Court of Appeal. This would be balanced by promoting Court of Appeal judges to fill the vacated Supreme Court positions. Such a rotation system could help prevent our most senior judges from becoming too detached from practical realities. It would also help guard against them gaining an exaggerated view of their role.

In addition, Parliament should consider legislative amendments to the judicial appointment process to enhance transparency and accountability. This could include a requirement for the Attorney-General to report to Parliament on judicial appointments, outlining the steps taken to assess candidates' suitability and their demonstrated understanding of constitutional principles.

Reforming the judicial appointment process in this way would foster a judiciary that is more attuned to respecting the proper limits of the judicial role. It would send a clear signal that partisan political views have no place in judicial appointments but that an appropriate understanding of the place of judicial power in our constitutional order is essential.

CHAPTER 4
Conclusion

Recent Supreme Court decisions show a Court that has lost its way. By blurring the lines between judging disputes and making law, the Court has stepped into Parliament's role. This judicial overreach undermines the separation of powers. It makes our laws less democratic. And it makes them less certain and predictable, characteristics that are key to the rule of law.

We see this troubling trend in two areas. When interpreting statutes, the Court now stretches or ignores clear words to achieve its preferred result. This can involve the Court taking over Parliament's role by rewriting laws.

Second, in relation to the common law, the Court is increasingly reshaping established legal principles based on its perception of contemporary social values and attitudes. However, the Court lacks both the tools and the democratic accountability to determine society's values. Its approach turns judges into politicians, making decisions that should be left to Parliament as the elected branch of government.

The Court's overreach challenges the balance between the judicial and legislative branches of government. If left unchecked, it risks turning the judiciary into a powerful policymaking institution, unaccountable to voters. This would represent a fundamental shift in how we govern ourselves.

As the supreme lawmaking body, it falls to Parliament to step in. Parliament must reassert its constitutional authority, restore the proper balance between the courts and the elected branch of government, and reaffirm the boundaries that underpin our constitutional order.

This report has outlined several ways Parliament could do this. These range from passing specific laws to overturn aberrant court decisions to more far-reaching reforms like amending the Legislation Act and the New Zealand Bill of Rights Act.

Of these options, the most immediate approach is for Parliament to focus on reversing particular judgments that have strayed too far. Changing judicial culture, especially in relation to common law reasoning, is a complex task that cannot be achieved solely through general legislation.

The Supreme Court's *Ellis* decision about tikanga is a prime example of why this targeted approach is necessary. The problem is not tikanga itself but the striking deficiencies in the Supreme Court's approach.

The *Ellis* decision is a profound example of the Supreme Court's inadequacy in its self-appointed lawmaking role. Far from enhancing the status of tikanga, the Court's approach may have inadvertently undermined it. By hastily overturning established precedent without providing a clear alternative framework, the Court has created confusion that threatens the very principles it wanted to protect.

Even the Law Commission, in its study on tikanga, seemed to recognise this problem. Without a clear rule for recognising tikanga as law, tikanga's status in our legal system might actually be weaker now.

This outcome was perhaps inevitable. The Court lacks the right tools and democratic mandate necessary to craft comprehensive legal frameworks. The *Ellis* decision reveals how judicial overreach can lead to unintended and potentially harmful outcomes.

The Court's ill-conceived attempt to 'develop' the law in this area highlights the dangers of judicial overreach more broadly. It demonstrates how courts, in straying beyond their proper constitutional role, can create more problems than they solve.

This situation shows the need for a more measured, democratically accountable approach to addressing complex legal and cultural issues. With its ability to engage in broad consultation, conduct thorough research, and craft comprehensive legislation, Parliament is far better equipped to tackle such fundamental changes to our legal system.

It is worth remembering that the courts *do* have constitutionally appropriate means of addressing perceived legal problems without overstepping. They can, for instance, point out in their decisions where Parliament might need to step in. This respects the separation of powers while still letting judges highlight areas that need attention. By sticking to these practices, the courts can help develop the law without risking the dangers illustrated by cases like *Ellis*.

The options discussed in this report would not weaken judicial independence or the rule of law. On the contrary, they would preserve these fundamental values by making sure the judiciary remains within its proper bounds. When judges overstep and take on Parliament's role, they weaken the rule of law they are meant to uphold.

Nor should we see Parliament reasserting its sovereignty as rejecting basic rights or the principles of justice. Instead, it is a return to the foundations of our legal system. In this system, we protect rights and justice through the democratic process, with elected representatives accountable to voters.

The Supreme Court's recent decisions have raised alarms across the legal and political spectrum. The public's trust in the impartiality and legitimacy of our courts is at stake. Parliament can begin to address these concerns by taking the steps recommended in this report. Parliament should start by overturning the most problematic court decisions.

The proposed new law to address the Court of Appeal's decision in *Re Edwards* shows that this recommendation is timely and practical. It is encouraging to see that the Government is willing and able to ensure Parliament asserts its sovereignty when needed to maintain the proper constitutional balance.

To restore the balance, Parliament should also amend problematic laws, like the Legislation Act and section 6 of the New Zealand Bill of Rights Act. It should also re-evaluate judicial appointment processes to encourage judicial restraint and respect for the sovereignty of Parliament.

If Parliament does not act, we will see an ongoing erosion of the foundations of our legal system. Activist judges will gradually replace the democratic process with rule by judicial decree. This is not how our constitution envisions our system of government working. Parliament must act with purpose to restore the constitutional balance and maintain the integrity of our legal system for future generations.

Endnotes

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Who makes New Zealand's laws? Is it democratically elected politicians or unaccountable judges?

Recent Supreme Court decisions have sparked widespread alarm about the answer to this question. They reveal a court that has misunderstood its role and overstepped its bounds.

The report shows how the Supreme Court has adopted a loose approach to interpreting laws passed by Parliament and is stretching or even ignoring clear statutory language. The Court is also reshaping the common law based on judges' views of changing 'social values'. Yet judges lack both the tools and the democratic accountability to make these sorts of policy decisions.

This judicial overreach has serious consequences. It undermines the law's democratic legitimacy and makes it more unpredictable. Clear and predictable laws are fundamental to the rule of law. When laws become uncertain, individuals and businesses cannot rely on them to guide their actions. This can paralyse decision-making and undermine confidence in our legal system.

The report recommends options for Parliament to address these issues. These include targeted legislation to overturn problematic decisions, clearer statutory guidelines to the courts and changes to judicial appointment processes.

These reforms aim to restore proper constitutional balance. The report argues for a system of government where elected politicians, answerable to voters, are primarily responsible for lawmaking and rights protection, not unaccountable judges.

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