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DEVELOPMENTS IN INDIGENOUS PEOPLES' RIGHTS UNDER INTERNATIONAL LAW AND THEIR DOMESTIC IMPLICATIONS

CLAIRE CHARTERS

The United Nations Committee on the Elimination of Racial Discrimination's finding that the New Zealand Foreshore and Seabed Act 2004 discriminates against Māori reminds us of the relevance of developments in international law on indigenous peoples' rights. This article pinpoints the content of those developments and their potential impact domestically. Four conclusions are drawn: indigenous peoples' land rights are binding on New Zealand via international human rights treaties and, to some degree, under customary international law; international human rights jurisprudence increasingly interprets individual human rights to protect indigenous peoples' rights; international law relating to indigenous peoples may be applied by New Zealand courts; and New Zealand policy currently falls short of international law on indigenous peoples' rights.

THE FREE TRADE AGREEMENT PARADOX

MEREDITH KOLSKY LEWIS

There is broad consensus that trade liberalisation is best achieved by negotiating reductions in trade barriers under the auspices of the World Trade Organization rounds of multilateral negotiations. Notwithstanding this consensus, Free Trade Agreements ("FTAs") have been proliferating at a rapid pace for many years now. The diversion of effort into negotiating FTAs, as well as the types of FTAs being negotiated, is undermining the ability to liberalise trade at the multilateral level. This article identifies this state of affairs as a paradox of sorts and seeks to explain the reasons for the paradox as well as to identify some potential solutions.

DEBATING NEW ZEALAND'S HATE CRIME LEGISLATION: THEORY AND PRACTICE

JOHN IP

Hate crime legislation, which imposes harsher penalties for crimes motivated by certain types of hatred or prejudice, is a controversial topic. Some claim that a genuine commitment to equality requires the enactment of hate crime legislation; others claim that such legislation violates the idea of equality before the law and infringes on personal autonomy. This article considers the impact and the merits of New Zealand's hate crime legislation, section 9(1)(h) of the Sentencing Act 2002. The article begins by comparing section 9(1)(h) to hate crime provisions overseas, and then considers its effect on sentencing practice to date. The justifications and objections to hate crime legislation are then considered under the framework of section 5 of the New Zealand Bill of Rights Act 1990. The article concludes that, while section 9(1)(h) does not infringe the Bill of Rights Act, the modest nature of the changes it mandates limits its impact on sentencing in New Zealand.

THE CHARITIES ACT 2005 AND THE DEFINITION OF CHARITABLE PURPOSES

DAVID BROWN

The enactment of the Charities Act 2005 on 14 April 2005 marks an opportunity to take stock of the definition of charitable purposes, which is at the heart of the functions of the new Charities Commission. Registration with the Commission is confined to charitable entities. Although voluntary, registration is a precondition to significant tax exemptions. Therefore the definition of "charitable purposes" is crucial. However, there are several overlapping and anachronistic definitions which appear in charity and tax legislation, a situation which has not been improved by the Act. This was a missed opportunity to deal comprehensively with the definitions, and furthermore, to establish the Commission as a central "one-stop shop". The extent to which this is the case is brought more clearly into focus by more substantial initiatives in other jurisdictions in the last two years, most notably the United Kingdom. This article will examine the direct impact of the Act on the definition of charitable purposes, the potential role of the Commission with regard to that definition, some recent approaches which have been taken in other jurisdictions, and an assessment of some contemporary New Zealand issues.

CRIME AND TERROR: NEW ZEALAND'S CRIMINAL LAW REFORM SINCE 9/11

ALEX CONTE

This article considers New Zealand's criminal and investigative law reform since September 11, 2001. It provides an overview of new terrorist and terrorism-related offences, then moving to examine three investigative tools introduced under the counter-terrorism legislative package in 2003. In the case of new powers of police questioning under section 198B of the Summary Proceedings Act 1957, it is concluded that the powers override a long-standing common law privilege against self-incrimination and, in circumstances where the power is exercised following arrest, a potentially unjustified (although lawful) violation of the right to silence under section 23(4) of the New Zealand Bill of Rights Act 1990. As to investigative tools impacting on privacy, the use of interception warrants under section 312N of the Crimes Act 1961 is argued to amount to a justifiable limit on privacy. In contrast, the tracking device regime introduced under sections 200A to 200O of the Summary Proceedings Act 1957 is, in its current unrestricted form, contended to amount to a breach of Article 17 of the International Covenant on Civil and Political Rights.

CRIMINAL NUISANCE: GETTING BACK TO BASICS

FRAN WRIGHT

This article considers the offence of criminal nuisance. It argues that nuisance is an endangerment offence and that understanding this assists with resolving questions about its scope, including the mental element of the offence, whether it applies where there is a breach of a common law duty, and whether consent to risk-taking is a defence. The article also suggests some reforms to the offence, including a higher penalty where harm has occurred, clarification of mental element so that it is clearly one of recklessness, and restriction of the offence to breaches of statutory duties. Finally, the article suggests consideration should be given to finding more suitable charges in cases of endangerment resulting in death or serious harm.

SO-CALLED "JUDICIAL ACTIVISM" AND THE ASCENDANCY OF JUDICIAL CONSTRAINTS

E W THOMAS

The constraints on the judiciary are much more extensive than is commonly appreciated. Yet, the phrase "judicial activism" is invoked to suggest that the courts are not constrained beyond such self-restraint as individual judges may choose to exercise. "Judicial activism" is seldom, if ever, defined. Historically, the phrase derives from the United States and, upon analysis, it is apparent that it has little relevance to this country. It tends to be used by its proponents as a label for decisions they do not agree with and to implicitly condemn the judicial approach underlying those decisions. The values underlying the label are obscured. Judicial constraints, however, interlock and reinforce one another to form a comprehensive matrix of control and discipline. They are sufficient to curb the errant or aberrant judge. An examination of both "external" and "internal" constraints confirms that judges operate within the bounds of an acceptable judicial methodology.