

INTERPRETATION OF LEGISLATION

TRENDS IN STATUTORY INTERPRETATION AND THE JUDICIAL PROCESS

*Kate Tokeley**

Professor John Burrows and Justice McGrath each presented papers that examined the changing approach to the interpretation of statutes. Both papers provide an interesting and detailed picture of the recent trends in statutory interpretation and raise important questions about the role of judges in giving effect to Parliamentary intent.

Victoria Heine presented a paper in which she undertook empirical analysis of the dissent judgments in the Court of Appeal during Sir Ivor Richardson's Presidency. The study provides important and useful empirical evidence of the trend toward a decrease in dissenting judgments.

Since the session dealt with these two distinct topics, my commentary is divided into two parts. In part A, I will give my own thoughts on the changing approach to statutory interpretation. Many of the current trends in interpretation are discussed by both Professor Burrows and Justice McGrath.¹ I will endeavour to explore some of the issues not dealt with in detail in their papers. In Part B, I argue that well-reasoned dissent judgments are a valuable part of the legal process. The recent decrease in dissents is therefore of concern if it is the result of a strong commitment by the Court to consensus and unanimity.

* Senior Lecturer in Law, Victoria University of Wellington.

1 Professor John Burrows "The Changing Approach to the Interpretation of Statutes" (2002) 33 VUWLR, 981 and John McGrath "Reading Legislation and Ivor Richardson" (2002) 33 VUWLR, 1017.

I THE CHANGING APPROACH TO STATUTORY INTERPRETATION

The subject of statutory interpretation is important because much of New Zealand law is contained in the statute books and because the majority of legal issues that come before the courts involve statutory interpretation.² Issues of interpretation arise because the precise meaning of words is often uncertain. There is usually an inner core of meaning that all reasonable people would agree upon and also a vast world of meaning that is clearly not conveyed by the word. However, there is a murky area in between these two spheres where interpretation becomes more difficult. The case of *Kecold Ltd v O'Brien*³ illustrates the uncertainty at the outer edges of meaning. This case involved interpretation of the word "sick". The inner core of meaning of this word is clear. If a person has influenza, cancer or food poisoning, for example, their condition is clearly within the meaning of "sick". The Court of Appeal had to decide whether the word "sick" applied to a person who was injured.⁴

The meaning of some words is particularly uncertain, in that the very nature of the word involves an element of subjectivity. For example, the Consumer Guarantees Act 1993 requires that goods supplied to consumers must be of "acceptable" quality, and the Credit Contracts Act 1981 prohibits "oppressive" credit contracts. Other statutes require the Court to make such orders "as it thinks just".⁵ Where such broad and non-specific wording is used, the courts must use their discretion to determine the scope of the words. If the provision comes before the court enough, an important body of case law will develop to fill out the meaning of the provision.

The difficulty drafters of statutes face is that it is impossible to predict all the situations which may arise and to provide clearly for each situation. If a drafter attempts to create a detailed provision which is specific and certain there is a danger that the provision will be long, unwieldy and lack flexibility to deal with the unexpected. On the other hand a provision drafted with broad conceptual terms may be flexible but this is potentially at the expense of certainty.

The process of interpreting statutes is an art and not an exact science. Nevertheless, general trends can be ascertained.

2 In 1996, sixty-four percent of cases in the Court of Appeal involved statutory interpretation. See Jane Allen "Statutory Interpretation and the Courts" (1999) 18 NZULR 439, 440.

3 *Kecold Ltd v O'Brien* [1999] 3 NZLR 261 (CA).

4 The Court concluded that the word "sick" in the context of the Holidays Act 1981 could apply to a person who was injured.

5 See, for example, the Contractual Mistakes Act 1977 s 7(3) and the Contractual Remedies Act 1979 s 9.

A *A Shift from Strict Literal Meaning to Natural and Ordinary Meaning in Context*

Both Professor Burrows and Justice McGrath refer to the old style of interpretation where courts applied the strict literal meaning of statutes as deduced from the words in question, the dictionary meanings, and rules of grammar.⁶ The golden rule allowed this approach to be departed from where a literal interpretation would lead to an absurd or unjust result. However, the new meaning given to the words still needed to be one that the words could bear.⁷

As both Professor Burrows and Justice McGrath explained,⁸ there has been a shift away from this strict literal approach. The shift includes a move toward a purposive approach and an increasing recognition of an approach described by Professor Burrows as "value-based interpretation".⁹ There has also been a subtler shift in approach, which is worth considering further since it was not the main focus of Professor Burrows' and Justice McGrath's papers. This is the shift from the strict literal approach to an approach that looks for the natural and ordinary meaning of words in their context.

This relaxation of the strict literal approach involves a wider search for meaning than simply looking at the word in question, its dictionary meaning and rules of grammar. The modern courts are concerned with finding the natural and ordinary meaning of that word or provision in its context. This involves consideration of the natural and ordinary meaning of the word in everyday usage as a more important indicator of meaning than the dictionary definition. More important than both the dictionary and ordinary usage is the internal context of the Act. Professor Burrows refers to this as the "scheme of the Act".¹⁰ The word must be examined in the context of the whole Act rather than limiting the inquiry to the section in question. So, for example if the issue is whether the word "wildlife" includes a dead kiwi in section 63 of an Act¹¹ it is relevant that under section 55 of the same Act the drafter refers to "the dead bodies of ... wildlife".¹² If the word

6 Professor John Burrows "The Changing Approach to the Interpretation of Statutes" (2002) 33 VUWLR, 981 and John J McGrath "Reading Legislation and Ivor Richardson" (2002) 33 VUWLR, 1017.

7 See, for example, *River Wear Commissioners v Adamson* [1877] 2 AC 743, 764 (HL).

8 Burrows, above, and McGrath, above.

9 Burrows, above, 981.

10 Burrows, above, 981.

11 Wildlife Act 1953.

12 See *Police v Johnson* (1990) 3 NZLR 211 (HC).

"wildlife" included the dead bodies of such wildlife there would be no need to use the expression "dead bodies of wildlife".

The examination of the internal context of the Act is more than a tool to be used when determining the purpose of the Act, it is firstly and more importantly a method for deducing natural meaning. Jefferies J stated in *Arataki Honey Ltd v Minister of Agriculture and Fisheries* "[i]n the complex task of wresting the true construction of an Act it cannot be compartmentalised and scrutinised molecularly".¹³

Although the strict literal rule has been relaxed and the purposive approach has been given more emphasis in recent years, the basic rule that prima facie the natural and ordinary meaning of words in their context must be applied still stands. The statutory language is still the starting point and in many cases it also provides the answer. A study conducted at the University of Otago showed that in almost half of the Court of Appeal cases involving statutory interpretation in 1976, 1986 and 1996, the Court reached its decision relying on simply the statutory language itself and any relevant precedent cases.¹⁴ Recognition of the importance of the statutory language itself is now contained in section 5(1) of the Acts Interpretation Act 1999, which directs the courts to ascertain meaning from the *text* of an enactment in light of its purpose.

B Purposive Approach

Both Professor Burrows and Justice McGrath emphasised the increasing importance of the purposive approach to statutory interpretation.¹⁵ Alongside the purposive approach has come the acceptance of the use of extrinsic material to assist in determining Parliamentary purpose. For example, courts are prepared to consider Hansard debates,¹⁶ Law Reform Committee or Law Commission Reports, the explanatory notes to Bills and international standards. Professor Burrows and Justice McGrath concluded that extrinsic material needs to be treated with care but can be of assistance in some situations by giving background information and occasionally indicating purpose.¹⁷

The requirement to have regard to purpose is contained in section 5(1) of the Acts Interpretation Act 1999. The section states that "the meaning of an enactment must be

13 *Arataki Honey Ltd v Minister of Agriculture and Fisheries* [1979] 2 NZLR 311, 314 (SC) Jefferies J.

14 See Jane Allen "Statutory Interpretation and the Courts" (1999) 18 NZULR 439, 479.

15 Professor John Burrows "The Changing Approach to the Interpretation of Statutes" (2002) 33 VUWLR, 981, and John J McGrath "Reading Legislation and Ivor Richardson" (2002) 33 VUWLR, 1017.

16 See *Marac Life Insurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694, 701 (CA).

17 Burrows, above, and McGrath, above.

ascertained from its text and in light of its purpose". The purposive approach is not a new idea. It was stated in section 5(j) of the Acts Interpretation Act 1924. However, as Justice McGrath points out, the courts for a long time failed to consistently apply the statutory mandate.¹⁸

Although the purposive approach is an important tool of interpretation it is generally accepted that its application is limited. In theory there are two limits. First, the purposive approach should only be applied where there is uncertainty in the words of the statute. Secondly, it should only be used to employ a meaning that the words of the statute are reasonably capable of bearing. The courts should not use the purposive approach to make a law consistent with Parliamentary intent if Parliament has failed to effectively state that intent in the statute.

The two limits on the application of the purposive approach are required in order to retain certainty in the law and to ensure that judges do not contravene the principle of the separation of powers by shifting from interpreting and applying the law to creating the law.

Section 5(1) of the Acts Interpretation Act 1999 has not changed the limits on the purposive approach despite omitting the useful phrase "shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act...". This phrase made it clear that the task is to *interpret* the words of the Act not to create new words in order to give effect to legislative intention.¹⁹ In the new section 5(1) the direction is to ascertain *meaning* from the *text* of the enactment. Like the old section 5(j) this subsection indicates that the courts are involved in the process of interpreting and not creating the law.

The theory on the limits of the purposive approach is easy to state however the translation of theory into practice results in some difficulties. First, there is the difficulty in determining at what point a word's meaning can be said to be truly uncertain. Secondly, there is the difficulty in determining the point at which a meaning is one that the words can no longer reasonably bear. The more conservative approach is to apply the most natural and ordinary meaning of a word in context, despite the fact that this might contravene Parliamentary intent. A more flexible approach is to attempt to give effect to Parliamentary intent so long as the meaning ascribed to a provision is a possible meaning

18 The New Zealand Law Draftsman, Mr Ward, criticised the courts for largely ignoring the purposive approach. See Denzil AS Ward "A Criticism of the Interpretation of Statutes in New Zealand Courts" [1963] NZLJ 293.

19 See *Union Motors Ltd v Motor Spirits Licensing Authority* [1964] NZLR 146, 150 (SC) where Wilson J states that the word "fair" in section 5(j) indicates that the words must *fairly* be able to bear the meaning put on them.

even if strained or unusual. Professor Burrow's example of the case where a container for sweets shaped like a baby's bottle was found to be a "toy" follows this more flexible approach.²⁰ The court gave the word "toy" a somewhat strained meaning in order to give effect to Parliamentary purpose.

Although the limitations on the purposive approach described above are generally accepted, there is another more extreme and controversial approach. Under this approach the court, either expressly or covertly, overrides meaning in order to give effect to Parliamentary intent. An example of this is the Court of Appeal interpreting "every person" as including "every person other than a solicitor".²¹ In a more recent case, the Court interpreted a two-year time limit as applying to the making of an application rather than the making of a court order.²² The section was perhaps clumsy but it clearly meant the time limit to refer to the making of an order but the Court nevertheless found an ambiguity and applied the purposive approach.²³ In this case the Court did not openly acknowledge that it was overriding meaning but instead claimed to find an ambiguity. Allowing courts to openly override meaning in some circumstances is an approach favoured by Jim Evans who recommends that the Interpretation Act 1999 should have a detailed provision to indicate when meaning should be disregarded.²⁴

This latter approach is strongly opposed to by both Justice McGrath and Professor Burrows. I am also wary of any suggestion that a judge should be able to override meaning even in limited situations. Neither do I think judges should be able to artificially strain words in such a way that meaning has essentially been dispensed with. As Sir Ian McKay stated: "A purposive approach should not be made an excuse for starting with the underlying purpose, and then forcing the words into a preconceived and strained construction to fit that assumption".²⁵

20 *Commerce Commission v Myriad Marketing Ltd* (2001) 7 NZBLC 103, 404 (HC), cited in Professor John Burrows "The Changing Approach to the Interpretation of Statutes" (2002) 33 VUWLR, 981.

21 *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191 (CA).

22 *Commissioner of Inland Revenue v Registrar of Companies* (1993) 7 PRNZ 224 (CA).

23 For a good discussion of this case see J Bruce Robertson "Judges, Deconstruction and the Rule of Law" [1994] NZLJ 344, 345. See also Claire Baylis "Home Care - Homework?" [1996] NZLJ 291. Baylis discusses *Cashman v Central Regional Health Authority* [1997] 1 NZLR 7, [1996] 2 ERNZ 159 (CA). She argues that the Court in this case followed the purposive approach after finding an ambiguity in the statutory definition of "homeworker" where no such ambiguity in fact existed.

24 Jim Evans "Getting the Words Right" [1992] NZLJ 256.

25 Sir Ian McKay "Interpreting Statutes - A Judge's View" (2000) 9 OULR 743, 749.

Of course, the line between the most natural and ordinary meaning, a strained meaning and a new meaning are not clear. What one person may describe as "overriding clear words" might by another be described as "a broad interpretation". As Professor Burrows states in his paper there is no "bright line" between interpretation and judicial legislation.²⁶

C Value-Based Interpretation

One of the most interesting points that Professor Burrows makes is that fundamental values have become a significant part of the interpretation process and that there is an increasing express recognition of their use.²⁷

What is described by Burrows as "value-based interpretation"²⁸ fringes on the same idea as the golden rule that maintains that where possible the words of a statute should be interpreted to avoid an absurd, unjust or repugnant result. The New Zealand Bill of Rights Act 1990 (Bill of Rights Act) requires a value-based interpretation but there are many other fundamental values not included in the Bill of Rights Act (freedom from slavery, privacy and the sanctity of property are examples given by Professor Burrows).²⁹ Some issues in respect of the Bill of Rights are discussed in Part I D The Bill of Rights.

Value-based interpretation is only applicable where there is some uncertainty over meaning. It is particularly helpful in situations where it is difficult to determine Parliamentary intent and so the purposive approach is of little help. In many cases extrinsic aids are unable to expressly state Parliament's intention in regard to a particular provision. In this situation the courts are able to consider fundamental values that exist outside of the statute when interpreting the statute. In one sense this can be seen as a way of making a presumption about Parliamentary intent. Burrows, however, argues that fundamental values operate as part of our legal system and are independent of Parliamentary intent.³⁰ In other words, if Parliament intends to enact something that contravenes fundamental values but does not do so with clear enough language then the court can override Parliamentary purpose in favour of preserving a fundamental value.³¹ Parliamentary intent is only relevant in that it can exclude values by an express statement.

26 Professor John Burrows "The Changing Approach to the Interpretation of Statutes" (2002) 33 VUWLR, 981, 995.

27 Burrows, above, 999.

28 Burrows, above, 1001.

29 Burrows, above.

30 Burrows, above, 1002.

31 The minority decision in *R v Salmond* [1992] 3 NZLR 8, 13 (CA) is an example of this approach.

This type of value-based interpretation shifts the power to create laws away from Parliament and onto the judiciary. The "fundamental" values are outside of the statute and, unless they are rights under the Bill of Rights Act, they are left to be defined by the judges. The values may not always accord with Parliamentary intent. It is arguable that fundamental values "exist" only in so far as they are believed in and applied by the judiciary. Whether or not fundamental values are inherent in the nature of the world or whether they are a subjective human creation is a contentious issue. If they are subjectively defined then the personal morality of each judge may sometimes influence his or her assessment of the relevant fundamental values in any given case. For discussion on subjectivity and the lack of diversity on the Bench see Part I E The Effect of Judicial Personality on Interpretation.

D The Bill of Rights Act

Section 6 of the Bill of Rights Act requires a value-based approach to statutory interpretation. It provides:

6. Interpretation consistent with the Bill of Rights Act to be preferred - 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.

The Courts have concluded that section 6 has a significant impact on statutory interpretation. In *Ministry of Transport v Noort*³² Sir Robin Cooke stated that section 6 is "perhaps of even greater importance" than the purposive approach in section 5(j) of the Acts Interpretation Act 1924. Both Professor Burrows and Justice McGrath describe the Bill of Rights Act as a qualification of the purposive approach.³³

In a recent article Michael Hodge questions the presumed importance of section 6 to statutory interpretation and its purported paramouncy over the purposive approach.³⁴ Section 6 allows enactments to be given a "meaning" consistent with the rights in the Act. He argues that the "meaning" of an enactment is determined by the reasonable reader's best estimate of the legislature's meaning taking into account syntax and semantics together with all the pragmatic factors that are available to the hearer.³⁵ These factors

32 *Ministry of Transport v Noort* [1992] 3 NZLR 260, 272 (CA) Cooke P.

33 Professor John Burrows "The Changing Approach to the Interpretation of Statutes" (2002) 33 VUWLR, 981 and John McGrath "Reading Legislation and Ivor Richardson" (2002) 33 VUWLR, 1017.

34 Michael Hodge "Statutory Interpretation and Section 6 of the New Zealand Bill of Rights Act: A blank Cheque or a Return to the Prevailing Doctrine?" (2000) 9 Auckland U LR 1.

35 Hodge, above, 5 and 9.

include the "general state of the law and the social concerns that the law addresses".³⁶ Certainly where the Bill of Rights Act is not in issue this is the prevailing method that the courts use to determine meaning.

Although a provision may at first appear ambiguous, Hodge points out that after a full consideration it is rare that there are two or more best estimate meanings.³⁷ His concern is that the courts are applying section 6 to allow any "meaning" that is a "tenable" estimate of the legislature's meaning and that this shows a failure to appreciate the nature of meaning. Only the best estimate of meaning should be recognised as the meaning of a provision.³⁸

Under this approach, section 6 has a far more limited scope. It does not allow the courts to ignore the purposive approach or the natural meaning of the word in context, in favour of a possible meaning that is consistent with the Bill of Rights. Instead, Hodge argues, the courts are required to determine the true meaning of a provision in light of its purpose and if this meaning is clear then section 6 is irrelevant.³⁹ It is only on the rare occasions where there is genuine ambiguity that section 6 is applicable.

The approach advocated by Hodge is not presently used by the courts and does not reflect how Professor Burrows and Justice McGrath view section 6. The courts apply section 6 wherever a *possible* meaning is consistent with the rights in the Act. The word "meaning" is therefore interpreted widely as including all tenable estimates of legislatures' meaning as well as the best estimate of meaning. This is arguably in accordance with the words of section 6, which simply require that the preferred meaning must be "a" meaning that an enactment "*can*" be given. The broad interpretation of "a meaning" also allows the Bill of Rights Act to best ensure it meets its stated objective of affirming, protecting, and promoting human rights and fundamental freedoms in New Zealand.

E The Effect of Judicial Personality on Interpretation

One aspect of statutory interpretation worth mentioning, that is not touched on by either Professor Burrows or Justice McGrath, is the effect that the characteristics of the judge have on the interpretation process. The object of statutory interpretation is to determine what the words of a statutory provision mean. However, what words mean may in some situations depend on who is reading them. Drucilla Cornell makes the following comment about the nature of meaning: "Meaning is not like a dead object which

36 Hodge, above, 9.

37 Hodge, above, 9.

38 Hodge, above, 13.

39 Hodge, above, 14.

is present for us to grasp and then apply. Meaning only comes to life within a form of life".⁴⁰

Characteristics such as gender, income level and race may all have an effect on interpretation. Judges tend to be privileged, white males and these characteristics can have an impact on the decisions that they make. As one commentator states:⁴¹

[N]o one who thinks carefully can doubt that social class, race gender, national origin, sexual preference, and more personal factors affect judicial outlooks...When cases are difficult, when good arguments can be made on both sides, the idea that detachment will somehow get judges to the right result seems naive.

Not only can the process of determining the meaning of words be affected by judicial personality, but so too can the implementation of the purposive approach. It will not always be easy to deduce the purpose from the Act and extrinsic materials. In such cases, an inquiry into purpose may not be an objective task and it is possible that different judges might disagree about the purpose of an Act. Indeed it has been said that "Judges giving weight to purposes may implement their own notions of good policy, while attributing them to the legislature".⁴²

The value-based approach to interpretation discussed in Professor Burrow's paper adds a further degree of subjectivity to the interpretation process. In many instances the relevant fundamental value will be clear as it will be contained in the Bill of Rights Act. However, there are many fundamental values not contained in the Bill of Rights Act. It is arguable that judges' personal ideas of policy might sometimes colour their determination of these fundamental values and the relevance of each value in any given case.

The element of subjectivity in interpretation has always existed. What is relatively new is the increasing recognition of this fact. Traditionally the interpretative process has been regarded as objective and neutral. In recent years, however, this assumption has been questioned. Scholars such as feminists and critical legal theorists have argued that the interpretation process is inevitably subjective and political.⁴³

40 Drucilla Cornell "Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal interpretation" (1988) 136 U Pa L Rev 1135, 1136 - 1138.

41 Kent Greenawalt "Variations on Some Themes of a 'Disporting Gazelle' and His Friend: Statutory Interpretation as Seen by Jerome Frank and Felix Frankfurter" (2000) Colum L Rev 176, 210.

42 Greenawalt, above, 211-212.

43 See Margaret Davies *Asking the Law Question* (Law Book Company, Sydney, 1994), for a discussion of the nature of objectivity. See also Lucinda Finley "Breaking Women's Silence in Law ... the Dilemma of the Gendered Nature of Legal Reasoning" (1989) 64 Notre Dame L Rev 886; Catherine

The acknowledgement of subjectivity within the interpretative process has brought with it a call for more diversity on the Bench.⁴⁴ Since 1999 achieving diversity has been identified as one of the objectives of the judicial appointment process.⁴⁵ The judiciary should represent as wide a range of perspectives as possible. The process of recruiting diversity on to the Bench may be challenging, but it is essential if the justice system is to represent more than the view of a small sector of the population.

F Conclusion

In the majority of cases, the language in statutes communicates effectively and causes no problems. Professor Burrows makes the important point that it is only the difficult cases that come before the courts and that in many situations, statutes are clear and applying them presents no problem.⁴⁶ In those cases where there is some uncertainty, the most ordinary and natural meaning of the words in context should be of central importance. In addition, the courts consider the purposive approach, the Bill of Rights Act and a value-based approach to guide their interpretation of ambiguous provisions.

It has been said that approaches to statutory interpretation "jostle with each other, and vary from case to case in their relative importance".⁴⁷ Indeed, to some extent judges will subconsciously or consciously use the statutory interpretation approach that gets the result they want to achieve. In addition, any general trends may be affected by the extent to which purpose can be determined and the importance of the fundamental value at stake. Overlaying all interpretation is the still generally accepted principle that whatever approach is used, the words should only be given meanings which they are reasonably capable of bearing.

McKinnon *Feminism Unmodified: Discourse on Life and Law* (Harvard University Press, Cambridge (Mass), 1987) 55.

44 See, for example, Sherrilyn A Ifill "Racial Diversity on the Bench: Beyond Role Models and Public Confidence" (2000) 57 Wash & Lee L Rev 405.

45 See the booklets Ministry of Justice *High Court Judge Appointment* (issued by the Attorney General's Judicial Appointment unit, Ministry of Justice, Wellington, March 1999) and Ministry of Justice *High Court Masters Appointment* (issued by the Attorney-General's Judicial Appointment Unit, Wellington, November 2001). These booklets identify one of the guiding principles of the judicial appointments as "a commitment to actively promoting diversity in the judiciary without compromising the principle of merit selection".

46 Professor John Burrows "The Changing Approach to the Interpretation of Statutes" (2002) 33 VUWLR, 981.

47 Sir Ian McKay "Interpretation Statutes - A Judges' View" (2000) 9 OULR 743, 747.

II *DISSENTING JUDGMENTS IN THE COURT OF APPEAL*

Victoria Heine's paper⁴⁸ presents the results of an empirical study that she conducted on the issuing of dissent judgments in the Court of Appeal during Sir Ivor Richardson's Presidency. The study showed that the general trend has been a decrease in the number of dissent judgments.⁴⁹ In 2001 only 5 per cent of decisions included a dissent judgment compared to 48 per cent in 1997.⁵⁰ Empirical evidence of this kind is important because it provides confirmation of anecdotal evidence and allows formal analysis of the trends.

Sir Ivor Richardson has identified judicial workload as one reason for a decrease in dissent judgments.⁵¹ Ms Heine also cites the personality of judges as another possible reason.⁵² She also suggests that Sir Ivor Richardson and the modern Court of Appeal appear to have shown a commitment to unity and compromise.⁵³

In this commentary I will argue that the practice of encouraging judges to express their disagreement in a formal dissent is important. I also explore some of the policy reasons behind the alternative approach that favours unanimity and discourages dissent.

A *Concerns about Dissents*

There are four main concerns often expressed about the practice of publishing dissent judgments. First, is the criticism that such a practice shows a lack of collegiality and respect. For example, the United States Justice William Brennan has pointed out that "[v]ery real tensions sometimes emerge when one confronts a colleague with a dissent. After all, collegiality *is* important; unanimity *does* have value; feelings *must* be respected".⁵⁴ Second, there is concern that dissent opinions weaken the court's authority and decrease public confidence in the Court's ruling.⁵⁵ A third concern recognised by Ms

48 Victoria Heine "Institutional Unity vs Freedom of Expression: A Dissent Analysis of the Richardson Courts" (2002) 33 VUWLR, 1001.

49 Heine, above, (2002) 33 VUWLR, 1008.

50 Heine, above, 1010,

51 Rt Hon Sir Ivor Richardson "Trends in Judgment Writing in the New Zealand Court of Appeal" in Rick Bigwood (ed) *Legal Method in New Zealand* (Butterworths, Wellington, 2001) 263.

52 Heine, above, 1011.

53 Heine, above, 1013.

54 William J Brennan Jr "In Defense of Dissents" (1986) 37 *Hastings LJ* 427. As the title of the article suggests, Brennan argues in favour of dissents notwithstanding his expression of concern over lack of collegiality and disrespect. Critics of dissents noted by Brennan include Herbert L A Hart *The Concept of Law* (Oxford University Press, New York, 1961).

55 See, for example, Judge Patricia M Wald "The Rhetoric of Results and the Results of Rhetoric" (1995) 62 *U Chi L Rev* 1371, 1413.

Heine is that there is a danger that dissenting judgments increase uncertainty in the law and can thus lead to more recourse to the courts.⁵⁶ Finally, there is an argument that dissenting judgments detract from the ideal of the rule of law, which claims that law is an objective determinate set of rules independent from the opinion of individual judges.⁵⁷

B Arguments in Favour of Dissents

There are several arguments that can be made in response to these concerns. First, dissent judgments do not have to be disrespectful and do not always signify a lack of collegiality. A dissent judgment can express an opposing view to the majority without directing personal attacks on the judges forming the majority. A well-written dissent not only claims that the majority's opinion is incorrect but backs this up with well-explained reasoning. It is entirely possible for a judge to express honest disagreement and at the same time have a collegial and respectful relationship with his or her colleagues. In fact some commentators have gone so far as to say that well-written dissents, in fact, promote collegiality.⁵⁸ It may happen that on occasion a dissent includes unnecessary and disrespectful language or fails to give adequate reasons as to why the Court is mistaken. Poorly written dissents can detract from collegiality and are to be discouraged. However, the possibility of poorly written dissents is not a good reason for dispensing altogether with the practice of dissent.

The concern that dissent opinions weaken the Court's authority and decrease public confidence is short sighted. A dissent judgment in a particular case might detract from the force of the Court's ruling in that case. However, in a general sense, the practice of publishing dissent judgments can increase public confidence in the system and strengthens the Court's authority. Dissents allow the public (and lawyers) to see that each judge has independently contributed their individual perspective and intelligence to the decision-making process. It is important that the judicial decision-making process is consistent with democratic principles and not simply the result of a policy committed to consensus. K J Stack argues that political legitimacy, in fact, depends upon the practice of dissent.⁵⁹

The fear that dissenting judgments will generate uncertainty within the law is unnecessary. The majority can still provide a well reasoned and certain ruling despite the publication of a dissent judgment. In fact it has been said that the existence of a dissent

56 Heine, above, 1008.

57 For discussion of this argument see Kevin M Stack "The Practice of Dissent in the Supreme Court" (1996) 105 Yale LJ 2235, 2236 - 2241.

58 See, for example, Francis P O'Connor "The Art of Collegiality: Creating Consensus and Coping with Dissent" (1998) 83 Mass L Rev 93, 93.

59 Stack, above, 2246 - 2247.

tends to "upgrade the performance of the majority".⁶⁰ Arguments are often made more persuasively when they are made in response to all the counter arguments. Nevertheless, split decisions from a court may be more likely to be appealed and a dissent can sometimes influence the development of the law through the years. For example, a well-written dissent can have the effect of limiting the application of the majority rule in future cases. However, this potential for a dissent judgment to affect the development of the law is not a reason to disapprove of dissents. Quite the contrary, the availability of a published dissent judgment is very useful because it provides lawyers, judges and legislators with a written record of a point of view which may ultimately be regarded as the correct view. Any uncertainty created by dissents is made up for by the important role that dissents play in the development of the law.

The final argument raised against dissents is that they detract from the ideal of the rule of law. The problem with dissents is that they expose the fact that in some instances the rule of law is in fact the rule of individual judges. The advantage of a single opinion of the Court is that the law is given a unanimous institutional voice, which gives the appearance of objectivity and determinacy. The reality is, however, that the law is not always objective and determinate and it is in many cases affected by the unique perspectives of the individual members of the Court.⁶¹ As Ms Heine observes, the fact that Justice Thomas was responsible for a significant percentage of dissents suggests that the particular personality of the judges is relevant.⁶² Indeed, it is likely that the influence of individual perspectives will become more relevant if the current endeavours to appoint a more diverse group of people to the Bench are successful.⁶³

There seems little point in suppressing the reality of subjectivity by encouraging a consensus where none exists. The integrity of the process is maintained by the publication of well-reasoned dissenting views. This is preferable to discouraging dissents in order to create the false impression that the court is an institution with one voice rather than a group of individual judges.

60 O'Connor, above, 95.

61 See Part I E The Effect of Judicial Personality on Interpretation.

62 Victoria Heine "Institutional Unity vs Freedom of Expression: A Dissent Analysis of the Richardson Courts" (2002) 33 VUWLR, 1001, 1012.

63 See Part I E The Effect of Judicial Personality on Interpretation.

C Conclusion

The United States Supreme Court Chief Justice Charles Evans Hughes (1930 - 1941) provides a succinct summary of the arguments in favour of dissent judgments:⁶⁴

[w]hen unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect upon public opinion at the time. This is so because what must ultimately sustain the court in public confidence is the character and independence of the judges. They are not there simply to decide cases, but to decide them as they think they should be decided and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognised than that unanimity should be secured through its sacrifice...

Well-reasoned dissent judgements are a valuable part of the legal process. They do not conflict with collegiality, they increase the public confidence in the court's decision-making process and they can help the development of the law.

The decrease in dissent judgments in the Court of Appeal in recent years may simply be the result of genuine agreement. If, however, it is the result of an earnest effort to achieve consensus, then there may be cause for concern. Judges should be encouraged to express disagreement and to publish that disagreement with reasons in a dissent judgment.

⁶⁴ C Evans Hughes *The Supreme Court of the United States* (Columbia University Press, New York, 1928) 67 - 68.

