

WAIKATO LAW REVIEW

TAUMAURI

VOLUME 21, 2013



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THE UNIVERSITY OF

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Te Whare Wānanga o Waikato

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EDITOR IN CHIEF'S INTRODUCTION

The 2013 edition of the Waikato Law Review is a wonderful reflection of the Māori title of the Review, Taumauri, which means “to think with care and caution, to deliberate on matters constructively and analytically”. The articles, book reviews, speeches and reports fully affirm the values of the Review and we are delighted to present a diverse selection of submissions in this edition.

Of course, the highly respected Harkness Henry Lecture is the lead article in the Review. We were honoured to have the lecture given this year by the Honourable Justice Joseph Williams of the High Court of New Zealand entitled “Lex Aotearoa: An Heroic Attempt at Mapping the Māori Dimension in Modern New Zealand Law”. This thought-provoking lecture was indeed an heroic attempt to map the Māori dimension in modern New Zealand law, and was delivered with great deliberation and care; it truly underpinned the Māori title of the Review. The lecture was very well received and is sure to inspire many conversations and reflections on its subject matter.

The Review is grateful to Harkness Henry for their continuing support of Te Piringa and the Review in the sponsorship and organisation of this prestigious annual event.

The Review would like to take the opportunity to thank all the authors for adding such value to this edition, and to the peer reviewers and its Editorial Advisory Board for their support and contributions throughout the year.

It is with some sadness that the Review announces the stepping down of Senior Student Editor Erika Schollum from her role, so 2013 is Erika's last edition in this position. Erika will be concentrating fully on her PhD and we wish Erika all the very best of luck with her studies, and wish to extend much thanks and appreciation for her hard work and dedication to the Review.

We are, however, delighted that such an able person is able to step in to Erika's shoes to fulfil the role of Senior Student Editor for the 2014 edition, and we would like to welcome Jaimee Paenga, who brings with her experience from working as a Student Editor on the Review.

Juliet Chevalier-Watts
Editor in Chief

THE HARKNESS HENRY LECTURE

LEX AOTEAROA: AN HEROIC ATTEMPT TO MAP THE MĀORI DIMENSION IN MODERN NEW ZEALAND LAW

BY JUSTICE JOSEPH WILLIAMS*

In the title to this lecture I promised to make an heroic attempt at mapping the Māori dimension in modern New Zealand law. It turns out there was nothing heroic in this mapping job at all. It just involved a whole lot of hard work. It also turns out that you should never come up with a name for a lecture before having written it. The name hooked me into a job that was not only hard work, but fraught with risk. The biggest risk was that I would end up simply delivering a summary of the different categories of modern law in which there is a Māori element or dimension. This would be both boring and superficial – a lecture a mile wide but only an inch deep. Another risk is that once the map is laid out it might become obvious that the Māori categories or dimensions in modern law are islands separate from and unrelated one to the other; that the mapping exercise might provide no additional insight because the various Māori parts of the whole law are really silos unto themselves. So why do it?

Well, nearly five years ago I changed careers. I transited from a 20-year career as a specialist practitioner and judge in Māori issues law, into the life of a generalist. That transition has reminded me that the law is a *whole* system with common threads and elements running over, through and underneath its broad and complicated geography. Being a specialist required me to think about Māori land and the Treaty of Waitangi in a deep way. Being a generalist has made me think about those issues in a more connected way: as parts of that much larger whole. So it was the transition that got me thinking about whether it is possible in the 21st century to say there is a coherent dimension in New Zealand's law called Māori law, parts of which are subjects in their own right and often internal to the Māori world (Māori land law, the Treaty and Treaty settlements law, and common law aboriginal title). But there is a much bigger part that is really a gloss on general legal categories, affecting both the Māori world and the wider community as part of everyday life. If so, is it possible to map both ends of this Māori law thing and thereby to describe its effect on the wider subject? And if that is possible, is it also possible to predict the ways in which that map may change, develop or even expand into the future? In this lecture I set out to answer some of these questions. I do not promise that the answers will be satisfactory, and I certainly do not promise that they will be final. What follows is nothing but a first attempt at joining dots that have perhaps previously remained unconnected. Whether they are the right dots joined in the right way very much remains to be seen. I will be very happy if these thoughts start a bigger discussion.

* Judge of the New Zealand High Court.

I. THE FIRST LAW OF AOTEAROA

In order to begin this exercise, it is necessary to reach back in time to the arrival of the first law of Aotearoa as accurately so described by Ani Mikaere in her article *The Treaty of Waitangi and Recognition of Tikanga Māori*.¹ This is the law brought across vast ocean distances by Kupe and Toi and others from their respective home islands in the tropical Pacific to these shores a millennium ago. Understanding this law (more accurately *these* laws for the laws were distinct in each source island) and its cultural drivers, helps to explain why this first law continues to force its way to the surface in the unimaginably different circumstances of modern New Zealand.

In the Wai 262 Report, the Waitangi Tribunal described the system of custom that Kupe brought with him in these terms:²

Its defining principle, and its life blood, was kinship – the value through which the Hawaiians expressed relationships with the elements of the physical world, the spiritual world, and each other. The sea was not an impersonal thing, but an ancestor deity. The dots of land on which the people lived were a manifestation of the constant tension between the deities, or, to some, deities in their own right. Kinship was the revolving door between the human, physical, and spiritual realms. This culture had its own creation theories, its own science and technology, its own bodies of sacred and profane knowledge. These people had their own ways of producing and distributing wealth, and of maintaining social order. They emphasised individual responsibility to the collective at the expense of individual rights, yet they greatly valued individual reputation and standing. They enabled human exploitation of the environment, but through the kinship value (known in te ao Māori as whanaungatanga) they also emphasised human responsibility to nurture and care for it (known in te ao Māori as kaitiakitanga).

Of course, in the beginning things were a little more complicated than that. A score of ocean-going waka followed Kupe from both his island and different islands and villages throughout eastern Polynesia. So the detailed systems of tikanga they brought with them varied between waka. And those variations remained with the descendants. As Buck said many years ago, iwi are, in heart and mind, a series of islands connected by land. But the underlying values of these old island cultures were, and remain, universal and simply stated. They melded, adapted and changed in important ways after arrival, in response to the very different environment of these temperate islands located at the hinge of the southern hemisphere's weather systems. In that sense Māori culture and Māori law is, in its distinctive aspects, entirely a product of the interaction between those old Hawaiians and this place. Te reo Māori was imagined out of the whenua, flora and fauna of this place as new words were needed to explain things newly experienced. The canoe and longhouse technology Kupe's descendants developed was possible because of the great forests and necessary because of the cooler climate in this place, and so on. The economy changed to accommodate a place with four distinct seasons and a growing period for gardens of only a few months.

The system of law that emerged from the baggage Kupe's people brought and the changes demanded of his descendants by the land itself have come to be known as tikanga Māori: "tika" meaning correct, right or just; and the suffix "nga" transforming "tika" into a noun, thus denoting the system by which correctness, rightness or justice is maintained. That said, tikanga and law are

1 Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) 330.

2 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 5.

not co-extensive ideas. Tikanga includes customs or behaviours that might not be called law but rather culturally sponsored habits. Where the line is to be drawn between the two need not deter us here. That is a legal anthropological debate for another time.

Professor Sir Hirini Moko Mead, a tikanga expert and academic in the western sense, describes tikanga in the following comprehensive way:³

Tikanga embodies a set of beliefs and practices associated with procedures to be followed in conducting the affairs of a group or an individual. These procedures are established by precedents through time, are held to be ritually correct, are validated by usually more than one generation and are always subject to what a group or an individual is able to do ...

Tikanga are tools of thought and understanding. They are packages of ideas which help to organise behaviour and provide some predictability in how certain activities are carried out. They provide templates and frameworks to guide our actions and help steer us through some huge gatherings of people and some tense moments in our ceremonial life. They help us to differentiate between right and wrong and in this sense have built-in ethical rules that must be observed. Sometimes tikanga help us survive.

Tikanga differ in scale. Some are large, involve many participants and are very public ... Other tikanga are small and are less public. Some of them might be carried out by individuals in isolation from the public, and at other times participation is limited to immediate family. There are thus great differences in the social, cultural and economic requirements of particular tikanga.

That said, to understand tikanga one must first understand the core values reflected in its directives. It must be remembered that tikanga Māori is law designed for small, kin-based village communities. It is as much concerned with peace and consensus as it is with the level of certainty one would expect of normative directives that are more familiar in a complex non-kin-based community. In a tikanga context, it is the values that matter more than the surface directives. Kin group leaders must carry the village with them in all significant exercises of legal authority. A decision that is unjust according to tikanga values risks being rejected by the community even if it is consistent with a tikanga-based directive.

There is considerable debate about what should be in the list of generally applicable core values the holders of the first law brought, adapted and still hold. See generally, for example, the intense debate between experts reflected in the Law Commission's 2001 Study Paper *Māori Custom and Values in New Zealand Law*.⁴ But for what it is worth, this is my list:

- *whanaungatanga* or the source of the rights and obligations of kinship;
- *mana* or the source of rights and obligations of leadership;
- *tapu* as both a social control on behaviour and evidence of the indivisibility of divine and profane;
- *utu* or the obligation to give and the right (and sometimes obligation) to receive constant reciprocity; and
- *kaitiakitanga* or the obligation to care for one's own.

3 Hirini Moko Mead "The Nature of Tikanga" (paper presented to Mai i te Ata Hāpara Conference, Te Wānanga o Raukawa, Otaki, 11–13 August 2000) at 3–4 as cited in Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [72].

4 Law Commission, above n 3, at [124]–[166].

Of these, whanaungatanga is the glue that held, and still holds, the system together; the idea that makes the whole system make sense – including *legal* sense. Thus the rights in cultivable land and resource complexes such as rivers, fisheries, forests, swamps and so on are allocated by descent from the original title holder (*take tupuna* – literally ancestral right or source). There is a form of legal interest created by conquest (*raupatu* – literally the harvest of the war club) and even, though more rarely, transfer (*tuku* – literally to give up). But these variants are better understood as the foundation of a right rather than rights in themselves. They were, in practice, fragile until consummated (literally) by creating a connection to, and then spring-boarding off, the line of the original ancestral right holder. So a “conquest” always involved formal making of peace through inter-marriage and assimilation of the old descent line into the new in order to remove later contestation about whether the newcomer held the primary right (history taught the makers of custom law that conquered hapu rebuilt and reasserted their rights unless properly accommodated in the new order of the conqueror). Tuku was never a one-off transaction in the way a contract is, but rather a means of incorporating the transferee into the community of the original title holder.⁵

So whanaungatanga might be said to be the fundamental law of the maintenance of properly tended relationships. The reach of this concept does not stop at the boundaries of what we might call law, or even for that matter, human relationships. It is also the key underlying cultural (and legal) metaphor informing human relationships with the physical world – flora, fauna, and physical resources – and the spiritual world – the gods and ancestors.

Thus the story of what happened to Rata when he felled his totara tree without proper procedure confirms that good relations must be maintained with the forest itself as a related descent group in order to maintain the human right to be a user of forest resources.

In a more prosaic context, the requirement to maintain *ahikā* (literally burning fires) – to continue to use resources in order to maintain the descent-based rights in them – makes the same point.

No right in resources can be sustained without the right holder maintaining an ongoing relationship with the resource. No relationship; no right. The term that describes the legal obligation is *kaitiakitanga*. This is the idea that any right over a human or resource carries with it a reciprocal obligation to care for his, her or its physical and spiritual welfare. *Kaitiakitanga* is then a natural (perhaps even inevitable) off-shoot of whanaungatanga.

The point is that whanaungatanga was, in traditional Māori society, not just about emotional and social ties between people and with the environment. It was just as importantly about economic rights and obligations. Thus rights depended on right holders remembering their own descent lines as well as the descent lines of other potential claimants to the right. Whakapapa was both sword and shield wielded by Māori custom lawyers. It remains so today.

Similar ideas infused what might now be called either criminal or tort law. The criminal/tort law institution of *murū* demonstrates the point. In traditional Māori society, a transgression of another person’s personal or possessory rights would see the victim’s whanau levying *murū* on the property of the transgressor’s whanau. This would be done with due and public ceremony, demonstrating the support of the hapu for the penalty. Literally taxing the perpetrator’s whanau for the trespass; sometimes summarily, and sometimes after much discussion and debate about appropriate compensation and from whom. A particularly egregious wrong, or a particularly

⁵ See, for example, Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997).

important victim, might even ratchet up the level of the *murū* from the usual whanau level action to hapu level. And in the most serious of cases it might even lead to forfeiture of land.

The accidental killing of one of my ancestors by a member of the Parawhau of Whangarei led to the latter hapu transferring land to my section of Ngati Pukenga to *murū* (make good on) the *hara* or wrong. The land is still in Ngati Pukenga ownership today. And as the whanaungatanga value dictates, the Ngati Pukenga families who have lived there since that time are deeply intertwined now with Parawhau and Ngati Wai descent lines.

In the 19th century *murū* was described in English by the settlers as plunder, giving the impression that it was a random act of violent theft. It was of course nothing of the sort. Rather, it was a civil/criminal remedy – indeed the primary legal remedy for transgressions of the kind I have described. And it was community sanctioned.

The important point in terms of the whanaungatanga value is that wrongs were not seen as individual wrongs. They were seen as the responsibility of the perpetrator's wider kin group. And the more serious the wrong, the wider the kin net that became hooked into the compensation equation. Equally the victim was not just the individual involved but his or her kin group, the parameter for which was set by the status of the victim and the seriousness of the wrong. So *murū* was not a system of individual to individual compensation or correction as in tort, or even individual to community as in crime. It was an aspect of the whanaungatanga value: it operated kin group to kin group. No one was ever just an individual.

The traditional Māori family law institution of *whangai* (traditional adoption)⁶ is another example of whanaungatanga in operation. In western law adoption is primarily a legal technique for dealing with children who, for whatever reason, lack a parent or parents. Apart from adopting step-parents, most modern adoptions are still stranger adoptions and the default position is that the adoption is “blind”. In tikanga Māori, the institution of *whangai* is a technique for cementing ties among members of whanau and hapu located at different points in the whanaungatanga net, and for ensuring the maintenance of tradition between generations; the latter, by placing young children with elders to be educated and raised in Māori tradition. Thus to be a *whangai* in tikanga Māori is not to be abandoned – quite the opposite. It is to be especially selected as someone deserving of the honour. Stranger adoption was completely unheard of and would be considered abhorrent in a system that valued kinship above all else. A form of banishment.

So the first law in Aotearoa is an old system built around kinship that was adapted to the new circumstance of this place. It was internally coherent and clear. But, being primarily value-based rather than prescriptive, it was flexible: law for small communities in which making peace was as important as making principle. In modern corporate parlance, the first law of Aotearoa was fit for purpose.

II. THE SECOND LAW OF NEW ZEALAND

When the British arrived 700 years later they brought an entirely different conception of law and its underlying values. By the 19th century the focus in that system was increasingly what we now call the liberal value of the autonomy of the individual. Important economic relationships were primarily defined by contract rather than kinship – the concept in theory at least, of an agreement defining both the objective and the rules of a relationship entered into between autonomous individuals

6 “Whangai” is the verb to feed.

exercising self-determination through free choice. That is not to say that social relationships – and kinship of course – were unimportant in that system. That would be quite wrong. It is rather that by the time that the enlightenment and then the industrial revolution had captured European and North American economic enterprise, the autonomous individual was the primary building block of wealth. And the Lockean concept of property had come to define the relationship between those theoretically autonomous individuals and their capital, land and other natural resources. Law and government, Locke said, could be justified only as mechanisms to protect private property.

As Locke was at pains to point out, a key – perhaps *the* key – characteristic of property is its free alienability, a necessary incident of the personal autonomy at the heart of the idea.

So by this stage in the evolution of western, and particularly British values, the autonomous individual freely interacting with others was the operative cultural myth (I use myth without pejorative intent). The law expressed this through contractarian theories of human relationships and proprietorial conceptions of rights in wealth including natural and physical resources. In fact the contract metaphor was also used increasingly to define the relationship between citizens and the state – at least after the reformation and the revolutions in America and France. Though the British were subjects not citizens, even they were increasingly seen as ruled only by their agreement to be ruled.

It comes as a surprise to lay people these days that the non-contractarian general law of negligence does not enter the common law lexicon until *Donoghue v Stevenson* – well into the 20th century.⁷ Even then, as Lord Atkin conceived of it, the obligation underlying it was cultural – indeed biblical – in origin. He called it the neighbourhood principle. He perceived it as a necessary limit on the default position of individual autonomy. Necessary he said, in light of complex post-industrial revolution life in modern western society. It was still seen as highly controversial in its time such was the hegemony of contract as definer of legal relationships.

So the fundamental difference between the respective values of the first law and the second law was really that one was predicated on personal connectedness (and through that group autonomy) and the other was predicated on personal autonomy (and through that group welfare).

A. Collision

These two systems collided here in the middle of the 19th century. The clash was the focus of issues thrown up by the Muriwhenua Land Claim reported on by the Waitangi Tribunal in 1997. This related to pre-Treaty land transactions between Māori and the earliest settlers in the Far North during the decade prior to 1840 and the formal arrival of the second law. The question was, were these land transactions *tuku* (transfers predicated on the maintenance of healthy relationships between transferor and transferee and therefore necessarily defeasible according to Māori custom), or were they transfers in the Lockean legal culture – one-off, autonomous and final? The Waitangi Tribunal said very firmly that they were the former.

In finding the answer, the Tribunal's view was context is everything. As Professor Dame Anne Salmond said in her evidence to the Waitangi Tribunal:⁸

It should be stressed that in 1840 in Northland, Māori were operating in a world governed by *whakapapa* (genealogical connections). Ancestors intervened in everyday affairs, *mana* was

⁷ *Donoghue v Stevenson* [1932] AC 562 (HL).

⁸ Waitangi Tribunal, above n 5, at 23.

understood as proceeding from the ancestor-gods and *tapu* was the sign of their presence in the human world. Life was kept in balance by the principle of *utu* (reciprocal exchanges), which operated in relations between individuals, groups and ancestors.

Her point was that when the settlers arrived in Muriwhenua in the 1830s the land was not empty of law. Kupe's law held sway. The point made repeatedly by the Waitangi Tribunal was that the first law did not evaporate when settlers arrived.

B. The Treaty of Waitangi at the Point of Contact between the First and Second Laws

At the end of that decade there was the Treaty of Waitangi itself; the mechanism through which these two systems of law would be formally brought together in some sort of single accommodation. But was it intended that one system would dominate at the expense of the other? Or was mutual survival expected or even guaranteed? Part of the answer to that question is in the age old debate between the English language text and its focus on the transfer of sovereignty in exchange for a guarantee of native title, and the Māori language text which transferred law-making power (*kawanatanga*) to the Crown in exchange for the autonomy right expressed as *tino rangatiratanga*.

In the 19th century and for most of the 20th century the law avoided framing this debate as a legal debate by rejecting the Treaty as an instrument having any legal effect. Prendergast CJ in *Wi Parata v Bishop of Wellington* famously described the Treaty as a "simple nullity" at least as an instrument of cession.⁹ Māori lacked sovereign capacity. They possessed none of the usual furniture of government and law, said the Chief Justice, and so could claim none of the advantages of the second law. And in *Te Heuheu Tukino v Aotea District Māori Land Board*, 64 years later, the Privy Council, while implicitly at least rejecting that nullity thesis, nonetheless considered that an international Treaty had no direct enforceability at domestic law.¹⁰ The Treaty of Waitangi then was New Zealand's *terra nullius*, roundly rejected as a source of rights within the second law.

C. Native Title and Enforceable Custom in the Second Law

Two further tracks need to be followed up. The Treaty is not the original source either of the native title explicitly referred to in the English text of Article 2 or of the custom law implicitly referred to in the Māori text of Article 2. The Treaty merely affirms their prior existence and the Crown's promise (whether enforceable or not) to respect them. In that sense it performed the same function as George III's Royal Proclamation of 1763 did in respect of native title east of the Appalachians after the Anglo-French seven years' war.

Both Paul McHugh¹¹ and Mark Hickford¹² have written leading texts on the nature and enforceability of native title across the British Empire jurisdictions, but with a focus on the situation in New Zealand. McHugh no longer propounds his groundbreaking theories of universal continuity of legal recognition of native title, accepting instead that there was wide diversity in the manner and extent of recognition across the British Empire and great debate among the judges. Hickford

9 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 at 78.

10 *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308, [1941] NZLR 590 (PC).

11 PG McHugh *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, Oxford, 2011).

12 Mark Hickford *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford, 2011).

emphasises the untidiness and idiosyncrasies of native title recognition in different jurisdictions. By his analysis the failure of the respective colonial legal systems in British Columbia and Australia to recognise native title are examples of this untidiness, rather than exceptions to a grand rule of continuity.

In New Zealand the question of the common law enforceability of native title and custom was easily avoided in the 19th and early 20th centuries by the legislative and title extinguishing activity of the Crown. Crown land purchasing between 1840 and 1860 – in reliance on the Crown pre-emption clause in Article 2 of the Treaty – was followed by the Native Lands Acts of 1862 and 1865. These Acts repealed the Crown's purchase monopoly, individualised Māori land entitlements and created a title allocation court. Pre-1860 Crown land purchasing had opened up the South Island and lower third of the North Island, while in the 30 years following 1865 the Native Lands Acts opened up the upper two-thirds of the North Island. The last hold-outs were the King Country and the Urewera.

Whatever its status at common law, native title was certainly recognised in Crown policy from the very beginning and in Parliamentary legislation from 1862. Such recognition as was provided had one purpose: the cheap extinguishment of said title to make way for colonisation as quickly as possible. Once the Native Land Court was in place, fights between the Crown and Māori over land were played out by petition to the Native Affairs Select Committee rather than on the battle field, and they were almost exclusively about Native Land Court awards in relation to particular blocks of land and/or the manner of extinguishment of such titles. They were detailed and messy affairs but they took the concept of native title itself as a given.

The first law of Aotearoa was made relevant in the title allocation process. Titles were to be allocated to such right-holders as Māori custom dictated. It could hardly have been otherwise. But that relevance was transitional. It was to prepare the land either for alienation into settler hands (most often via Crown purchase even after the Crown's general monopoly was abandoned), or by transforming the reserves that remained in Māori hands to estates cognisable at English law called native freehold title. Common law native title only occasionally reared its head and then only around the edges of the legislative regime in relation to resources not specifically recognised in statute: in the Rotorua and Taupō lakes – *Tamihana Korokai v Solicitor-General*;¹³ in the foreshore – *Re The Ninety-Mile Beach*;¹⁴ and in river beds – *Re The Bed of the Wanganui River*.¹⁵

Like the legislators, the judges were positivist by inclination. Their opinions tended to turn on whether the provisions of the Native Land legislation were wide enough to encompass the resource in question. *Re The Ninety-Mile Beach* concluded that a grant of native title by the Native Land Court in respect of land above mean high water mark impliedly extinguished any connected title to the adjoining foreshore below mean high water mark. *Tamihana Korokai* on the other hand concluded that an application to the Native Land Court for title to the Rotorua lakes could be entertained by that Court and such title as might be found to exist under its legislation could not be extinguished by mere declaration of the Solicitor-General.

The *Wanganui River Bed* case found, somewhat consistently with the *Ninety-Mile Beach* case, that the *ad medium filum* rule applied to the beds of New Zealand rivers, though erroneously as a matter of Māori custom rather than English legal presumption. These cases seemed to proceed on

13 *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 (CA).

14 *Re The Ninety-Mile Beach* [1963] NZLR 461 (CA).

15 *Re The Bed of the Wanganui River* [1962] NZLR 600 (CA).

the positivist basis that native title was only recognisable because a statute said it was, and that such title was not enforceable by suit in the general courts in accordance with any principle of the general law.

As Prendergast CJ opined in *Wi Parata*, claims to native title are not justiciable in the ordinary courts and the Crown must “acquit itself as best it may” as the “sole arbiter of its own justice”.¹⁶

D. Custom

What then of the enforceability of free-standing custom?

Just as there was an unassailable argument – in the end accepted by the settlers – that every inch of land in Aotearoa was owned by some hapu prior to colonisation, it is as I have tried to demonstrate, unquestionably the case that Māori society was organised in accordance with enforceable customary legal norms prior to the arrival of the English common law. These are the norms that are encapsulated in the concept of tino rangatiratanga (self-determination in modern English) retained to Māori by Article 2 of the Treaty. Although some academics prefer to argue that Māori custom is an incident of the concept of taonga provided for in the same article, I for myself doubt whether that is conceptually sound. Rather, it is better to think of customary law as a necessary and inevitable expression of self-determination.

But did those customs, or tikanga as I earlier described them, survive the impact of post-Treaty colonisation? Dr Robert Joseph reminds us, in his comprehensive treatise *Re-Creating Legal Space for the First Law of Aotearoa – New Zealand*, that a number of early statutes had, by necessity, to recognise and apply tikanga.¹⁷ There was the Native Exemption Ordinance of 1844 excluding Māori on Māori crime from the reach of English criminal law and applying muru-like penalties in inter-racial theft cases.¹⁸ Imprisonment was rejected early on as a general sanction because Māori viewed jail as abhorrent.¹⁹ Governor Grey’s Resident Magistrates Courts Ordinance of 1846 is another hybridised example in which a white Magistrate sat as a panel with two native assessors (always chiefs). The coram was required to reach a unanimous verdict. This meant, inevitably, that custom would come to play a significant role even in the assimilating mechanisms conceived by the Governor.

There was also s 71 of the New Zealand Constitution Act 1852 which allowed the Governor to set aside districts in which Māori custom would be the applicable law. The section was never used. That fact itself is an indication of settler attitudes to separate Māori self-determination despite the terms of the Treaty. But there is no doubt that right through the 19th and early 20th centuries there were districts that, with or without settler approval, lived by tikanga Māori as the applicable law.

By 1877 and the *Wi Parata* case, Prendergast CJ felt able to say that no body of custom law existed and not even the Native Land Act 1873 with its specific reference to such custom as the metric for title awards, could call into existence an illusion. That finding was roundly rejected by the Privy Council in *Nireaha Tamaki* but somehow Prendergast CJ’s prejudices persisted in New Zealand legal culture throughout the second law.²⁰

¹⁶ *Wi Parata v Bishop of Wellington*, above n 9, at 78.

¹⁷ Robert Joseph “Re-Creating Legal Space for the First Law of Aotearoa – New Zealand” (2009) 17 Wai L Rev 74.

¹⁸ At 77.

¹⁹ Joseph, above n 17.

²⁰ *Nireaha Tamaki v Baker* [1901] AC 561, (1901) NZPCC 371.

In fact as *Salmond on Jurisprudence* notes, the common law itself was originally custom:²¹

It was long the received theory of English law that whatever was not the subject of legislation had its sources in custom. Law was either the written statute law, or the unwritten, common, or customary law. Judicial precedent was not conceived as being itself a legal source of law at all, for it was held to operate only as evidence of those customs from which the common law proceeded. ... Even now custom has not wholly lost its law-creating efficacy. It is still to be accounted one of the legal sources of the law of England, along with legislation and precedent, but far below them in importance.

Both *The Case of Tanistry*²² in 1608 and *Campbell v Hall*²³ in 1774 recognise that local custom can (subject to the repugnancy test) survive the arrival of the English common law. The tests sourced from those authorities are applied in fact in the recent Court of Appeal decision in *Takamore* about which I will say more below.

But in second law New Zealand, examples of recognition were intended to be points along a journey to jurisdictional amalgamation, rather than dots to be joined to demonstrate continuity of recognition of ongoing custom to the present day. In different ways and from very different perspectives, Mark Hickford²⁴ and Professor John Dawson²⁵ argue that the most significant obstacle to the recognition of a thorough going and independent sphere of custom law was the large scale extinction of native title in the second half of the 19th century. Custom was, they argued, inextricably linked with the retention of a territory over which a holistic system of law could operate. That is why custom law has not been the political or judicial focus in New Zealand that it has been in the United States where tribes are seen as exercising originating sovereign powers on reservation land.

Nonetheless, custom issues continued to arise with regularity in New Zealand jurisprudence throughout the late 19th and early 20th centuries, usually in the limited recognition environment of the Native Lands Acts and most often in the context of succession to Māori land.²⁶ Custom had become confined as a subject and, within its confinement, atomised into controversies over rights to individual interests in Māori land. The stage seemed set for the complete extinguishment of Māori title to the assets that gave Māori custom continuing relevance, and therefore the extinguishment of Māori custom itself as a jural phenomenon in New Zealand.

E. Summary

In summary, the second law at its positivist height rejected the legal relevance of the Treaty, reduced native title to its statutory boxes and acknowledged tikanga Māori only as a temporary expedient in the wider project of title extinction and cultural assimilation. The future for a distinct Māori cultural and legal existence in these islands looked bleak indeed.

21 P Fitzgerald *Salmond on Jurisprudence* (12th ed, Sweet and Maxwell, London, 1966) at 189–190 cited in Joseph, above n 17, at 86.

22 *The Case of Tanistry* (1608) Davies 28 (KB).

23 *Campbell v Hall* (1774) 1 Cowp 204 (KB).

24 Hickford, above n 12.

25 John Dawson “The Resistance of the New Zealand Legal System to Recognition of Māori Customary Law” (2008) 12 *Journal of South Pacific Law* 56.

26 These were no longer questions of free-standing surviving custom, but rather incorporated custom, the application of which was made necessary by explicit statutory discretions.

III. THE THIRD LAW OF AOTEAROA/NEW ZEALAND

The enormous changes wrought by the arrival of the second law in the 19th century occurred in the context of unprecedented immigration and the equally unprecedented extinction of native title. This was achieved through Crown purchase prior to 1860, through war and confiscation, and through that “engine of destruction” called the Native Land Court after 1865. It is that revolutionary change, achieved valley by valley over two generations, that reduced the first law to a bare shadow of its former self. By World War II, little Māori land remained and tikanga Māori lived on only in villages, homes and marae on that remnant land base, beyond the reach of judicial, legislative or executive oversight. But that, as we know, was not the end of the story.

Though much weakened, the first law nonetheless survived into a discrete third phase after the momentum of amalgamation, assimilation and extinction in the second law abated and New Zealand was forced by circumstance into a reluctant search for itself. This is the period from the 1970s on, with which we are more familiar. It is the period during which some of the surviving remnants of Māori custom were, in one form or another, incorporated into legislation in key spheres of New Zealand life. This phase begins with the enactment of the Treaty of Waitangi Act 1975 and the creation of the Waitangi Tribunal, first with prospective jurisdiction only and then, in 1985, with retrospective jurisdiction to address Treaty breaches in the 19th century – the real grievances of modern iwi.

The introduction of this new mechanism to address both modern and historic Treaty grievances was a legislative response to significant social change in the country. Not just the local effect of race consciousness triggered by the American civil rights movement or sporting ties with apartheid South Africa. Nor even the steady dimming of the Empire’s light as the United Kingdom shifted focus to surviving as a part of Europe. It was, just as importantly, the rise of the Māori demographic and of young urban Māori protest in the 1970s and 1980s. This was the impact of the Māori baby boomers. These factors ultimately led to the construction of the Treaty settlement process in the 1990s, a process that continues at a steady pace today often led on both the Crown and Māori sides by those Māori baby boomers.

But the impact of these underlying social and political changes on New Zealand law and policy was much wider still. In the 1980s after the Waitangi Tribunal first began to prod them forward, judges rediscovered the old common law doctrine of aboriginal title. As a result, both legislature and judges rediscovered the Treaty of Waitangi. From there followed pioneering legislative changes in environmental and family law in the 1980s and 1990s, together with changes in conservation law. And in more subtle ways, the list began to grow: the law relating to trusts and Māori land administration, charities and tribes, intellectual property and cultural rights, the law relating to protected areas and objects, employment law and dispute resolution, sentencing and the place of ethnicity, and so on. All came to address in their respective silos the ways in which the values of the first law might have continuing impact in this new post-Empire phase of our national and legal development.

In one important way this third law phase was very similar to the colonial second law phase. That is in the sense that Māori custom was recognised in law and legal process primarily through legislation rather than common law. Not entirely, but primarily. This, as Boast and Dawson have said, reflects both our constitutional structure and our constitutional culture. Power in New Zealand is centralised to a high degree in a Cabinet that both controls and answers to a sovereign, unicameral legislature. Māori issues have always been mediated in New Zealand by passing an Act first and

asking questions later. They still are. It would be easy then to conclude that the modern phase is a simple continuation of the second law with a few mitigatory post-colonial add-ons.

But that would be wrong. I think that there is a key distinction between law in the colonial period and that of the post-1970s modern period. It is this: where tikanga Māori was recognised during the colonial period, it was recognised only to the extent necessary to succeed in extinguishing it. The Crown recognised native title in the period prior to the Native Land Court only so that it could purchase it on highly advantageous terms or take it as the spoils of war. The Government recognised native title through the Native Land Court only for the purpose of facilitating the destruction of customary tenure and the alienation of the new individualised land interests. The criminal law ordinances of 1840 and the Resident Magistrates system of 1846 were seen as temporarily necessary to smooth the path to assimilation; all were brief stopovers on a linear path to extinction.

The recognition of custom in the modern era is different. It is intended to be permanent and, admittedly within the broad confines of the status quo, transformative.

For that reason, I consider that this modern period represents a third law, different both from the first law of Aotearoa and the second law of New Zealand, the latter so intent on destruction of its predecessor. This third law is predicated on perpetuating the first law, and in so perpetuating, it has come to change both the nature and culture of the second law. And it is at least arguable therefore that the resulting hybrid ought to be seen as a thing distinct from its parents with its own new logic. I do not have time to trace every subcategory of law in which a Māori dimension can be found, but it is worth tracking the big ones. They provide excellent examples of the tensions in this new fused system: the push/pull of what is after all a very human process of law-making and nation-building – or perhaps law-making *as* nation-building.

IV. THE BIG THREE

I will begin with picking up the threads of the big three: the Treaty, native title and standalone Māori custom before moving to categories that belong more squarely to New Zealand's natural positivist preferences – environment, family, crime and so on.

A. *The Treaty*

By the period of the modern Treaty settlement process circa 1990, the status of the Treaty was, as Matthew Palmer rightly points out, a matter of real legal debate.²⁷ Pointing to the infusion of Treaty principles into the workings of executive government via the Cabinet Manual, Palmer cautions that the question of the Treaty's fuzzy legal status should not be confused with its significant practical effect in the workings of government.

Wholesale statutory inclusion of Treaty principles as mandatory relevant considerations in key areas of state activity such as environmental regulation, conservation, the sale of state assets, and

27 Matthew SR Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008).

of course the Treaty of Waitangi Act itself made the question of the Treaty's standalone legal status less pressing in practical terms. Cooke P in the famous 1987 *Lands* case, tantalisingly described *Te Heuheu* as the law on the status of the Treaty "at any rate from a 1941 standpoint".²⁸

At around the same time, judges were prepared to explore the gaps in statutory language in their search for a credible Treaty of Waitangi after Empire. Thus in 1987 Chilwell J was persuaded to read the Treaty of Waitangi into a provision of the Water and Soil Conservation Act 1967 that contained no reference to the Treaty or indeed Māori considerations of any kind. The Treaty was, he said, a part of the "fabric" of New Zealand society, and ought not to be ignored.²⁹

Gallen and Goddard JJ in *Barton-Prescott v Director-General of Social Welfare* found that "all Acts dealing with the status, future and control of children, are to be interpreted as coloured by the principles of the Treaty of Waitangi", whether or not the Treaty was the subject of express statutory reference.³⁰ Child welfare, the Court held, is a core Treaty issue and the Treaty's terms speak to it.

In the same year as *Barton-Prescott* the High Court also confronted the issue of Māori customary fishing rights under the Fisheries Act 1983 and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.³¹ McGechan J considered that even in the absence of an express statutory obligation to apply the principles of the Treaty, a minister's exercise of discretion must be coloured by the Treaty background of the thing being considered.³² He analogised:³³

[I]f the Minister has discretionary power to expend a fund in preservation of works of art, and there is not enough to go around, and some are taonga which under Article II the Crown has Treaty obligations to protect, then even if there is no express statutory discretion to apply principles to the Treaty, it would hardly be open to the Minister totally to ignore that Treaty background and that character as a taonga.

As Palmer rightly warns, it is important not to get carried away in assessing the impact of these authorities, but they are nonetheless significant markers of the (then new found) place of the Treaty in public law.³⁴

These matters were left until 2007 and that year's iteration of the *New Zealand Māori Council v Attorney-General*, this one a case involving an attack on a settlement relating to Crown forestry land.³⁵ The Māori Council argued that the settlement would breach an earlier agreement between the Council and the Crown. Although the issue did not require resolution, the Court of Appeal expressed a view on the question of the Treaty's direct enforceability at law.

The Treaty, the Court said, could have direct impact in judicial review cases (the Treaty being an implied or express relevant consideration), or in cases involving statutory interpretation (by reading the statute so as to be consistent with Treaty obligations). But it could not, on its own, form

28 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands* case] at 667.

29 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 196.

30 *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184.

31 *New Zealand Federation of Commercial Fishermen Inc v Minister of Fisheries HC Wellington CP237/95*, 24 April 1997.

32 At 148.

33 At 148.

34 Palmer, above n 27.

35 *New Zealand Māori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318.

the basis of an action in the New Zealand courts. In this the Court considered it was following principles laid down in the *Lands* case.³⁶

The appeal that followed to the Supreme Court was subsequently withdrawn but only after the Supreme Court issued a minute recording that the parties themselves acknowledged the Court of Appeal's comment on Treaty status, and those in relation to Crown fiduciary obligations,³⁷ were obiter dicta. It thus cannot yet be said with confidence that O'Regan J's (as he then was) assessment of the modern status of the Treaty is the last word on the matter.

Matthew Palmer's modest proposal was that the Treaty should be given general legal effect through the enactment of an ordinary statute along the lines of the New Zealand Bill of Rights Act 1990. That proposal has not yet been taken up, and was ultimately rejected by the 2013 constitutional advisory panel.³⁸ So the ball is accordingly back in the judges' court (excuse the pun).

B. Native Title

The five-judge Court of Appeal decision in *Ngati Apa v Attorney-General* is New Zealand's modern landmark authority on native title.³⁹ Faced with contradictory authority from the second law phase, the Court opted for the continuity of recognition theory of native title. The Court was prepared to join the dots between the run of New Zealand cases that accepted that colonisation delivered a radical title to the Crown (imperium) but retained a form of usufructory title in Māori as a burden on the Crown's radical title (dominium). *Wi Parata v The Bishop of Wellington*⁴⁰ and *Re The Ninety-Mile Beach*⁴¹ were treated by the Court as "discredited" and "wrong", even in their own time, and *R v Symonds*,⁴² *Manu Kapua v Para Haimona*⁴³ and *Nireaha Tamaki v Baker*⁴⁴ were seen as affirming an imperial continuity doctrine.⁴⁵ Resort was also had to supportive 19th century authorities from cognate jurisdictions – *Johnson v McIntosh*⁴⁶ and the Cherokee cases in the US Supreme Court⁴⁷ and *St Catherine's Milling and Lumber Co v The Queen*⁴⁸ in the Privy Council

36 As to relevant considerations, the Court cited *Huakina* and in relation to statutory interpretation the case cited was *Barton-Prescott*.

37 Throughout the 19th century, the colonial Crown in New Zealand did in fact create statutory trustees and statutory protections around the process of land sales – the appointment in the 1840s of the Office of the Protector of Aborigines is an example, as were the extensive safeguards drafted into the Native Land legislation after 1867. These didn't work, and there is much Waitangi Tribunal litigation around why (see for example the Tribunal's 2004 report on the Gisborne claims – *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims* (Wai 814, 2004)). But for present purposes, the important point is the Crown saw that it had at least a political obligation to provide such protection.

38 Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation* (November 2013) at 33–34.

39 *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA).

40 *Wi Parata v The Bishop of Wellington*, above n 9.

41 *Re The Ninety-Mile Beach*, above n 14.

42 *R v Symonds* (1847) NZPCC 387 (SC) at 390.

43 *Manu Kapua v Para Himona* [1913] AC 761 (PC) at 765.

44 *Nireaha Tamaki v Baker* [1901] AC 561 (PC).

45 *Ngati Apa v Attorney-General*, above n 39, at [13].

46 *Johnson v McIntosh* 21 US 543 (1823).

47 *Cherokee Nation v Georgia* 30 US 1 (1831); *Worcester v Georgia* 31 US 515 (1832).

48 *St Catherine's Milling and Lumber Co v R* [1888] 14 AC 46 (PC).

on appeal from Canada.⁴⁹ The Court also reached across jurisdictions in the modern era. The Judges cited the Australian authority in *Mabo*⁵⁰ and the Canadian authorities in *Delgamuukw*⁵¹ and *Sparrow*⁵² to show that the doctrine of native title in its modern form had universal application across the Empire now too.⁵³ *Ngati Apa* was rightly seen by specialists and academics as entirely orthodox late 20th century, anglo-common law indigenous rights law.

Predictably, given our consistent legal history in this regard, the New Zealand legislature responded quickly by introducing the Foreshore and Seabed Act 2004.

C. *Tikanga Māori*

The issue of whether a free-standing form of Māori custom law, unconnected to a native title-based resource claim, could be directly enforced in New Zealand did not arise in the modern era until the case of *Takamore v Clarke*.⁵⁴ This is perhaps a reflection of the multiple categories of modern New Zealand law into which Māori custom is incorporated in some form, and the extent to which legislation has generally displaced the common law. At issue was whether Māori custom controlled where a Māori deceased should be buried, or whether the executor under the will (his Pākehā spouse) had the final say. The latter, it was contended, followed the common law rule, although there was considerable debate about whether that was the common law rule at all.

In the Court of Appeal, Glazebrook J (writing for herself and Wild J) adopted an orthodox incorporation analysis. She concluded that there was such a thing as Māori burial custom and it had been followed continuously from time immemorial until the present day. But, she said, to the extent that this custom sanctioned the forcible taking of a deceased from his or her family, the custom was unreasonable and therefore should be considered unenforceable in its entirety. The right of control therefore defaulted to the executor.

The Supreme Court on appeal adopted quite a different and, I suggest, novel approach. All five Judges assumed as an abstract proposition that Māori custom was indeed a part of the New Zealand common law in some form. All implicitly rejected the notion that Māori burial custom was unreasonable as a general proposition and therefore could not be enforced as a part of the law of New Zealand.

The principle espoused by the Chief Justice (and followed by William Young J in a separate opinion) was essentially that the venerable tradition of the common law is that it morphs and adapts to the circumstances and location in which it operates and that means local indigenous custom will usually have some kind of transformative effect on the arriving system. Just what kind of effect is not articulated – that will fall to be resolved by the courts on a case by case basis.

The Chief Justice took a direct route. She said:⁵⁵

Values and cultural precepts important in New Zealand society must be weighed in the common law method used by the Court in exercising its inherent jurisdiction, according to their materiality

49 *Ngati Apa v Attorney-General*, above n 39, at [19], [20] and [142].

50 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (HCA) at 50.

51 *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

52 *R v Sparrow* [1990] 1 SCR 1075 at 1099.

53 *Ngati Apa v Attorney-General*, above n 39, at [31] and [148].

54 *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573.

55 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94]–[95].

in the particular case. That accords with the basis on which the common law was introduced into New Zealand only “so far as applicable to the circumstances of the ... colony”. ... Māori custom according to tikanga is therefore part of the values of the New Zealand common law ...

[A]s in all cases where custom or values are invoked, the law cannot give effect to custom or values which are contrary to statute or to fundamental principles and policies of the law.

The majority judgment of McGrath J (writing also for Tipping and Blanchard JJ) concluded that the common law was clear that the matter was controlled by the executor. But in a more dilute recognition of custom, McGrath J nonetheless accepted that Māori custom will be a relevant consideration for the executor (apparently relevant in a quasi-public law sense), along with any other relevant circumstances, when the executor comes to make his or her decision. He said:⁵⁶

The common law is not displaced when the deceased is of Māori descent and the whanau invokes the tikanga concerning customary burial practices, as has happened in this case. Rather, the common law of New Zealand requires reference to the tikanga, along with other important cultural, spiritual and religious values, and all other circumstances of the case as matters that must form part of the evaluation.

So tikanga is no longer seen as an independent source of law but rather as a flavour in the common law of stronger or weaker effect, depending on subject matter and context.

This is an interesting new take on the survival of custom in modern law. It is consistent with *Tanistry* and *Campbell v Hall* in the sense that it reflects the original conception of the common law as itself custom. It therefore logically contemplates the incorporation of custom from sources outside the common law into the common law. But it does this in a peculiarly public law way. Custom is a relevant consideration for the individual with the power of decision where context and subject matter require it. This approach is, in substance, indistinguishable from that in *Huakina* and *Barton-Prescott*. Are the once separate approaches of the courts to the Treaty, Māori custom and Māori interests generally beginning to merge?

D. *A Brief Summary: The Treaty, Native Title and Custom*

It has been necessary to pick up the key strands of legal contestation arising at the point of formal contact (or collision) between the first law and the newly arriving second law and bring those strands through to the present. There was the Treaty and its content and its status. The nature and status of native title, and the legal enforceability of Māori custom once the second law arrived. I said that the Treaty, a solemn compact in 1840, came to be regarded in law as unenforceable unless the settler legislature had incorporated it, though it was, in the modern period, resurrected in much weaker form as subtly relevant in judicial review and statutory interpretation exercises. Background to the 2007 *New Zealand Māori Council* case makes it clear that we do not yet have the last word on this subject.

The enforceability of native title was contestable through the 19th century, but by the end of the 20th century, the New Zealand courts, like those in Australia and Canada, had adopted a doctrine of continuity of recognition even if the title itself was highly defeasible.

Finally custom, the subject of a reasonably clear guarantee in the Treaty and given practical recognition in statutory instruments from the very beginning, progressively faded from view as the

⁵⁶ At [164].

19th century played out, and native title was progressively extinguished on the ground. Its primary life in state law during those years was in fact within the discipline of allocating ownership by custom in the transformative Native Land Court. By the early 21st century, the whole role of Māori custom in New Zealand society had become reinterpreted as relevant but again highly contestable, even in particularly Māori spheres of activity like burial custom.

In short, the big three have survived the second law phase. Each is in a fragile state as it attempts, with some success, to shake off the effects of that phase. It cannot yet be predicted whether the third law phase will see their status enhanced, but it must be said there is no particular reason to be pessimistic at this stage. Indeed a survey of Māori law in the legislative context might well suggest there is a basis for cautious optimism. I turn now to that context.

V. MĀORI LAW IN LEGISLATION – THE FIRST MOVERS

The first three areas of significant legislative change were in historical Treaty claims, environmental regulation and family law. These were the big categories because they were, and remain, the subject of intense focus within the Māori community. Relatively significant change was made in these areas from the mid-1980s through to the early 1990s. Historical Treaty claims law and policy is a temporary phenomenon. The Government's aim is to complete the process of compensating the descendants of those who suffered during the colonial period and then to put that chapter in our history behind us. Its biggest long-term impact will be in bringing the 50 or 60 settling tribes into the penumbra of the law, for the most part, for the first time. They will unquestionably change the law by dint of entering its sphere. I will come back to that issue below. My focus at this point will be on the other two areas. I want to trace, at a very high level, developments in environmental and family law as a useful starting point in explaining how legislation has helped create the third law phase.

A. Environment

Step-changes in environmental regulation were first triggered by case law. The old s 3(1)(g) of the Town and Country Planning Act 1977, the predecessor of s 6(e) of the current Resource Management Act 1991, made the Māori relationship with their ancestral land, a matter of national significance in town and country planning. But its reach had been restricted to Māori-owned land until the 1987 High Court decision in *Habgood*.⁵⁷ *Habgood* found that *any* land the subject of Māori ancestral connection was addressed by the provision.⁵⁸ This made Māori ancestral connection to land relevant everywhere in land use planning. That changed the game in an obviously important way.

I have already mentioned *Huakina*'s general impact on Treaty law, but it had an important specific impact on environmental law. Moving from land use to water use, *Huakina* (also, coincidentally, in 1987) imported the Treaty of Waitangi into the Water and Soil Conservation Act 1967 when the statute was entirely silent on the question.⁵⁹ Using orthodox judicial review principles it made Māori interests in, and ancestral connections to, water a relevant matter in the

⁵⁷ *Royal Forest and Bird Protection Society Inc v WA Habgood Ltd* (1987) 12 NZTPA 76 (HC).

⁵⁸ At 9.

⁵⁹ *Huakina Development Trust v Waikato Valley Authority*, above n 29.

allocation of all water rights. The reasoning was orthodox, but it was deployed because something quite fundamental had changed in judicial attitude to the subject matter.

As I hinted earlier in the context of native title and the Treaty, it is important to understand that these cases were not decided in a jurisprudential vacuum. They were issued at the same time as similar aboriginal rights cases. There was the 1986 High Court decision in *Te Weehi v Regional Fisheries Officer*, the first of the modern authorities to recognise an aboriginal right in fishing.⁶⁰ And of course in the same year was the *Lands* case made possible by s 9 of the State-Owned Enterprises Act 1986. The cases were in turn being driven by Māori litigation and other activism, and the writings of young scholars such as Paul McHugh, the son of a respected Māori Land Court Judge. McHugh had studied at the Native Law Centre at the University of Saskatchewan where he was reminded that native title was a common law doctrine not a statutory creation.

These developments in the native rights and statutory rights area were mutually affirming and strengthening. There was, in a sense, a grand conversation going on here, between three players: iwi, the courts and the legislature with the academy taking cameo roles at important junctures. The conversation lasted for a decade.

Outside the Treaty settlement process, which took much longer to construct in its present form, the Resource Management Act 1991 model was the most important and impressive result of this grand conversation. It led to the inclusion of multi-dimensional Māori provisions in pt 2 of that Act: s 6(e) picked up the old s 3(1)(g) of the Town and Country Planning Act 1977, and relying on *Habgood* and *Huakina*, applied it (effectively) to all natural resources; s 7(a) of the Resource Management Act 1991 (RMA) introduced the tikanga value of kaitiakitanga into environmental management;⁶¹ and s 8 imported the principles of the Treaty.⁶² It was the first genuine attempt to import tikanga in a holistic way into any category of the general law.⁶³

Not much was left out. Mechanisms were provided to ensure the Māori voice could participate as an initiator, and not just as an objector: s 33 related to delegations of final decision-making power, heritage protection provisions could apply to iwi and hapu, and iwi-generated planning documents were made relevant in the planning process for the first time. Māori communities could make their vision for their traditional territories relevant to the process.

But these Māori interest-based considerations still had to compete for the attention of the final decision-maker against a multi-layered menu of other interests. Ancestral relationships, kaitiakitanga and the Treaty were all relevant, each differently weighted in the statute, but ultimately easily set to one side if necessary in pursuit of a western empirical or scientific view of sustainable management if that was the preference of the relevant decider.

The courts, local authorities, resource users and the Māori community have had more than two decades of experience with this integrated recognition of Māori custom in the regulation of the

60 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC).

61 *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA). The signal and a single-handed achievement, in my view, of Dame Nganeko Minhinnick's campaign to protect the Waikato River and the Manukau harbour from degradation through unsustainable use.

62 Section 8 of the Resource Management Act 1991 followed *Huakina* but it must be remembered that these changes also occurred at the time that Treaty clauses were routinely included in statutes governing areas of particular Māori focus: I have mentioned s 9 of the State-Owned Enterprises Act 1986, but there was also the long title to the Environment Act 1986, s 4 of the Conservation Act 1987 and so on. These reflected, for their time, quite significant changes in legal mind set and culture.

63 Codifying *Habgood* and *Huakina*.

environment. I want to spend a little time gauging where this particular model has taken law at the interface between the Māori and wider New Zealand communities. This is necessary and, I suggest, useful, because of all such cultural interface management mechanisms, the model adopted in the RMA is the most sophisticated.

Four cases show how the Environment Court and appellate courts have struggled with the different culture and custom law of the Māori community in environmental regulation over this period.

A starting point for brief mention is *Watercare Services Ltd v Minhinnick* in which the courts set the statutory test for offensiveness under s 314 of the RMA.⁶⁴ The appellant argued that the construction of a sewer pipe through an archaeological site Mrs Minhinnick claimed to be a wahi tapu was culturally offensive. The Environment Court decided that the applicable standard in determining whether the proposal was indeed offensive was that of a reasonable (implicitly non-Māori) member of the wider community. In the High Court, Salmon J, formerly a leading planning silk, found that this was wrong and that offensiveness could only be measured from the perspective of a reasonable member of the Māori community. The Court of Appeal, rather surprisingly, reversed the High Court, preferring the approach taken by the Environment Court. Thus it seems that actions objectively offensive to Māori (if found to be so) would only breach the standard in s 314 if the majority non-Māori community agreed. The Court seemed to fear that a Māori-centric standard could cause the majority to be held in thrall to minority sensibilities. This is a common theme in the discretionary application of Māori custom to cross-cultural circumstances.

The decision of the Environment Court in *Ngati Rangi Trust v Manawatu-Wanganui Regional Council* is, with respect, an example of the Environment Court really grappling with, and trying to make sense of, the traditional Māori relationship with natural resources, in that case between the Whanganui River tribes and the river itself.⁶⁵ The case concerned consenting of the Tongariro Power Development and the (wrongful in Māori eyes) diversion of water out of the Whanganui and Whangaehu river catchments and across the island into the Taupo Tongariro catchment.

The Court heard evidence in Māori communities and was clearly struck by the depth of Māori feeling and the different way in which Māori perceived their relationship to the resource.

As the Court described it:⁶⁶

The most damaging effect of both diversions on Māori has been on the wairua or spirituality of the people. Several of the witnesses talked about the people “grieving” for the rivers. One needs to understand the culture of the Whanganui River iwi to realise how deeply engrained the saying *ko au te awa, ko te awa, ko au* is to those who have connections to the river. The iwi see the river as a part of themselves, and themselves as part of the river. Their spirituality is their “connectedness” to the river. To take away part of the river (like the water or river shingle) is to take away part of the iwi. To desecrate the water is to desecrate the iwi. To pollute the water is to pollute the people.

It appeared that the Whanganui River tribes called limited scientific evidence while Genesis Energy’s scientific evidence was extensive. The Court found that there was a disconnect between the two perspectives and that further discussion and consultation was required to find common ground. The Court judged that a limited water right (10 years) should be granted to Genesis rather

64 *Watercare Services Ltd v Minhinnick*, above n 61.

65 *Ngati Rangi Trust v Manawatu-Wanganui Regional Council* NZEnvC Auckland A067/2004, 18 May 2004.

66 At [318].

than the full term (35 years) requested. This was in order to allow the two worlds to begin a conversation over accommodation and mitigation.

The High Court⁶⁷ and a majority in the Court of Appeal⁶⁸ found that the Environment Court had erred in the approach it took. William Young P considered that the Court was just giving the iwi another chance to produce a better case in 10 years' time. A consent that involved more time for a longer conversation about mitigation of effects was not permissible. The Environment Court had to make a decision. The High Court had made much of the refusal of the Whanganui tribes to engage in any consultations with Genesis – a refusal the Environment Court accepted as understandable in light of the iwi's deep suspicion of Genesis' intentions. The majority in the Court of Appeal implicitly affirmed the High Court's criticism of the iwi.

The result is disappointing in terms of the Act's overall effectiveness in mediating Māori concerns that impact on the wider community and economy. If the reforms contained in the RMA were about anything, they were about providing a platform upon which the two systems could engage in civilised conversation about their differences and mutual interests. Given Whanganui's hundred year history of claims in respect of the river and their opposition to the power development since its inception, their anger at and distrust of Genesis was, with respect, understandable.

Make no mistake, the decisions in the High Court and Court of Appeal were orthodox on the law, but in practical terms the *Genesis Energy* case probably represents a missed opportunity to adapt and mould RMA processes in a new and innovative way. As Ellen France J noted in dissent, an adjournment for further discussion between the parties over acceptable mitigation measures would probably have been unobjectionable and would have achieved the same result.

I am told that despite the result on appeal, the parties did meet and discuss appropriate accommodations and common ground was eventually found as the Environment Court had hoped.

As it turns out, the Whanganui tribes are now in negotiations with the Crown over the settlement of the Whanganui River claim. And although a final settlement is not yet signed, it is clear that Māori and the Crown are of one mind that the river should be recognised as having its own legal personality and its own independent interests deserving of protection. This is likely to change any further reconsealing processes in fundamental ways.

The *Friends and Community of Ngawha Inc* case related to the building of Ngawha Prison on land said by some of the hapu of the area to be the domain of a taniwha named Takauere.⁶⁹ They argued in the Environment Court, High Court and Court of Appeal that the taniwha would be adversely affected. The Māori position in the Environment Court was divided. Some members of the hapu believed this to be so; others rejected that allegation and sided with the applicant. Each of the courts, in dismissing the appeal, struggled with the whole idea of whether and how secular courts should make provision for spiritual beliefs and cultural entities such as those at issue in this case.

Perhaps understandably given their own cultural backgrounds, judges brought a degree of scepticism to the task of weighing spiritual concerns in relation to taniwha against wider tangible environmental effects. The Environment Court found that disputes within the community over taniwha were simply not justiciable, a view with which Wild J in the High Court implicitly

67 *Genesis Power Ltd v Manawatu-Wanganui Regional Council* (2006) 12 ELRNZ 241, [2006] NZRMA 536 (HC).

68 *Ngati Rangi Trust v Genesis Power Ltd* [2009] NZCA 222.

69 *Friends and Community of Ngawha Inc v Minister of Corrections* (2002) 9 ELRNZ 67, [2003] NZRMA 272 (CA).

concluded.⁷⁰ But all Judges accepted that s 6(e) of the RMA requires the court to take into account metaphysical and intangible matters and therefore to take into account Māori belief in the existence of the *taniwha* and the allegation of effects on it.

In the end, the Environment Court found as a matter of fact that the prison development did not affect the *taniwha* or belief in it, relying on evidence from within the community to reach that conclusion. The appellate courts concluded that these findings of fact meant that no relevant question of law arose. The problem was thus neatly avoided. But after two decades of jurisprudence in these matters the courts can still, with respect, demonstrate relatively limited understanding of the techniques Māori custom would use to assess the veracity of conflicting evidence on spiritual matters, still less of the metrics from within Māori custom by which effects on spiritual interests might be properly and objectively measured.

The Environment Court decision in *Ngati Hokopu* is an interesting exception.⁷¹ The Court took a post-modern relativistic approach to this question when it was faced with having to decide whether a proposed development site was a *wahi tapu* by virtue of being an *urupa* or burial ground. This case did not bring with it the very difficult metaphysical issues raised in *Genesis* and *Ngawha*. Rather it was a case more easily amenable to western forensic techniques. Were there burials at the consent site or not? Nonetheless, the Court picked up where *Ngawha* left off citing Wild J's difficulty in that case in accepting that beliefs can be regarded as a natural and physical resource, or that they can be sustainably managed as required by the Act.⁷² The Environment Court disagreed with Wild J on the point arguing that the connection between belief and these other matters is to be found in properly understanding the Māori approach to "relationships" as imported into the RMA. There is, the Court said, "no rigid distinction between physical beings, *tipuna* (ancestors), *atua* (spirits) and *taniwha*."⁷³ But, the Court said, in the RMA context:⁷⁴

In our view there can be some meeting of the two worlds. We start with the proposition that the meaning and sense of a Māori value should primarily be given by Māori. We can try to ascertain what a concept is (by seeing how it is used by Māori) and how disputes over its application are resolved according to *tikanga Ngati Awa* [the relevant *iwi* in the area]. Thus in the case of an alleged *wahi tapu* we can accept a Māori definition as to what that is (unless Māori witnesses or records disagree amongst themselves).

After a lengthy and, with respect, rather insightful exegesis on the importance of understanding Māori evidence and beliefs from within that system, the Court then identified appropriate metrics for assessing conflicting evidence from within the Māori "system":⁷⁵

- whether the values correlate with physical features of the world (places, people);
- people's explanations of their values and their traditions;
- whether there is external evidence (e.g. Māori Land Court Minutes) or corroborating information (e.g. *waiata*, or *whakatauki*) about the values. By "external" we mean before they became important for a particular issue and (potentially) changed by the value holders;

70 *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401 (HC).

71 *Ngati Hokopu Ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111 (NZEnvC).

72 At [41].

73 At [42].

74 At [43].

75 At [53] (footnote omitted).

- the internal consistency of people's explanations (whether there are contradictions);
- the coherence of those values with others;
- how widely the beliefs are expressed and held.

The secret, the Court held, is in making the assessment within the world from whence it came. I agree entirely, with respect.

At least, it must be said, the courts are now genuinely grappling with the issues. And, if *Ngati Hokopu* is a marker of progress, there is some sign that New Zealand judges may in time become comfortable operating within and between the two worlds.

What has changed in environmental regulation over the last 20 years is that Māori issues that were never on the table are now on the table for discussion at council level and in court, even if they must compete for air with a dozen or more other considerations, are highly defeasible and only rarely ever decisive.

The greatest concern is not that judges are struggling to bridge the divide between Māori custom and the more positivist traditions of modern Pākehā law (though that is still a concern). It is rather that, despite the Act's mechanisms aimed at mediating these issues, it has not over the last two decades produced examples of any significant step change in the *structural* relationships between the necessary players under the Act. Neither s 33 nor the heritage protection provisions in pt 8 have been used by ministers to transfer decision-making powers to iwi or hapu. Partnership-based powers under s 36B have been used by local authorities, as far as I know, only once and then only in relation to Māori-owned land. Iwi generated planning instruments, although they are specifically provided for in the Act, have not enabled iwi and hapu to take the resource management initiative on matters of deep significance to them – that is to drive conversations with local authorities over iwi and hapu priorities. Iwi remain, for the most part, cast in the role of objectors to the initiatives of others. These structural provisions are, for Māori, a dead letter, despite Lord Cooke's obiter in the *McGuire v Hastings District Council* case that the Māori provisions in pt 2 of the RMA are "strong directions, to be borne in mind at every stage of the planning process."⁷⁶

The RMA is frankly not pulling its weight. Instead, such modest advances as iwi and hapu are achieving in these structural areas are almost exclusively the result of Treaty settlement negotiations with the central Crown. The new regulatory structure for allocation and use of the resources of Waikato River is the most dramatic example, but there are many others more modest in scale and impact, being introduced settlement by settlement. While these advances are very positive, in my

76 *McGuire v Hastings District Council* [2001] UKPC 43, [2002] 2 NZLR 577 at [21].

view they are a significant admission of failure in the RMA itself, since the mechanisms to achieve similar outcomes have existed in that Act for more than 20 years without being deployed.⁷⁷

B. Family

If environmental law changes were driven from the obvious base that Māori relationships with land, water and environment are the core of Māori culture, then Māori collective relationships – whanau, hapu, and iwi – are a co-equal core of the culture: both of them underpinned by whanaungatanga or kinship. Traditionally the whanau, at least three generations deep comprising more than two nuclear families and co-resident at a resource complex, was the centre of Māori life. It was the primary unit of close identity and belonging, the primary unit of social rights and obligations and, at a practical level at least, the primary unit of economic rights and obligations.

The whanau was, and still is, the essential glue that holds Māori culture together. In practical terms being Māori counts most at the intimacy of the whanau. Without whanau, being Māori is a mere abstraction. At the hapu level (involving multiple whanau all inter-related by descent), higher level political and economic rights and obligations cohered. The hapu was the primary political unit of Māori life during the first law period, and through its laws, economic rights were distributed to whanau and exercised (for the most part) at that level on whanau-specific resource complexes.

The colonisation process in the second half of the 19th century and the beginning of the 20th century stripped both the physical assets belonging to whanau and hapu, and their political and legal authority. That meant that by the 1920s, hapu and whanau were only relevant as co-residential social units based around traditional villages located on the remnant land base. Each had lost its core economic and political functions. By the 1960s, whanau and hapu were no longer even co-resident, as individual families decamped to the cities to find work away from land-poor village communities in the rural areas. Economic wealth then came not from kinship rights, but from the urban factory, rail yard or government job. And social control was imposed not by hapu and

77 There are a number of related Acts affecting environmental regulation in various ways outside the umbrella of the Resource Management Act that warrant brief mention because of their significance. Foremost among these is the Conservation Act 1987. Though narrow in subject, it is wide in application – governing around 30 per cent of New Zealand’s land surface and a wide swathe of our marine area. The conservation estate includes national parks, other Crown-owned native forests, river habitats, mountains, wetlands, and other precious landscapes and eco-systems. The Department is also responsible for about 1.28 million hectares of marine reserves and for the conservation of marine mammals and protected wildlife. Its work is of enormous importance to the Māori community and that community’s sense of connection to the landscape. Often the Department of Conservation (DOC) estate is the only place from which iwi can obtain flora and fauna for the maintenance of cultural practices. It is often also where iconic landscape features in Māori custom are found. As is well-known, s 4 of the Conservation Act 1987 requires that the Act be so interpreted and administered “as to give effect to the principles of the Treaty of Waitangi.” It is a powerful Treaty clause creating positive obligations. Time does not permit any kind of discussion of the implications of that section for the work of the Department of Conservation and the administration of the conservation estate, but it is sufficient to say that its effect has been to infuse tikanga Māori-based processes and considerations throughout the work of the Department in its various conservancies. The result has been relationships between iwi and local conservancies that are often close and co-operative approaching, at local levels, genuine Treaty partnerships. The models are of course not perfect. Problems arise and the law constrains how much iwi and hapu kaitiakitanga can be exercised within the DOC estate, although Treaty settlements are often loosening those constraints in local circumstances. I should mention also the Hazardous Substances and New Organisms Act 1996 whose provisions mirror pt 2 of the RMA and the Environmental Protection Authority Act 2011 which contains a Treaty provision in s 4 and continues the now disestablished Environmental Risk Management Authority’s Māori Advisory Committee in ss 18–21 whose purpose is to advise the new Authority on Māori perspectives.

whanau leaders but through the criminal justice system, the Social Welfare Department and in the Family Court.

Yet the whanau persists as an institution in the hearts and minds of Māori people, despite its multi-generational economic and social redundancy.

Again, as with Treaty rights, native title and environmental law, the great awakening in the law came in the 1980s. A Ministerial Advisory Committee on a Māori Perspective was drawn together in 1985 to advise the Department of Social Welfare (as it then was) on an appropriate Māori perspective for its activities. The Committee was headed by the respected Tuhoē leader, John Rangihau, and included leading members of the Māori community and public service. In 1986 it produced a report, still widely cited, called *Puao-te-Ata-tu*.⁷⁸ This report changed the game. It drew attention to the deeply monochromatic nature of New Zealand's family laws and policies. For the first time in an official journal, it told the story of Māori custom and the whanau and the struggle of Māori communities to maintain the relevance of that institution in the face of laws inconsistent with its continued life.

It became a key driver of the Children, Young Persons, and Their Families Act 1989 (1989 Act) in which court intervention is mandated where a child is in need of "care and protection". The legislation picked up references in *Puao-te-Ata-tu* emphasising that a Māori child's life needs to be seen within a kin matrix – whanau, hapu and iwi. Section 5 contains the principles of the Act and its support for whanau, hapu and iwi life in making decisions under the Act in respect of Māori children is clear. The essential principles are that whanau, hapu and iwi should participate in decisions under the Act wherever possible; their views should be considered by deciders; connections to whanau, hapu and iwi should be maintained and strengthened; and the stability of whanau, hapu and iwi should be a matter of judicial consideration.

These principles are subject to the overriding welfare and interests of the child or young person provided for in s 6. It seems that the two provisions are drafted so as to be in tension and they are often interpreted that way. The individual child versus the whanau. But that need not necessarily be so, provided it is accepted that the best interests of a Māori child will always be, to some extent or other, in attachment to the kin matrix. If that is accepted, the real challenge for the law is *how* to achieve continued attachment if a whanau is genuinely dysfunctional, not *whether* to do so. My impression from reading the leading cases is that the Family Court is not at that point. At least not yet. And the wider kin group – hapu or iwi – is not yet at the centre of decision-making.

Section 187 of the Act allows the court to call for cultural reports. I understand from discussions with judges that these are not often utilised. Nor do counsel tend to push for them. I address similar provisions in the sentencing context below.

The greatest innovation in the 1989 Act was the introduction of the Family Group Conference. In a Māori context, this amounts to the reintroduction as far as is possible (usually now in an urban context) of whanau decision-making (at least it can mean that if administered according to the Act's spirit). Sections 20 to 38 provide an opportunity for the whanau to come together and find an internally-generated solution to the care and protection problem that they confront. It tries to replicate, albeit in a very attenuated form, the old social control role of the whanau under tikanga.

The old, and very out of date Guardianship Act 1968 was replaced by the Care of Children Act 2004 (2004 Act). It too made extensive reference to whanau, hapu and iwi in its principles

78 Māori Perspective Advisory Committee *Puao-te-Ata-tu: The Report of the Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare* (Department of Social Welfare, SW 470, September 1988).

section (s 5). In s 16 there is reference to the guardian's responsibility to contribute to a child's cultural development, and there is reference also to language.

Section 133 provides for cultural reports (again, I understand from discussions with judges, under-utilised both by Bench and counsel), and s 136 allows a party to seek leave to be heard on matters of cultural background.

Yet s 4 still refers to the paramountcy of the interest of the child and the structure of ss 4 and 5 has been roundly criticised in taking a primarily individualistic approach to issues of care in preference to the child's place within whānau, hapū and iwi. Professor Bill Atkin made this comment in 2006:⁷⁹

The Care of Children Act 2004 makes passing reference to Māori values but not in any meaningful way – indeed in a totally confusing way. For example, section 5(b) says that “the child's relationships with his or her family, family group, whanau, hapu, or iwi, should be stable and ongoing” which is fine, but then is confounded by a bewildering phrase in brackets which reads: “in particular the child should have continuing relationships with both of his or her parents”. The Care of Children Act 2004 is a muddle as it is, but to have the muddle so manifest by the juxtaposition of these concepts is bizarre.

Once again we see the conflict between these two cultural and legal world views: kin obligations versus individual autonomy. It can also be seen in the failure of the Act to empower whanau and hapu members to apply for parenting orders as of right. Parents, step-parents and guardians can apply, but any other person including a member of a child's whanau can only do so with leave. Judge Annis Somerville in her article “Whanaungatanga in the Family Court”⁸⁰ was nonetheless optimistic that the structure of the 2004 Act can be seen as “a step towards a third space that incorporates positive aspects of all cultures present in New Zealand.” She may ultimately be proved right, but it is fair to say that the jury is still out.

A key problem with the 2004 Act is its lack of an equivalent to the Family Group Conference in the 1989 Act. That means that unless things have become so problematic as to warrant asking whether the child is in need of care and protection, the wider whanau has no mandate to participate in decisions under the Care of Children Act 2004. This must be seen to be a significant gap in light of the importance of decisions under the Act and the centrality of the whanau role in such decisions in Māori custom.

That leaves the old Adoption Act 1955. Curiously, that Act contains none of these modernising third law sensitivities, even the more modest ones to be found in the 2004 Act. The Adoption Act seems entirely based on the closed stranger adoption model, and there is no recognition of the still very much alive custom of whangai adoption.

C. Family Conclusion

There is evidence then of significant progress in early renaissance legislation (1989) but some second law legislation still survives and a key 21st century instrument appears to be deficient in recognising the centrality of whanau and hapu in custom both traditionally and in modern life.

Whanaungatanga has not advanced appreciably as a value in family law since the initial model

79 Bill Atkin “Harmonising Family Law” (2006) 37 VUWLR 465 at 477.

80 Annis Somerville “Whanaungatanga in the Family Court” (2006) 5 NZFLJ 140 at 141.

of whanau engagement was adopted in 1989. Indeed if Professor Atkin is to be believed, it may even have regressed.

While tribes have taken sole or shared responsibility in some areas of environmental regulation through Treaty settlement negotiations, there has been no equivalent development in the family law area. Iwi social service organisations remain in their limited roles as contracted providers of government services. There is no steady development toward iwi uptake of *jurisdiction*. This was not the vision of the Puao-te-Ata-tu Committee in 1986. Where iwi and the Crown have found natural synergies between environmental regulation and Treaty settlements, the same opportunities have not been found with respect to the law regulating families – at least not yet. This is frankly surprising.

I understand that iwi negotiating their settlements are now including discussions over arrangements for addressing iwi social issues. Tuhoe is leading the way here. Late settling iwi want to take back control in a manner that approximates the position they held under the first law. As with environmental law, Treaty settlements may end up being the driver for change in family law. And as with environmental law, that is because players in the family law system from policy-makers, to judges, to counsel, to operational agencies such as Child Youth and Family have not seen the opportunities.

VI. MĀORI LAW IN LEGISLATION – THE LATE ADOPTERS

A. *Crime*

Is there room for tikanga Māori in the core state function of law enforcement? There have been a number of significant cases in which that question was explored.

In the *R v Mason* case, Tamati Mason was charged with murder.⁸¹ He sought a ruling that he should be dealt with in accordance with tikanga Māori, the argument being that such a system still exists in parallel to the Crimes Act-based criminal justice system. Not surprisingly Heath J ruled against him, in an orthodox, though sympathetic treatment of the issue. Heath J found that the Crimes Act crowded out any possibility of an alternative criminal justice system, even if one existed. Unsurprisingly, the Court of Appeal agreed with the basic point.⁸² Both courts doubted, in any event, that a parallel system of adjudication existed in fact after many years of neglect in the second law period. Even the evidence of lawyer and expert defence witness, Moana Jackson, was that the Māori community is rebuilding its customary structures and it would be some time before such a system could be fully operational.

Heath J, however, did not stop there. He went further:⁸³

The finding that a parallel customary system is precluded by statute does not exclude the possibility of custom playing a meaningful role in criminal proceedings, provided it can be accommodated within the existing statutory system.

I interpolate here to note that s 8(i) of the Sentencing Act 2002 makes it mandatory for a sentencing

81 *R v Mason* [2012] NZHC 1361, [2012] 2 NZLR 695.

82 *Mason v R* [2013] NZCA 310 at [35].

83 *R v Mason*, above n 81, at [38].

court to take account of an offender's whanau, community and cultural background. It was no doubt with this provision in mind that the Judge continued:⁸⁴

Indeed, where both offender and victim are Māori and there is no issue as to guilt, such processes may be more appropriate to address the needs of those directly involved in the offending, leaving to one side the distinct interest of the community in the imposition of a sentence that adequately marks the offending.

The Judge was at pains to point out that he was not advocating a separate Māori system of sentencing, rather that culture and custom are matters that will often be relevant to the Judge's sentencing exercise. But the more serious the offending, the more significant the wider community interest in the punishment meted out, and by implication, the less room for custom and culture to play a role.

In the area of sentencing, judicial policy in particular has occasionally been innovative. Judges have been active in promoting the Rangatahi courts – a somewhat parallel system of marae-based Youth Courts, and the Matariki sentencing court, operative in Kaikohe in the Far North.

The Rangatahi Court process is generally seen as a positive and therapeutic model for youth offenders. Māori communities have embraced it and called for its expansion. But Judge Heemi Taumaunu, its leader, would be the first to accept that the Rangatahi Court has important limitations. The offender's first appearance is always in the mainstream Youth Court, and both the victim and offender must agree to the referral to the Rangatahi Court. The Court's jurisdiction is triggered once a Family Group Conference is completed and the Court may monitor the plan agreed at the Family Group Conference. Cultural components are strong in the process, with a powhiri, karakia, a requirement that the offender address the court in Māori, even if in a basic way, discussions between kaumatua sitting with the judge and the offender, and hongis at the end of each appearance. The Rangatahi Court was independently reviewed at the end of last year, and early signs are very positive. The model will undoubtedly evolve and grow over time.

The Matariki Court was first conceived by the late Chief District Court Judge Russell Johnson, who saw a particular need to address Māori offending in rural tribal areas using the power and support of whanau, hapu and iwi. The process was designed and consulted on by Judge Johnson and Judge Rota (now retired).

The Matariki Court operates in Kaikohe. It is designed as a technique to engage the offender's whanau, hapu and iwi in the sentencing process. It is an attempt, in a heartland tribal area, to engage with the old kin structures in constructing and monitoring sentences. A local kaumatua is co-ordinator or kairuruku. I understand Judge Greg Davis takes the lead judicial role in the Matariki Court. He is Nga Puhī and well-known and respected in the community. Once again, early indications as to success are positive.

The Matariki Court in particular was seen as a "s 27 Court"; a court that focuses on receiving information from whanau about cultural and family background in order to inform the sentencing process in accordance with the information gathering mandated by s 27 of the Sentencing Act 2002. Early signs are, as I say, good. There is every reason to support its expansion into other heartland tribal areas.

These are the positive examples, but s 27 of the Sentencing Act is a generally applicable provision in all sentencing. The provision is compulsory in the sense that if a person asks to address the Court

84 At [39].

on the matter of whanau and cultural background, then the Court must hear that person provided they are called by the offender, unless the Court is satisfied that there is some special reason not to hear him or her. And the Court may call for such information or report of its own motion even if there is no request. Information can be provided on any dispute resolution or therapeutic processes that have been undertaken with the victim; whanau or community supports around the offender, and any background relevant to possible sentences. Such reports could be of enormous importance in transferring responsibility and some level of control of the sentencing exercise to the offender's whanau and on a much wider scale than just the Rangatahi and Matariki Courts.

This provision addresses the same issue as s 718.2(e) of the Canadian Criminal Code – the subsection that gave rise to the judgment of the Canadian Supreme Court in *R v Gladue*.⁸⁵ Section 718.2(e) is less detailed than s 27. It simply requires that a sentencing court must consider the principle that:

All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with *particular attention to the circumstances of aboriginal offenders*.
(Emphasis added.)

But it does say that non-custodial sentences must be a particular focus for the courts in sentencing aboriginal offenders. The Canadian Supreme Court considered that the provision was enacted to ameliorate systemic discrimination against aboriginal offenders in the criminal justice system. The significant over-representation of indigenous Canadians in the criminal justice system, and in prison in particular, was, the Court said, the underlying reason for the statutory direction to search for alternatives.

In *Gladue*, the Supreme Court required sentencing courts, when sentencing aboriginal offenders, to obtain information (later dubbed a *Gladue Report*) on the aboriginal offender's social and cultural background so as to assess the degree to which systemic and background factors unique to aboriginal offenders have played a role in the offender's life and the offending. The factors, the Court said, will often include poverty, substance abuse, poor education, poor employment opportunities, cultural dislocation and so on. The decision changed the way courts across Canada sentenced aboriginal offenders.

There has obviously been some level of judicial push back in the lower courts in Canada since *Gladue*, because the Canadian Supreme Court took two more bites at the issue in *Wells*⁸⁶ and in *Ipeelee*⁸⁷ in 2012. *Ipeelee* in particular deserves more attention than can be given in the context of this lecture. The careful and sensitive judgment of LeBel J writing for all of the panel except Rothstein J, retraversed the Court's reasons for requiring sentencing judges to give particular consideration to the sentencing needs of aboriginal offenders.

The Court recognised the reality of economic and cultural loss during the colonial period; modern poverty and dysfunction, as well as differing cultural approaches to criminal justice. In particular, LeBel J emphasised the terrible incarceration asymmetry for indigenous Canadians as clear evidence that Canada's sentencing policy and practice was discriminatory and counterproductive. The Judge rejected academic, political and legal criticism of the *Gladue* approach. He confronted head-on claims that aboriginal over-representation in prison could not be addressed through individual

85 *R v Gladue* [1999] 1 SCR 688.

86 *R v Wells* [1998] 2 SCR 517.

87 *R v Ipeelee* [2012] 1 SCR 433.

sentences; that *Gladue* mandated an unjustified race-based discount; and that the requirement to treat aboriginal offenders differently for that reason alone amounted to reverse racism. The Court explained why focusing on aboriginality and its impact on life experience was still consistent with a principled approach to sentencing.⁸⁸

Section 718.2(e) does not create a race-based discount on sentencing. The provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case. This has, and continues to be, the fundamental duty of a sentencing judge. *Gladue* is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them.

Similar ideas were expressed in respect of aboriginal sentencing in Australia (without the aid of s 718.2(e)) by the New South Wales Supreme Court Criminal Division as early as 1992 in *R v Fernando*.⁸⁹

Section 27 of the New Zealand Sentencing Act, by contrast, is rarely used outside the Rangatahi and Matariki Courts. To be sure, the Sentencing Act does not require it to be applied to every sentencing of a Māori offender. But s 27 is clearly aimed at addressing the incarceration asymmetry in the Māori community through culturally specific sentencing to fit the circumstances of the offender just as the Canadian provision is. Such reports have the potential to trigger customary processes of the kind identified by Heath J in *Mason*. They have the potential to change sentencing practices in respect of Māori. The statistics suggest trying something different on a wider scale cannot possibly do any harm.

I note Heath J's discomfort with culturally-based sentences in more serious crimes. That is understandable at an intuitive level. But, as the Canadian Supreme Court makes clear in *Gladue* and even more forcefully in *Ipeelee*, culture and background will *always* be relevant to sentencing, if the sentence is to fit not just the crime but the offender. The discomfort with alternative approaches the further up the scale of seriousness one gets is, in my view, if unconsciously, political rather than logical. Judges are very sensitive to potential community backlash.

Thus, while there is no longer room for tikanga-based approaches to the criminal verdict inquiry, there is substantial room for tikanga to speak in the sentencing process and therefore, for whanau and hapu to wrest some measure of control back to the kin group – a limited return to first law processes. The Rangatahi and Matariki Courts are a start but in reality they have barely scratched the surface. After all in a whanaungatanga-based culture, kin group responsibility for the wrongs committed by a member of the group is assumed. The tikanga of muru reflects that basic idea. Finding means by which that kin group can participate in sentence selection processes, whether therapeutic or otherwise, assists the kin group and therefore the wider community to take responsibility for offenders in a manner consistent with tikanga Māori and good criminal justice practice.

Before leaving the criminal law, I should mention the very recent decision of the New Zealand Court of Appeal in *Mika v R* in which Harrison J, writing for a unanimous divisional court, roundly

88 At [75].

89 *R v Fernando* (1992) 76 A Crim R 58 (NSWSC).

rejected the submission that Māori offenders should receive an automatic 10 per cent discount for reasons similar to those expressed in *Gladue* and *Ipeelee*.⁹⁰

The result was unsurprising given the unsophisticated way, to say the least, in which the case was argued and the fact that there was no s 27 report to support a more carefully calibrated approach to the sentence. As Harrison J said:⁹¹

An appeal heard before a Divisional Court of this Court, advanced without the benefit of argument developed on a proper evidential foundation, is not the place for a discourse on sentencing principles and policy.

The Court did not however take up the opportunity to address whether a different approach might be required in the *process* of Māori sentencing as so comprehensively advocated in *Ipeelee* for indigenous Canadians. Given that Māori over-representation in prison is just as significant an issue in New Zealand as it is for indigenous peoples in Canada and Australia, it is inevitable that jurisprudence from those jurisdictions will continue to be called upon by counsel in New Zealand. An argument built on a proper evidential foundation drawing upon insights from jurisdictions with similar problems will inevitably come before the courts and soon. The dialogue that will inevitably be generated will be healthy.

B. Intellectual Property

There is insufficient time in the context of this lecture to do more than touch on this broad and complex subject. For the most part, intellectual property law has belonged to the second law category; law that has been at best blissfully unaware of the existence and relevance of the first law, and at worst intended to override it. The relationship between tikanga Māori and intellectual property law has been the subject of extensive discussion in the Wai 262 report of the Waitangi Tribunal.⁹²

In that report the Tribunal talked about the kaitiakitanga relationship between iwi and hapu on the one hand and their matauranga Māori and indigenous flora and fauna on the other hand. The Tribunal recommended significant changes to copyright, patent and trademarks law to better protect that kaitiakitanga. It is, after all, a product of the kinship relationship between humans and what the Tribunal called “taonga species” and matauranga Māori.⁹³ For the most part that is not a discussion about a Māori dimension in modern New Zealand intellectual property law but rather about the *lack* of a Māori dimension in modern New Zealand intellectual property law and the need to make changes to introduce that dimension to the legal discourse. This is not the place to reprise those issues.

There are two areas however where the current law does make provision for some form of recognition of matauranga Māori and kaitiakitanga relationships. It is worth pointing those out.

The first is in ss 177 to 180 of the Trade Marks Act 2002, the provisions that create and regulate the operation of a Māori Advisory Committee to the Commissioner of Trademarks. The function of the Committee is, according to s 178:

90 *Mika v R* [2013] NZCA 648.

91 At [7].

92 Waitangi Tribunal, above n 2.

93 At 63–104: taonga species are species of flora or fauna having special significance to iwi, while matauranga Māori is best translated as Māori traditional knowledge.

[T]o advise the Commissioner whether the proposed use or registration of a trade mark that is, or appears to be, derivative of a Māori sign, including text and imagery, is, or is likely to be, offensive to Māori.

The Committee is appointed by the Commissioner of Trademarks but appointments must reflect the appointee's knowledge of te ao Māori (Māori world view) and tikanga Māori (Māori protocol and culture).

I understand that the Committee is extant and active in the work of Intellectual Property Office of New Zealand.

The recent review of the Patents Act has created a similar Advisory Committee in ss 225 to 228 of the new 2013 measure. That Committee is to be constituted by the Commissioner of Patents with similar qualification requirements. Its function (s 226) is to advise the Commissioner (on request) on whether:

- (a) an invention claimed in a patent application is derived from Māori traditional knowledge or from indigenous plants or animals; and
- (b) if so, whether the commercial exploitation of that invention is likely to be contrary to Māori values.

According to s 227, the advice of the Committee must be considered but is not binding. According to s 15(3), the Commissioner may also seek advice from the Māori Advisory Committee in deciding whether patentability of an invention would be contrary to "public order" (as that term is used in the international Trade-Related Aspects of Intellectual Property agreement) or "morality".

The impact of the Māori Advisory Committee on patentability questions has yet to be tested as far as I know.

To be sure, these provisions are relatively weak. They make matters of Māori values and custom relevant if the Commissioner triggers an inquiry but (in the patents case) not otherwise. And even if they are relevant, the Committee's view will not be binding. Nonetheless, this is a small inroad into two traditional private law areas previously untrammelled by tikanga Māori. They are each in small ways mechanisms by which consideration of whanaungatanga, kaitiakitanga and tapu may be imported into the allocation of private intellectual property rights affecting custom, identity and culture.

There is considerable activity at the international level in respect of traditional knowledge, interests in indigenous species and intellectual property. Both the World Trade Organization and the World Intellectual Property Organization are now actively engaged in reform discussions. Where these issues will go both internationally and locally is hard to gauge, but it is clear that these advisory committees are most unlikely to be the last word on the Māori dimension in intellectual property.

C. Public Law

This is an area I thought worth mentioning not because of any particular Māori dimension currently extant in the broad category we call public law, but because of what appears to be sitting on the horizon. I set aside in this discussion any question of substantive or procedural rights that arise from the Treaty of Waitangi whether expressed or implied in legislation. That is covered elsewhere in this lecture. What I want to discuss here arises because of the creation of quasi-public law entities in the Treaty settlement process.

The matter of the quasi-public nature of iwi authorities is separate and new. New primarily

because historically the law has never recognised tribes as having legal personality. Now there is such recognition as a matter of course at the conclusion of a Treaty settlement, usually through a special constituting statute that provides for decision-making power internal to the tribe, and in some cases, the right to exercise public powers affecting non-iwi members.

As I have said earlier, this external power has been, by and large, in the environmental regulation area but similar powers are contemplated with respect to coastal space, the administration of certain public reserves and so forth. Will these iwi bodies be amenable to judicial review? They certainly will be when exercising statutory discretions. The question in such cases will be whether customary law and values (first law questions) will be relevant in considering the legality of that exercise. And if the answer to that question is yes, the next question is what the applicable customary laws and values might be. Either iwi or individual members will be arguing that the interstices of the empowering statute should be backfilled or coloured with content imported from the first law. Kaitiakitanga will be argued for. Good faith and reasonableness will not be enough. It will become hard to extricate custom from statutory discretion as a source of reviewability. That must surely be so if *Huakina* and *Takamore* are to be applied according to their spirit.

Watch this space!

VII. AN ATTEMPT AT SOME CONCLUSIONS

I started from the proposition that law in New Zealand has been laid down in layers: the first law of Aotearoa; the second law of New Zealand; and the third law of Aotearoa/New Zealand. We are, I suggested, in the third layer. But it does not seem to me on reflection to be as simple as that. I have not, in this lecture, had to dig up the first layer to show you what the law in New Zealand used to be like. This has not been an exercise in legal archaeology. The first law exists in the present tense too. In fact all three layers are still alive and interacting organically. There is therefore more depth and tradition in our untidy legal eco-system than I had originally contemplated.

At the beginning of the lecture I posed some simple questions in the hope that in writing I might turn up some answers. The first question was is there a coherent dimension in New Zealand's law called Māori law? The answer is that if Māori law coheres at all, the first law is its glue. The first law is the common denominator joining disparate areas of the third law together. Essential principles such as whanaungatanga and kaitiakitanga speak to questions around genetically modified organisms or assessing the offensiveness of trademarks, just as they speak in child placement decisions of the Family Court, the Environment Court's consideration of Māori relationships with rivers, or the High Court's assessment of a claim to title to the foreshore. It is, I conclude, by dint of a living first law, possible to posit that there is indeed a coherent body of legal principle and doctrine called Māori law.

The next question I posed was whether, if there is such a body of law, it can be mapped and its effect on New Zealand law more generally measured? The answer is of course yes. The model consistently adopted in the third law phase for expressing first law principles is what might be called the "integrate-to-perpetuate" model, where first law values are drawn into mainstream decision-making and expressed in that context. I have pointed to many examples of this approach in legislation. But the courts seem also to have adopted this approach in judge-made law – I mentioned *Huakina* and *Barton-Prescott*, but the most significant and recent example is the innovation adopted by all five of the Supreme Court Judges in *Takamore*.

In this, the New Zealand approach is to be contrasted with the "separate-to-survive" model

preferred in common law jurisdictions addressing similar issues: most clearly the United States and to a lesser but still significant extent, Canada. The reason for this difference is probably scale. The Americans and Canadians have a continental state of mind. We, by contrast, have an island state of mind. There are practically far fewer opportunities here for effective jurisdictional separation. We lack the scale of the North Americans. But as Tuhoe reminds us with their Treaty negotiation campaign to re-educate the Crown integrationists, opportunities for legal separation still remain to be explored in New Zealand law and politics.

Looking at the various modern legal silos in a single snapshot has turned up some surprising insights, beyond the obvious point that they are sites in which, to a greater or lesser extent, the principles of the first law survive as modern law. First, the first law is still fragile law today. A common theme in the integrate-to-perpetuate model is that first law principles are often discretionary for decision-makers and the weight afforded them often intentionally limited. This use of techniques to limit the impact of minority rights and interests on the majority or on majority sensibilities is common in western democracies and particularly so in post-colonial societies with indigenous minorities. New Zealand is no different. A frequent result of this discretionary recognition is that optional systems put in place in our statutory or common law regimes to implement the first law are just not used. The failure of local government to implement power sharing and delegation provisions in the RMA is the most spectacular example of this, but the failure of sentencing and family courts to make use of special report procedures in the Sentencing Act 2002, the Children, Young Persons, and Their Families Act 1989 and the Care of Children Act 2004 are nearly as significant.

The reasons for this systemic failure appear complex. In the RMA context local authority reluctance and limited capacity are likely culprits. The reluctance is probably both attitudinal and majoritarian. Power transfer takes courage and vision. And some re-education. In sentencing and family law, part of the problem is the failure of counsel to require judges to engage with culture and context through the specific reporting procedures in the legislation. This is to be contrasted with the Canadian context as I have discussed. The rest of the problem may well be that judges are untrained and therefore poorly equipped to address the issue even if it comes up. I am minded therefore to put this worryingly widespread problem down to a conspiracy of unintended slip-ups. My own experience of judicial colleagues is that most are aware of the imbalance of Māori participation in the criminal and family courts and are willing both professionally and personally to address it. They just don't quite know where to start.

That brings me to a deeper problem that contributes to the particular failure I have identified but is in fact a wider cause of underperformance.

In most litigation where first law issues arise, the judge will not be an expert in that subject. That is an inevitable result of the mainstreaming integrate-to-perpetuate model preferred in this country. Most judges who must weigh and apply tikanga in their work (or choose not to do so), will never have heard of whanaungatanga or kaitiakitanga. It is not good enough, in my view, to treat the first law as a conflict of laws question in which judges must be educated case by case through expert evidence as to the content of that law. We should be well past that point now.

The third law proceeds on the basis that tikanga Māori is not foreign and separate but rather integrated and mainstream. If that is so, then the judiciary needs to up its game. I am pleased to say that New Zealand's judiciary now generally agrees. There is cross-Bench consensus that we need to educate ourselves in these matters. Last year the New Zealand Institute of Judicial Studies began to plan a programme of study in the first law for judges. It is due to be implemented this year. It is a start (at last) but there is still much to do.

Well, I have found cohesion in a body of law that can be called Māori law; I have, by taking a snapshot of the third law of Aotearoa/New Zealand, found dots to join between legal silos that were not obvious to me. The last question I promised to ask is whether there were hints in those connections about future developments in this law? I think there are.

Whata J, in an excellent lecture entitled *The Evolution of Legal Issues Facing Māori*, described the 1980s and 1990s as producing a Cambrian explosion of Māori issues law – both legislative and judge-made.⁹⁴ I agree entirely and the metaphor is particularly apt. That explosion has borne extensive fruit in some areas: iwi engagement in environmental regulation and Treaty settlements in particular has produced important legal change and still does so. But other areas have become evolutionary cul-de-sacs by comparison. I have identified sentencing and family law generally as areas in apparent stasis despite the obvious challenge the Māori community presents in each field.

In environmental management iwi have worked hard to force change through Treaty settlements when the mechanisms in the RMA failed to do so. That process continues. In family and sentencing it may well be that iwi are now beginning to shift their energies so as to force change in system failures there too. Tuhoē, Ngāpuhi, Muriwhenua and other iwi are now arguing, with some success, for a stronger role in these areas. These will be areas of dynamic legal change in the next decade.

Another area is the role of the first law in the distribution of private rights in culture and knowledge. I have mentioned limited changes in trademarks and patent legislation, but as the Waitangi Tribunal in the Wai 262 claim has pointed out, these issues are not unique to New Zealand. There is an international movement for the protection of the first law rights of indigenous people in this area. Both the World Intellectual Property Organization and the World Trade Organization are engaged. Further developments are therefore inevitable here too.

Finally, I would reiterate that the rise and rise of post-settlement iwi corporates exercising statutory functions affecting both their own members and the wider community will affect public law doctrines in potentially significant ways.

One consequence of the mainstreaming of the first law is that judges must decide what the applicable tikanga is. I spent some time summarising the travails of the environment and appellate courts in this area. As judges become better trained to address tikanga Māori, will they become agents of its change? Will the first law still be made on the marae as it has for a millennium, or in the court room? Will the first law evolve in the way that the common law did: from a system of local custom to a more positivist system of judge-made law? These are issues judges and the Māori community will be working through over the next generation.

Lex Aotearoa is very much alive. It is still fragile but its survival is more certain now than in the past. It is demanding that we change to address its challenges. I hope we Aotearoans are up for it.

94 Christian Whata “The Evolution of Legal Issues Facing Māori” (paper presented to Māori Legal Issues Conference, Legal Research Foundation, Auckland, 29 November 2013).

PARLIAMENTS OF THE FUTURE

BY RT HON JOHN BERCOW*

Thank you so much for the warmth of that introduction. It is an enormous pleasure and privilege to be here today at this exceptional institution in front of this distinguished audience and in this wonderful country. It is an incredible honour for me to speak in this place and I already know that it will be one of the highlights of my tenure. The United Kingdom might be described, not least within itself, as having created the “Mother of Parliaments” but if that is the case then New Zealand has long been among the smartest of her many daughters. That is evident not only in your noble history of entrenching democracy ever since Westminster offered you the New Zealand Constitution Act of 1852, most obviously through becoming the first nation in the world to permit universal suffrage of all adults regardless of gender a shade more than four decades later, but in another perhaps slightly more esoteric regard for how you organise yourselves that has enormous appeal to me personally.

This is the reverence which your arrangements offer to the holder of the office of Speaker of the New Zealand House of Representatives. I note with enthusiasm that the Speaker here ranks third constitutionally behind only the Governor-General and the Prime Minister, that it is technically the owner of the entire parliamentary estate and has sweeping authority over it and is so esteemed in Wellington that the last incumbent, Sir Lockwood Smith, who I have met a number of times, moved on to become your High Commissioner in London. I must admit I look upon this situation with envy. It seems to me to be entirely appropriate but alas one that I am unlikely to be able to duplicate. It is a little early, I hope, for me to be contemplating my life after leaving the Speaker’s Chair but it seems improbable that I will be sent to Wellington in a sort of exchange outcome with Sir Lockwood, which is rather unfortunate. This is despite the fact that there must be some ministers in my country who would find the prospect of my being relocated the better part of 12,000 miles away rather enticing.

The topic which I have been asked to speak to today is “Parliaments of the Future”. As with anything involving long-term predictions this is a perilous exercise. It has the severe disadvantage that at best my thoughts today, for reasons I will outline in a moment, are likely to prove incomplete. At worst, they are destined to be thoroughly mistaken. The one recompense is that by the time it is obvious how far short of the truth I have fallen, all of us, including me, are likely to have forgotten what I said anyway, or taking matters to an even more extreme sense, we will have all moved on to the ultimate Upper Chamber in the sky (in that regard I trust that New Zealand does not want to be unicameral). The reason that a subject of this sort is so challenging is that the only way a human being can hope to approach it is by extrapolating from some recent developments and assuming that they will be even more significant, indeed seminal, in the future. Despite this being a Malthusian maxim (and we can see in a planet of around seven billion souls now where that logic took him), it is irresistible. We cannot know what utterly novel invention or idea will occur which disrupts everything beforehand, so we work with the most obvious example of significant change or reform in our current lives.

* Speaker of the House of Commons. Transcript of speech originally given at the University of Waikato, Hamilton, New Zealand.

At the turn of the 20th century, thinkers in Victorian England, nicely illustrated through the work of HG Wells, were fascinated by the possibilities which electricity seemed to be signalling. With the demonstration of the electronic escalator in Harrods store in 1898 and the moving walkway or travelator at various exhibitions in Europe and America at about the same time, serious people were convinced that pavements and indeed walking were about to be rendered redundant. The early motor car, which was being patented in primitive form at the same time, did not loom largely in their imaginations, let alone the aeroplane which would come along very shortly afterwards.

In a similar spirit, I was an impressionable child during the age of the Apollo moon missions. Like most young people then if I had to be asked to write about what the future would look like, I would have assumed that it involved space stations on other planets within my lifetime on earth and that, especially with Concorde in the mix as well, flight times from Britain to New Zealand would be cut to a handful of hours. In fact, the last moon landing occurred in 1973 and the time taken to travel from London to Wellington has not improved much in the past four decades. Yet at about the same time as these seemingly obvious future advances stalled, others, notably the creation of the microchip and the linkage of a set of computers together into an early version of the Internet were occurring but were invisible to all but a tiny collection of specialists at this stage. In a very strong sense, however, the microchip and the Internet have advanced human communications dramatically more than a shiny space station and a four hour flight time between our two countries would have done.

All of this is not, I should stress, an alibi for ducking the question of Parliaments of the Future. It is more of an apology that I am not technologically accomplished enough to be able to anticipate what will prove to be the equivalent of the missed motor car or the ignored Internet in the years to come. I do have some views on the future for legislatures in democracies which I would like to share with you, but they come with the health warning that they too unavoidably involve extrapolation from the past and present, to frame a vision of the future. All that I can aspire to in ambition is that what I am about to set out will turn out merely to be incomplete, rather than an outright mistaken, analysis.

The propositions which will frame my argument today are three-fold.

First, that history suggests that the single most important factor in triggering change within Parliaments is an often delayed response to change without Parliaments. In other words, the changing nature of who the electorate are, what their expectations are and by what means they exercise their views inevitably induces change among the representing as well as the represented and hence parliaments, as political places, although this might take time to manifest itself completely.

Second, democratic innovations do not seem to take place randomly. Certain sorts of states seem to continuously be the source of what is initially seen by many as experimentation (even eccentricity) but which come to be viewed later, often rather swiftly in fact, as the new and welcome orthodoxy.

Third, that despite the certainty of change, the central challenges facing a Parliament in a democracy have been reasonably constant and are likely to remain broadly consistent. The fundamental issue is the extent to which change can be co-opted to make meeting those challenges a little easier, rather than them serving to weaken the legislature against the executive, political parties or the media.

So let me start with my first assumption. Societies lead Parliaments as well as follow them. The expansion of an electorate by extending voting rights to those previously denied them, the evolving composition of an electorate because of demographic movement, particularly immigration and the

capacity of existing electors to articulate themselves fully in every respect of their lives because of a more tolerant approach from the majority around them, will all affect the way that a Parliament thinks as well as how it looks, although not with the speed that many reformers would want to see. The incorporation of women into the active electorate in Britain was bound to alter the composition and the character of the Westminster Parliament, although it should not have taken so long to do so. The fact that Britain is more ethnically, racially and religiously diverse has taken its time to filter its way through to the nature of our Parliament, indeed that process is still not complete, but it is there. Homosexuality was never a formal barrier to the franchise in the United Kingdom but an enforced silence about what people felt they could say about the nature of their love ensured a similar silence at the Palace of Westminster as well. More space for articulation in society at large has prompted more capacity for political expression of sexual politics within Parliament. The formal means by which voting is conducted, while to a degree secondary, is not inconsequential. Universal suffrage conducted via the sorts of public meetings which took place in Britain before the introduction of the secret ballot in 1872 would have been a very different sort of democracy to the one that we enjoy.

So, extrapolating from the past and present to the future, what is it reasonable to assume? I think we should operate on the presumption that the diversity of the electorate will become yet more embedded and that our arrangements need to adjust even further to reflect this. I think that it will become even harder for political parties which were created in an age of much greater conformity and which have found it difficult to adapt to a more diverse democracy to reflect the electorate, so we should expect more new political parties to emerge, looser political parties to be seen and more individuals elected entirely independently of the traditional political party structure altogether. This too will create a challenge for Parliaments designed on an implicit model which may become dated. Parliaments of the future will thus, in my opinion, need to be more fluid and less formal in feature.

Secondly, where should we look for countries which will prove to be the pioneers of change? As I alluded to earlier on the question of truly universal adult suffrage, New Zealand was the incubator and not the Westminster Parliament which established representative institutions here. It was not Britain but Australia which pioneered what we now think of as the typical ballot. I think we can see a pattern in this. As I will attempt to illustrate, not only in Australasia but Europe and North America, it is persistently relatively new, comparatively small (in terms of population, not area) and frequently geographically quite distinct nations which take the initiative and who should be looked to if we are seeking to identify future trends which may then be adopted as the new norm in many other places. Let me take Europe as an example. The first nation to introduce what we would today recognise as a Parliament was Iceland via the Althing. The first place to render slavery illegal was the Republic of Venice more than 1,000 years ago. Switzerland has had universal male suffrage at the federal level since 1848 (and earlier still for certain cantons) and it pioneered the use of the referendum in the European continent (although I should note its record on votes for women was truly appalling as it was not until an unbelievably late 1971 that all adult females in that country were enfranchised). Sweden, by contrast, was the market leader as far as women electors are concerned. Turnout in elections in Belgium has long exceeded that which occurred in Britain.

Much the same can be seen in the United States. The first state to abolish slavery was tiny Rhode Island in 1774 even before the US came into existence. The territory and then state of Wyoming was the first to permit universal female suffrage. The popular referendum or initiative was adopted by South Dakota in 1898. It was then championed by the state of Colorado. The then

very sparsely populated state of Florida was the first, in 1901, to introduce the direct primary at all levels. Much more recently, Oregon has been associated with the notion of elections conducted entirely by post.

The past and present would hence lead me to look to a relatively new country, or more exactly, a relatively new democracy, small in population probably and geographically distinct as a source for a change in the manner in which an electorate expresses itself that will ultimately change parliaments. Is it possible to identify such a place and such a proposition? I believe that we can. It is Estonia. Estonia has a long and proud, if slightly isolated national political history. It has only been a modern democracy since the collapse of the old Soviet Union but has made enormous strides since then and is today an extremely comfortable member of the European Union. The notion that it was a dark dictatorship by external imposition less than quarter of a century ago now seems to be surreal. The most striking aspect of democracy in Estonia, for this discussion at least, is the means by which it conducts its elections. After an experiment with local elections, Estonia became the first nation in the world to permit online voting for its 2007 national parliamentary elections. On that occasion, only 3.4 per cent of all participants took up the option. In 2011, by contrast, almost one quarter (24.3 per cent) of all votes were cast via the Internet or chip-secure mobile telephones. Observers expect that at least half of the votes which will be recorded in the next parliamentary elections – due in 2015 – will be delivered by this new rather than the traditional method. Whereas most European countries have a problem with participation in elections, particularly amongst younger adult citizens, Estonia is in a much stronger position. Technology is changing the electorate as well as elections. This has, perhaps not surprisingly, had an immediate impact on the Estonian Parliament as an institution which is widely regarded as the most technologically-savvy in the world. The level of e-dialogue between representatives and the represented is staggering. Although as I have consistently contended throughout this speech there are real risks in predicting the future from the present, if you are to undertake that wager then it is to Estonia that you should head in 2015 rather than to Britain which will be holding parliamentary elections at about the same time in one sense and quite a long way behind the times in another. The new New Zealand in this sentiment is an institution called the Riigikogu in Tallinn where the presiding officer or Speaker is Ms Eine Ergma, possibly the only Speaker in the world to have once been a Professor of Astronomy. My principal prediction about the legislatures which we will see emerge and evolve in the next twenty years is that they will be shaped by electorates and elections which have followed Estonia's example. The advantage enjoyed there is because the Estonian Parliament is a relatively new institution it has not found it too difficult to adjust to the knock-on effects of new technology in and on the electorate. The challenge for Britain (and, dare I say it, New Zealand) will be culturally substantial by comparison.

Yet that is the challenge for Parliaments of the Future as I see it. Let me return to the three enduring functions of a Parliament that I noted earlier, namely representation, scrutiny and legislation. What would be the impact of the sort of e-democracy of which Estonia is the best example existing today?

The area on which I want to focus is representation. This is because I think that what happens here will eventually have a transmission effect on scrutiny and legislation too and indeed render what we have historically thought of as three separate aspects of parliamentary life much more closely interconnected, a shift towards something close to a Venn diagram over the next few decades. How this happens, nonetheless, is likely to depend on how notions of representation change over time.

If Estonia is any illustration then what we already think of as a virtually revolutionary shift in the size of correspondence from the postbag to the inbox is only in its infancy. We are destined for a lot more of it. The representing will surely find themselves in an almost continuous dialogue with the represented. The traditional notion of there being but one concept of a constituency, based on geography, will become increasingly hard to sustain. It will remain the principal notion of a constituency for some aspects of personal representation but I cannot believe that it will be the only acceptable form of constituency. Issue or cause constituencies will matter just as much as territorial constituencies. An MP will be seen, even more than is the case now, as being as much the member for those with a concern about certain sorts of illness or conflicts in foreign countries as they are for the immediate patch of land which provides them with voters at a general election.

This has huge implications for Members of Parliament. It also has massive ramifications for the resources which we will need to devote if our democracy is to service the electorate in a manner which they think reaches the sort of standard that they would accept in private or commercial e-transactions. Can we be as good as Amazon or Google? If not, we may go the way of Bebo or MySpace. Being more responsive than MPs might have been 30, 20, 10 or even five years ago will not be impressive enough. When Estonia first starting innovating with e-democracy at the local level neither Facebook nor Twitter nor any kind of tablet computer existed. What then might have been called, if the phrase had been struck, a smartphone would today seem pretty stupid. Is any of this change remotely compatible with the current, austerity-induced, cry to “cut the cost of politics”? I doubt it. Yet if we do not keep up with the pace of change we will be steamrolled by it.

The increased intensity and speed that an e-democracy demands will travel beyond just one form of representation. It will and should have an impact on what and how we choose to debate. The single biggest change at Westminster with which I have been linked is the revival of the Urgent Question. The UQ is a device which allows any MP to petition me at the start of a parliamentary day to compel a minister to come to the chamber and answer an enquiry on an issue which has suddenly emerged. In the year before I became Speaker only two UQs were accepted and the instrument was dying. In my time in the Chair I have allowed numerous Urgent Questions and Parliament is much the more topical and hence more relevant for it. In the Parliaments of the Future, time allocated for the UQ or similar will, in my view, be automatic. The issue will be not whether but what now should be discussed. The historic concept of departmental questions held at fixed, often lengthy intervals will be antiquated. The notion is already meaningless in Estonia today. We will have to be far, far more flexible about what is debated and when across our whole timetable. And the dictum that the Government of the day should have control over virtually the whole of that business will seem astonishingly arrogant. New Zealand, I observe, is ahead of the curve on that score. Others including us must follow you. An e-democracy will demand enhanced democracy within a Parliament and well as between it and the outside world. Deference is not a quality which will have much purchase in the democracy to come.

To a degree, of course, all of this is speculation. It is not, I hope, speculation without some evidence. I have argued previously that the age of representative democracy is not dead and continuous direct democracy via daily polling will not put parliaments out of action and that continues to be my view. Parliaments will, though, be compelled to change and I think we can see through the example that already exists in Estonia, the direction of travel that our democracy is likely to take. We also know from history that societies, as I remarked, lead Parliaments as much as they are led by them. This time, crucially, it will not be possible for decades to pass before legislatures start to look and sound and think like the electorates which they represent.

It will be a much faster process in the future. All of which, in conclusion, leaves me as an optimist about the place of parliaments in democracies. We can become the means by which a rightly more demanding public secures what it is entitled to expect from those who rule in their name. “Never make predictions”, the old adage always runs, and “especially about the future”. At best these thoughts will be incomplete but I hope they are not that mistaken. The Mother Parliament has learnt more from a certain Daughter Parliament than it often cares to concede openly. I have come here today to acknowledge this. I have also chosen to suggest that both Mother and Daughter have much to learn from someone even younger. Thank you all so much for letting me look into the crystal ball. The immediate future now belongs to your questions.

APPOINTING JUDGES THE NEW ZEALAND WAY

BY PROFESSOR MARGARET WILSON*

I. INTRODUCTION

Thank you for the invitation to discuss the arrangements for appointment of judges in New Zealand. I do not intend to present an academic analysis of the various jurisdictions process of appointment of the judiciary and the role of women in that process. There is a considerable literature on the topic. I thought it would be more interesting and relevant if I shared with you my experience and observations of the judicial appointment process. I was Attorney-General from 1999 to mid-2005 when I was elected Speaker of the New Zealand Parliament. Under the New Zealand system the Attorney-General is responsible for recommending to the Governor-General all appointments to the judiciary apart from the Chief Justice appointment that is made by the Prime Minister, and the Māori Land Court judges that are recommended by the Minister of Māori Affairs and the Attorney-General.

I propose to structure the presentation in the following way. First I thought it would be useful to briefly explain the constitutional arrangements in New Zealand so there is a context within which to place the formal requirements for the appointment of judge. I would then describe the process for District Court and High Court judges and the recent analysis of that process by the Law Commission in its general review of the Judicature Act 1908¹ and the government response to the recommendations.² Finally I shall make some more personal observations from my own experience when I was Attorney-General and responsible for recommending to the Governor-General the appointment of members of the judiciary. I should also note I was criticised for the appointments to the Supreme Court and also generally for the number of women I recommended for appointment. I would value the opportunity for discussion at the end of the presentation.

II. NEW ZEALAND'S CONSTITUTIONAL ARRANGEMENTS

New Zealand does not have a written constitution in the sense of a document or statement of constitutional institutions, principles and values that has the status of superior or supreme law. This is why the term constitutional arrangements is more accurate when trying to describe the New Zealand constitution. There is a series of laws, conventions, and practices that set down the governance institutions and the relationship between the citizen and the executive. For example the Constitution Act 1986 in a minimalist fashion describes the primary constitutional institutions including the judiciary. Part 4 of the Act, titled "The Judiciary", provides:

* Professor Margaret Wilson, Te Piringa – Faculty of Law, University of Waikato. Speech given at NZAWJ Asia-Pacific Regional Conference, Auckland, 12 May 2013.

1 Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012).

2 Cabinet minutes "Government Response to the Law Commission Report" (15 April 2013) CAB Min (13) 12/18.

23 Protection of Judges against removal from office

A Judge of the High Court shall not be removed from office except by the Sovereign or the Governor-General, acting upon an address of the House of Representatives, which address may be moved only on the grounds of that Judge's misbehaviour or of that Judge's incapacity to discharge the functions of that Judge's office.

24 Salaries of Judges not to be reduced

The salary of a Judge of the High Court shall not be reduced during the continuance of the Judge's commission.

These are the only provisions relating to the judiciary in the Constitution Act 1986. The emphasis in these provisions is on protecting the independence of the judiciary. There has been no removal of a judge under s 23. There has been some controversy surrounding s 24 when the superannuation of judges was altered in the late 1980s but the government proceeded despite the criticism.

The provisions of the Constitution Act 1986 support the notion of parliamentary sovereignty, or more accurately in reality the power of the executive. The Act is silent on the relationship between the legislature and executive and the judiciary. It was not until the enactment of the New Zealand Bill of Rights Act 1990, however, that it was clear the legislature had the power to make laws while the courts interpret the laws. The Act makes it clear that no judgment of the courts can invalidate an Act of Parliament even if it is contrary to fundamental human rights enacted in both the New Zealand Bill of Rights Act and the Human Rights Act 1993.³ This is not the place to discuss the case law that has emerged from the New Zealand Bill of Rights and Human Rights Acts but it may be fair to observe that there is some creative tension on some occasions.⁴

The courts have been careful to observe the comity between the courts and the legislature when interpreting legislation in cases that come before the courts. The legislature has also recently amended the Standing Orders of Parliament to ensure the Members of Parliament respect the role of the judges and the courts.⁵ At times however it is an uneasy relationship and in my experience as Speaker of the Parliament there were a few Members of Parliament who placed political advantage over constitutional propriety.

New Zealand has a very fragile statutory framework and the constitutional culture has been characterised as being pragmatic with little support for formalism. One academic commentator has also observed that observance of the rule of law cannot be described as a defining characteristic of New Zealand's constitution.⁶ I agree with this observation. From my experience however while there is not a strong commitment to proper process there is considerable support for people being treated "fairly". Of course what is meant by "fairly" is often in the eyes of the beholder. It is also appropriate to add there is a limited understanding amongst most people of the constitutional relationship between the legislature, executive and judiciary.⁷ Civics education is unsupported in the school system.

3 See New Zealand Bill of Rights Act 1990, ss 4, 5 and 6.

4 A recent example of this tension is seen in the government response to *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.

5 Standing Orders of the House of Representatives 2011, SO 111–113.

6 Matthew SR Palmer "New Zealand Constitutional Culture" (2007) 22 NZULR 565.

7 This observation is supported by submissions to the current Constitutional Review initiated by the government in response to a coalition agreement with the Māori Party.

A great deal of confidence is placed by the people in the electoral process to control any abuse of power by the executive. Elections are held every three years, though the government is promoting a campaign to extend that to four years. During the term of a parliament, it is fair to note that governments are subject to considerable lobbying by sector groups and that although the media is not distinguished by its investigative capacity, it does assert an influence on government action as does constant polling and focus group research. The small size of the population also enables reasonable access to Members of Parliament, though limited access to public officials.

There has been since the 1980s, when the Select Committee system was reformed, a growing expectation of consultation with the community before the implementation of major policy changes. It is apparent however that the general policy advice works within a neo-liberal framework with the assumption that market solutions are better than state interventions. Currently, however, there is a major change programme being undertaken within the public service. I note that in the context of the administration of justice, the various performance review reports observe the importance of better engagement with other institutions of justice, in particular the legal profession and the judiciary.⁸ As someone interested in public policy, I consider this a good development because it appears to support a change in the attitudes towards justice participants. We are no longer assumed to be self-interested “rational utility maximisers”, but a more collaborative approach to the administration of justice must be developed by the Ministry of Justice. Unfortunately however the various reviews fail to understand the constitutional independence of the judiciary and it is apparent the primary focus of the government is achieving “value for money” with an emphasis on introducing new systems of management and administration to reduce the cost of the justice system.

III. THE APPOINTMENT PROCESS

I must note at this point that the government has foreshadowed a change in the process as recommended by the Law Commission in its report *Review of the Judicature Act 1908: Towards a New Courts Act*.⁹ It would appear however that in terms of the appointment process the changes would be minimal. The government has rejected the recommended statutory criteria for appointment as a judge and also the recommendation as to whom should be consulted when making the appointments.¹⁰ It appears all that will be required is for the Attorney-General to place on the website information about the process. The Attorney-General retains the power of appointment without statutory transparency or accountability.

A. *District Court Appointments*

District Court appointments are made under the District Court Act 1947 that provides the Governor-General may appoint “fit and proper” a person who has held a practising certificate as a barrister or solicitor for at least seven years; or has 10 years’ employment with the Ministry of Justice, during which time the person has been employed for not less than seven years as a clerk or Registrar

8 State Services Commission, Treasury and Department of the Prime Minister and Cabinet “Performance Improvement Framework: Formal Review of the Ministry of Justice (MoJ)” (July 2012) <www.ssc.govt.nz>.

9 Law Commission, above n 1.

10 Office of the Minister of Justice “Government response to the Law Commission’s report: Review of the Judicature Act 1908: toward a new Courts Act” (April 2013) <www.courts.govt.nz> Appendix 1 at 28–29.

of a court, and is a barrister or solicitor who has been qualified for admission or admitted as such for not less than seven years, to be a judge of the District Court. In practice the process involves candidates submitting an expression of interest in appointment or being invited to submit an expression of interest. A shortlist is prepared by the Solicitor-General and submitted to the Attorney-General, who approves a shortlist for interview by the Chief District Court Judge, the Head of Bench where relevant, the Executive Judge for the relevant region and a representative of the Ministry of Justice. The Solicitor-General and President of the Law Society are consulted before appointments are recommended to the Governor-General. The Cabinet is informed before the recommendation goes to the Governor-General. The Law Commission in its report considered that the process is appropriate and should continue. It did recommend however that the legislation should include the criteria for appointment and the consultation process. The government has rejected these recommendations.

B. High Court Appointments

Appointments to the High Court follow a different process. Section 4(2) of the Judicature Act 1908 provides that “Judges of the High Court shall be appointed by the Governor-General in the name and on behalf of Her Majesty.” Section 6 provides that such persons must have held a practising certificate as a barrister or solicitor for at least seven years. The Act is silent on the process for appointment and there is no “fit and proper” requirement. There is no process for appointment to the Court of Appeal, only that the person must be a judge of the High Court at the time of appointment or any time thereafter. Appointment to the Supreme Court only requires the judge to have been a judge of the High Court.

In practice, the process of appointment depends on the Attorney-General but consultation normally involves the Solicitor-General, the judiciary and the Bar Association. The level of consultation is a matter for the Attorney-General to determine. The Law Commission report also notes that in practice different processes are undertaken by different Attorneys-General. For some reason the Law Commission did not consult previous Attorneys-General to find out the nature of the different practices. It did however recommend the process should be more transparent with a statutory criteria for appointment; notification by the Attorney-General of the process followed in soliciting and progressing nominations for appointment; and a statutory requirement for consultation with the Chief Justice, Chief District Court Judge, Head of Bench where appropriate, Solicitor-General, President of the New Zealand Law Society, President of the Bar Association, and such other persons considered appropriate. The additional statutory criteria recommended was as follows:¹¹

- (a) the person to be appointed a judge must be selected by the Attorney-General on merit, having regard to that person’s:
 - personal qualities (including integrity, sound judgment, and objectivity);
 - legal abilities (including relevant expertise and experience and appropriate knowledge of the law and its underlying principles;
 - social awareness of and sensitivities to tikanga Māori; and
 - social awareness of and sensitivities to the other diverse communities in New Zealand; and

¹¹ Law Commission, above n 1, at 57.

- (b) regard must be given to the desirability of the judiciary reflecting gender, cultural and ethnic diversity.

IV. PERSONAL EXPERIENCE

I found the appointment of judges one of the most difficult tasks during my time in Parliament as a minister and the Speaker. I was conscious, not only of the effect on individuals who sought judicial appointment, but also that the credibility of the justice system was dependent on the appointment of people of integrity and competence to hold judicial office. Much of my thinking and approach to judicial appointments is to be found in the discussion paper on appointing judges I initiated while Attorney-General.¹² I had initiated a review of ways to improve judicial administration by Sir Geoffrey Palmer in 2002 and amongst his recommendations was the establishment of a Judicial Appointments and Liaison Office. The discussion paper on the appointment of judges in New Zealand and overseas was an attempt to gauge the level of public support for a change of the system. I was personally uneasy about the power given to the Attorney-General to make appointments without an obligation to consult and without clear statutory criteria for the appointment.

The 2004 discussion paper stated that the requirements of a judicial appointments system includes primarily appointments:

- (a) on merit;
- (b) that maintain public confidence in the process, courts and judiciary;
- (c) that produce a judiciary that is capable of independent, impartial and competent decision-making;
- (d) are reflective of the society the system serves; and
- (e) finally that avoid inappropriate politicisation.

The discussion paper then adds further requirements for a selection process that:

- (a) is fair;
- (b) is based on clear criteria;
- (c) protects the privacy of applicants and those consulted in the process;
- (d) is transparent; and
- (e) provides for accountability.

These criteria are similar to those of the Law Commission though for some reason no reference was made to the discussion paper in its report.

The discussion paper also reviews appointment processes in other jurisdictions and discusses the possibility of a Judicial Appointments Commission for New Zealand and notes such a Commission had been raised in the past in New Zealand. The 1978 Report of the Royal Commission on the Courts recommended an Independent Commission chaired by the Chief Justice, two other judges, the Solicitor-General, the Secretary of Justice and two members nominated by the Law Society to recommend judicial appointments. It also recommended this Commission would also exercise unified control over case-flow and the day-to-day administration of the courts. The recommendation lapsed evidently through lack of support from the judiciary. This recommendation and the judiciary response reflected the political and policy context of the period. I would argue that today such a

¹² Ministry of Justice “Appointing Judges: A Judicial Appointments Commission for New Zealand? – A public consultation paper” (April 2004) <www.justice.govt.nz>.

proposal should be revisited because the increasing control and management of resources for the judiciary by the executive through the Ministry of Justices raises the question of the independence of the judiciary.

The idea of a commission to appoint the judiciary was raised again in the 1990s but was rejected. The discussion did however lead in 1998 to a review of the appointment procedures in an effort to standardise the process and provide more transparency. Two previous Attorneys-General publicly opposed the establishment of a Commission on the grounds the appointment of the commission members was itself political and could enable political patronage, and that the judicial members of the commission would dominate the others, leading to conservative appointments. Personally I have sympathy for both objections because they reflect political reality. I still thought, however, that there needed to be greater transparency and accountability. The issue was to seek a better method of appointments that minimised self-interested or ideological political decision-making.

The 2004 discussion paper set out a possible appointments commission of eight members made up of:

- three lay people appointed by the government;
- the Chief Justice or nominee;
- one other senior judge;
- the President of the New Zealand Law Society or a nominee;
- the President of the New Zealand Bar Association or a nominee;
- the Solicitor-General for appointments to High Court, Court of Appeal and Supreme Court;
- the Secretary of Justice for appointments to the District Court, Employment Court and Environment Court; and
- the Chief Executive of Te Puni Kokiri for appointments to the Māori Land Court.

As it turned out the proposals in the discussion paper were not pursued after I left the executive in May 2005 and was elected Speaker of the Parliament. I suspect my ministerial colleagues had little interest in the proposal but the Green Party was very supportive of proceeding with the reform of the appointment process.

As I recall during the 1990s there was increasing criticism of the Attorney-General's failure to appoint women to the judiciary. Since the mid 1970s there had been an increasing number of women entering the legal profession and it was argued that while experience is essential for appointment, an increasing number of women were gaining the required experience. For me personally, it was obvious that there would not an increase in the number of women appointed until there was an Attorney-General with a commitment to make the appointments.

In 1998 I was contacted by the Leader of the Opposition, Hon Helen Clark, and asked to consider standing on the Labour Party list at the 1999 election. Her argument was that the Labour Party did not have a lawyer with experience to undertake the role of Attorney-General if the Labour Party was to form a government after the 1999 election. I had just spent nearly 10 years establishing and working at the Waikato Law School and had felt it was time to seek another challenge. At the 1999 election the Labour Party formed a coalition government and I was appointed Attorney-General.

I was fortunate to be a member of a government that had a strong commitment to equality for women and to have the support of the Prime Minister. Appointments to the judiciary are non-political however and must remain so for credibility and legitimacy. The first step was to consult with the Solicitor-General (a public service officer) on the current process. I was unclear as to just how widely there was consultation on the recommendations submitted to the Attorney-General

for decision. I made it clear therefore that the widest possible consultation process was expected to ensure members of the profession eligible for appointment and ready to seek appointment were to be considered. The appointment process for District Court judges was already inclusive but often members of the profession were reluctant to submit their names for fear of rejection. Regular advertising for expressions of interest however and a professional process of interviews increased the number of names submitted.

I did find however that it was not common practice to require CVs to obtain information such as the age of the applicant. I had a fear of repeating the Western Australian experience where a judge did not give her correct age and remained on the bench beyond her retirement age causing considerable problems. I also noted that often a lack of knowledge of applicants might lead to inclusion or exclusion. For example, complaints are often made to the Law Society against members of the profession that are proven to be without substance and therefore it was important to check whether there was a complaint and its outcome. These were simple matters that should have been taken care of and with time the process did become much more professional but I learnt early to check everything. Before I made any recommendation for appointment I met with the Solicitor-General, the Chief District Court Judge and the Secretary of Justice who often sat on the interview panel. I also made it clear the final list of recommendations should include a woman if there were qualified applicants.

With High Court appointments the process was different. I met with the Solicitor-General and the Chief Justice to discuss the skills required for the appointment. There was extensive consultation with the Bar Association, Law Society and often the Women Lawyers Association. At a meeting with the Attorney-General, these views were represented by the Solicitor-General, and the Chief Justice would also contribute consultation from the judiciary before members of the profession had appeared in court. I had made it clear that I believed the judiciary should reflect the diversity of the community for legitimacy, especially in the District Court, though appointment of women to the High Court was also a priority. I have made a rough calculation of the percentage of women I appointed during my time as Attorney-General. I recommended 43 Judges to the District Court of whom 16 or 37 per cent were women. In the High Court I recommended 18 judges for appointment of whom 4 or 22 per cent were women.

The most controversial appointments I recommended were to the new Supreme Court. The Labour Government had a policy commitment to disestablish appeals to the Privy Council and establish a new final court of appeal. The saga of that process has been recounted elsewhere so I shall concentrate on the process of appointment.¹³ I had thought the appointments should be made on merit and not necessarily follow the seniority of the Court of Appeal judges. Opponents of the new Supreme Court and the media started a campaign of allegation that the appointments would be political with “activist” judges being appointed. I also thought it was important that a final court of appeal reflect a diversity of legal experience. In the end this was not to be and while all judicial appointments are on merit, the political decision was taken to appoint on seniority.

This was the only time I can say there was any discussion in Cabinet of judicial appointments. I had suggested an appointment panel but this did not gain support. Unfortunately one of my ministerial colleagues suggested subsequently that the appointments were not made on merit, which created a brief furore and convinced me that the practice of not discussing judicial appointments in

13 Margaret Wilson “From Privy Council to Supreme Court: A Rite of Passage for New Zealand’s Legal System” (2010) 18 *Wai L Rev* 1.

Cabinet was a good policy. As it turned out future appointments have allayed some the fears that appointments will be made only on seniority.

V. CONCLUSION

I always considered it was a great privilege to recommend the appointment of judges. It is a political process and it seems stupid to deny that it is anything else. What is more important however is that it is a process that ensures the appointment of individuals with the integrity and capability to do what is one of the most difficult constitutional roles – the delivery of justice. In New Zealand I think we are blessed with an excellent judiciary. It is important that the judiciary retain the confidence of the people and the executive can assist with this by adequately resourcing the judiciary and making the appointment process more transparent through the establishment of an independent body to recommend appointments.

PRODUCTION OF REPORTS FOLLOWING FINDING OF MISCARRIAGE OF JUSTICE IN CERTAIN CASES

BY NIGEL STONE*

I. INTRODUCTION

A determination by the Supreme Court or the Court of Appeal that there has been a miscarriage of justice on the basis of prosecutorial misconduct does not, in practice, bring about an investigation or sanctions against Crown prosecutors. This stands in contrast to the way in which judges may be held to account by the Judicial Conduct Commissioner, police officers by the Independent Police Conduct Authority or doctors, nurses and others in the medical profession by the Health and Disability Commissioner. It is difficult to rationalise why judges, police officers or medical professionals may be investigated by an independent body, while prosecutors are not under similar scrutiny. In relatively recent times, this growing trend in accountability has extended to defence counsel, who no longer enjoy barristerial immunity from suit.¹ Of course, all lawyers may be subject to disciplinary proceedings by the New Zealand Law Society Standards Committee or the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.² Sanctions may also be brought by “civil actions for malicious prosecution or other torts ... and even, in rare instances, prosecution.”³ Despite these powers, however, Crown prosecutors are rarely held to account, certainly externally, even with a clear appellate court determination of prosecutorial misconduct causing a miscarriage of justice. This paper recommends a procedure be put in place to correct this by having reports prepared (similar to those published by the Health and Disability Commissioner) by the Crown Law Office from time to time.

II. COMPARISON WITH OTHER PROFESSIONALS

A. *The Judiciary*

Since 2005, New Zealand has had a Judicial Conduct Commissioner⁴ and the role of the

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1 *Chamberlains v Lai* [2006] NZSC 70, [2007] 2 NZLR 7.

2 See “New Zealand Lawyers and Conveyancers Disciplinary Tribunal” Ministry of Justice <www.justice.govt.nz>.

3 Robert J Frater *Prosecutorial Misconduct* (Canada Law Book Ltd, Aurora (ON), 2009) at 257; *Nelles v Ontario* [1989] 2 SCR 170 is Canadian authority for the proposition that prosecutors have civil liability for malicious prosecutions.

4 Office of the Judicial Conduct Commissioner “Annual Report for 2005/2006” (10 October 2006) New Zealand Parliament <www.parliament.nz> at 3.

Commissioner has recently been strengthened by updated legislation.⁵ The Judicial Conduct Commissioner receives complaints from members of the public about the way in which they have been dealt with by judges in court. The Commissioner publishes a summary of the categories into which these complaints fall on its website.⁶ Most are made under the misapprehension that appellate rights may be enforced this way and therefore go no further.⁷ In those rare instances when the Commissioner makes a finding that the case should proceed further, the matter may be referred to the appropriate head of bench for determination.⁸ In more serious matters, the Commissioner makes a recommendation to the Attorney-General that a Judicial Conduct Panel be appointed.⁹ This panel conducts a public hearing (except in exceptional circumstances)¹⁰ and if it makes a determination recommending removal, the Attorney-General then has “absolute discretion” whether to take steps to initiate the removal of the judge in question.¹¹

Judges, of course, are more important functionally and constitutionally in the criminal justice system than Crown prosecutors. The doctrine of the separation of powers dictates that interference with the judiciary by the executive or legislature be kept to an absolute minimum, so as to maintain the rule of law. However, if judges are subject to this scrutiny, despite their more significant status, then a fortiori so should Crown prosecutors. The Judicial Conduct Commissioner publishes reports of its decisions¹² in a similar way to the New Zealand Law Society Standards Committee, the Legal Complaints Review Officer¹³ or the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.¹⁴

The Judicial Complaints Commissioner fulfils a dual role: as report writer, similar to the Health and Disability Commissioner, but unlike the Health and Disability Commissioner, the Judicial Complaints Commissioner may also recommend a hearing to bring about possible disciplinary action against a judge. In this way the Judicial Complaints Commissioner fills a gap that in other contexts is filled by the Medical Council or Law Society.

5 The Judicial Conduct Commissioner and Judicial Conduct Panel (Deputy Commissioner and Disposal of Complaints) Amendment Act 2010 was recently enacted amending the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 to, *inter alia*, require the Judicial Conduct Commissioner to conduct a preliminary investigation into the conduct of a judge before proceeding further in certain cases and the creation of the position of Deputy Judicial Complaints Commissioner, who may hear matters when the Commissioner has a conflict of interest. See Judicial Conduct Commissioner and Judicial Conduct Panel (Deputy Commissioner and Disposal of Complaints) Amendment Bill 2010 (216-3A).

6 See “Reports and News” Office of the Judicial Conduct Commissioner <www.jcc.govt.nz>.

7 In the year from 1 August 2009 to 31 July 2010, 223 complaints were received by the Commissioner, of which 138 were processed and seven were either referred to the head of bench or recommendation was made to convene a Judicial Conduct Panel. See Office of the Judicial Conduct Commissioner “Annual Report for 2009/2010” (23 September 2010) New Zealand Parliament <www.parliament.nz>.

8 Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, s 17.

9 Section 18.

10 Section 29.

11 Section 33.

12 Office of the Judicial Conduct Commissioner, above n 6.

13 Ministry of Justice, above n 2.

14 The Standards Committee, Legal Complaints Review Officer and Disciplinary Tribunal determine in each case whether to publish their decisions online. None of the online decisions from these bodies relate to prosecutors, except one, *Complainant E v Prosecutor B and Prosecutor C* [2009] LCRO 30. In this case proceedings were brought against two Crown prosecutors, but the case itself may be characterised as legally unsustainable (at best) by an unrepresented litigant, and offers no precedent value.

The judiciary forms one of the branches of Government, with judges acting on behalf of the Government in courts, taking into account various factors such as the public interest, the interests of an accused and, in a broad sense, policy considerations. Crown Prosecutors, by contrast, only appear in court representing the public interest, but this is sufficiently serious in and of itself for Crown prosecutors to be the subject of investigations into their actions (extending beyond those that apply to all lawyers). Perhaps we need go no further when comparing judges to prosecutors than to consider how likely a member of the public would think it appropriate that Crown prosecutors are held to account in a similar way to judges, in cases of misconduct.

B. The Medical Profession

In *B v Medical Council*,¹⁵ Elias J discussed the nature of disciplinary proceedings that may be brought against medical practitioners as determined by the scheme of the Medical Practitioners Act 1968. The Act established a hierarchy of ever more serious breaches, beginning with “unbecoming conduct” followed by “professional misconduct” and finally “disgraceful conduct,” which must be dealt with by the Medical Council itself. The lesser charges are administered by the Medical Disciplinary Committee, with a right of appeal to the Medical Council.¹⁶ Her Honour noted that the Act relies in “large part upon judgment by a practitioner’s peers, emphasis[ing] that the best guide to what is acceptable professional conduct is the standards applied by competent, ethical, and responsible practitioners.”¹⁷

Medical practitioners may also be subject to investigation by the Health and Disability Commissioner, or when there has been a death, investigated and made to appear before an inquest by the Coroner.¹⁸ The Office of Health and Disability Commissioner was established by the Health and Disability Commissioner Act 1994 (HDC Act) to create an independent agency to promote and protect consumers who use health and disability services and help resolve issues between consumers and providers of health and disability services.¹⁹ The Health and Disability Commissioner is linked to independent advocates under the director of advocacy, as well as an independent prosecutor. In this way, healthcare consumers are provided with a fully independent means of having complaints heard, without the need to pay for legal services. However, the Health and Disability Commissioner is separate from the Medical Council and if there is an investigation by the Medical Council, typically the Health and Disability Commissioner will take no action.²⁰ The Commissioner has various powers to assist in the creation of reports, which are set out in the HDC Act. The Commissioner’s website notes “[a] simple investigation usually takes six to nine months; a complex investigation can take eighteen months to two years.”²¹ The Commissioner’s decisions cannot be appealed, but may be reviewed by the office of the Ombudsman or the High Court.²²

15 *B v Medical Council* HC Auckland HC11/96, 8 July 1996, noted [2005] 3 NZLR 810.

16 At 810.

17 At 810–811.

18 Coroners Act 2006, ss 57–91.

19 See “Health and Disability Commissioner” (2009) Health and Disability Commissioner <www.hdc.org.nz>.

20 Interview with Julian Sakarai, Legal Advisor to the Health and Disability Commissioner (Nigel Stone, 21 September 2010). I am grateful to Mr Sakarai for his assistance and information regarding the role of the Commissioner.

21 “FAQs – Consumers” (2009) Health and Disability Commissioner <www.hdc.org.nz> at Q10.

22 At Q12.

It is no doubt easier to achieve the political will necessary to compile reports following cases of medical misadventure by an independent body. Quite simply, this area involves matters of life and death. Furthermore, medical science may provide an exact answer as to why a certain event (perhaps the death of a patient) occurred. By comparison, trials in the criminal justice system are primarily concerned with the reconstruction of past events and how the law applies to those facts. There is an inherent degree of ambiguity in this process because perceptions of witnesses may differ from the actual reality, or the reason for a particular event may be the result of a number of factors, about which reasonable people may disagree. While the medical profession must also confront ambiguity, and conversely criminal trials may be based on clear scientific evidence, the justice system is far more likely to encounter ambiguities. This would need to be addressed by reports of the kind proposed in this paper by acknowledging these ambiguities, which do feature in Health and Disability Commissioner Reports.

Another factor that differentiates the medical profession from those acting within the criminal justice system is that a miscarriage of justice does not occur until it has been determined to be as such by an appellate court. To add to the complexity, one appellate court may consider a particular case amounts to a miscarriage of justice, while a higher court may not, and may subsequently overturn the decision. In certain cases, new and potentially exonerating evidence may only surface long after a conviction has been entered. This process can take years. The passing of time allows participants within the system to distance themselves from the miscarriage of justice. In those rare instances when further analysis is deemed appropriate, a commission may be established, furthering the perception that the miscarriage of justice was an anomaly. The traditional means of educating lawyers in court, employing junior and senior counsel in trials, has limitations in terms of educative power too, as this system relies on a finding by an appellate court of a miscarriage of justice.

In contrast, Health and Disability Commissioner reports are compiled on a routine basis and may be only a single page long or, alternatively, hundreds of pages in length. This level of adaptability allows for a more robust system that does not lurch from one crisis to another and prevents actors within the system so easily distancing themselves from the mistakes of the past. This concept is referred to as “continuous quality improvement” in the literature on health care risk management, and is an approach to quality on a continuing basis, through incremental change. It originated as a business management philosophy.²³ While adoption of business management concepts into the criminal justice system without appropriate adaptation is unwise, in this case, the concept would be useful in preventing miscarriages of justice. Part of this philosophy is that “quality circles”²⁴ be put in place within a system to improve it.

In the context of Crown prosecutors’ roles in miscarriages of justice, this means the production of reports (which need not be particularly long) disseminated to Crown solicitors’ offices on a reasonably regular basis. Under this system, small, incremental changes are made by providing education through an ongoing basis, rather than large and infrequent investigations or inquests. The theory (which seems to be based on a degree of common sense) concludes many small changes result in greater improvement to the system overall than would be the case if only the largest problems were reviewed.

23 George D Pozgar *Legal Aspects of Health Care Administration* (10th ed, Jones and Bartlett, Sudbury (MA) 2007) at 455.

24 At 455 (sometimes called “positive feedback loops” or “virtuous circles”).

C. *The New Zealand Police*

The Independent Police Conduct Authority was established by the Independent Police Conduct Authority Act 1998 to provide a means by which members of the public may complain about the conduct of police officers, independent of the police. The Authority has employed independent investigators since late 2003, and in 2007 was granted further powers enhancing its independence.²⁵ The Authority publishes its reports and is headed by a High Court judge. It has the power to investigate police officers, or oversee police investigations and, if necessary, recommend disciplinary proceedings. This is separate from the internal disciplinary proceedings or investigation that may be brought against a police officer by the police force itself.

The existence of the Authority highlights the importance of accountability and transparency for other actors within the criminal justice system. That Parliament would see fit to provide for an independent authority provides a compelling reason why a greater degree of accountability is appropriate for Crown prosecutors.

III. PROSECUTORIAL ACCOUNTABILITY

A growing trend within the New Zealand criminal justice system, and criminal justice systems elsewhere in the world, is for greater public accountability and transparency by participants within the system. This has been accompanied by an increasing recognition of greater accountability towards, and participation of, victims of crime. Crown prosecutors have a highly visible and important role acting in the public interest in courts. A greater level of accountability and transparency in regard to their decision-making should accompany this responsibility.

An example of this increased accountability is a growing trend within England and Wales for judicial review proceedings to be brought against prosecutors for choosing *not* to prosecute.²⁶ Traditionally, judges have been reluctant to interfere, or be seen to interfere, with prosecutorial discretion in determining whether to conduct a prosecution, as this infringes on the separation of powers.²⁷

A. *Public Scrutiny*

As we have seen, members of the public may make complaints against judges, doctors and police officers, but a more difficult question arises whether the public should have a means of redress

25 See “History” Independent Police Conduct Authority <www.ipca.govt.nz>.

26 See generally *R v Director of Public Prosecutions, ex parte Manning* [2000] 3 WLR 463, [2001] QB 330 (QB) where the Director of Public Prosecutions for England and Wales was required to remake a decision following a review of his decision not to prosecute in a case involving a death in custody by the High Court of Justice. This case was followed in England by *R (On the application of Corner House Research and Others) v Director of the Serious Fraud Office* [2008] UKHL 60 in which the High Court of Justice was again prepared to entertain a challenge to the United Kingdom Serious Fraud Office Director’s decision not to prosecute. (The House of Lords later upheld the Director’s decision.) Another example is *R v Director of Public Prosecutions, ex parte Duckenfield* [1999] EWHC Admin 286 (QB).

27 Frater, above n 3, at 45. The most recent case at the time of writing to discuss this issue is *Greymouth Petroleum Ltd v Solicitor-General* [2010] 2 NZLR 567 (HC) which followed *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 (HC). Those decisions agree there is jurisdiction to entertain a review, but that this would only be in “exceptional circumstances”: *Greymouth Petroleum Ltd v Solicitor-General* at [39]. This is in contrast to the orthodox view espoused in *Saywell v Attorney-General* [1982] 2 NZLR 97 (HC) that review is not possible.

against prosecutors as well. Significantly, prosecutors do not act on behalf of members of the public, but in the public interest, and are not advocates for particular victims of crime. Unlike judges, doctors or police officers, prosecutors act exclusively on behalf of society's interests at large; we might therefore conclude no individual ought to be able to make a complaint against them.

Despite this, it would be appropriate for certain classes of persons to be able to put forward their concerns about the actions of Crown prosecutors (aside from their ability to bring the matter before the New Zealand Law Society in the usual way). Victims should have the power to make a complaint about the conduct of a Crown prosecutor insofar as they were directly affected by that decision. This would not extend, of course, to a complaint made on the basis that an accused was acquitted.

Crown prosecutors in New Zealand are accountable to their respective Crown solicitor and, in practice, to the partners in the firm that employs them. Crown solicitors are accountable to the Solicitor-General. The Solicitor-General is the non-elected appointee "junior law officer" accountable to the Attorney-General (in New Zealand, a member of both Parliament and Cabinet).²⁸ This structure provides a degree of independence which is vital for prosecutors to carry out their role. It is appropriate that this structure also remain the basis by which prosecutors are held to account in the investigations proposed in this paper. The Solicitor-General should determine whether an investigation into a prosecutor's conduct ought to take place on the basis of either:

1. a finding by an appellate court of prosecutorial misconduct resulting in a miscarriage of justice; or
2. a complaint made by a person falling within a defined category.

The Solicitor-General would publish a list of those who fell within this defined category. It should include "victims" (as defined in the Victims' Rights Act 2002)²⁹ as noted above, complainants, witnesses, parents of child witnesses and family members of deceased persons in homicide cases. A list of individuals expressly prohibited from making such a complaint should also be published, including accused persons and prisoners. Relief for those falling within this prohibited category should be limited to the ordinary means of complaint about the conduct of any lawyer. An exhaustive list of these parties would not be necessary, but public education about this scheme on the Ministry of Justice website³⁰ and pamphlets available in courts throughout the country would be appropriate. Crucially, victims would need to be informed of their rights, without their expectations being unduly raised, having regard to the role of Crown prosecutors acting solely in the public interest.

The Solicitor-General would have complete discretion in deciding whether an investigation took place. It is difficult to estimate the number of complaints that might be made by persons falling within these defined categories; however, based on the number of complaints made about the judiciary to the Judicial Conduct Commissioner, the number is likely to be very small. Moreover, the number of individuals who may complain about judicial conduct is far greater, simply because the jurisdiction in which Crown prosecutors appear most frequently accounts for only a small percentage of criminal prosecutions. Obviously, almost all court proceedings involve a judge or judges. Analysis of complaints at the same level of scrutiny as those performed by the Judicial

28 David Collins QC, Solicitor-General of New Zealand "Independence of the prosecution" (paper presented to New Zealand Legal Method – Modern Challenges to the Rule of Law Conference, Auckland, 23 October 2009) at [6].

29 Victims' Rights Act 2002, s 2.

30 "Ministry of Justice" Ministry of Justice <www.justice.govt.nz>.

Conduct Commissioner or Health and Disability Commissioner would not be necessary, and when no investigation was deemed appropriate, a simple pro forma letter would suffice.

IV. PROPOSED REFORM – CREATION OF REPORTS

Once the Solicitor-General has made a determination that an investigation and report be completed for a case in the indictable jurisdiction, a lawyer with the appropriate qualifications from within the Crown Law Office (assisted if necessary by a member or members of the Independent Police Conduct Authority) would conduct an investigation and publish a report. The Independent Police Conduct Authority would have its remit expanded to include investigation and production of these reports. This system is preferable to the establishment of a “Prosecution Review Authority” of the kind employed in Europe and Canada³¹ for two reasons; primarily the additional costs that this authority would incur, as well as the lack of evidence to suggest the problem of prosecutorial accountability justifies the significant step of establishing an entirely separate agency to oversee prosecutors. This is especially so if its oversight only included reports related to indictable matters.

Investigators in these cases would be expected to act in a similar way to Health and Disability Commissioner investigators, and would usually undertake their work “on the papers”³² in the same way. The results of the investigation would be published, providing a similarly detailed report (if the circumstances called for it) using corresponding methodology. Unless enabling legislation was enacted, the investigation would lack certain powers, such as an ability to compel witnesses to give evidence. Although helpful, reports could still be compiled without conferring these powers on investigators. A conclusion would be made about the underlying reasons for the miscarriage of justice, in their overall contextual setting.

A. *Expertise and Objectivity*

The expertise needed to conduct an investigation into prosecutorial misconduct would, in practical terms, need to be found within the Crown Law Office. Crown Law Office lawyers *being seen to be* objective is a potential problem in the investigation of Crown prosecutors’ work. In the same way that there are relatively few prosecutors in New Zealand, there are also relatively few experts in certain areas of medical practice. Short of establishing a new body to investigate prosecutors (along with attending costs) this ostensible lack of objectivity cannot be overcome. Health and Disability Commissioners face similar issues and, for this reason, their reports include expert opinions from (usually senior) medical practitioners, independent of the case. To ameliorate the potential issues of objectivity, the Health and Disability Commissioner requires any expert engaged in the commission of a report to declare any conflicts of interest that he or she might have,³³ relying on professional integrity to remain objective. From time to time experts from Australia are asked for their assistance,³⁴ although this seems unfeasible in the context of prosecutorial investigations owing to the difference between New Zealand and Australian law. Wherever possible, these practices should be adopted in the production of the reports concerning prosecutors.

31 Sean McGonigle “Public Accountability for Police Prosecutions” (2006) 8 Auckland U L Rev 163 at 182.

32 Slide presentation provided by Julian Sakarai, Legal Advisor to the Health and Disability Commissioner (14 October 2010).

33 Sakarai, above n 20.

34 Sakarai, above n 20.

B. Purpose of Reports

Appellate court judgments, by themselves, do not provide an appropriate educative tool for Crown prosecutors detailed enough to assist in the prevention of many miscarriages of justice. Obviously, the courts' judgments provide a basis for determining the law, and the appropriate way in which the prosecution should carry out its duties in many instances. However, the assumption that these judgments provide comprehensive answers to many of the issues faced by prosecutors is flawed. There are various reasons for this, all beyond the power of judges to remedy. These include the fact that appellate courts can only make their determination on the basis of material put before them, and this may well omit crucial documents explaining why decisions were made at an early stage of a prosecution. Furthermore, appellate court judgments are not written with the primary aim of providing continuing educational training to lawyers. That would require far longer judgments and would be considerably less suitable in relation to the courts' primary purpose of explaining the law as it applies to the cases before them.

By their very nature, appellate courts are reactive, rather than proactive, and their decisions may or may not provide an overarching contextual framework, depending on the cases falling within their remit. The status of appellate court judgments under the proposed reform would be that of the "preliminary assessment" made by the Health and Disability Commissioner before an investigation is undertaken.³⁵ This "preliminary assessment" is made to determine whether an investigation is necessary and provides a starting point for that investigation. Appellate court decisions would provide a framework for the investigation for the Crown Law Office to build upon.

"*Learning not lynching*" is the catch-cry of the Health and Disability Commissioner.³⁶ The primary purpose of the reports produced by the agency is to provide an educative tool to promote and protect the rights of consumers. Health and Disability Commissioner reports are clearly written to provide context and a comprehensive understanding of the events that transpired leading to the complaint. They are not solely focused on the immediate causes of a patient's death, for example, but the overriding contextual information for individual physicians, nurses, other medical providers and, crucially, for the organisations that provide health care to New Zealanders. In this way, they allow an analysis of the healthcare system in its totality, rather than a report produced with a specific narrow aim. For example, the Medical Council might reach a determination in respect of a medical practitioner, without necessarily a concern for the overriding context of the case, primarily relating to a District Health Board. In a similar way, reports produced by the Crown Law Office of the kind proposed in this paper would provide an overarching contextual analysis for miscarriages of justice, which are not currently available to those within the system. Simply put, the full picture is not readily available to Crown prosecutors. For maximum effectiveness, these reports should be published online and disseminated to Crown prosecutors throughout the country. The Crown Law Office already provides online information to Crown prosecutors, and these reports would build on this communication. An accompanying education programme based on those reports would also be of considerable assistance, although it would involve additional costs.

³⁵ Health and Disability Commissioner Act 1994 (HDC Act), s 33.

³⁶ "HDC and competence reviews". (2009) Health and Disability Commissioner <www.hdc.org.nz>.

C. *Methodology of Reports*

Health and Disability Commissioner reports can be as short as half a page or more than 150 pages long. While in certain reports denunciation is deemed to be an important factor, this is not so for others. For example, doctors who have fallen beneath the level expected by their peers can at times be named in reports, while in other cases, parties involved are referred to by pseudonyms in the reports such as “Dr J” or “Ms G” which apparently bear no relationship to their actual names. They are described by this pseudonym along with their roles such as “house surgeon.”³⁷ Any experts engaged do, however, state their full name and include a brief description of their experience.³⁸ In cases of sufficiently serious misconduct, it would be appropriate to name Crown prosecutors, as in certain Health and Disability Commissioner reports.

In longer reports, an accompanying narrative is provided with quotations from the various participants, and conclusions where the narrative is unclear. This is followed by independent expert advice from those with different types of expertise, such as doctors and nurses. The parties are then given an opportunity to respond and the Commissioner provides an opinion about the various participants, commenting on whether they have breached their obligations and providing adverse comments if necessary about of their actions. Crucially, entities such as district health boards can be named as causing a breach of a consumer’s obligations. Reports of the kind proposed in this paper should consider investigating prosecutors’ firms where appropriate, to reduce the possibility of systemic problems.

To accomplish the task of preparing reports, the HDC Act provides the Commissioner with certain powers permitting the Commissioner to investigate breaches of the code, to be published by the Commissioner.³⁹ The Commissioner must inform the complainant and provider that an investigation is underway.⁴⁰ Furthermore, the Commission must inform the appropriate authority that no disciplinary action is to take place under the Health Practitioners Competence Assurance Act 2003. Natural justice concepts are provided for, such as the ability of individuals subject to disciplinary proceedings to comment on the findings of the Commissioner. Sections 44 and 67 of the Act states investigations may be public or private and the Commissioner may hear or obtain information from such persons as the Commissioner thinks appropriate. Under s 59 of the Act, the Commissioner is entitled to compel witnesses to give evidence and be examined on oath. Witnesses are to be given the same privileges as they would in courts⁴¹ and proceedings are privileged.⁴² These are similar powers to those conferred on a Judicial Conduct Panel.⁴³ These are powers that could be considered for investigations into prosecutors, should enabling legislation be enacted (see below).

There has been relatively little judicial commentary on the sections within the Health and

37 See “Capital and Coast District Health Board Case (05HDC11908)” (22 March 2007) Health and Disability Commissioner <www.hdc.org.nz> at 1–2.

38 At 26.

39 HDC Act, s 40.

40 Section 41.

41 Section 63.

42 Section 65.

43 Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, s 26 which gives the panel the same powers as those conferred on Commissions of Enquiry by ss 4 and 4B–8 of the Commissions of Inquiry Act 1908. These are essentially the same as a District Court operating in the civil jurisdiction.

Disability Commissioner Act. However, in *Stubbs v Health and Disability Commissioner*,⁴⁴ the High Court determined the Commissioner's role "is to express an opinion about the health care provider's conduct and if appropriate refer the matter to other authorities to consider prosecution or other forms of disciplinary process." The court acknowledged that while the Commissioner's opinion was "well informed" and that healthcare providers treat any negative comment as significant, there was still "scope for disagreement" with the Commissioner's opinion.⁴⁵

Reports of the kind proposed in this paper should have a corresponding status. Disciplinary proceedings would remain separate, but the disciplining body could take into account the "well informed" opinion of the Crown Law Office investigation. Enabling legislation providing Crown Law Office investigators the power to compel witnesses to appear before them and to give evidence under oath would be overly elaborate and unnecessary at the present time, but may be considered in the future. Accurate and forthright reports should be possible, relying on the professional integrity of Crown prosecutors and the sanctions that may be brought against police officers by the already established Independent Police Conduct Authority.

V. CONCLUSION

This paper advocates for the creation of reports regarding Crown prosecutors' actions, similar to those written by the Health and Disability Commissioner. This is a practical reform proposal that would enhance the quality of decisions within the criminal justice system by introducing an important educative tool. These reports would be a means of "continuing quality improvement," helping to provide higher quality decision-making at all levels of the criminal justice system and reduce the possibility of miscarriages of justice. Reforms of this kind are in keeping with a trend towards greater transparency and accountability on the part of actors within the criminal justice system. The actions of Crown prosecutors should be open to scrutiny in the same way decisions of judges, medical professionals and police officers are scrutinised. Much of the methodology in the reports prepared by the Health and Disability Commissioner is directly applicable to the way reports should be prepared about the work of Crown prosecutors. The reports would focus on learning, and could be part of a training programme to improve decision-making by prosecutors. Unlike in the case of judges, police officers and medical professionals, it would not be appropriate for any member of the public to make a complaint about a Crown prosecutor, as prosecutors appear in the public interest. However, certain classes of persons would be able to apply to the Solicitor-General to make a determination whether Crown prosecutors' conduct was appropriate.

New Zealand's criminal justice system was brought about by a system of "incrementalism" as this paper demonstrates. Adding to the current system in the ways described above furthers this approach and provides the robustness, openness and transparency required for the new century.

44 *Stubbs v Health and Disability Commissioner* HC Wellington CIV 2009-485-2146, 8 February 2010.

45 At [33]–[35].

EROSION OF MĀORI FISHING RIGHTS IN CUSTOMARY FISHERIES MANAGEMENT

BY ANNE-MARIE JACKSON*

Taiāpure fisheries management in New Zealand is based on historical discourses that restricted Māori fishing rights. Māori fishing rights were first guaranteed in the Tiriti o Waitangi signed in 1840 between a representative of the Queen of England and primarily Māori chiefs of hapū (subtribes). However, since 1840, Māori fishing rights have been continually eroded. Māori brought the erosion of Māori fishing rights to the attention of government officials during the heightened race relations context of the 1980s. Following a series of negotiations and settlements between Māori and the government, one of the solutions was the creation of a “new” fisheries tool called taiāpure (local fishery). Introduced under the Maori Fisheries Act 1989, taiāpure was an interim settlement as part of the ongoing definition of Māori fishing rights. Taiāpure were created to make better provision for rangatiratanga and the right secured in relation to Article II of the Treaty of Waitangi. However, it is evident through a discursive analysis of the taiāpure fisheries legislation and historical legislation from 1840 to 2010, that instead of fulfilling these broad objectives, taiāpure continue to erode Māori fishing rights.

I. INTRODUCTION

New Zealand is regarded as one of the global leaders in fisheries management.¹ Fisheries management in New Zealand is divided into three sectors: commercial, recreational and customary. While there is some evidence and understanding of the commercial fisheries sector² there is limited research about the recreational³ and customary⁴ sectors. This paper focusses on customary fisheries management and in particular on the area management tool taiāpure. Customary fisheries management is based upon historical discourses of Māori fishing rights that were first guaranteed in the signing of the Tiriti o Waitangi/Treaty of Waitangi in 1840. Apart from a few instances, since 1840 Māori fishing rights have been continually eroded. Customary fishing and customary fisheries management are currently provided for under: pt 9 of the Fisheries Act 1996 (ss 174–186B); the Fisheries (South Island Customary Fishing) Regulations 1999; the Fisheries (Kaimoana Customary Fishing) Regulations 1998; and reg 27A of the Fisheries (Amateur Fishing) Regulations 1986.

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1 Kelly Lock and Stefan Leslie *New Zealand's quota management system: A history of the first 20 years* (Ministry of Fisheries, Motu Working Paper 07-02, April 2007).

2 Lock and Leslie, above n 1; Gina Straker, Suzi Kerr and Joanna Hendy *A regulatory history of New Zealand's quota management system: Setting targets, defining and allocating quota* (Ministry of Fisheries, Motu Economic and Public Policy Research, 2002).

3 Randall Bess and Ramana Rallapudi “Spatial conflicts in New Zealand fisheries: The rights of fishers and protection of the marine environment” (2007) 31(6) *Marine Policy* 719.

4 Randall Bess “New Zealand's indigenous people and their claims to fisheries resources” (2001) 25(1) *Marine Policy* 23.

Taiāpure are local fisheries, or area management tools and are part of the suite of customary tools that can be used by Māori for customary fisheries management. Taiāpure were entrenched in legislation in the Maori Fisheries Act 1989 as an interim settlement of defining Māori rights to fisheries.⁵ These provisions are now contained within pt 9 of the Fisheries Act 1996 (ss 174–185) and the object is to “make ... better provision for the recognition of rangatiratanga and of the right secured in relation to fisheries by Article II of the Treaty of Waitangi”.⁶

Taiāpure can relate to:⁷

... areas of New Zealand fisheries waters (being estuarine or littoral coastal waters) that have customarily been of special significance to any iwi or hapu either – (a) as a source of food; or (b) for spiritual or cultural reasons.

Both commercial and non-commercial fishing can occur within taiāpure. Taiāpure are managed by a committee that is representative of the local Māori community, and the committee can recommend regulations to the Minister of Fisheries. The regulations can only be made with respect to fishing, or fishing-related activities within the taiāpure.

Jackson explains that there are numerous meanings for the word taiāpure.⁸ Ririnui⁹ contends that the word taiāpure was first used during the introduction of the Maori Fisheries Bill 1989, by Māori negotiators (Sir Graham Latimer, the Honourable Matiu Rata, Richard Dargaville, Tipene O’Regan, Cletus Maanu Paul, Whatarangi Winiata, other individuals on behalf of iwi, the New Zealand Maori Council, the National Maori Congress, and other representatives of iwi) and the Crown. According to Ririnui, taiāpure is a:¹⁰

... construct of three different words (“taia” meaning sea coast, “a” meaning of and “pure” meaning procedure), “taiapure” can be broadly interpreted as a procedure for dealing with the sea coast.

Furthermore, Moller discussed taiāpure in the following way:¹¹

the resulting sworn statement by Timoti Karetu, then Māori Language Commissioner, recommended the term “taiapure”, as a derivative from two words “Tai” and “Apure”. “Tai” is the sea or coast, being the opposite of “uta” (inland). An “Apure” is defined as a patch or circumscribed area. Because Apure is a term used for land, like sections of vegetation or forest, Timoti prefaced it with Tai. Therefore he concluded that the word “taiapure” is a small circumscribed area of coastal water in which members of a particular tribe or hapu would have rights to gather seafood.

5 RP Boast “Maori Fisheries 1986–1998: A Reflection” (1999) 30 VUWLR 11 at 131–132; Anne-Marie Jackson “Towards understanding indigenous knowledge in environmental management practise: A discursive analysis of the East Otago taiāpure proposal” (2008) MAI Review 1 at 4; Gary D Meyers and Catherine M Cowan *Environmental and natural resources management by the Maori in New Zealand* (UNSW Press, Australia, 1999); Stephanie Milroy “The Māori fishing settlement and the loss of rangatiratanga” (2000) 8 Wai L Rev 63 at 67.

6 Fisheries Act 1996, s 174.

7 Section 174.

8 Jackson, above n 5, at 5–6.

9 Taneti Ririnui *The recognition of Maori customary fisheries in New Zealand’s fisheries management regime: A case study of taiapure* (University of Otago, Dunedin, 1997) at 37.

10 At 37.

11 Henrik Moller “New ways demand new words ... so where do they come from?” Kai Kōrero (New Zealand, December 2007) at 7.

I argue that the current taiāpure fisheries legislation is based on historical discourses that restricted Māori fishing rights. The paper begins with a description of the importance of fisheries for Māori prior to European contact and continues with an examination of the Tiriti o Waitangi and Treaty of Waitangi. Following which, Māori fisheries legislation from 1840 to 1986 are analysed focussing on two distinctive features, the first being the prescription of broad Māori fishing rights and the second, the limitations on Māori fishing rights. The context of the 1980s and the definitions towards understanding Māori fishing rights are described. The taiāpure fisheries legislation is examined in detail to highlight how the discourses of Māori fishing rights are continued rather than as a fulfilment of the better provision for rangatiratanga. The “Sealord Deal” of 1992 is outlined as well as the consequences of this deal on the New Zealand fishing industry.

The paper has particular relevance today with two recent cases in the Environment Court that had a customary fisheries management focus.¹² In each of the cases, there was proposed dredging by the port companies to deepen the harbours to allow for larger container ships. The proposed activities of the port companies, in both instances, were opposed by supporters of a gazetted mātaītai¹³ (in Tauranga) and a taiāpure¹⁴ (in East Otago).

II. PRE-EUROPEAN CONTACT

Fisheries are an important resource for Māori and were guaranteed in the Treaty of Waitangi (“their fisheries”) and in te Tiriti o Waitangi (as taonga), however the Māori relationship with fisheries stretches back much further than 1840. There are many mythical stories that contain reference to fish and marine resources,¹⁵ for example the ancestor Māui fishing up the North Island of New Zealand, Te Ika a Māui¹⁶ and Marokura who introduced fish into New Zealand waters. There is extensive oral and written history about the importance of fisheries and mahinga kai resources for Māori.¹⁷ Leach outlines that Māori fishers were:¹⁸

... profoundly knowledgeable about the sea and its resources, and well able to harvest fish in a manner which conformed, in the main, to the customs of his ancestors in the tropical Pacific.

The *Report on the Crown’s Foreshore and Seabed Policy* outlines that “Māori exercised the authority of te tino rangatiratanga, under tikanga Māori”.¹⁹ Jackson contends that “this authority

12 *Te Runanga o Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402; *East Otago Taiapure Management Committee v Otago Regional Council* [2013] NZEnvC 1.

13 *Te Runanga o Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council*, above n 12.

14 *East Otago Taiapure Management Committee v Otago Regional Council*, above n 12.

15 AW Reed *Māori myths & legendary tales* (New Holland Publishers, Auckland, 1999).

16 Heidi Kai Guth “Dividing the catch: Natural resource reparations to indigenous peoples – Examining the Maori fisheries settlement” (2001) 24 U Haw L Rev 179 at 184; Reed, above n 15.

17 Waitangi Tribunal *Motunui-Waitara Report* (Wai 6, 1983) [Wai 6]; Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua fishing claim* (Wai 22, 1988) [Wai 22]; Waitangi Tribunal *The Ngai Tahu Sea Fisheries Report* (Wai 27, 1992) [Wai 27]; Waitangi Tribunal *Report on the Crown’s foreshore and seabed policy* (Wai 1071, 2004) [Wai 1071].

18 Foss Leach *Fishing in pre-European New Zealand* (New Zealand Journal of Archaeology and Archaeofauna, Wellington, 2006) at 311.

19 Wai 1071, above n 17, at [2.1.5].

included a spiritual dimension, a physical dimension, a dimension of reciprocal guardianship, a dimension of use, manaakitanga and manuhiri”.²⁰

III. TIRITI O WAITANGI/TREATY OF WAITANGI

Māori fishing rights were first guaranteed in the signing of the Tiriti o Waitangi/Treaty of Waitangi in 1840. The treaty was first signed on 6 February 1840, between the Queen of England’s representative Captain William Hobson, and northern Māori chiefs, particularly those of the hapū (subtribes) of He Wakaminenga o Nu Tireni (the Confederation of the United Tribes of New Zealand). There are two versions of the treaty: English language (Treaty of Waitangi) and Māori language (Tiriti o Waitangi), and there is considerable debate over the meanings of the texts and the differences between them. The two texts are not direct translations of each other (neither English to Māori, nor Māori to English). Each treaty text consists of a preamble, three articles and a post-script. For this paper, the focus is on Article II of the Māori language version, te Tiriti o Waitangi, where it is stated that the chiefs of He Whakaminenga are guaranteed “te tino rangatiratanga o ō rātou wenua ō rātou kāinga me ō rātou taonga katoa.” This is translated as “their paramount and ultimate power and authority over their lands, their villages and all their treasured possessions”.²¹ The second article of the English version, the Treaty of Waitangi, states that the Queen of England:

... confirms and guarantees ... the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.

In the second article of the Tiriti o Waitangi, there is no specific mention of fisheries, but the word taonga is accepted as encompassing fisheries.²² Comparatively in the second article of the Treaty of Waitangi, fisheries are specifically mentioned and Māori were guaranteed the “full exclusive and undisturbed possession of their land, forests estates and fisheries”. The definition of fisheries from the *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* and similarly accepted by the *Ngai Tahu Sea Fisheries Report* was given as “the activity and business of fishing and that must necessarily include the fish that they [Māori] caught, the places where they caught them, and the right to fish”.²³ It was not restricted to only specific fishing grounds and was developed further in the *Ngai Tahu Sea Fisheries Report*, which stated that “tino rangatiratanga in relation to fisheries encompasses much more than simply fishing grounds”.²⁴ In the *Ngai Tahu Sea Fisheries Report* the definition of fisheries was explained as “the absence of any restriction as to species, depth or seaward boundary, and the potential for development”.²⁵ While there is considerable debate over the meaning of the different elements of the treaty for fisheries, both versions of the treaty are

20 Anne-Marie Jackson “A Discursive Analysis of Rangatiratanga in a Māori Fisheries Context” (2013) 2(1) MAI Journal 3 at 12.

21 Margaret Mutu “Constitutional Intentions: The Treaty of Waitangi Texts” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 13 at 25.

22 Wai 22, above n 17, at [10.2.2]; Wai 27, above n 17.

23 Wai 22, above n 17, at [11.3.2(a)]. The “business and activity of fishing” also became the long title to the Maori Fisheries Act 1989.

24 Wai 27, above n 17, at [4.4.5].

25 At [4.4.4].

clear for what the chiefs of the hapū were guaranteed with respect to fisheries, that is, their right to control, sustainably manage and develop their fisheries.

IV. DISCOURSES OF BROAD MĀORI FISHING RIGHTS.

From 1840 to 1983 there are four pieces of legislation that expressly provide for broad Māori fishing rights. These are: the Fish Protection Act 1877; the Sea-fisheries Amendment Act 1903; the Fisheries Act 1908; and the Fisheries Act 1983.

The first mention of Māori fishing rights is in the first general fisheries legislation, the Fish Protection Act 1877. The Fish Protection Act 1877 was for both sea and freshwater fisheries and in s 8 it stated that:²⁶

Nothing in this Act contained shall be deemed to repeal, alter, or affect any of the provisions of the Treaty of Waitangi, or to take away, annul, or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder.

While the Act recognised the Treaty of Waitangi, its contents were contradictory towards it,²⁷ particularly in the allowance for the public exploitation of fisheries. There were no explanations as to what these rights were. The Fish Protection Act 1877 was repealed in 1894 so far as it related to sea fisheries by the Sea-fisheries Act 1894, where s 8 of the 1877 Act was completely omitted.

In the Sea-fisheries Amendment Act 1903, s 14 somewhat restored s 8 of the Fish Protection Act 1877, with the inclusion of the statement that “nothing in this Act shall affect any existing Maori fishing rights”.²⁸

However, the 1903 Act omitted specific reference to the treaty and this section was only for sea fisheries. As aptly described in the *Ngai Tahu Sea Fisheries Report*, the inclusion of the above statement was a “watered down saving provision”²⁹ and has provided limited benefit, with the exception of the recognition of customary fishing rights in *Te Weehi v Regional Fisheries Officer [Te Weehi]*.³⁰

The Fisheries Act 1908 was a consolidating piece of legislation. Part 1 of the Act legislated for sea fisheries while pt 2 dealt with fresh water fisheries. The Act established an administrative and statutory framework that remained in place until 1983. The Act remained relatively unchanged until the 1940s.³¹ In the 1908 Act, s 77(2) was the continuation of s 14 from the Sea-fisheries Amendment Act 1903, reasserting that “[n]othing in this Part of this Act shall affect any existing Maori fishing rights”.³²

However, this reassertion was only in pt 1 (that focussed on sea fisheries). There were no provisions for fresh water fisheries. While the Act continued these broad protective provisions, it

26 Fish Protection Act 1877, s 8.

27 Wai 27, above n 17; Wai 6, above n 17; Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau claim* (Wai 8, 1985) [Wai 8].

28 Sea-fisheries Amendment Act 1903, s 14.

29 Wai 27, above n 17, at [5.19.9].

30 *Te Weehi v Regional Fisheries Officer* [1986] NZLR 680.

31 See generally Wai 27, above n 17; Wai 6, above n 17; Wai 8, above n 27.

32 Fisheries Act 1908, s 77(2).

also restricted Māori fishing rights with the continuation of provisions that limited Māori fishing rights. The Fisheries Act 1908 was wholly repealed by the Fisheries Act 1983.

The Fisheries Act 1983 consolidated and reformed “the law relating to the management and conservation of fisheries and fishery resources within New Zealand and New Zealand fisheries waters”.³³ The Act was introduced due to concerns over the rapid depletion of fish stocks. Importantly s 88(2) in this Act stated that “[n]othing in this Act shall affect any Maori fishing rights”.³⁴

The significant change was the amendment from “any existing Māori fishing rights” to “any Māori fishing rights” until the subsection was repealed by the Treaty of Waitangi (Fisheries Settlement) Act 1992. Although there were provisions in the legislation for Māori fishing rights, until the *Te Weehi* case, the provisions had “been of no significant benefit to Maori”.³⁵ As the Muriwhenua Report outlines, these:³⁶

... were general words, making no specific provision for the protection or advancement of Maori fishing interests, and leaving it very much to the administrators to make of them what they would. Not unexpectedly, that task fell also to the courts.

V. LIMITING OF MĀORI FISHING RIGHTS

Despite the clarity from the treaty, and the specific references to the treaty and Māori fishing rights in the legislature from 1877 to 1983, the Crown continued to limit Māori fishing rights in particular ways. This limiting of Māori fishing rights is a common feature in fisheries legislation from 1884. From 1885 to 1892, two separate sets of legislative features emerged. The first set defined and limited Māori fisheries rights to the taking of indigenous fish, for personal consumption and for non-commercial use. The second set of legislative features was provisions for reserves to be established. Following the introduction of the Sea-fisheries Act 1894, these two sets of legislative features are combined.

The first set of limitations defining Māori fishing rights to personal consumption and non-commercial benefit can be seen in the amendment in 1885 to the Fisheries Conservation 1884. The Fisheries Conservation Act 1884 incorporated previous fisheries legislation including the Fish Protection Act 1877 and thus the continuation of s 8 of that Act. The Fisheries Conservation Act provided “extensive regulation making powers for the protection of fish”.³⁷ Regulations made in 1885 exempted Māori from the regulations. However later in that same year, an amendment limited Māori to “taking oysters or indigenous fish for their personal consumption only and not for sale”.³⁸ This regulation directly contradicted s 8 of the Fish Protection Act, which preserved Māori fishing rights.³⁹

33 Fisheries Act 1983, long title.

34 Fisheries Act 1983, s 88(2).

35 Wai 27, above n17, at [5.19.8].

36 Wai 22, above n 17, at [6.2.1].

37 Wai 27, above n 17, at [5.19.8].

38 At [12.3.8].

39 At [12.3.9].

The second set of legislative features can be seen in the establishment of oyster fisheries. Section 14 of the Oyster Fisheries Act 1892 allowed for the establishment of Māori oyster fisheries, in the vicinity of a pa or village where Māori could exclusively take oysters, only for their personal consumption, and not for commercial sale. Section 14 stated:⁴⁰

The Governor may, by Order in Council, from time to time declare any bay, or portion of a bay, estuary, or tidal waters in the colony in the vicinity of any Native pa or village to be an oyster-fishery where Natives exclusively may take oysters for their own food at all times, irrespective of any of the provisions of this Act, and may from time to time revoke the same; and may prescribe regulations for preventing the sale by Natives of any oysters from such beds, and for protecting any such bay, estuary, or tidal waters from trespassers, and the oysters therein from destruction.

This 1892 Act continues the precedent in the Fisheries Conservation Act 1884 regulation of 1885 whereby Māori fishing rights were defined as being for personal consumption and non-commercial benefit and an area restriction as well, within the vicinity of pa or villages. There were very few oyster fisheries created under the Oyster Fisheries Act 1892.⁴¹ Importantly in the 1892 Act, there was no mention of Māori fishing rights.⁴² The provisions for the oyster reserves were similar to the provisions for the current customary fisheries management tool of *taiāpure* and *mātaítai*⁴³ in particular.

The two legislative features for limiting Māori fisheries were combined in the Sea-fisheries Act 1894. The Sea-fisheries Act 1894 completely omitted s 8 of the Fish Protection Act 1877 as it affected sea fisheries. This meant that there were no longer any statutory rights of the Treaty of Waitangi entrenched in fisheries legislation.⁴⁴ Instead, the Sea-fisheries Act 1894 continued the provisions from the Oyster Fisheries Act 1892 for establishing oyster reserves. The sections that were relevant specifically for Māori were ss 17 and 72. Of most relevance was s 17, which continued the provision in the Oyster Fisheries Act 1892 that made orders for the exclusive right for Māori to harvest oysters near a pa or village. There were no oyster reserves set aside until 1901, but only then for Māori in the North Island with the last reserve being established in 1933.⁴⁵ These legislative provisions continued to define Māori fishing rights as: for personal consumption; for non-commercial use; and within the vicinity of pa or villages.

To add to the complexities of Māori fishing rights, other non-fisheries-specific legislation provided law for fisheries, such as the Māori Councils Act 1900. The Maori Councils Act 1900 also allowed for the creation of fishing reserves. The purpose of the Maori Councils Act was to provide local self-government for Māori in the form of Māori councils.⁴⁶ Section 16(10) allowed the Māori Councils to make bylaws, subject to approval by the Governor, including:⁴⁷

[f]or the control and the regulation of the management of all oyster-beds, pipi-grounds, mussel-beds, and fishing-grounds used by the Maoris or from which they procure food, and from time to time to

40 Oyster Fisheries Act 1892, s 14.

41 See Wai 22, above n 17, at 82; Wai 27, above n 17, at 144.

42 Wai 27, above n 17, at [5.13.19].

43 A *mātaítai* can be applied for over a traditional fishing ground.

44 Wai 8, above n 27, at 34.

45 Wai 22, above n 17, at [5.4.10].

46 At [6.2.3].

47 Maori Councils Act 1900, s 16(10).

close such grounds or to protect such grounds from becoming exhausted, and to make reserves for the protection and cultivation of such shell-fish or eels and to prevent their extermination, and to restock such grounds as are in danger of extermination or exhaustion.

However, there were neither fishing grounds nor bylaws relating to fishing grounds gazetted under this Act.⁴⁸ Similarly to the oyster reserves legislation, the Maori Council Act 1900 provisions are comparable to the current customary fisheries management tools of *taiāpure* and *mātaītai*. A new provision was that Māori councils were provided with the ability to create bylaws.

Section 4 of the Maori Councils Amendment Act 1903 stated that the fishing grounds could only be for the exclusive use of Māori and that:⁴⁹

... the Governor, on the recommendation of the Council, may at his discretion reserve any oyster, mussel, or pipi bed, or any fishing-ground, exclusively for the use of the Maoris of the locality, or of such Maori hapus or tribes as may be recommended: Provided that in making such reservation the Governor may take into consideration the requirements of the residents of the locality.

These provisions were consolidated by s 33 of the Maori Social and Economic Advancement Act 1945 and that was then repealed and replaced by the Maori Welfare Act 1962. The Fisheries Act 1908 continued to restrict Māori fishing rights by maintaining s 72 of the Sea-fisheries Act 1894 regarding oyster fishing reserves.

Section 10 of the Fisheries Act Amendment Act 1923 enlarged and replaced the stipulation in s 17 of the Fisheries Act 1908 that any waters or tidal lands in the vicinity of a pa could be declared an oyster reserve. The 1923 amendment included a provision that an oyster fishery could be declared over any tidal lands or waters near a pa or village for Māori to use for their personal consumption. These fisheries were to be managed by a committee, with the members holding office at the pleasure of the Minister. The role of the committee was to maintain the fishery. There was to be no commercial gain from the oyster fishery. The Governor-General could make regulations for the fishery under this section of the Act.

Like the 1892 Oyster Fisheries Act, the amended Fisheries Act 1908 also contained the power to create oyster reserves, yet as with the earlier Act only a few oyster reserves were made under the new Act. When oyster reserves were made, none were made in the South Island.⁵⁰ In the new Act there was continuation from previous oyster fisheries legislation that enabled Māori to control their own reserves, the nature of which was, however, still controlled by the Crown. Furthermore, these rights were only for harvesting resources within these reserves and for personal use. There was an explicit requirement that any surplus oysters were not to be sold to Europeans.

The Maori Social and Economic Advancement Act 1945 replaced the Maori Councils Acts of 1900 and 1903, with minor revisions. Section 33 of the 1945 Act allowed for the reservation of exclusive Māori fishing grounds, but only on the recommendation of the Minister of Marine:⁵¹

... and subject to such conditions (whether as to compliance with all or any of the provisions of the Fisheries Act, 1908, or otherwise) as he thinks fit, by Order in Council, reserve any pipi-ground,

48 Wai 22, above n 17, at 101.

49 Maori Councils Amendment Act 1903, s 4(1).

50 Wai 27, above n 17, at [5.13.23].

51 Maori Social and Economic Advancement Act 1945, s 33(1).

mussel-bed, other shell-fish area, or fishing-ground or any edible seaweed area for the exclusive use of Maoris or of any tribe or section of a tribe of Maoris.

The control for the reserves could be vested in any tribal executive or tribal committee. The executive or committee could:⁵²

... take such steps as may appear to it to be necessary or desirable for the protection of the shell-fish or other fish and to prevent their extermination, and for the protection of the edible seaweed.

Māori councils could apply to the Minister for bylaws “for the control, regulation, and management of pipi-grounds, mussel-beds, fishing-grounds, and other areas”.⁵³ There were no reserves created under this Act and it was repealed in the Maori Welfare Act 1962. There were several reserves applied for; however, there were negative reactions by Members of Parliament to the applications.⁵⁴

VI. GRIEVANCE MODE: TOWARDS DEFINING MĀORI FISHING RIGHTS

Until 1986 the nature and extent of Māori fishing rights had not been truly tested in court and the precedent case in the courts was still the *Wi Parata v The Bishop of Wellington* case of 1877 where the Treaty of Waitangi was described as a “nullity” because it was not recognised in legislation.⁵⁵ The landmark 1986 case of *Te Weehi* set in motion the current definition of Māori fishing rights.⁵⁶ In 1984 Tom Te Weehi was caught with undersized pāua in Motunau Beach, North Canterbury. Te Weehi had gained permission from a Ngāi Tahu kaumatua (elder) to gather shellfish for personal and family consumption. The High Court hearing on 17 April 1986 found that “the appellant was exercising a customary Maori fishing right within the meaning of s 88(2) of the Fisheries Act”.⁵⁷

In 1986, four months after the *Te Weehi* decision, the quota management system (QMS) was introduced by the Fisheries Amendment Act 1986 (which came into force on 1 August). The QMS was introduced as a reaction to concerns over depleting fish stocks and the degradation of New Zealand’s marine environment.⁵⁸ The QMS allocates a percentage of the total allowable catch (TAC) to companies and individuals who fish commercially and it is based on the record of fish caught for the previous three years.⁵⁹ The QMS created a property right over fish where prior to 1986 that right did not exist. Memon and others argue that the introduction of the QMS was

52 Section 33(3).

53 Section 33(4).

54 Wai 27, above n 17, at 197.

55 Stephen C Bourassa and Ann Louise Strong “Restitution of fishing rights to Maori: representation, social justice and community development” (2000) 41(2) *Asia Pacific Viewpoint* 155 at 160.

56 See Shane Heremaia “Native title to Commercial Fisheries in Aotearoa/New Zealand” (2000) 4(29) *ILB* 15 at 15; Lock and Leslie, above n 1; Alison Thom “Sharing the Fish: Allocation in Customary Fisheries Management” (paper presented at Sharing the Fish Conference, Fremantle, 2006); Michael A Burnett “The Dilemma of Commercial Fishing Rights of Indigenous Peoples: A Comparative Study of the Common Law Nations” (1996) 19 *Suffolk Transnational Law Review* 389 at 414; Richard S Hill *Māori and the State: Crown-Māori relations in New Zealand/Aotearoa, 1950–2000* (Victoria University Press, Wellington, 2009); Meyers and Cowan, above n 5; Claudia Orange *An Illustrated History of the Treaty of Waitangi* (Bridget Williams Books, Wellington, 2004).

57 *Te Weehi v Regional Fisheries Officer*, above n 30, at 693 per Williamson J.

58 PAli Memon, B Sheeran and T Ririnui “Strategies for Rebuilding Closer Links between Local Indigenous Communities and Their Customary Fisheries in Aotearoa/New Zealand” (2003) 8(2) *Local Environment* 205 at 206.

59 Bourassa and Strong, above n 55, at 162.

“strongly supported by the corporate commercial fisheries sector which has emerged as a major beneficiary”.⁶⁰ However, the QMS forced smaller Māori fishermen out of business because their previous catch efforts were below the minimum required.⁶¹ The introduction of the QMS was another example of the Fourth Labour Government’s (1984–1990) neoliberal economic reforms.⁶² The QMS was in direct conflict with the Treaty and, what was more, there was no consultation with Māori regarding the introduction of the QMS.⁶³

Concurrently to the introduction of the QMS, the Waitangi Tribunal was investigating the Muriwhenua claim. Following the announcement of the introduction of the QMS, Muriwhenua claimants adjusted the claim and included a statement that the QMS was in fundamental conflict with the Treaty of Waitangi. In December 1986 the Waitangi Tribunal recommended to the government that Māori interests needed to be settled before the QMS was continued, particularly because at this time customary rights had not been defined following the *Te Weehi* ruling. Despite the recommendation, the government began to issue quotas under the new legislation.⁶⁴

There were two High Court injunctions that restrained the issuing of further quotas. The first injunction was for restrictions in quota-issuing in the Muriwhenua region on 30 September 1987.⁶⁵ The second injunction was restricting quotas for all of New Zealand on 2 November 1987.⁶⁶ The QMS was determined by the Muriwhenua Tribunal to be:⁶⁷

... in fundamental conflict with the Treaty’s principles and terms, apportioning to non-Maori the full, exclusive and undisturbed possession of the property in fishing that to Maori was guaranteed ... but the Quota Management System need not be in conflict with the Treaty, and may be beneficial to both parties, if an agreement or arrangement can be reached.

Thus Māori and the government went into negotiation. The interim settlement of Māori fisheries claims that arose was the enactment of the Maori Fisheries Act 1989.⁶⁸ The long title of the Maori Fisheries Act 1989 said it was an Act:⁶⁹

- (a) To make better provision for the recognition of Maori fishing rights secured by the Treaty of Waitangi; and
- (b) To facilitate the entry of Maori into, and the development by Maori of, the business and activity of fishing; and
- (c) To make better provision for the conservation and management of the rock lobster fishery.

Part 1 of the Maori Fisheries Act 1989 established the Maori Fisheries Commission. Part 2 outlined the amendments to the Fisheries Act 1983 with regard to rock lobster. Part 3A introduced the new

60 Memon, Sheeran and Rininui, above n 58, at 214.

61 Heremia, above n 56, at 16.

62 P Ali Memon and Nicholas Kirk “Barriers to Collaborative Governance in New Zealand Fisheries: Pt 1” (2010) 4(7) *Geography Compass* 778 at 779; Boast, above n 5, at 112.

63 Milroy, above n 5, at 66–69.

64 Bourassa and Strong, above n 55, at 162.

65 *New Zealand Maori Council v Attorney-General* HC Wellington CP553/87, 8 October 1987 at 4.

66 *New Zealand Maori Council v Attorney-General* [1987] BCL 1493; Wai 22, above n 6, at [1.7.7].

67 Wai 22, above n 17, at [12.2.3].

68 Bess and Rallapudi, above n 3, at 722; Bourassa and Strong, above n 55; Meyers and Cowan, above n 5.

69 Maori Fisheries Act 1989, long title.

mechanism for non-commercial fisheries – taiāpure. The Crown was required to transfer to the Maori Fisheries Commission 10 per cent of all existing quotas managed under the QMS and a payment of \$10 million to the Maori Fisheries Commission.

VII. INTERIM SETTLEMENT: TAIĀPURE FISHERIES LEGISLATION

The taiāpure fisheries legislation texts are: the second reading of the Maori Fisheries Bill; the Maori Fisheries Act 1989; and the Fisheries Act 1996. These three texts are similar, apart from a few minor changes. As aforementioned, the term “rangatiratanga” emerged in the second article of te Tiriti o Waitangi. Rangatiratanga is not utilised in any fisheries legislation from 1840 until the Maori Fisheries Act 1989, where it was used in the second reading of the Maori Fisheries Bill 1989, which was introduced into the House of Representatives on 12 December 1989.⁷⁰ Rangatiratanga is currently entrenched in the taiāpure fisheries legislation in pt 9 of the Fisheries Act 1996. The object of the taiāpure fisheries legislation is to “make ... better provision for the recognition of rangatiratanga”.⁷¹ The taiāpure fisheries legislation were part of the new fix for Māori fisheries rights in New Zealand, an area of New Zealand’s jurisprudence that had been unclear and unjust for many years. Thus the taiāpure fisheries legislation utilised the word rangatiratanga as one of the means for addressing treaty injustices with respect to fisheries. As well as introducing the word rangatiratanga, the second reading of the Maori Fisheries Bill 1989 introduced the word taiāpure to represent a new fisheries management tool. Although the impetus for taiāpure was introduced and had many similarities to the “local non-commercial fishery” area management tool that was created in the first reading of the Maori Fisheries Bill 1988.⁷² The Maori Fisheries Bill 1989 was read and debated for a third time in the House of Representatives on 12, 13 and 15 December 1989, and was passed into legislation on 20 December 1989 under urgency as described by John Luxton: “[T]he Government is tonight creating a constitutional ‘first’ in New Zealand – it is knowingly ramming through the House, under urgency, a Bill that contains known mistakes”.⁷³

Part of the difficulty of elucidating the meanings of rangatiratanga from the taiāpure fisheries legislation is that at the time of the Maori Fisheries Bill 1988 and 1989, the discussions of rangatiratanga within the *Parliamentary Debates* were tied up in the discourses for economic rationalism, due to the dual focus of the Maori Fisheries Bills, for both Māori commercial and non-commercial treaty grievances. The coupling of rangatiratanga and economic rationalism was expressed by Rt Hon Geoffrey Palmer, the then Prime Minister of New Zealand:⁷⁴

... it is clear that there is true rangatiratanga under the Treaty of Waitangi, because there is the ability of Maori to go fishing with half of the quota available, and the commercial company is set up that will operate in the interests of Maori ... for them to do with as they want.

70 Maori Fisheries Bill 1989 (81-2), pt 3A, cl 54A.

71 Fisheries Act 1996, s 174.

72 The Maori Fisheries Bill 1988 (80-1) was a Labour Party Bill that was first introduced into the House of Representatives on 22 September 1988 by Hon Colin Moyle, the then Minister of Fisheries.

73 (12 December 1989) 503 NZPD 14786.

74 (12 December 1989) 503 NZPD 14410.

In the second reading of the Maori Fisheries Bill 1989 Colin Moyle outlines the two major purposes of the Bill:⁷⁵

First, it recognises tino rangatiratanga with respect to fisheries. It does this by transferring to Maori 10 percent of quota, thus getting Maori into the business and activity of fishing – the phrase used by the Waitangi Tribunal in its report on the Muriwhenua claim. It recognises rangatiratanga in the provisions it makes for the allocation of quota, and it recognises rangatiratanga by enabling the establishment of taiapure – local fisheries.

VIII. CONTINUATION OF HISTORICAL MĀORI FISHING RIGHTS

While the taiāpure fisheries legislation purports to make better provision for rangatiratanga, in reality the legislation is a continuation of historical fisheries discourses. Similarly to the broad Māori fishing rights previously discussed, the taiāpure fisheries legislation claims to make provision for rangatiratanga however the contents of the legislation limits Māori fishing rights. The taiāpure fisheries legislation limits Māori fishing rights to: reserves; site-specific rights and restricted to small defined areas; management by regulations; rights under Crown control (rangatiratanga is subordinate to kāwanatanga); management by a committee; and partnership.

A discourse of broad Māori fisheries rights emerges in the object for taiāpure, where the object for taiāpure is to “make ... better provision for the recognition of rangatiratanga”.⁷⁶ This is similar to previous historical fisheries legislation, such as the Fish Protection Act 1877, Sea-fisheries Amendment Act 1903, Fisheries Act 1908 and Fisheries Act 1983. Rangatiratanga in the taiāpure fisheries legislation, like the treaty provisions and Māori fishing rights, is legislated for but the contents of the part of the Act are contradictory towards it and this follows the legacy that has been historically evident in fisheries legislation.

The taiāpure fisheries legislation continues the precedent of the reserves that was established firstly in the Oyster Fisheries Act 1892 (and continued in the Sea-fisheries Act 1894, furthered by the Maori Councils Act 1900 and Fisheries Act 1908). In those Acts, the Crown limited the area where Māori could apply for the reserves, and their regulation- or bylaw-making rights. There were also few reserves made under any of those aforementioned laws. The taiāpure fisheries legislation similarly confines the taiāpure to specific areas and restricts power to make regulations. Similarly Māori have not had a good record of success for taiāpure gazettal as well, with only eight gazetted taiāpure from 1989 to 2011.

Site-specific rights that emerged from the Oyster Fisheries Act 1892 and subsequent legislation are continued in the taiāpure fisheries legislation. The area that taiāpure can cover are “New Zealand fisheries waters (being estuarine or littoral coastal waters) that have customarily been of special significance to any iwi or hapu”.⁷⁷ Furthermore, the area must be significant as a source of food or for spiritual or cultural reasons. Hon Colin Moyle, the then Minister of Fisheries, outlined when discussing the Maori Fisheries Bill 1989 in the *Parliamentary Debates* that the “areas will not be large, and will be areas of customary significance to local iwi”.⁷⁸

75 (12 December 1989) 503 NZPD 14522.

76 Fisheries Act 1996, s 174.

77 Section 174.

78 (12 December 1989) 503 NZPD 14523.

There are a number of difficulties with site-specific rights and rights that are confined to small areas. These rights are similar to the limited rights provided for example in the Oyster Fisheries Act 1892 (and subsequent legislation). Rangatiratanga is not restricted to particular sites, and it was traditionally (and contemporarily) exercised over the entirety of the tribal area where hapū held mana whenua status, and mana moana status accordingly.

The taiāpure concept is described within the taiāpure fisheries legislation as a local fishery (Fisheries Act 1996, pt 9: Taiapure-local fisheries and customary fishing, for example). Interestingly, the first reading of the Maori Fisheries Bill 1988 introduced a fisheries management tool called “local non-commercial fisheries”. The provisions of these local non-commercial fisheries were replaced with the taiāpure provisions. However, the rationale remains similar and in particular the name “local non-commercial fisheries” was changed to “taiapure–local fishery”. The coupling of the words taiapure and local fishery partly reflects the discourse of community management which is described by Hon Colin Moyle:⁷⁹

... the management of the areas will be the responsibility of the local Maori tribe. Any rules for the conservation of the fisheries in that area must be non-discriminatory and will be subject to ministerial approval. The local communities will be the guardians of the area. The Maori negotiators have been advised – and I think they accept this – that it would be wise for the tribes to involve other members of the local community in the management of those fisheries. However, that will be for them to decide.

The taiāpure fisheries legislation requires public input throughout a number of the processes in both the application and management of the taiāpure. During the application process, the taiāpure proposal must include the impact of the taiāpure on the user groups of the proposed taiāpure and the local community. There is opportunity for the public input into the process in the form of submissions following the application process for the gazettal of both the taiāpure and regulations and also a Maori Land Court hearing if required. The requirement to take into consideration the general welfare of the community and the other stakeholders is an example of partnership and co-management rather than rangatiratanga.

This management by regulations is a continuation from the reserve-making legislation that allows for committees to recommend bylaws and regulations. However, this is a limited form of rangatiratanga. In a letter dated 25 August 2010 Hon Phil Heatley, the then Minister of Fisheries and Aquaculture stated the committee’s powers are limited to making regulations.⁸⁰ While regulation-making power remains ultimately with the Crown full rangatiratanga cannot be achieved. These provisions allow for Māori (a committee – which is not made up completely of Māori) to propose regulations for the taiāpure. These regulations can relate only to fish, and fishing-related activities. To date, of the eight taiāpure within New Zealand, only the East Otago Taiāpure and the Akaroa Taiāpure have regulations.⁸¹ It is difficult to highlight how the regulation-making provision provides for rangatiratanga when there have been few regulations made.

The ultimate control is located with the Minister of Fisheries at every step: application, approval of taiāpure, approval of management committee, gazettal of regulations. As aforementioned, this is not rangatiratanga under Crown control. The process is controlled by the Crown at all stages. The process does not allow for rangatiratanga because it is a “cumbersome procedure”.⁸²

79 (22 September 1988) 492 NZPD 6884.

80 Personal communication with Phil Heatley, Minister of Fisheries (Anne-Marie Jackson, 25 August 2010).

81 Maximum daily number of fish and prohibition on taking or possessing sea horses 1 October 2009.

82 Boast, above n 5, at 132.

A management committee is charged with the responsibility to exercise rangatiratanga, and its membership can comprise any representatives of the local Māori community and can also include non-Māori and local community members. The committee can only make recommendations to the Minister, thus it only has an advisory role.⁸³ This is an example of the recontextualisation of “management by the committee” as per the Maori Councils Act 1900.

IX. FULL AND FINAL SETTLEMENT: SEALORD DEAL

Following the interim settlement of Māori fishing rights, which lead to the enactment of the Maori Fisheries Act 1989, there were significant events that also impact upon definitions of Māori fishing rights, in particular, the Sealord Deal. The opportunity for the full and final settlement of Māori fishing claims arose by accident.⁸⁴ Sealord Products Ltd, New Zealand’s largest fishing company, which owned 26 per cent of the quota, was offered for sale. The government saw this as an opportunity too good to miss, and decided to negotiate the full and final settlement of claims relating to Māori fishing rights.

Through a series of hui and negotiations, the government offered to fund the \$150 million required for a 50/50 joint ownership with Brierley Investments Ltd, to purchase Sealord Products Ltd. The Deed of Settlement for the Sealord Deal was signed on 23 September 1992 by Māori negotiators and the Crown.⁸⁵ In purchasing Sealord Products Ltd, Māori gained an additional 13 per cent of the quota (half of the company’s 26 per cent quota). Furthermore, the government allocated Māori 20 per cent of the quota for new species added to the QMS.⁸⁶ The government also renamed the Māori Fisheries Commission as the Treaty of Waitangi Fisheries Commission, whose primary task was to allocate the quota and oversee the Māori commercial fishing interests while ensuring accountability to Māori.⁸⁷

The legislative provision for the Sealord Deal was the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (which was enacted on 14 December 1992). The Treaty of Waitangi (Fisheries Claim) Settlement Act 1992 repealed “section 88(2) of the Fisheries Act 1983 and specified that customary rights would be provided for, on a temporary basis, under the Fisheries Regulations 1986”.⁸⁸ The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 represents a full and final settlement of all claims to Māori commercial fishing.

Alongside the full and final settlement of claims to Māori commercial fishing, new rights were created in the form of customary (non-commercial) fishing rights.⁸⁹ The new customary fisheries sector is predicated on the assumptions that “Maori traditional fishing rights no longer derive

83 Meyers and Cowan, above n 5.

84 Boast, above n 5, at 116–117.

85 Boast, above n 5, at 118.

86 Bess and Rallapudi, above n 4 at 23–32; Bourassa and Strong, above n 55.

87 See Bess and Rallapudi, above n 4 at 23–32; Bourassa and Strong, above n 55; Lock and Leslie, above n 1; Boast, above n 5; Milroy, above n 5; Office of Treaty Settlements *Ka tika ā muri, ka tika ā mua. Healing the past, rebuilding a future* (Office of Treaty Settlements, Wellington, 2002) at 26; Scott Davidson “New Zealand” (1993) 8(2) *International Journal of Marine & Coastal Law* 300; Aroha Waetford “Legislation notes” (1992) 7 *Auckland U L Rev* 402; Justine Munro “The Treaty of Waitangi and the Sealord Deal” (1994) 24(4) *VUWLR* 389; Guth, above n 16.

88 Bourassa and Strong, above n 55, at 161.

89 Boast, above n 5, at n 7.

their status from the Treaty or from aboriginal title, but instead from regulations made by the Crown”.⁹⁰ Furthermore, any claims to non-commercial fishing rights no longer have any legal effect, apart from the rights that are provided for by regulations. To further explain, the Minister of Fisheries is required to act in accordance with the principles of the treaty and must consult with tangata whenua to develop policies for the “use and management practices of Maori in the exercise of non-commercial fishing rights”.⁹¹ The Minister of Fisheries can make regulations subject to section 89 of the Fisheries Act 1983.⁹²

... to recognise and provide for customary food gathering by Maori and the special relationship between tangata whenua and those places which are of customary food gathering importance (including tauranga ika and mahinga mataitai), to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade.

There are multiple issues with the Sealord Deal,⁹³ which Guth describes as having “significant flaws”.⁹⁴ Milroy explains that the Sealord Deal:⁹⁵

... suffered a difficult birth, and conflict and compromise have been the dominant characteristics of its life since then. The settlement saw the extinction of Maori fishing rights under the Treaty of Waitangi.

The Sealord Deal was perceived to be a recognition of Māori fishing rights by the Crown and that by providing Māori with a major share and stake in the fishing industry, the Crown “fulfilled its Treaty obligations to Maori”.⁹⁶ However, the Sealord Deal “sacrificed fundamental principles for short-term gains”.⁹⁷

When Māori agreed to the Sealord Deal, Māori fishing rights that derived from the treaty, common law, and aboriginal title were extinguished.⁹⁸ The difficulties of the Sealord Deal were noted by Milroy⁹⁹ when discussing the issue of the Crown (following the Sealord Deal) having to act in accordance with the principles of the Treaty of Waitangi. Milroy concluded that the principles of the Treaty of Waitangi were developed from a Pākehā court and that s 10 (of the Treaty of Waitangi (Fisheries Claim) Settlement Act 1992) is a breach of the treaty “because it gives to the Minister the right to make regulations governing Māori in the exercise of our customs”.¹⁰⁰ Milroy further contends that the newly formed regulations from the Sealord Deal meant that “Māori can have some control over customary fishing and some control in respect of mātaimai reserves, but it is

90 Munro, above n 87, at 412–413.

91 Treaty of Waitangi (Fisheries Claim) Settlement Act 1992, s 10(b)(ii).

92 Section 10(c).

93 Bourassa and Strong, above n 55; Boast, above n 5; Milroy, above n 5.

94 Waetford, above n 87; Munro, above n 87; Guth, above n 16, at 182.

95 Milroy, above n 5, at 63.

96 Munro, above n 87, at 389.

97 At 389.

98 Milroy, above n 5, at 71.

99 Milroy, above n 5.

100 At 81.

still within the overarching control of the Minister”.¹⁰¹ Furthermore, as Munro outlines, the Sealord Deal:¹⁰²

... breaches the Treaty principles developed by the Waitangi Tribunal and the courts. In its substance, it fails to respect the status of the Treaty as a fundamental constitutional document conferring ongoing rights and laying the basis for a developing partnership. It allows the Crown to exceed the legitimate bounds of *kāwanatanga*; and key issues surrounding the restoration of *rangatiratanga* have gone unaddressed.

The Crown exceeds the bounds of *kāwanatanga* because the Crown has extinguished Māori fishing rights that are guaranteed under the Treaty of Waitangi. The Crown purposefully diminishes *rangatiratanga* through restricting *rangatiratanga* to regulation-making. Furthermore, the Crown positions its role as being superior and final. Milroy questions whether Māori “have any chance of achieving *tino rangatiratanga* in respect of the fisheries” and further outlines that:¹⁰³

the promise of the Treaty, that Māori would continue to enjoy the governance and bounty of the fisheries resources that they had prior to European contact, has not been fulfilled ... The settlement provided for the extinguishment of Māori rights, including *tino rangatiratanga*, in exchange for limited rights under the QMS and the customary fishing regime. Whether that exchange will provide Māori with the benefits of governance that we should have had under the Treaty is yet to be seen. But, in light of what has been provided under the legislation, any *rangatiratanga* will be but a shadow of what might have been.

X. CONCLUSION

Milroy’s statement is an important one.¹⁰⁴ Māori fishing rights today are described as Māori non-commercial (or customary) rights and are divided into Māori customary fishing and Māori customary fisheries management tools. This new customary fishing and fisheries management sector is very different from the rights that were guaranteed in both versions of the treaty. There is a shift in emphasis from “*te tino rangatiratanga o ō rātou taonga katoa*” to restrictive interpretations of *rangatiratanga* in law; interpretations which are based on prior restrictive Māori fishing legislation. What are left are legislative attempts to enable *rangatiratanga* to be properly exercised but result instead in a limited ability of Māori to apply *rangatiratanga* in accordance with their value system.

Taiāpure fisheries legislation is situated within a context of the reclamation and definition for Māori fishing rights. Although taiāpure was introduced as a means to make better provision for *rangatiratanga*, the discourses to provide this “*rangatiratanga*” that the Crown draw upon, stem from the historical legislation that taiāpure was created to reject and replace. Evident within the taiāpure fisheries legislation were discourses of: reserves; site-specific rights restricted to small defined areas; management by regulations; *rangatiratanga* under the Minister of Fisheries control; management by a committee; and partnership. The discourses of *rangatiratanga* that are espoused in taiāpure fisheries legislation are not new discourses, and can be traced to particular historical fisheries legislation that restricted Māori treaty fishing rights.

101 At 84.

102 Munro, above n 87, at 427.

103 Milroy, above n 5, at 63.

104 Milroy, above n 5, at 84–85.

As Fairclough outlines, social change is characterised by changes in the language and discourses that are used.¹⁰⁵ In the case of the taiāpure fisheries legislation, which was created in a period of intense social change, in a context of the Māori revitalisation in the 1970s and 1980s, there was limited change in the language used within the legislation to reflect this social change. While the term rangatiratanga was introduced into the legislation, it was nothing more than “window dressing”.¹⁰⁶ There is limited change in the language because there are limited provisions for rangatiratanga provided within the legislation, as evidenced by the lack of recontextualisation of the emergent discourses of rangatiratanga into the taiāpure fisheries legislation.

XI. ACKNOWLEDGEMENTS

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105 Norman Fairclough “Critical discourse analysis” (2005) 9 *Marges Linguistiques* 76.

106 The phrase used to describe the Fish Protection Act 1877 in Wai 22, above n 17, at [5.4.6].

CLINICS: HOW TO TEACH THE ART OF “LAWYERING” – DOES IT HAVE A PLACE IN ACADEMIA?

BY CHERYL GREEN*

Learning the theory of law is and always will be of paramount importance, as students must understand that before they can go on to practice law. But how can we assist our students to make that transition from the theory to the practice of law? When and how is it most appropriate to undertake this? What are the challenges taking place today that we need to take into account and plan for?

I. INTRODUCTION

What is required to produce a good lawyer capable of entering the realm of private or other types of law practice? Law is a profession and a business. From a professional and/or business perspective, a lawyer needs to meet the following requirements:

- (a) intellectual horsepower sufficient to excel in his or her role as a lawyer;
- (b) quality of work output – the ability to produce high quality work with attention to detail;
- (c) achievement of targets in day-to-day work – the setting of realistic objectives and priorities and the initiation of prompt corrective action if required;
- (d) meeting deadlines – the ability to complete work and to manage time effectively;
- (e) cost effectiveness – making optimum use of financial and other resources;
- (f) decision-making – an ability to make sound decisions based on fact and to take initiative; to accept responsibility for decisions. It is also about the ability to follow through and avoid procrastination;
- (g) problem-solving – analytical skill and the ability to develop effective solutions;
- (h) job knowledge – knowing and understanding his or her brief;
- (i) innovation/creativity – an ability to think creatively within the context of his or her own specialisation and to find original solutions to problems;
- (j) leadership – effective management of, and planning with, team members, including the delegation of jobs at an appropriate level;
- (k) team building – an understanding of group processes and the coaching and development of all team members;
- (l) relationships – an ability to generate and sustain appropriate professional relationships;
- (m) communication skills – oral – an ability to communicate logically, clearly and with conviction; and
- (n) communication skills – written – an ability to present documents in a clear, concise manner.

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Looking at this list it is clear that many of the qualities required are not based on legal principles or in fact in law at all. Therefore, whilst law students must still learn to research, write and analyse the law, students also get great value from learning how to think like lawyers, in particular, ones who learn how to learn from their own experience to ensure that their education does not end when they receive their degrees.

Arguably, law schools are in a position to encourage these types of qualities. One simple example is the requirement for meeting deadlines – how does the faculty deal with students on this issue? Certainly there are policies and rules that cover this but are they consistently applied and do they assist the students with understanding that while at the moment the only people they are letting down are themselves, students must certainly have an understanding of the consequences of missing deadlines when they practice law.

To help students achieve this, legal education must include a strong element of practical legal skills *as well as* the academic skills of researching, writing and analysing. One of Te Piringa’s strengths is the early incorporation of learning some of those skills by way of interviewing, mooting, negotiation, mediation and specialised advocacy assignments together with a focus on dispute resolution skills, which is one of the essential skills of a competent practising lawyer.

In particular, mooting exposure is given to students in Year One during Legal Method. Year Two provides for an option to moot in Administrative Law and Year Three has a moot in Dispute Resolution – all of which are assessed and marked. Teaching a law student to stand up and speak in such an environment provides essential skills which mirror exactly what a lawyer is expected and obliged to undertake on behalf of those he or she represents. Ultimately, it may not be in a courtroom setting, but the ability for a lawyer to properly represent the client is a professional obligation, not an option.

The practice of good legal drafting is incorporated into Te Piringa’s compulsory and optional curriculum.

II. TRADITIONAL MODES OF TRAINING GRADUATES

In the article by Jennie Vickers “Being a Law Grad in 2012 – will it be terrific or traumatic?”¹ the author analyses “millennials”, which are described as those born between 1980 and 2000, and looks at whether “we have a clear sense of how we actually manage, lead, mentor, and nurture our grads currently”, once those millennial graduates start to practice law. There is an interesting “Managing Millennials Model” incorporated into the article that describes some “traditional” learning models within law firms.² Some examples follow:³

Revenge Seekers – say things like:

- (a) I suffered so should you ...
- (b) You need to do the hard yards ...
- (c) It is so easy now in comparison ...

1 Jennie Vickers “Being a Law Grad in 2012 – will it be terrific or traumatic?” *NZ Lawyer* (New Zealand, 24 February 2012).

2 At 25.

3 At 25.

Deserters – say things like:

- (a) I haven't got time to give you instructions but ...
- (b) The firm has never done this type of work but ...
- (c) Not a good effort but work out for yourself what you did wrong ...

Ready, willing, but unable – say things like:

- (a) We have never had a grad before what do you need? ...
- (b) What do they teach you in [professionals]? ...
- (c) My door is always open but don't get offside with my PA ...

Empowerers are those that attempt to depart from the above three categories and are prepared to put in a high investment effort with low control based on the premise that the best training is not telling and risking them forgetting, not showing and hoping they will remember, but *allowing them to do it themselves so that they will understand*.

The article lists some suggestions to help you become an Empowerer when training a student or graduate in the practice of law:⁴

- (1) Set realistic mutual expectations from the start *and deliver on them*;
- (2) Draw up an investment plan covering all the types of investment you are going to make and deliver on the plan;
- (3) Introduce a structured mentoring and coaching plan with robust two-way communication flows;
- (4) Look at your brand and test its integrity. If it does not match, fix it;
- (5) Get with the programme on technology instead of sticking with being a luddite, as a badge of honour it is not;
- (6) Get mentoring or coaching for yourself if any of this seems unachievable; and
- (7) Celebrate your success as you move into the green zone.

Shelley Dunstone, lawyer and consultant, who runs Legal Circles in Adelaide and is convenor of the groups “Thought Leadership for Lawyers” on LinkedIn and Martindale Connected, has written “Seven ways to accelerate on-the-job learning for lawyers”.⁵ She suggests seven ways to impart wisdom and to make new lawyers productive sooner:⁶

- (a) *Build on Basics*: relating new ideas to existing knowledge;
- (b) *Think Aloud*: expose your thinking process;
- (c) *Ask Questions*: to help, you need to know what they are thinking;
- (d) *Seek Questions*: encourage your students or graduates to ask probing questions;
- (e) *Widen the Picture*: provide context and linkages;

4 At 26 (emphasis added).

5 At 26.

6 At 26 (emphasis added).

- (f) *Expose the Learning*: reflection on learning aids retention; and
- (g) *Work on Strengths*: nurture their individual style.

III. LEARNING VERSUS KNOWLEDGE

In Dan Berrett’s article “Harvard Conference Seeks to Jolt University Teaching”, he observes that:⁷

[a] growing body of evidence from the classroom, coupled with emerging research in cognitive psychology and neuroscience, is lending insight into how people learn, but teaching on most college campuses has not changed much, several speakers said ... at Harvard University at a daylong conference dedicated to teaching and learning.

... Students should be made to grapple with the material and receive authentic and explicit practice in thinking like an expert ... [and a faculty] would need to provide timely and specific feedback, and move beyond lectures in which students can sit passively receiving information.

... [O]btuse writing and poor teaching both reflect what [one professor] called the “curse of knowledge.”

Having this curse means that a writer or professor often assumes knowledge the reader or student does not have. More important, the writer or teacher usually forgets that the reader or student is struggling to learn the material for the first time, which often was long ago for the teacher:⁸

It’s hard to know what it is like for someone else not to know something that you do know ... It’s the chief driver of bad writing and, I would argue, bad teaching.

IV. USE OF TECHNOLOGY TO ENHANCE PRACTICAL LEGAL SKILLS

There is no doubt that today the traditional way tertiary institutions teach is under challenge. In an article, Des Butler states that:⁹

Seminal reviews in the 1990s, both in Australia and overseas ... advocated a greater focus on “what lawyers need to be able to do, [rather than being] anchored around outmoded notions of what lawyers need to know”. ... In endorsing these observations, the Australian Law Reform Commission noted the advantages of combining the teaching of such skills within substantive law subjects, giving as an example the law of contracts, which provided opportunities for skills development in negotiation and the ethical considerations involved in negotiations.

The use of narrative in higher education is not a new concept. In legal education, the “law and literature” field of study draws connections between legal theory and literature, including William Shakespeare’s *The Merchant of Venice*, Charles Dickens’ *Bleak House* and Harper Lee’s *To Kill a Mockingbird*.¹⁰

7 Dan Berrett “Harvard Conference Seeks to Jolt University Teaching” *The Chronicle of Higher Education* (online ed, Cambridge (MA), 5 February 2012)

8 Steven Pinker, quoted in Dan Berrett, above n 7.

9 Des Butler “*Second Life* machinima enhancing the learning of the law: Lessons from successful endeavours” (2012) 28 *Australasian Journal of Educational Technology* 383 at 384 (citations omitted).

10 At 391 (citation omitted).

According to Butler:¹¹

A narrative learning environment can not only convey important information, but also provide contextual cues that facilitate recall of that information in situations in which it is likely to be applicable.

At the Queensland University of Technology (QUT) School of Law, two programs – *Air Gondwana* and *Entry into Valhalla* – employ machinima created using the *Second Life* virtual world to create authentic learning environments for the teaching of negotiation skills and legal ethics, respectively.

Second Life machinima such as that in *Air Gondwana* and *Entry into Valhalla* adds a new dimension to a narrative-centred approach to learning. Machinima was created using a virtual environment that can be used “as a means of facilitating and accelerating the creative story development and storytelling process”.¹²

Machinima simulations enable students to take an active, practical approach to their learning rather than a passive, theoretical approach. They engage students and allow them to appreciate the relevance of what they are learning to the real world, thereby helping to facilitate their transition from study to their working lives.

Another way that virtual worlds can assist learning is by going places it is physically difficult or costly to get to. Creating a virtual law court would be an example.

V. PRESENT DAY NEW ZEALAND AND FUTURE PROPOSED CHANGES

A. Post-Graduate/Preadmission Professional Legal Training

Currently the Professional Legal Studies Course is a compulsory post-graduate requirement prior to a person’s being admitted to the High Court of New Zealand as a barrister and solicitor, and subsequently obtaining a practising certificate. The course can be undertaken by 13 weeks’ full-time or 19 weeks’ part-time study with set requirements and assessments. This type of training has been in place since 1988. The Professional Legal Studies Course and Assessment Standards Regulations 2002 (2002 regulations) set out the aims of the Professional Legal Studies Course (PLSC).

New Zealand has one of (if not the) shortest professionals course in the world. There are currently two providers that deliver professionals in New Zealand: the Institute of Professional Legal Studies and the College of Law.

As well as universities and Professional Legal Services providers, New Zealand law firms play a crucial role in training soon to be lawyers. Law firms begin to shape the careers of law students in various ways and at various stages of their training including: school leaver scholarships, university scholarships, summer/winter clerk programmes and graduate programmes.

It can be strongly argued that it is not the role or responsibility of university law schools to prepare graduates for practice as lawyers. The New Zealand legal profession has an inherent interest in ensuring that young lawyers are competent and able to adequately service the public and uphold the profession’s reputation.

11 At 391.

12 Leo Berkeley “Situating Machinima in the New Mediascape” (2006) 4 Australian Journal of Emerging Technologies and Society 65 at 75, as quoted in Des Butler, above n 9, at 391.

The introduction of a requirement that New Zealand law firms of all sizes and in all practice areas take responsibility for training graduates thoroughly, and in accordance with stipulated regulations, would arguably serve this interest and likewise benefit trainees. However, practice-based learning programmes are expensive to regulate and monitor, and put considerable pressure on the resources of training organisations. Small and medium-sized firms who do not have extensive HR resources would be the most heavily impacted were such programmes to be introduced.

Employers may also react negatively to having to employ graduates for any extended length of time without being able to have them undertake the work of admitted lawyers or bill their time. Lengthening the time taken to qualify after graduation is also likely to be met by trainees with some displeasure. The ability of graduates to qualify at all would also become dependent on their ability to obtain pre-admission employment.

An alternative could be an appropriate administrative body that could set standards for, and monitor the implementation of law firms’ in-house training programmes. Given that current in-house training programmes vary in quality and depth and are not available to all graduates working in the legal field, this could improve the competency of young lawyers and help level the playing field in terms of training opportunities.

Of interest is the reaction of the legal profession to the current arrangements regarding the education and training of law graduates. In a 2011 NZLS survey, there was no surprise that, when looking at employing graduates, the emphasis is on the LLB degree and the grade average achieved by students, with the top 10 per cent of students being sought after by the “top 10” law firms.

However, general consensus was that masters and postgraduate degrees do not enhance employability, and for firms in the provinces, students with masters degrees are seen as over-qualified and likely to leave for better prospects elsewhere.

Whether changes such as those mentioned above, or others (for example, making PLSC longer and more comprehensive or designing a specific, compulsory course for barristers) are necessary or appropriate can only be satisfactorily determined following a comprehensive, empirical investigation into the adequacy of the New Zealand PLSC as it currently stands. It was recommended that such an inquiry be commissioned and undertaken.¹³

Regarding the future of professional legal training, it has been made clear that a stringent review of professional legal training as it currently stands is required and recommended.

The New Zealand Council of Legal Education has engaged the Right Honourable Sir Andrew Tipping to conduct a Professional Legal Studies Course Review. There are 8 terms of reference to the report, including:¹⁴

- (iii) Examining the extent to which other types of teaching and learning, for example lectures and seminars, should be integrated with a skills-based approach, and overall the extent to which other types of teaching and learning should be recognised in the Regulations.
- ...
- (v) Examining whether trainees are developing skills outside of the Professional Legal Studies Course, and the extent to which these may overlap with skills prescribed by the Regulations.

The report is scheduled for completion towards the end of 2013.

13 Ali Van Ammers “Report on Professional Legal Training in New Zealand” (Report prepared for the law deans, 2011).

14 New Zealand Council of Legal Education “Professional Studies Course Review” (5 September 2012) at Terms of Reference.

Te Piringa will be looking at how clinics may be able to contribute to any future decisions made in this area.

B. Continuing Professional Development within the Profession

At its meeting on 11 September 2009, the New Zealand Law Society Board received a paper on competency assurance issues including a section on mandatory continuing legal education (MCLE).

The Board agreed:

- (a) in principle, to the introduction of a new competency assurance scheme to include, in the first instance, some form of MCLE yet to be determined; and
- (b) to authorise the Executive Director to take all necessary steps to implement the scheme.

A paper incorporating a proposed scheme of Mandatory Continuing Professional Development (CPD) was produced by the New Zealand Law Society in 2012.¹⁵ The paper was a careful analysis of the potential benefits and possible detractors of such a scheme together with comparisons to other similar schemes for lawyers adopted in Canada, Scotland, England and Wales. The following is a brief summary of part of that report.

On the positive side, MCLE was said to:

- (a) demonstrate the profession's concern about competency;
- (b) provide a positive incentive to lawyers to participate in CLE; and
- (c) provide a positive incentive to providers to develop more and better courses, in particular using technology in new and innovative ways.

On the other hand, only a small percentage of lawyers were incompetent. Most provided a good service to their clients and it would be unfair and inefficient to force all lawyers to comply with a programme designed to deal with the shortcomings of the small minority. Also:

- (a) There is no evidence traditional points-based MCLE schemes improves lawyers' competence and indeed, they might inadvertently decrease in some circumstances.
- (b) MCLE did not usually address the behaviours that typically led to complaints and findings of unsatisfactory conduct.
- (c) Traditional points-based MCLE went against accepted principles of adult learning. It was not lawyer-centred and focused on "inputs" not "outcomes" or results.

Some risks that could be associated with introducing MCLE included the possibility that:

- (a) MCLE might not improve the profession's competency and would thus add unnecessarily to the cost of practice to the detriment of the public and profession alike.
- (b) Practitioners from country districts might not be adequately catered for despite recent developments in technology.
- (c) Given the small size of the profession, some specialist groups would struggle to meet the scheme's requirements in a meaningful manner, particularly if "points" had to be gained by attending formal programmes.
- (d) Some lawyers might resent the fact the majority were apparently being made to suffer for the inadequacies of the small minority and might not support the programme for that reason.

¹⁵ New Zealand Law Society "A Proposed Scheme of Mandatory Continuing Professional Development (CPD)" (2012) <www.lawsociety.org.nz>.

Nevertheless, the report concluded that despite the above risks and shortcomings, the potential benefits of an MCLE scheme outweighed the disadvantages and that MCLE should be introduced.

For various reasons (too numerous to refer to here¹⁶) it has been proposed that the requirements relating to ongoing legal education should refer to continuing professional development (CPD) rather than to mandatory continuing legal education (MCLE).

CPD could be defined as:¹⁷

... a mandatory programme of education and training designed to maintain and increase competency within the profession by requiring lawyers to identify their individual learning needs, to develop and expand their professional knowledge and skills, and their understanding of the law and of the practice of law, including the relevant rules of conduct and client care.

It was proposed that this definition be adopted.

The New Zealand Law Society’s Council approved the current proposed Lawyers and Conveyancers Act (Lawyers: Ongoing Legal Education) Rules (CPD Rules) at its meeting in Wellington on 19 April 2013. The CPD Rules are in the process of being sent to the Minister of Justice for her approval as required by s 100 of the Lawyers and Conveyancers Act 2006. Provided this approval is given, the first CDP year will run from 1 April 2014 to 31 March 2015. 1 October 2013 to 31 March 2014 will be a transitional period.

The New Zealand Law Society has provided draft guidelines for the CPD Rules (available from the New Zealand Law Society’s website) which are regularly reviewed and enhanced as feedback is received.

One of the crucial parts of the CPD scheme is what constitutes eligible activities. While eligible activities must still be verifiable in that participation must be confirmed by some form of documentation it is proposed that the range of permitted activities, providers and topics should be much broader than used to be the accepted practice.

The report proposed that *any person or organisation should be able to organise an eligible activity* and further that other activities that are not course-based may also be eligible, such as *certain distance and online learning activities, teaching, lecturing and instructing, and legal writing*.

Eligible activities may include:

- (a) courses or programmes that could be arranged by universities;
- (b) lecturing or teaching and preparing for law courses at a tertiary level;
- (c) instructing or demonstrating at skills workshops, speaking at conferences, discussion groups and the like;
- (d) preparing and updating materials and papers for the above activities;
- (e) writing law-related books and articles; and
- (f) preparing formal submissions on proposed reforms of the law or of legal processes and procedures on behalf of the law society or a legal association (but not for clients).

¹⁶ See New Zealand Law Society, above n 15, at 10.

¹⁷ New Zealand Law Society, above n 15, at 11.

The report also proposed that there are a number of *non-eligible activities* in terms of CPD including:

- (a) assisting at Community Law Centres and taking part in pro bono activities; and
- (b) mentoring.

In general, any topic which the individual lawyer can show is relevant to their learning needs, and can justify, may count towards his or her CPD hours. The guidelines provide that lawyers must use their professional judgment to decide if an activity appears to align with their continuing professional development plan and record.

Once the CPD has been finalised and put into place, a skilful assessment of courses and/or programmes together with consultation with the local law practitioners will be undertaken by Te Piringa. The aim will be to encourage experienced practitioners to become involved in aspects of clinical teaching at a tertiary level, which would in turn provide the practitioners with some substantial CPD hours that comply with the requisite rules. One example could be overseeing the preparation of formal submissions by law students.

C. Community Law Centres

The Ministry of Justice (MOJ) have spent the last 18 months looking at making fundamental changes to the way our Community Law Centres work and how they are funded. The rationale behind these changes is an acknowledgment by the MOJ that these services are a vital part of the community, but they want the centres to be smarter in performance on a national basis.

There are currently 26 Community Law Centres around New Zealand providing “variable services and quality”.¹⁸ All of their contracts expired in June 2013 and originally that was to be the elected “point of change” from the Ministry’s perspective.

The MOJ is taking somewhat longer to incorporate the changes and currently the MOJ contracts for most Community Law Centres have been “rolled over” for a further year. The first proposed change is that the Ministry intends to redefine the monetary relationship with the centres from a funding model to a purchasing of services model. The second proposed change is that the Ministry is looking closely at the viability of reducing the number of nationally funded centres to a maximum of 10 to 15.

The aims of the MOJ’s new approach to purchasing community legal services are as follows:

- (a) increased access to services and better outcomes for vulnerable communities;
- (b) more consistency of services, and service quality, across the country;
- (c) recognition of the role of Community Law Centres in the continuum of publicly funded legal services: Maximise the contribution of community legal services to the prevention and early resolution of legal problems;
- (d) community legal services that are ready to meet demands by:
 - (i) modernising services;
 - (ii) maximising delivery channels;
 - (iii) leveraging off existing government services; and
 - (iv) collaborating to improve value for money;

¹⁸ Bryan Fox “Improve access to community legal services so that all New Zealanders are able to receive support” (Ministry of Justice presentation to Hamilton District Community Law Centre, April 2012).

- (e) effectively prioritised services nationally and locally;
- (f) demonstrated effectiveness and value for money;
- (g) a sustainable funding base for community legal services;
- (h) a shift in role for the Ministry from funder to that of purchaser of services, entailing compliance with the Government’s Mandatory Procurement Policy; and
- (i) compatibility with Government’s intentions for its role in provision of legal services.

The Ministry has also set out a list of what is likely to change with the introduction of this new “model” for Community Law Centres:

- (a) purchase of services guided by a *needs analysis* and services focused on areas of greater need;
- (b) a review of the definitions and scope of community legal services;
- (c) a range of services purchased that may change based on priorities;
- (d) *greater focus on services that steer matters away from the courts (early intervention and prevention)*;
- (e) selection of providers by tender, including *consideration of a broader range of providers: including non-traditional Community Law Centres* – the focus will be on achieving aims;
- (f) a review of National Performance Standards;
- (g) a change in accountability and reporting against outputs – reporting against outcomes and quality standards;
- (h) *a change in the number of organisations contracted* – improved governance and better balance between governance and management effort and service delivery;
- (i) expanded channels of service delivery – more recognition of the role for other service portals for example CAB, Heartlands and Community Link Centres;
- (j) more co-ordination of some types and specialities of services;
- (k) an increase in services funded by purchasers other than the MOJ;
- (l) better information support to Community Law Centres through the NLIS (National Legal Information Services); and
- (m) improved focus on customers, with greater community ownership and perspective.

The timeframe within which all of this change was to take place was very tight and, ultimately, could not meet the MOJ’s proposed timeframe of July 2013.

The Ministry originally proposed to decide the geographical need and where to buy services; for example, they will tell the Centres what they are trying to buy and the skills needed. Tenders were to be classed as an “expression of interest”. In the original proposal, when the MOJ invites tenders for the services, all Community Law Centres were expected to tender for services but not exclusively – the tenders would also be open to other organisations. Restorative Justice is up for tender at the same time (and has always been separately tendered for) and an example might be that the Hamilton Community Law Centre could tender for that as well.

The Justice Department is encouraging centres to look at what they could “hook in to”¹⁹ that fits that particular centre. They are putting an emphasis on local collaboration that can provide a triage type of situation that can give clients “fast entry” to other providers, for example budget services and mental health care.

Needless to say there have been some very urgent and detailed discussions at Community Law Centres, with other service providers and with Community Law Centres o Aotearoa to try and

19 Fox, above n 18.

ascertain the best outcome. At present such discussions are limited to the type of resolution that can be made until such time as the requisite information from the Ministry regarding geographical need and the purchasing of services is available.

With this collective approach being required there will be scope for Te Piringa to provide a collaborative approach with the local Community Law Centre and other associated organisations to assist not only with the transition of the new system but with the provision of services in a much more flexible way than is happening presently. This could vary from a paper analysing the changes to provision of law students to assist in a variety of clinical undertakings. Once the tenders have been made and the decisions of the Ministry made we will have a much firmer base on which to work on.

D. Pro Bono Legal Work

There has always been an expectation and undertaking of work done for free in the legal profession but the way it has been exercised in New Zealand to date has been mainly in an ad hoc manner with lawyers choosing what organisations, clubs, societies and so on to affiliate with and to what or whom the free legal services are applied. More recently, some of the larger law firms have been much more organised with pro bono work incorporating structures and budgets designed to reflect that as part of a practitioner's practice.

Internationally, pro bono work has been recognised as not a substitute for legal aid but a necessary supplement because unmet legal needs exist in every society no matter how robust a state's organised legal aid system. Governments usually have an obligation to fund and provide legal aid, and the availability of pro bono work should not be an excuse to reduce or eliminate a legal aid system. Governments should work closely with clearinghouses to ensure that unmet legal needs are addressed.

According to PILnet, the global network for public interest law:²⁰

Law schools and law students can play a vital role in the future advancement of the pro bono community. In a 2009 survey conducted by PILnet of 148 lawyers in fifteen different countries, fifty-seven percent of all respondents said that the greatest impediment to pro bono work is that it is "not prioritised", and thirty-six percent indicated that pro bono work is not "respected or valued generally". Law students are sometimes taught that lawyering is just another type of business, and no information is provided to them about the social and ethical responsibility of the profession. To overcome these impediments, lawyers need to be educated on the value and benefit of pro bono practice early in their careers. If this education starts in law school, lawyers are more likely to appreciate the value of pro bono practice and it will gain respect and become prioritised in the legal community.

Law students are ideal candidates to conduct pro bono work (under the supervision of a suitably qualified lawyer). They are not constrained by the commercial pressures of an employer. Additionally, students that participate in pro bono programmes increase their knowledge and marketability, gain practical experience, develop skills and facilitate their involvement in the community. University-based clinical programs, specifically, are excellent ways for law students to take part in pro bono work.

Providing it has the approval and cooperation of the law faculty, it is possible for a clearinghouse to create a legal clinic at that law faculty.

20 PILnet: The Global Network for Public Interest Law and Advocates for International Development *Pro Bono Clearinghouse Manual – Resources for developing pro bono legal services* (2011) at 49.

E. How to Create a Legal Clinic (within the Context of a Pro Bono Clearing House)

PILnet sets out the following stages:²¹

The first step is to find a key patron of the clinic, whose involvement and assistance may play a vital role in the attainment of subsequent objectives.

A patron will prove particularly helpful in obtaining the consent of the dean [of the faculty] to enter the legal clinic’s program into the university curriculum. This is the very foundation for the clinic’s future development.

The next task is to find an office and provide it with the necessary equipment, which is instrumental for the clinic to operate efficiently. If in the initial phase of clinic organisation problems present themselves in obtaining an adequate office at the university, one may arrange with the charitable organisations, which will refer clients to the clinic, to hold client conferences in their offices, thus limiting operations on the university premises to consulting opinions with supervisors and to holding weekly seminars.

Finance is necessary to secure the clinic’s efficient operations. It is needed to pay for the running of the office and for an office secretary. Such means may be obtained from institutions [such as a University] and foundations such [as] local government. ... It should also be kept in mind that one should not assume that any of the [institutions initially funding the clinic] will continue financing the clinic indefinitely. The aim of the clinic should be to become incorporated in the curriculum and to build itself a strong position at the university law faculty and, ultimately, to obtain recognition in the form of financing from the university budgets.

It is important in the process of establishing a legal clinic to initiate close cooperation with charitable organisations from a given city (such as city social services, Caritas, the Red Cross, ... offices of members of parliament and parishes) so that such organisations may refer clients to the clinic. Such referral would translate into the lack of need to select cases within a specified type, or to verify the financial status of the clients.

The next step shall be recruiting students to work in the clinic, and the process of establishing the clinic should be concluded with the fulfilment of all standards of legal clinical operations[. This includes professional indemnity insurance,] the proper organisation of the clinic’s secretary office, and the drawing up of appropriate sets of rules and forms which are going to be used in the clinic.

In conclusion – how do you create a legal clinic?

- (a) Find a patron for your clinic.
- (b) Obtain consent to incorporate the clinic in the curriculum.
- (c) Secure an office.
- (d) Research financing options.
- (e) Initiate cooperation with charitable institutions in your city.
- (f) Promote the clinic and assist with student recruitment.
- (g) Make sure that the clinic meets all standards from the onset of its operations.²²

21 PILnet, above n 20, at 108.

22 PILnet, above n 20, at 109.

Focusing back on to current practices in New Zealand, there is currently work underway to launch New Zealand's first pro bono clearinghouse. The intention of such a clearinghouse is to work with the entire profession to:

- (a) ensure that pro bono help reaches the most vulnerable members of our society;
- (b) strengthen the ability of non-profit organisations to serve their communities;
- (c) increase the capacity of Community Law Centres and other referral agencies;
- (d) supplement the services of the legal aid scheme and free legal advice organisations;
- (e) *contribute to law reform submissions and other initiatives for the public good;*
- (f) support the Government's commitment to universal access to justice;
- (g) educate individuals and non-profit organisations on legal issues;
- (h) develop the practical skills and general expertise of participating lawyers;
- (i) build a strong pro bono culture that involves all sectors of the legal profession;
- (j) *nurture future generations of lawyers to willingly shoulder their professional obligations;*
- (k) *provide university law schools with access to pro bono opportunities for their students;*
- (l) monitor, measure and evaluate the quantity and quality of pro bono in New Zealand; and
- (m) publicise and celebrate the pro bono achievements of our country's lawyers.

Such an institution could be a registered charity or charitable trust with its patron and governing board drawn from its stakeholder groups.

The creation of such a clearinghouse could be timely given that the MOJ are looking at changes in the way that Community Law Centres' funding is allocated in the future as outlined above. The changes could well put further pressure on the Centres' ability to provide ongoing representation across all legal areas and geographic locations. The aim of a clearinghouse should be to ensure that the profession's pro bono contribution is delivered in a way that complements existing free legal advice services and the legal aid scheme.

To further develop New Zealand's pro bono culture, the clearinghouse is looking at building strong relationships with New Zealand's law schools. They will look to assist the law schools to educate the students about their professional obligation to undertake pro bono work, and where possible to find opportunities for motivated students to participate in the clearinghouse's work. They will endeavour to involve law students from the first year of the three-year proposed pilot scheme and will place particular emphasis on students' participation as the clearinghouse develops specialist projects in Year Two and beyond.

This proposal is still very much at the developmental stage and yet to receive the requisite funding but it is certainly worth analysing the potential initiatives of such a proposal.

VI. CLINICS WITHIN THE LAW CURRICULUM

Jeff Giddings has put forward the following description of clinical legal education:²³

Clinical legal education involves an intensive small group or solo learning experience in which each student takes responsibility for legal and related work for a client, whether real or simulated, in collaboration with a supervisor. Structures enable each student to receive feedback on their contributions and to take the opportunity to learn from their experiences through reflecting on matters including their interactions with the client, their colleagues, and their supervisor, as well as the ethical dimensions of the issues raised and the impact of the law and legal processes.

In his article, Giddings discusses how students are given the opportunity to consider how the theory-based learning they have done elsewhere connects with the practice of law. The type of integration required for a clinic is usually described in positive terms. What can often be missing is detail on *how* to make integration effective and sustainable.

Arguably, in order for clinical legal education to be a sustainable practice, it is likely to rely on multiple contributions from different participants and their appreciation of the benefits of working to integrate different interests. In other words:²⁴

[G]oal alignment is critical to integrative relationships with parties sharing some common goals and objectives. Such relationships see parties focus on what they share while also recognising that they each bring valuable and distinctive contributions to a relationship characterised by trust and shared understandings and expectations. Commitment to a problem-solving framework also facilitates integrative approaches.

...

Law schools need to be realistic in setting objectives for clinical integration and focus on ensuring that effective practices are sustained in the long term.

...

Integration of clinical activities should encompass both the teaching and research dimensions of a law school.

...

Integration efforts should be focused on those areas of substantive law being addressed both in the clinic and in the classroom.

This involves more than an appreciation of the benefits of students learning in a practice setting.

I now return briefly to three of the subject matters set out previously in this paper and how each of them may have capacity to contribute to or become part of a clinic that is serving its community, the profession and the faculty itself.

A. Professional Legal Training and Postgraduate Students

With regard to incorporating a law clinic within the requirements of professional legal training and postgraduate students, the task of developing a comprehensive clinical program as part of

23 Jeff Giddings “Why No Clinic is an Island: The Merits and Challenges of Integrating Clinical Insights across the Law Curriculum” (2010) 34 Wash UJL & Pol’y 261 at 265.

24 Giddings, above n 23, at 266, n 13; 288–289; 266; and 269 (citation omitted).

a law degree which also satisfies practice admission requirements must be carefully considered. This requires substantial planning efforts and care must be taken to ensure that those efforts are not solely focused on meeting the requirements of the admitting authorities (for example the New Zealand Law Society Council for Legal Education), with less attention paid to determining how to best integrate and sequence different forms of clinical teaching across the program.

B. Use of Technology to Enhance Practical Legal Skills

Use of technology within a law school clinic can be used to enhance practical legal skills. In many cases, it is imperative that students can “practice” a skill before being sufficiently competent to be involved in a “live” clinic. Integrative approaches enable simulations to be utilised to provide students with frameworks they will need to deal effectively with the uncertain, dynamic nature of the person-to-person contacts that characterise real client clinic work. Simulations can at least raise student awareness of the complexities involved in relatively unstructured situations involving clients, supervisors, witnesses, bureaucrats, and other professionals. Technology is making these types of simulations a reality via programs such as *Second Life* Machinima and we are currently working on the production of such a programme for our Year Three Dispute Resolution course to utilise.

C. Continuing Professional Development

Clinical teaching methods and insights can be constructively integrated into classroom-based courses. “Chalk and talk” teaching/lecturing can include references to clinics and when applicable can be taught by current clinicians/practitioners who bring their clinical insight with them. The law and legal process can be examined, analysed and critiqued with the client’s concerns and interests in mind. The benefit of clinical education as a teaching technique focuses on the learner and the process of learning. Clinical legal education has the potential to alleviate concerns regarding monotony and mental fatigue that can develop in any course governed by a single teaching methodology.

Integration efforts should be focused on those areas of substantive law being addressed in both the clinic and the classroom. One option is to develop clinical components to traditionally taught courses. For example, in a Torts course, with support from the colleague teaching the course, a clinician or practitioner could teach a class on negligence using, with the permission of the client, a current file. The preparation of the claim could be explained, engaging students with relevant legislation and case law. Students can then be subsequently briefed on the case outcome. With Continuing Professional Development about to be introduced by the New Zealand Law Society in the near future, law faculties will be able to form liaisons with local practitioners to undertake these tasks as one of the eligible activities required for CPD for example lecturing or teaching and preparing for law courses at a tertiary level.

VII. PRACTICAL REQUIREMENTS OF CLINICS WITHIN THE LAW CURRICULUM

What is required to develop a curriculum that integrates a range of clinical methods and activities? Starting with the basics, the following three requirements will assist greatly in the effort to develop such integration:

- (a) the Dean’s support;
- (b) the practice of informally approaching a range of academic colleagues which in turn generated organisational momentum; and
- (c) enabling the development of simulated and real-client clinical components operating in parallel with substantive courses.

Also applicable is having a group of people working together, playing different roles, and working from different standpoints.

Another important factor of developing these types of programs is that they are of sufficient size to enable responsibilities to be shared and to emphasise effective integration to enable a group of academics and clinicians or practitioners to collectively take responsibility and provide leadership for the clinical program. Clinical programs are unlikely to find and retain individuals who, on their own, possess the range of skills and the inclination to effectively advance the multiple facets of their programme.

Healthy scepticism can work well with high-flying ideas regarding the creation of clinics. Good ideas can be examined by asking, “Yes, but how do you actually do it?” It is a balancing act and there is a need for ensuring that good ideas are tested and turned into something that is practical.

Conversely, what can hamper the development of such integration? Obstacles include:

- (a) “support” in theory only. This type of support is conditional. Support is provided only on the basis that it didn’t suck away what colleagues considered to be a disproportionate share of funds *and* they were not asked to go and work at or be involved with the clinic or with a clinician;
- (b) division of “camps” between clinicians and doctrinal scholars and overall isolation of the clinic;
- (c) student resistance based on inadequate academic credit for the amount of work required, for example it is designed to be tough in order to give it credibility but students hate it because it is a great deal of work for little credit;
- (d) under-resourcing of the project regarding both funding, and teaching staff and clinicians;
- (e) professors of relevant substantive courses not accepting skills education as legitimate, and in turn resisting a doctrinal course renovation; and
- (f) staff being expected to “wear too many hats”.

A. *Research Opportunities*

Given the emphasis and expectations by universities to the pursuit of scholarly research, the research opportunities generated by effective clinical integration may promote the sustainability of clinical programs. Substantial research projects tend to require a breadth of knowledge and expertise best provided by a team of researchers. Clinicians are ideally placed to provide insights from their practising areas, emphasising the strengths and limitations of problem-solving approaches. They can contribute expertise related to client-centred models of legal practice, alternative dispute resolution, and access to justice, as well as insights relevant to research projects

involving colleagues, especially in areas well represented in clinical casework such as family law, criminal law, immigration law, and ACC law.

B. *Law in Context in a Clinical Setting*

Considering that law in context is one of Te Piringa's founding principles, we need to look at how clinics can be aligned with and be part of that.

The Australian Government Office of Learning and Teaching has produced a Best Practices Australian Clinical Legal Education report. In their report the following was identified regarding law in context in a clinical setting:²⁵

We assert that clinical "graduates" are among the more ethically responsible lawyers in the community. We further assert that they confirm the capacity of the legal education system as a whole to produce socially aware and responsible professionals who can contribute constructively to just and equitable communities. It is also plausible to suggest that students' (clinical) education represents a cost-effective strategy over time for the community and profession because their skills and ethical understanding are far more likely to be retained within legal practice than those without such law school experience. Clinical experience is a high-quality approach to legal education that needs to be shared nationally and not just championed in a relatively few schools.

The Report also noted the following:²⁶

Through its immersion of students into real legal client work, clinical legal education (CLE) provides an extra dimension for studying law in context: teaching law students to think critically about law, rules and practices from a variety of perspectives and theoretical understandings of law. These perspectives include gender, race, disability, socio-economic, philosophical, cultural, Indigenous, political and other social constructs. Studying law in context also means analysing the role of power in shaping the law and legal system; and analysing the role of lawyers and how they perpetuate, challenge and reform structures, institutions, systems and relationships.

Teaching law in context is different from conventional "positivist" law teaching, which tends to allow students to accept that the law simply "is" as stated, and that its social context is irrelevant to understanding it. A clinical setting provides opportunities for students to see, analyse, reflect on and deal with the various ways in which law actually manifests in people's lives, and to consider the need for law reform.

C. *Learning Outcomes*

In the Best Practices report referred to above, the authors incorporated a set of potential Learning Outcomes for CLE courses and programs in Australia, which could apply and be adapted to clinical programmes within a New Zealand law faculty. These objectives are that:²⁷

[u]pon completion of a clinical course, the clinical student will demonstrate:

- promoting critical analyses of legal concepts through reflective practice;
- an ability to work collaboratively;

25 Adrian Evans and others *Best Practices: Australian Clinical Legal Education* (Australian Government Office for Teaching and Learning, September 2012) at 6.

26 At 15.

27 At 11.

- an ability to practice “lawyering” skills;
- developed interpersonal skills, emotional intelligence and self-awareness of their own cognitive abilities and values;
- a developing ability to “learn from experience”;
- an understanding of continuing professional development and a desire for life-long self learning;
- an understanding, and appropriate use, of the dispute resolution continuum (negotiation, mediation, collaboration, arbitration and litigation);
- an awareness of lawyering as a professional role in the context of wider society (including the imperatives of corporate social responsibility, social justice and the provision of legal services to those unable to afford them) and of the importance of professional relationships;
- a developing personal sense of responsibility, resilience, confidence, self-esteem and, particularly, judgment;
- a consciousness of multi-disciplinary approaches to clients’ dilemmas – including recognition of the non-legal aspects of clients’ problems;
- a developing preference for an ethical approach and an understanding of the impact of that preference in exercising professional judgment;
- a consolidated body of substantive legal knowledge, and knowledge of professional conduct rules and ethical practice; and
- an awareness of the social issues of justice, power and disadvantage and an ability to critically analyse entrenched issues of justice in the legal system.

D. Clinics and Student Learning

An important aspect of a clinic is the ability of the student to undertake reflective learning. The Australian report asserts:²⁸

The practical and “live” nature of clinics coupled with their knowledge of the theoretical bases of reflection provide a valuable opportunity for students to better understand the role (and benefits) of reflection in legal practice and more generally. Therefore reflection within a clinical setting becomes the foundation for the developing “reflective practitioner” in each and every student. This in turn assists them in developing responsibility, resilience, confidence, self-esteem, self-awareness, courage and humility.

E. Assessment of Students in Clinical Courses

There are some quite legitimate differences of opinion as to whether clinical casework can be fairly graded and in some cases a hybrid approach is used but any such assessments must be valid (achieving its intended purpose), reliable (referenced to specific criteria rather than to the performance of other students) and fair.

Clinical assessment should be timely and constructive, and promote deep active learning, with explicit opportunities for students to gauge the extent of their learning. Assessment processes must be sufficiently documented to facilitate external review.

28 At 20.

F. The (Long and Winding?) Road Ahead

In his publication “Best Practices for Legal Education – A Vision and a Road Map”, Roy Stuckey observes that there are three principles of best practices for legal education that are of particular importance:²⁹

1. The school is committed to preparing its students to practice law effectively and responsibly in the contexts they are likely to encounter as new lawyers.
2. The school clearly articulates its educational goals.
3. The school regularly evaluates the program of instruction to determine if it is effective in preparing students for the practice of law.

One of the barriers to change in complex organisations like law schools can be institutional inertia. They do not move swiftly in any direction, and it is difficult to begin movement at all. Traditions can die hard, even when traditions are clearly out of step with best practices.

Te Piringa’s founding principles and relative youth provide an advantage in having the ability to constantly evolve and adapt to a range of teaching and assessment resources that reflect a way to move forward together. Law schools need to keep building a system of legal education that respects appropriate traditions and embraces sound educational practices to ensure that students have sufficient opportunities to acquire and develop skills and values they will need as 21st century practitioners.

²⁹ Roy Stuckey and others *Best Practices for Legal Education: A Vision and a Road Map* (1st ed, Clinical Legal Education Association, Columbia (SC), 2007) at 210.

EUROPEAN UNION CIVIL JUSTICE AND EUROPEAN UNION CRIMINAL JUSTICE

BY MARIA MARCOS*

I. INTRODUCTION

One of the key objectives of the European Union is to offer its citizens an area of freedom, security and justice (FSJ) without internal borders, with the aim of ensuring genuine freedom of movement for individuals in the territory of the European Union and a higher level of security through more effective action against crime, racism and xenophobia.¹ To achieve this, it is necessary to ensure that the different national judicial systems of all European Union Member States² work effectively together and do not create obstacles to European Union citizens whenever they are seeking access to justice.³

European cooperation in justice and home affairs is a relatively recent phenomenon. Following a number of partnerships, for example between police chiefs (known as the TREVI group), concrete arrangements were primarily provided for by the Schengen Agreements of 1985 and 1990 and the 1999 Europol Convention. It was the Maastricht Treaty (1993), which first introduced cooperation in the area of justice and home affairs, with the creation of the “third pillar”.⁴

Cooperation was stepped up in the Treaty of Amsterdam (1999). In October 1999, in Tampere, Finland, the European Council⁵ decided to set the area of freedom, security and justice high on the European Union agenda. It was seen as an essential component of a true “Union” that a free circulation of people should apply to a free circulation of judicial decisions. This is where the principle of mutual recognition leads to a real change in the philosophy of judicial cooperation. It means that each national judicial authority should recognise requests made by the judicial authority of another European Union country with minimal formalities.⁶

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1 For a short, clear explanation about the European Union online, see Pascal Fontaine “Europe in 12 lessons” (2010) European Commission <<http://ec.europa.eu>>.

2 28 Member States and about 508 million people: “Changes within the European Union as from 1 July 2013 related to the accession of Croatia” (28 June 2013) Council of the European Union <www.consilium.europa.eu>.

3 Viviane Reding “The European Area of Justice” European Commission <<http://ec.europa.eu>>.

4 Matters relating to justice and home affairs used to be dealt with solely under the intergovernmental rules, in particular under Title VI of the Treaty on European Union (the “third pillar”). The Amsterdam Treaty “communitised” asylum, immigration and judicial cooperation in civil matters, moving them under Title IV of the Treaty establishing the European Community (“first pillar”). The Lisbon Treaty regrouped all these in the Treaty on the Functioning of the European Union: “The Lisbon Treaty: a comprehensive guide” European Commission <<http://europa.eu>>.

5 For EU institutions, see “How the European Union works” (July 2012) European Commission <<http://europa.eu>>.

6 “Criminal Justice” (16 July 2013) European Commission <<http://ec.europa.eu>>.

The creation of the area of FSJ is based on the Tampere (1999–2004), Hague (2004–2009) and Stockholm (2010–2014) programmes. It derives from Title V of the Treaty on the Functioning of the European Union, which regulates the “Area of freedom, security and justice” and comprises five chapters: (i) general provisions; (ii) policy on border controls, asylum and immigration; (iii) judicial cooperation in civil matters; (iv) judicial cooperation in criminal matters; and (v) police cooperation.

Opt-out arrangements exist for the United Kingdom and Ireland, though they have decided to opt-in on most initiatives concerning the areas of freedom, security and justice. Denmark exercises full opt-out from this area.⁷

This is a sensitive issue because freedom, security and justice are directly related to security, public order and national legal systems. These systems have often evolved in separate countries over a matter of centuries resulting in significant differences between Member States.⁸ If Member States have therefore only gradually agreed to “communitarise” successive parts of FSJ by moving from unanimity to qualified majority voting and by giving the European Parliament the power of co-decision.

The Lisbon Treaty (2007) has introduced several important changes:⁹

- the abolition of the pillar structure and the “universalisation” of the co-decision procedure with qualified majority voting (with some exceptions);
- an option of resorting more easily to enhanced cooperation with a limited number of Member States in criminal matters;
- an extension of the system of opt-ins and opt-outs for certain Member States regarding justice and home affairs; and
- a greater role for national parliaments (subsidiarity principle).

II. EUROPEAN UNION CIVIL JUSTICE

The increase in free movement of people, goods and services inevitably results in an increase in the potential number of cross-border disputes.

In a genuine European area of justice, individuals should not be prevented or discouraged from exercising their rights. The incompatibility and complexity of legal or administrative systems in European Union countries should not be a barrier.

The European Union has put in place a number of legislative instruments¹⁰ designed to help

7 These three countries have the option of deciding not to participate in the legislative procedures in this field (See Protocol on the position of the United Kingdom and Ireland on policies in respect of border controls, asylum and immigration, judicial cooperation in civil matters and on police cooperation; and the Protocol on the position of Denmark).

8 “European Union” Kingdom of Belgium: Foreign Affairs, Foreign Trade and Development Cooperation (2012) <<http://diplomatie.belgium.be>>.

9 Kingdom of Belgium: Foreign Affairs, Foreign Trade and Development Cooperation, above n 8.

10 Access to European Union law (EUR-Lex): from 1 July 2013, thanks to Regulation (EU) No 216/2013, the electronic version of the Official Journal of the European Union is authentic and produces legal effects. See “EUR-Lex: Access to European Law” European Union <<http://new.eur-lex.europa.eu>>.

individuals with cross-border litigation, which will be described below in no way exhaustively.¹¹ It aims to ensure that people can approach courts and authorities in any European Union country as easily as in their own. Alternative dispute resolution methods, such as mediation, have also played a big part in easing cross-border conflicts.¹²

The priorities for action are: better access to justice, mutual recognition of judicial decisions and increased convergence in the field of procedural law.

Civil justice cooperation covers both civil and commercial matters, and matters of family law.

A. Insolvency Proceedings

LEGISLATIVE ACT: Council Regulation (EC) 1346/2000 of 29 May 2000 on Insolvency Proceedings.¹³

SHORT EXPLANATION: Companies and individuals in the European Union are increasingly establishing business activities or economic interests in European Union countries other than where their core activities are located. If they become insolvent, there may be direct implications for the proper functioning of the internal market.

PURPOSE: This Regulation establishes a common framework for insolvency proceedings in the European Union. The purpose of harmonised arrangements regarding insolvency proceedings is to avoid assets or judicial proceedings being transferred from one European Union country to another in order to obtain a more favourable legal position to the detriment of creditors (“forum shopping”).

BACKGROUND: The winding-up of insolvent companies, compositions and analogous proceedings is excluded from the scope of the 1968 Brussels Convention. Work has been carried out at various levels since 1963 with a view to formulating a Community instrument in the field. A convention on insolvency proceedings was concluded on 23 November 1995. However, this convention could not enter into force because one European Union country failed to sign it within the time limit.

The Amsterdam Treaty, signed on 2 October 1997, lays down new provisions for judicial cooperation in civil matters. It was on this basis that the Regulation on Insolvency Proceedings was adopted.

BRIEF CONTENTS: This Regulation establishes common rules regarding the court competency to open insolvency proceedings, the applicable law and the recognition of the court’s decisions for cases where a debtor, whether a company, trader or individual, becomes insolvent.

The proposed solutions rely on the principle of proceedings with universal scope. At the same time, they retain the possibility of opening secondary proceedings within the territory of the European Union country concerned.

11 Text comes from: European e-Justice Portal <<https://e-justice.europa.eu>>; “Legislative Observatory” European Parliament <www.europarl.europa.eu>; “Summaries of EU legislation” European Union <<http://europa.eu>>; “European Judicial Atlas in Civil Matters”, “European Judicial Network in civil and commercial matters” and “Justice: Building a European Area of Justice” European Commission <<http://ec.europa.eu>>.

12 See Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters [2002] OJ L136/3. On 12 March 2013, the European Parliament voted to support the new legislation on Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR).

13 [2000] OJ L160/1. Successive amendments and corrections to Regulation (EC) 1346/2000 have been incorporated in the basic text.

ENTRY INTO FORCE: 31 May 2002.

APPLICATION: The Regulation does not apply to Denmark, any European Union country where winding up obligations resulting from a prior convention with other countries is irreconcilable, concluded prior to its entry into force by this country and one or more third countries, or the United Kingdom to the extent that it is irreconcilable with existing arrangements with the Commonwealth.

FOLLOW-UP WORK: The Commission is proposing to modernise the current rules. The new rules will shift focus away from liquidation and develop a new approach to helping businesses overcome financial difficulties, all the while protecting creditors' right to get their money back.¹⁴

B. Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters

LEGISLATIVE ACT: Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("Brussels I").¹⁵

SHORT EXPLANATION: Judicial cooperation in civil matters means that clear rules exist on questions such as: Which European Union country has jurisdiction? Which court is competent? Which law is applicable? This ensures judgments in one country are recognised and enforced in other countries without difficulties.

PURPOSE: The Regulation lays down rules governing the jurisdiction of courts and the recognition and enforcement of judgments in civil and commercial matters in European Union countries.

BACKGROUND: The Regulation supersedes the Brussels Convention of 1968, which was applicable between the European Union countries before the Regulation entered into force. The Convention continues to apply with respect to those territories of European Union countries that fall within its territorial scope and that are excluded from the Regulation pursuant to Article 299 of the Treaty establishing the European Community (now Article 355 of the Treaty on the Functioning of the European Union). The Regulation also lists a number of other conventions, treaties and agreements between European Union countries that it supersedes.

BRIEF CONTENTS: A judgment given in a European Union country is to be recognised without special proceedings, unless the recognition is contested. A declaration that a foreign judgment is enforceable is to be issued following purely formal checks of the documents supplied. The basic principle is that jurisdiction is to be exercised by the European Union country in which the defendant is domiciled, regardless of his or her nationality. Apart from the basic principle on jurisdiction, in certain circumstances a defendant may be sued in the courts of another European Union country. The Regulation lists areas of jurisdiction where this is so: special or exclusive jurisdiction, as well as jurisdiction on matters relating to insurance, consumer contracts and individual contracts of employment.

ENTRY INTO FORCE: 1 March 2002.

APPLICATION: Even after the Regulation entered into force, questions of jurisdiction between Denmark and the other European Union countries continued to be governed by the Brussels

¹⁴ See European Commission *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: A new European approach to business failure and insolvency* (COM(2012) 742 final, 12 December 2012).

¹⁵ [2001] OJ L12/1.

Convention of 1968. This Danish opt-out was based on the 1997 Protocol No 5 on the position of Denmark annexed to the Treaties. On 19 October 2005, the European Union concluded an agreement with Denmark on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters that extended the provisions of the Regulation to that country. On 27 April 2006, the agreement was approved on behalf of the European Union by Council Decision 2006/325/EC.¹⁶ It entered into force on 1 July 2007.

As provided for in the Protocol on the position of the United Kingdom and Ireland annexed to the Treaties, these two countries have indicated their wish to take part in the adoption and application of the Regulation.

C. Jurisdiction, Recognition and Enforcement of Judgments in Matrimonial Matters

LEGISLATIVE ACT: Council Regulation No. 1347/2000 on 29 May 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for children of both spouses.¹⁷

REPLACED BY: Council Regulation (EC) 2201/2003 of 27 November 2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) 1347/2000.¹⁸

SHORT EXPLANATION: In encouraging the free movement of persons, the development of the internal market is increasing family ties between people of different nationalities or who are residents in different Member States. This has prompted a growing need to speed up matrimonial procedures and ensure legal certainty in matters of jurisdiction. Although the substantive family law remains under the sole competence of European Union countries, the European Union is empowered to respond to family law concerns with cross-border implications.

PURPOSE: To standardise the rules of private international law in the Member States relating to jurisdiction and to improve the recognition and enforcement of judgments in relation to the dissolution of marriage and joint custody of children.

BACKGROUND: On 28 May 1998, the Member States signed the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (known as the “Brussels II Convention”) and the Protocol on its interpretation by the Court of Justice. This Convention extends the 1998 Brussels Convention to cover matrimonial matters, so far excluded from the scope of cooperation between Member States.

The Amsterdam Treaty changed the legal basis for judicial cooperation in civil matters, which has now been incorporated into the EC Treaty (Article 65). The Convention has been converted into a Community instrument (Regulation) to ensure that it is implemented quickly and to overcome the practical difficulties encountered by citizens in their daily lives.

A “Regulation” was preferred to a “Directive” because it enables strictly defined and harmonised

16 Decision 2006/325/EC concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2006] OJ L120/22.

17 [2000] OJ L160/19.

18 [2003] OJ L338/1.

rules to be applied quickly. Furthermore, it incorporates the content of the Convention, thereby ensuring continuity.¹⁹

BRIEF CONTENTS: The Regulation covers civil proceedings relating to divorce, legal separation and annulment of marriage, and matters concerning parental responsibility for children of both spouses when the matrimonial proceedings take place.

Jurisdiction in matters relating to divorce, legal separation or annulment of marriage is determined according to the country of residence of one or both spouses or according to their nationality. The competent court also has jurisdiction in all matters concerning parental responsibility over a child of both spouses, if the child is resident in that Member State. Where this is not the case, the same court may have jurisdiction in certain circumstances.

Judgments in matrimonial matters or in matters of parental responsibility delivered in one Member State are recognised in the other Member States without any particular formalities, and no procedures are required for the updating of civil status documents.

ENTRY INTO FORCE: 1 March 2001.

APPLICATION: It applied in all Member States with the exception of Denmark.

IMPLEMENTING MEASURES:

On 3 July 2000, the French Republic presented an Initiative with a view to adopting a Council Regulation on the mutual enforcement of judgments on rights of access to children.²⁰

- Declaration of Sweden and Finland pursuant to Article 36(2)(a) of Council Regulation (EC) 1347/2000 of 29 May 2000 on jurisdiction and recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses.²¹

Sweden and Finland declare that the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden comprising private international law provisions on marriage, adoption and guardianship (known as the “Nordic Convention on Marriage”), together with its Final Protocol, will apply in full in relations between Sweden and Finland in place of Regulation (EC) 1347/2000, as from the date on which the agreement of 6 February 2001 comes into force between Finland and Sweden.

- Commission Regulation (EC) 1185/2002 amending the list of competent courts in Annex I to Council Regulation (EC) 1347/2000 of 29 May 2000 on jurisdiction, the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses.²²

D. Taking of Evidence in Civil and Commercial Matters

LEGISLATIVE ACT: Council Regulation (EC) 1206/2001 of 28 May 2001 on Cooperation between the courts of the Member States in the Taking of Evidence in civil or commercial matters.

SHORT EXPLANATION: In cross-border proceedings, it is often essential for a decision in a civil or commercial matter pending before a court in a European Union country to take evidence in another European Union country.

¹⁹ For legislative process in the European Union, see Klaus-Dieter Borchardt *The ABC of European Union law* (Publications Office of the European Union, Luxembourg, 2010).

²⁰ [2000] OJ C234.

²¹ [2000] OJ L160/9.

²² [2002] OJ L173/3.

PURPOSE: To improve, simplify and accelerate cooperation between Member States as regards the taking of evidence in legal proceedings in civil and commercial matters.

BRIEF CONTENTS: The Regulation provides for two ways of taking of evidence between Member States: direct transmission of requests between the courts and the direct taking of evidence by the requesting court.

ENTRY INTO FORCE: 1 July 2001.

APPLICATION: The Regulation is applicable in all European Union countries except Denmark. With respect to Denmark, the Hague Convention (1970) on the taking of evidence abroad in civil or commercial matters is applicable. However, not all European Union countries have acceded to this Convention.

RELATED ACTS:

- Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee of 5 December 2007 on the application of the Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.²³

According to the Report from the Commission, the two main objectives of the Regulation (to simplify cooperation among the Member States and speed up the taking of evidence) have been satisfactorily achieved. However, certain measures are still needed in order to improve the functioning of the Regulation, in particular to: improve the level of knowledge of the Regulation among the legal professions; take the measures required so that the deadline of 90 days set for executing requests is complied with; and exploit new technologies, more specifically videoconferencing.

E. Common Minimum Rules Relating to Legal Aid

LEGISLATIVE ACT: Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.²⁴

SHORT EXPLANATION: The right to legal aid allows those who do not have sufficient financial resources to meet the costs of a court case or legal representation. Legal aid systems exist in all Member States of the European Union in both civil and criminal proceedings. In order to facilitate access to legal aid in civil and commercial matters, the Directive on legal aid in cross-border issues was adopted.

PURPOSE: To improve access to justice in cross-border civil cases by establishing common minimum rules relating to legal aid; to ensure that appropriate legal aid is granted, under certain conditions, to persons who cannot meet the cost of proceedings on account of their financial situation; to facilitate compatibility of national laws in this matter and to provide for cooperation mechanisms between the authorities of the Member States.

BACKGROUND: At the Tampere European Council in 1999, the Member States undertook to establish common measures to remove all obstacles to the smooth operation of civil procedures.

²³ European Commission *Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee: on the application of the Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters* (COM(2007) 769 final, 5 December 2007) – Not published in the Official Journal.

²⁴ [2003] OJ L26/41.

In 2000 the Commission presented a Green Paper on legal aid in civil matters with a view to taking stock of difficulties encountered by cross-border litigants and proposing solutions. The Green Paper met with differing reactions underscoring the need to put forward a proposal providing for cooperation and information mechanisms between the Member States.

The Commission initiative is all the more necessary since existing conventions on the matter (the Strasbourg Agreement of 1977 on the Transmission of Legal Aid Applications and the Hague Convention to Facilitate the International Access to Justice, signed in 1980) have not been ratified by all the Member States and remain somewhat underused.

BRIEF CONTENTS: All the persons involved in a civil or commercial dispute within the scope of this Directive must be able to assert their rights in the courts even if their personal financial situation makes it impossible for them to bear the costs of proceedings. Legal aid is regarded as appropriate when it allows the recipient effective access to justice under the conditions laid down in this Directive. Legal aid should cover pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings, legal assistance in bringing a case before a court and representation in court and assistance with or exemption from the cost of the proceedings.

The competent authorities shall cooperate to provide the general public and professional circles with information on the various systems of legal aid, in particular via the European Judicial Network, established in accordance with Decision 2001/470/EC.²⁵

ENTRY INTO FORCE: 31 January 2003.

APPLICATION: The Directive applies to all Member States of the European Union with the exception of Denmark. Between Denmark and certain Member States, the European Agreement on the Transmission of Applications for Legal Aid of 1977 applies. It should be noted that the United Kingdom and Ireland have given notice of their wish to take part in the adoption and the application of this Directive.

RELATED ACTS:

- Commission Decision 2005/630/EC of 26 August 2005 establishing a form for the transmission of legal aid applications under Council Directive 2002/8/EC.²⁶
- Commission Decision 2004/844/EC of 9 November 2004 establishing a form for legal aid applications under Council Directive 2002/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.²⁷ This decision establishes the standard form for submitting legal aid applications provided for by Directive 2002/8/EC.

F. Jurisdiction, Recognition and Enforcement of Judgments in Matrimonial Matters and Matters of Parental Responsibility

LEGISLATIVE ACT: Council Regulation (EC) 2201/2003 of 27 November 2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) 1347/2000.²⁸

²⁵ Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters [2001] OJ L174/25.

²⁶ [2005] OJ L225/23.

²⁷ [2004] OJ L365/27.

²⁸ Amending act: Regulation (EC) 2116/2004.

SHORT EXPLANATION: The European Union gives priority to the child's right to maintain normal relations with both parents. The child will have the right to make his or her views known on all aspects of parental responsibility, having regard to his or her age and degree of maturity. In order to ensure equality of treatment for all children, the scope of this Regulation covers all judgments on parental responsibility concerning children of married and unmarried couples.

PURPOSE: The European Union has brought together in a single legal instrument the provisions on divorce and parental responsibility, with a view to facilitating the work of judges and legal practitioners and to regulating the exercise of cross-border rights of access. This Regulation represents a major step forward in the fight against abductions of children.

BACKGROUND: In 1999, the Ministers of Justice endorsed the principle of mutual recognition of judgments as the cornerstone for the creation of a genuine judicial area and identified access rights as a priority. In May 2000, Council Regulation 1347/2000 was adopted. This was followed by an initiative presented by France in July 2000 on the question of access rights. In November 2000, a programme for the mutual recognition of judgments was adopted including judgments on parental responsibility as one of its areas of action.

BRIEF CONTENTS: The Regulation applies to civil proceedings relating to divorce, separation and marriage annulment, as well as to all aspects of parental responsibility. The Regulation ensures that a judgment on parental responsibility can be recognised and enforced in another Member State through a uniform, simple procedure. It also lays down uniform rules on jurisdiction. It gives answers to the questions regarding in which Member State the courts are competent to decide on divorce, the question of parental responsibility and how a judgment on parental responsibility is recognised and enforced in another Member State.

Each European Union country designates one or more central authorities to exercise several functions, in particular to promote exchanges of information on national legislation and procedures; facilitate communication between courts; provide assistance to holders of parental responsibility seeking to recognise and enforce decisions; and seek to resolve disagreements between those with parental responsibility through alternative means such as mediation.

ENTRY INTO FORCE: 1 August 2004.

APPLICATION: It applied in all Member States with the exception of Denmark.

RELATED ACTS:

- Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.²⁹
- Council Decision 2010/405/EU of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation.³⁰

In 2008, it became clear that finding unanimity on the 2006 proposal to amend Regulation 2201/2003 was going to be difficult. Consequently, a number of European Union countries have since then expressed their intent to establish enhanced cooperation in the area of applicable law in matrimonial matters. This decision authorises these countries to establish such cooperation between them. The other European Union countries may join this cooperation at any time.

Enhanced cooperation in the area of law applicable to divorce and legal separation will provide the participating countries with a clearer and more comprehensive legal framework for cross-border

29 [2010] OJ L343/10.

30 [2010] OJ L189/12.

cases. At the same time, it will increase legal certainty, predictability and flexibility for citizens. This enhanced cooperation is based on the principle of mutual recognition of judgments, and ensuring better compatibility between the participating countries' rules on conflict of laws.

- Proposal for a Council Regulation of 17 July 2006 amending Regulation (EC) 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters.³¹

In view of the increasing number of “international” marriages and divorces, the Commission intends to provide a clear and comprehensive legal framework in matrimonial matters ensuring legal certainty, predictability, flexibility and access to courts. The proposal therefore provides for:

- harmonised conflict-of-law rules in matters of divorce and legal separation to enable spouses to easily predict which law will apply to their matrimonial proceeding; and
- a limited degree of choice for the spouses regarding which law is applicable and which court is competent in proceedings concerning divorce and legal separation.

The proposal follows the Green Paper on applicable law and jurisdiction in divorce matters of 14 March 2005.

G. European Enforcement Order for Uncontested Claims

LEGISLATIVE ACT: Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for Uncontested Claims.³²

SHORT EXPLANATION: To save money and time by eliminating recognition procedure, the European Union agreed that in a certain category of civil cases, called “uncontested”, the claimant would be able to get a European Enforcement Order certificate. The claim would be considered uncontested if the defendant has agreed with the plaintiff's claim either in court, in a court-approved settlement or in an authentic act, or if the defendant never objected to it, or if, having initially objected, the defendant then failed to appear in court.

PURPOSE: To create a European Enforcement Order for Uncontested Claims. Through the introduction of minimum standards, the instrument allows the free movement in the European Union of judgments, out-of-court settlements or authentic instruments concerning uncontested claims.

BRIEF CONTENTS: The Regulation applies to civil and commercial matters. A judgment on an uncontested claim is certified as a European Enforcement Order by the Member State who delivered the judgment (State of origin). Certification is carried out by means of the standard form. It may apply to only parts of the judgment, in which case the order will be known as the “partial European Enforcement Order”.

ENTRY INTO FORCE: 21 January 2005.

APPLICATION: It is applicable to all Member States with the exception of Denmark.

31 Commission of the European Communities *Proposal for a Council Regulation: amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning law in matrimonial matters* (COM(2006) 399 final, 17 July 2006) – Not published in the Official Journal.

32 Amending Act: Regulation (EC) 1869/2005 [2005] OJ L300/6.

H. European Order for Payment Procedure

LEGISLATIVE ACT: Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European Order for Payment Procedure.³³

SHORT EXPLANATION: The obstacles to obtaining a fast and inexpensive judgment are intensified in such a cross-border context. This situation privileges bad debtors in cross-border situations and may discourage economic operators from extending their activities beyond their Member State of origin. In order to improve and facilitate access to justice, the European Union has set itself the aim of laying down common rules for simplified and accelerated litigation.

PURPOSE: To establish a procedure for European Orders for Payment. The procedure simplifies, speeds up and reduces the costs of litigation in cross-border cases concerning uncontested pecuniary claims in civil and commercial matters.

BACKGROUND: Following the Tampere conclusions (1999) and the mutual recognition programme, the European Commission in December 2002 adopted a Green Paper on a European Order for Payment Procedure.

BRIEF CONTENTS: The procedure does not require presence before the court; it can even be started and handled in a purely electronic way. The claimant only has to submit his or her application, after which the procedure will lead its own life. It does not require any further formalities or intervention on the part of the claimant.

ENTRY INTO FORCE: 31 December 2006.

APPLICATION: The Regulation applies between all Member States of the European Union with the exception of Denmark.

I. Service of Judicial and Extrajudicial Documents

LEGISLATIVE ACT: Regulation (EC) 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the Service in the Member States of judicial and extrajudicial Documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) 1348/2000.³⁴

SHORT EXPLANATION: Legal proceedings include the transmission of documents between parties involved.

PURPOSE: The Regulation seeks to improve and expedite the transmission of judicial and extrajudicial documents in civil or commercial matters for service between the Member States.

BACKGROUND: In 2000 the European Union adopted a Regulation laying down procedural rules to make it easier to send documents from one Member State to another. As of 13 November 2008, the Regulation is replaced by Regulation (EC) 1393/2007 which was adopted on 13 November 2007.

BRIEF CONTENTS: The Regulation provides for different ways of transmitting and serving documents: transmission through transmitting and receiving agencies, transmission by consular or diplomatic channels, and service by postal services and direct service.

33 [2006] OJ L399/1. Successive amendments and corrections to Regulation (EC) 1896/2006 have been incorporated in the basic text.

34 [2007] OJ L324/79.

ENTRY INTO FORCE: 30 December 2007.

APPLICATION: The Regulation applies between all Member States of the European Union.

J. European Small Claims Procedure

LEGISLATIVE ACT: Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.³⁵

SHORT EXPLANATION: There are more and more cross-border disputes which involve more than one Member State of the European Union. The expense of obtaining a judgment against a defendant in another Member State is often disproportionate to the small amount of money involved.

PURPOSE: To improve access to justice by simplifying cross-border small claims litigation in civil and commercial matters and reducing costs. The European small claims procedure applies in cross-border litigation to civil and commercial matters where the claim does not exceed 2000 euros.

BACKGROUND: The Regulation is based on the Green Paper on a European Order for Payment Procedure and on measures to simplify and speed up small claims litigation. The European Commission presented the proposal that led to the adoption of this Regulation on 15 March 2005.

BRIEF CONTENTS: The Small Claims procedure operates on the basis of standard forms. It is a written procedure unless an oral hearing is considered necessary by the court.

The Regulation also establishes time limits for the parties and for the court in order to speed up litigation.

REVIEW: By 1 January 2014, the Commission will present a detailed report reviewing the operation of the European Small Claims Procedure, including the EUR 2000 limit. That report shall contain an assessment of the procedure as it has operated and an extended impact assessment for each Member State. To that end and in order to ensure that best practice in the European Union is duly taken into account, Member States must provide the Commission with information relating to the cross-border operation of the European Small Claims Procedure. This information will cover court fees, the speed of the procedure, efficiency, ease of use and the internal small claims procedures of the Member States. The Commission's report will be accompanied, if appropriate, by proposals for adaptation.

ENTRY INTO FORCE: 1 August 2007.

APPLICATION: The Regulation applies between all Member States of the European Union with the exception of Denmark.

K. Maintenance Obligations

LEGISLATIVE ACT: Council Regulation 4/2009 of 18 December 2008 on Jurisdiction, Applicable law, Recognition and Enforcement of Decisions and Cooperation in matters relating to Maintenance Obligations.³⁶

³⁵ [2007] OJ L199/1.

³⁶ [2009] OJ L7/1.

SHORT EXPLANATION: The increase in international couples and cross-border disputes impacts upon children's rights in maintenance obligations.

PURPOSE: To remove all remaining obstacles to the collection of maintenance payments within the European Union.

BACKGROUND: In order to cover the whole range of problems linked to the recovery of maintenance claims, the Commission published a Green Paper in April 2004. On 15 December 2005 the Commission presented to the Council a proposal for a Council Regulation on Jurisdiction, Applicable Law, Recognition and Enforcement of decisions and Cooperation in Matters relating to Maintenance Obligations.

BRIEF CONTENTS: The Regulation covers cross-border maintenance applications arising from family relationships. It establishes common rules for the entire European Union aiming to ensure recovery of maintenance claims even where the debtor or creditor is in another country.

This Regulation replaces the provisions concerning maintenance obligations of Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. It also replaces Regulation (EC) 805/2004 creating a European Enforcement Order for Uncontested Claims, except for European Enforcement Orders concerning maintenance obligations issued by Member States that are not bound by the 2007 Hague Protocol.

ENTRY INTO FORCE: 30 January 2009.

RELATED ACTS:

- Council Decision 2011/220/EU of 31 March 2011 on the signing, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.³⁷

The Hague Convention of 23 November 2007 establishes, a worldwide system for the recovery of maintenance claims between the parties to the Convention.

L. Law Applicable to Divorce and Legal Separation

LEGISLATIVE ACT: Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced Cooperation in the area of the Law applicable to Divorce and Legal Separation.

SHORT EXPLANATION: Spouses should be able to choose the law of a country with which they have a special connection or the law of the forum as the law applicable to divorce and legal separation. The law chosen by the spouses must be consonant with the fundamental rights recognised by the Treaties and the Charter of Fundamental Rights of the European Union.

PURPOSE: The Regulation provides citizens with appropriate outcomes in terms of legal certainty, predictability and flexibility, protects weaker partners during divorce disputes, and prevents "forum shopping". This also helps avoid complicated, lengthy and painful proceedings.

BRIEF CONTENTS: The Regulation allows international couples to agree in advance which law would apply to their divorce or legal separation as long as the agreed law is the law of the Member State with which they have a closer connection. In cases where couples cannot agree, the judges can use a common formula for deciding which country's law applies.

ENTRY INTO FORCE: 30 December 2010.

37 [2011] OJ L93/9.

APPLICATION: The rules apply to 14 European Union countries initially (Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain). European Union countries that do not participate in this initiative continue to apply their own national law.

M. Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters

LEGISLATIVE ACT: Regulation No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in civil and commercial matters.³⁸

This Regulation replaces Regulation (EC) 44/2001 on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (“Brussels I”).

SHORT EXPLANATION: In recent years the Brussels I Regulation has been subject to scrutiny by the European Union’s legislative institutions with the aim of revising its terms to deal with a number of dysfunctional features. The reform of the Brussels Regulation commenced formally in April 2009.

PURPOSE: To facilitate and accelerate the circulation in the European Union of decisions in civil and commercial matters, in accordance with the principle of mutual recognition and the Stockholm Programme guidelines.

BRIEF CONTENTS: The new text contains several adjustments regarding the system to determine the international jurisdiction in cross-border disputes.

The most important changes are the:

- abolition of the *exequatur* procedure: judgments given in a Member State should be recognised in all Member States without the need for any special procedure. A judgment given in a Member State should be recognised and enforced in another Member State without the need for a declaration of enforceability;
- introduction of a rule on international *lis pendens*: the Regulation introduces a clear and effective mechanism to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States;
- strengthening of choice of forum agreements; and
- consecration of the arbitration exception.

REPORT: By 11 January 2022 the Commission shall present a report to the European Parliament, to the Council and to the European Economic and Social Committee on the application of this Regulation. It shall include an evaluation of the possible need for a further extension of the rules on jurisdiction to defendants not domiciled in a Member State and, where appropriate, shall be accompanied by a proposal for amendment of this Regulation.

ENTRY INTO FORCE: 9 January 2013.

APPLICATION: This Regulation shall only apply to legal proceedings instituted on or after 10 January 2015. The United Kingdom and Ireland have notified their wish to take part in the adoption and application of this Regulation. Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application, without prejudice to the possibility

³⁸ [2012] OJ L93/9.

that they may apply the amendments to Regulation (EC) 44/2001 pursuant to the Agreement of 19 October 2005 between them and the European Community.

N. Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Authentic Instruments in Matters of Succession and the Creation of a European Certificate of Succession

LEGISLATIVE ACT: Regulation No 650/2012 on Jurisdiction, Applicable law, Recognition and Enforcement of decisions and acceptance and enforcement of authentic instruments in matters of Succession and on the creation of a European Certificate of Succession.³⁹

SHORT EXPLANATION: Successions with cross-border elements are usually characterised by their high complexity. Succession law varies considerably from one European Union country to another. A major step to facilitate cross border successions was the adoption of new European Union rules, which will make it easier for European citizens to handle the legal side of an international will or succession.

PURPOSE: To allow citizens the organisation in advance of their succession in a Union context and the protection of the rights of heirs and legatees and of persons close to the deceased, as well as of the creditors of the succession.

BRIEF CONTENTS: These new uniform rules of Regulation will make sure that:

- a given succession is treated coherently, under a single law and by one single authority;
- citizens are able to choose whether the law applicable to their succession should be that of their habitual residence or that of their nationality;
- parallel proceedings and conflicting judicial decisions are avoided; and
- mutual recognition of decisions relating to succession in the European Union is ensured.

The Regulation also creates a European Certificate of Succession to enable a person to prove his or her status and rights as heir or his or her powers as administrator of the estate or executor of the will without further formalities.

REVIEW: By 18 August 2025 the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation, including an evaluation of any practical problems encountered in relation to parallel out-of-court settlements of succession cases in different member states or an out-of-court settlement in one member state affected in parallel with a settlement before a court in another member state. The report shall be accompanied, where appropriate, by proposals for amendments.

ENTRY INTO FORCE: 13 August 2012.

APPLICATION: This Regulation shall apply to the succession of persons who die on or after 17 August 2015.

The Regulation shall directly apply to all the Member States of the European Union with the exception of Denmark, the United Kingdom and Ireland.

39 [2012] OJ L201/107.

III. EUROPEAN UNION CRIMINAL JUSTICE

National borders within the European Union are being progressively dismantled. Citizens move more freely than ever before. This means however that it is also easier for criminals to travel⁴⁰ and operate across borders. Combating crime involves strengthening dialogue and action between the criminal justice authorities of EU countries.

The European Union has set up specific structures to facilitate mutual assistance and support cooperation between judicial authorities:

- Eurojust: a European Union body comprising experienced judges or prosecutors who support and strengthen coordination and cooperation between national authorities in relation to serious crime;⁴¹ and
- European judicial network in criminal matters (EJN): a network of magistrates and prosecutors who act as contact points in European Union countries to facilitate judicial cooperation.

The European Union has put in place a number of legislative instruments,⁴² which will be described below in no way exhaustively,⁴³ designed to support freedom of movement and prevent and combat cross-border crime.

A. *Standing of Victims in Criminal Proceedings*

LEGISLATIVE ACT: Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings (2001/220/JHA).⁴⁴

REPLACED BY: Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012 establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and replacing Council Framework Decision 2001/220/JHA.⁴⁵

SHORT EXPLANATION: The role of victims in criminal proceedings and the relevant national laws and policies on victims' rights differ considerably from one Member State to another. To address such lack of common minimum rules, the European Union has adopted European Union legislation both in relation to all victims and in relation to specific groups of victims.

40 ECRIS (European Criminal Records Information System) was created in response to obvious need to improve the exchange of information on criminal records at the European level. (Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States [2009] OJ L93/23; Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System [ECRIS] in application of Article 11 of Framework Decision 2009/315/JHA [2009] OJ L93/33) European e-Justice portal <<https://e-justice.europa.eu>>.

41 The Treaty of Lisbon considers the possible creation of an actual European Public Prosecutor's Office from Eurojust.

42 Access to European Union law (EUR-Lex): from 1 July 2013, thanks to Regulation (EU) No 216/2013 on the electronic publication of the *Official Journal of the European Union* [2013] OJ L69/1, the electronic version of the Official Journal of the EU is authentic and produces legal effects. See "EUR-Lex: Access to European Law" European Union <<http://new.eur-lex.europa.eu>>.

43 Text comes from: European e-Justice Portal <<https://e-justice.europa.eu>>; "Legislative Observatory" European Parliament <www.europarl.europa.eu>; "Summaries of EU legislation" European Union <<http://europa.eu>>; "European Judicial Atlas in Civil Matters", "European Judicial Network in civil and commercial matters" and "Justice: Building a European Area of Justice" European Commission <<http://ec.europa.eu>>.

44 [2001] OJ L82/1.

45 [2012] OJ L315/57.

PURPOSE: The Framework Decision provides for the assistance of crime victims before, during and after criminal proceedings. Member States must guarantee that the dignity of victims is respected and that their rights are recognised throughout the proceedings. Vulnerable victims must specially be treated in a manner that is most appropriate to their circumstances.

BACKGROUND: On 14 July 1999, the Commission adopted a communication on the rights of crime victims. Subsequently, the conclusions of the European Council meeting in Tampere on 15 and 16 October 1999 requested that minimum standards be established to protect crime victims, especially concerning access to justice and compensation of damages.

BRIEF CONTENTS: The Framework Decision provides for minimum rights for crime victims to be exercised in relation to criminal proceedings. It sets out provisions whereby victims are guaranteed the right to be heard, the opportunity to participate in the procedures (also when the offence was committed in another Member State), protection, compensation, and access to mediation and to any other relevant information.

ENTRY INTO FORCE: 22 March 2001.

RELATED ACTS:

- Report from the Commission of 20 April 2009 pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings.⁴⁶

This report presents the implementation of the Framework Decision by 24 (out of 27) Member States as of 15 February 2008. The Commission notes that this implementation is unsatisfactory. None of the States transposed the Framework Decision in a single piece of national legislation; instead, they referred back to existing or newly adopted national provisions. Furthermore, Member States implemented certain provisions through non-binding guidelines, charters and recommendations without any legal basis. Only a few Member States adopted new legislation to cover one or more of the articles.

Consequently, the Commission encourages Member States to provide further information concerning implementation, as well as to enact and submit the relevant national legislations under preparation.

- Report from the Commission of 3 March 2004 on the basis of Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings.⁴⁷

B. European Arrest Warrant

LEGISLATIVE ACT: Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA).⁴⁸

SHORT EXPLANATION: The European Arrest Warrant (EAW) is a request by a judicial authority in one of the Member States of the European Union to arrest a person in another Member State and to surrender that person to the former state for the purpose of prosecuting or executing a custodial

⁴⁶ Commission of the European Communities *Report from the Commission: pursuant to article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA)* (COM(2009) 166 final, 20 April 2009) – Not published in the Official Journal.

⁴⁷ Commission of the European Communities *Report from the Commission: on the basis of Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings* (COM(2004) 54 final/2, 16 February 2004) – Not published in the Official Journal.

⁴⁸ Amending act: Framework Decision 2009/299/JHA [2009] OJ L81/24.

sentence or detention order. The mechanism is based on the principle of mutual recognition of judicial decisions. It presupposes direct contact between judicial authorities.

PURPOSE: The Decision improves and simplifies judicial procedures designed to surrender people for the purpose of conducting a criminal prosecution or executing a custodial sentence or period of detention, given that the whole political and administrative phase is replaced by a judicial mechanism.

BRIEF CONTENTS: The EAW replaces the extradition system by requiring each national judicial authority (the executing judicial authority) to recognise, *ipso facto*, and with a minimum of formalities, requests for the surrender of a person made by the judicial authority of another Member State (the issuing judicial authority).

The EAW ensures a good balance between efficiency and guarantees that the arrested person's fundamental rights are respected. Member States and national courts have to respect the provisions of the European Convention on Human Rights. Anyone arrested under an EAW has the right to a lawyer, and if necessary an interpreter, as provided by the law of the country where he or she has been arrested.

ENTRY INTO FORCE: 7 August 2002.

RELATED ACTS:

- Report from the Commission to the European Parliament and the Council of 11 April 2011 on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the EAW and the surrender procedures between Member States.⁴⁹

This report describes seven years of implementation of the EAW. The initiative seems to be a success in operational terms – 54,689 warrants have been issued and 11,630 executed. Extradition between European Union countries now takes 14 to 17 days if the person consents to their transfer, and 48 days if they do not give consent. Previously, this process took more than one year. By using this mechanism to ensure that the opening of borders does not assist those seeking to avoid the application of the law, the free movement of persons in the European Union has been strengthened. The Commission notes some shortcomings, however, particularly with regard to respect for fundamental rights. It requests that Member States should bring their legislation into line with Framework Decision 2002/584/JHA where that is not already the case and implement instruments already adopted in order to improve the functioning of the warrant. The report also notes that too many warrants are issued for minor offences and encourages requesting Member States to apply the principle of proportionality.

- Report from the Commission of 23 February 2005 based on Article 34 of the Council Framework Decision of 13 June 2002 on the EAW and the Surrender Procedures between Member States.⁵⁰

According to the evaluation made by the Commission in its report, the impact of the EAW since its entry into force on 1 January 2004 has been positive both in terms of depoliticisation and

49 European Commission *Report from the Commission to the European Parliament and the Council: on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* (COM(2011) 175 final, 11 April 2011) – Not published in the Official Journal.

50 Commission of the European Communities *Report from the Commission: based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* (COM(2005) 63 final, 23 February 2005) – Not published in the Official Journal.

effectiveness as well as in terms of the speed of the surrender procedure, while the fundamental rights of the persons concerned have been observed.

- Statements provided for in Article 31(2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the EAW and the surrender procedure between Member States.⁵¹

Denmark, Finland and Sweden state that their uniform legislation in force allows the provisions of the Framework Decision to be extended and enlarged. They will continue to apply the uniform legislation in force between them, namely:

- Denmark: Nordic Extradition Act (Act No 27 of 3 February 1960, as amended);
- Finland: Nordic Extradition Act (270/1960); and
- Sweden: Act (1959:254) concerning extradition to Denmark, Finland, Iceland and Norway for criminal offences.

C. Execution of Orders Freezing Property or Evidence

LEGISLATIVE ACT: Council Framework Decision 2003/577/JHA of 22 July 2003 on the Execution in the European Union of Orders Freezing Property or Evidence.⁵²

SHORT EXPLANATION: Freezing and confiscation are effective tools used in the fight against crime as they aim to recover property derived from illegal sources. Freezing aims to temporarily retain property and confiscation is a further measure that stops anyone from accessing illegal property.

PURPOSE: To establish the rules under which a Member State is to recognise and execute in its territory a freezing order issued by a judicial authority of another Member State in the framework of criminal proceedings.

BRIEF CONTENTS: The Framework Decisions allow a judicial authority in one European Union country to send an order to freeze property directly to the judicial authority in another European Union country where it will be recognised and executed without any further formality.

ENTRY INTO FORCE: 2 August 2003.

RELATED ACTS:

- Report from the Commission of 22 December 2008 based on Article 14 of the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.⁵³

This report evaluates the transposition measures that Member States have taken to implement Framework Decision 2003/577/JHA. However, by October 2008, only 19 Member States had notified the Commission of the transposition of the provisions into national law. Furthermore, several omissions and misinterpretations were found in the national laws, and some laws did not make any reference to the Framework Decision. Consequently, implementation of the Framework Decision cannot be deemed satisfactory.

The objective of the Framework Decision as well as the definitions have generally been well

51 [2002] OJ L190/1.

52 [2003] OJ L196/45.

53 Commission of the European Communities *Report from the Commission: based on Article 14 of the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence* (COM(2008) 885 final, 22 December 2008) – Not published in the Official Journal.

implemented by Member States. Similarly, a high number of Member States have implemented the list of offences that are not subject to a dual criminality check.

In terms of the procedure, more improvement is needed regarding the direct transmission of freezing orders between judicial authorities. Currently, many Member States require transmission through a central authority. Nevertheless, almost all Member States have implemented provisions on the immediate execution of decisions and on the duration of the freezing.

More improvements are needed on the implementation of the provisions concerning the grounds for non-recognition and non-execution. Member States have implemented most of these grounds, but they were transposed mostly as obligatory grounds. In addition, 14 Member States have applied additional grounds for refusal, which is not in line with the Framework Decision.

Concerning grounds for postponement of execution, most Member States have implemented the provisions at least in part. Furthermore, legal remedies are in place in all Member States and usually the measures provided do not require suspensive effect.

The Commission recommends that Member States take this report into consideration, proceed with the necessary legislative actions and transmit all relevant information in accordance with Article 14 of the Framework Decision to the Commission and the General Secretariat of the Council of the European Union.

D. Compensation to Crime Victims

LEGISLATIVE ACT: Council Directive 2004/80/EC of 29 April 2004 relating to Compensation to Crime Victims.⁵⁴

SHORT EXPLANATION: Crime victims should be entitled to fair and appropriate compensation for the injuries they have suffered, regardless of where in the European Union the crime was committed.

PURPOSE: To set up a system of cooperation to facilitate access to compensation for victims of crimes in cross-border situations. This system operates on the basis of Member States' compensation schemes for victims of violent intentional crime committed in their respective territories.

BACKGROUND: In 1999, the Commission presented a communication with a view to improving the situation of crime victims in the European Union. In addition, at the Tampere European Council, Member States recognised the need to lay down minimum standards on the protection of victims of crime in the Union. On 15 March 2001, the Council adopted a Framework Decision on the standing of victims in criminal proceedings. This Framework Decision contains provisions on compensation by the offender, but does not otherwise address the matter of compensation of crime victims.

Subsequently, on 28 September 2001, the Commission presented a Green Paper on the compensation of victims of crime, which targeted two main areas for potential action:

- the adoption of minimum standards with regard to compensation at European level by requiring Member States to guarantee victims a reasonable level of state compensation; and
- the adoption of measures making access to compensation easy in practice, irrespective of where in the European Union the crime was committed.

This Directive follows on from the Green Paper. After the terrorist attacks in Madrid in March 2004,

⁵⁴ [2004] OJ L261/15.

the Commission called for the adoption of the Directive before 1 May 2004 in its declaration on combating terrorism.

BRIEF CONTENTS: Victims of a crime committed outside their Member State of habitual residence can turn to an authority in their own Member State (assisting authority) to submit the application and get help with practical and administrative formalities. The authority in the Member State of habitual residence, which is responsible for compensation, transmits the application directly to the authority in the Member State where the crime was committed (the deciding authority), which is responsible for assessing the application and paying out the compensation.

ENTRY INTO FORCE: 26 August 2004.

RELATED ACTS:

- Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee of 20 April 2009 on the application of Council Directive 2004/80/EC relating to Compensation to Crime Victims.⁵⁵

This report evaluates the application of the Directive in Member States during the period of 1 January 2006 to 31 December 2008. Only 15 Member States met the deadline for the transposition of the Directive (1 January 2006). Subsequent notifications have been received from 11 Member States. The evaluation is thus incomplete.

Nevertheless, 25 Member States have put in place schemes for victims to submit applications, established the responsible authorities and implemented the provisions concerning administrative procedures. Most have also notified the Commission of their measures and methods for providing applicants information on compensation schemes.

Due to the recent implementation of the Directive in some Member States, the language barriers that some have encountered as well as a lack of knowledge of other legal systems and procedures, the number of cross-border applications and actions has remained very low. Furthermore, the processing and transmitting of applications and decisions varies greatly from one Member State to another.

All but one Member State have in place fair and appropriate national compensation schemes. Most compensate victims for personal injury, long-term disability and death, as well as compensating close relatives in cases of homicide, but the schemes exclude unintentional injuries from their scope. However, the offences must have been reported to the police. Most Member States impose time limits for applications and upper limits for compensations. Most also provide for reduced compensations when the victim contributed to his or her injury.

Only 13 Member States transmitted full details of the assisting and deciding authorities, the languages in which information may be transmitted between these authorities, the measures for providing information to applicants and the application forms to the Commission. Consequently, the manual containing these details, which is published in the Atlas, will be updated regularly.

- Commission Decision 2006/337/EC of 19 April 2006 establishing standard forms for the transmission of applications and decisions pursuant to Council Directive 2004/80/EC relating to Compensation to Crime Victims.⁵⁶

⁵⁵ Commission of the European Communities *Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee: on the application of Council Directive 2004/80/EC relating to compensation to crime victims* (COM(2009) 170 final, 20 April 2009) – Not published in the Official Journal.

⁵⁶ [2006] OJ L125/25.

The Commission has established standard forms for the transmission of applications and decisions relating to compensation. These forms are attached as an annex to the Decision.

E. Mutual Recognition of Financial Penalties

LEGISLATIVE ACT: Council Framework Decision 2005/214/JHA of 24 February 2005 on the Application of the Principle of Mutual Recognition to Financial Penalties.⁵⁷

SHORT EXPLANATION: In order to tackle non-payment of financial penalties committed in another European Union country, specific measures need to be taken that allow the national courts to impose and enforce financial penalties effectively against offenders.

PURPOSE: To extend the principle of mutual recognition, the cornerstone of judicial cooperation, to financial penalties.

BRIEF CONTENTS: This enables a judicial or administrative authority to transmit a financial penalty directly to an authority in another European Union country and to have that penalty recognised and executed without any further formality.

The procedure applies to situations where a fine is imposed on a person who is not a resident of the European Union country where the offence was committed, who fails to pay the fine and then leaves the territory of that country.

ENTRY INTO FORCE: 22 March 2005.

RELATED ACTS:

- Report from the Commission of 22 December 2008 based on Article 20 of the Council Framework Decision 2005/214/JHA of 24 February 2005 on the Application of the Principle of Mutual Recognition to Financial Penalties.⁵⁸

This report evaluates the measures Member States have taken to transpose the provisions of Framework Decision 2005/214/JHA into national law. However, by October 2008, only 11 Member States had notified the Commission of the transposition, which is not sufficient for making a full assessment of the implementation of the Framework Decision at this point in time.

The implementing provisions of these 11 Member States are generally in line with the Framework Decision, especially among the most important issues such as the recognition and execution of decisions without any further formality and without verification of dual criminality. In addition, most Member States have applied the provisions concerning alternative sanctions, amnesty, pardon and review of sentences, as well as those concerning the accrual of monies obtained from the enforcement of decisions.

With regard to the law governing the enforcement of decisions, some of the Member States have only partially implemented the provisions.

Furthermore, the optional provisions were transposed in most Member States as obligatory on the grounds that may constitute a basis for refusing the recognition or execution of a decision. Several Member States have also laid down additional grounds for refusal, which is not in line with the Framework Decision.

⁵⁷ [2005] OJ L76/16. Amending act: Framework Decision 2009/299/JHA [2009] L81/24.

⁵⁸ Commission of the European Communities *Report from the Commission: based on Article 20 of the Council Framework Decision 2005/214/JHA of February 2005 on the application of the principle of mutual recognition of financial penalties* (COM(2008) 888 final, 22 December 2008) – Not published in the Official Journal.

The Commission encourages Member States to take this report into consideration, proceed with the necessary legislative actions, and transmit the relevant information in accordance with the provisions of Article 20 of the Framework Decision to the Commission and the General Secretariat of the Council of the European Union.

F. Recognition and Execution of Confiscation Orders

LEGISLATIVE ACT: Council Framework Decision 2006/783/JHA of 6 October 2006 on the Application of the Principle of Mutual Recognition to Confiscation Orders.⁵⁹

SHORT EXPLANATION: The European Union is facilitating the direct execution of confiscation orders for proceeds of crime by establishing simplified procedures for recognition among European Union countries and rules for dividing confiscated property between the country issuing the confiscation order and the one executing it.

PURPOSE: To strengthen cooperation between European Union countries by enabling judicial decisions to be recognised and executed within strict deadlines (the principle of mutual recognition of judicial decisions).

BACKGROUND: In October 1999, the Tampere European Council defined mutual recognition as a fundamental principle underpinning judicial cooperation in civil and criminal matters and stated that it should be possible to apply the principle to pre-trial orders as well as to the final decision.

The programme of measures designed to implement the principle of mutual recognition in the field of criminal law adopted by the Council in November 2000 provides for improvement of the recognition and direct execution of confiscation orders issued by European Union countries (Measure 19). This Framework Decision represents an elaboration of that measure.

BRIEF CONTENTS: To establish simplified procedures for recognition among European Union countries and rules for dividing confiscated property between the country issuing the confiscation order and the one executing it.

ENTRY INTO FORCE: 24 November 2006.

RELATED ACTS:

- Report from the Commission to the European Parliament and the Council of 23 August 2010 based on Article 22 of the Council Framework Decision 2006/783/JHA of 6 October 2006 on the Application of the Principle of Mutual Recognition to Confiscation Orders.⁶⁰

By 24 November 2008, the original deadline set by the Framework Decision, only a few European Union countries had notified the Commission of their national transposition measures. Consequently, a significant delay occurred in preparing this report.

Of the 13 European Union countries that implemented the Framework Decision by the end of February 2010, most transposed the provisions correctly except for Article 8 on reasons for non-recognition or non-execution. These countries laid down additional grounds for refusing recognition and execution of confiscation orders, which do not comply with the framework decision. A few European Union countries transposed the provisions of the Framework Decision

59 [2006] OJ L328/59. Amending act: Framework Decision 2009/299/JHA [2009] L81/24. Successive amendments and corrections to Framework Decision 2006/783/JHA have been incorporated in the basic text.

60 European Commission *Report from the Commission to the European Parliament and the Council: based on Article 22 of the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders* (COM(2010) 428 final, 23 August 2010) – Not published in the Official Journal.

only partially. The methods chosen to transpose the provisions varied from one European Union country to another.

In general, the national implementing provisions are satisfactory and comply with the Framework Decision, particularly as regards the most important issues, notably the abolition of verifications of the double criminality of the acts giving rise to confiscation orders, and the recognition of confiscation orders without further formality. Nevertheless, due to the low number of notifications, the general degree of implementation cannot be considered satisfactory.

G. European Evidence Warrant

LEGISLATIVE ACT: Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.⁶¹

SHORT EXPLANATION: The European evidence warrant (EEW) replaces the system of mutual assistance in criminal matters between Member States for obtaining objects, documents and data for use in criminal proceedings.

BRIEF CONTENTS: This Framework Decision establishes the procedures and safeguards for Member States, whereby EEWs are to be issued and executed. The EEW is issued by competent authorities designated by the Member States. An issuing authority may be a judge, court, investigating magistrate, public prosecutor or other judicial authority. Member States must also designate the competent authorities for recognising and executing the EEW.

ENTRY INTO FORCE: 19 January 2009.

LATEST DEVELOPMENTS: The existing instruments in this area are fragmentary. A new approach is needed based on the principle of mutual recognition while also taking into account the flexibility of the traditional system of mutual legal assistance:

- In April 2010, European Union countries launched an initiative for the adoption of a Directive on the European Investigation Order.
- The Commission is presently analysing the opportunity to put forward a proposal for two further instruments, one in the area of mutual recognition, the other in the area of admissibility of evidence. The latter could establish minimum rules for recognition of evidence presented to criminal courts in European Union countries.

Those proposals are specifically aimed at practitioners and could bring considerable added value to the existing fragmented arrangements. It is regarded as a step forward in the fight against cross-border serious crime and for law enforcement across the European Union.

H. Detention and Transfer of Prisoners

SHORT EXPLANATION: The European Union aims to facilitate the social rehabilitation of convicted persons by ensuring that they serve their sentence in their home country. To this end, a system was established for transferring convicted prisoners back to their European Union country of nationality, habitual residence or other European Union country with which they have close ties.

In November 2008, two Framework Decisions were adopted which enable better social

61 [2008] OJ L350/72.

rehabilitation in the home country of persons sentenced in another Member State than that in which they normally reside:

1. Mutual Recognition of Custodial Sentences and Measures Involving Deprivation of Liberty

LEGISLATIVE ACT: Council Framework Decision 2008/909/JHA of 27 November 2008 on the Application of the Principle of Mutual Recognition to Judgments in Criminal Matters imposing Custodial sentences or measures involving Deprivation of Liberty for the purpose of their Enforcement in the European Union.⁶²

PURPOSE: The aim is to thus facilitate the social rehabilitation and reintegration of sentenced persons.

BRIEF CONTENTS: This Framework Decision sets out the rules whereby judgments that impose custodial sentences or measures involving the deprivation of liberty delivered in one Member State are to be recognised and enforced in another Member State.

This Framework Decision automatically replaces such agreements as the European Convention on the transfer of sentenced persons (1983) and its Additional Protocol (1997) in respect of relations between all European Union Member States. These Conventions will remain in force in relation to third States.

A real improvement, as regards the Framework Decision in relation to the Convention, lies in the channel of communication between the States involved. Under the Convention, requests for transfer shall be made between the Ministries of Justice of each State. The Framework Decision provides instead for direct contact between the competent authorities.

ENTRY INTO FORCE: 5 December 2008.

2. Supervision of Sentenced Persons or Persons on Conditional Release

LEGISLATIVE ACT: Council Framework Decision 2008/947/JHA of 27 November 2008 on the Application of the Principle of Mutual Recognition to Judgments and Probation Decisions with a View to the Supervision of Probation Measures and Alternative Sanctions.⁶³

SHORT EXPLANATION: This Decision provides that the probation decision or other alternative sanction may be executed in a European Union country other than the one in which the person was sentenced as long as he or she has consented.

PURPOSE: To encourage the recognition and supervision of probation measures and alternative sanctions between Member States. The Framework Decision encourages Member States to cooperate more fully, to document the supervision of measures and sanctions in their national registers, as well as to protect personal data.

BRIEF CONTENTS: This Decision extends the principle of mutual recognition of judicial decisions to the serving of non-custodial sentences. It also defines the rules for supervising suspended sentences, alternative sanctions and conditional sentences, with a view to increasing the sentenced person's chances of social re-integration, preventing re-offending and improving the protection of victims.

To date, the only international law instrument on cross-border assistance with probation is the 1964 Council of Europe Convention. It has so far been ratified by only 12 Member States,

62 [2008] OJ L327/27. Amending act: Framework Decision 2009/299/JHA [2009] L81/24.

63 [2008] OJ L337/102. Amending act: Framework Decision 2009/299/JHA.

some of them subject to numerous reservations. This has limited the importance of the instrument in practice. The Framework Decision will replace the corresponding provisions of the Council of Europe Convention on the supervision of conditionally sentenced or conditionally released offenders in relations between the Member States.

ENTRY INTO FORCE: 16 December 2008.

I. Rights of Suspect and Accused

LEGISLATIVE ACT: Resolution of the Council of 30 November 2009 on a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings.⁶⁴

SHORT EXPLANATION: The European Union works towards achieving common minimum standards of procedural rights in criminal proceedings to ensure that the basic rights of suspects and accused persons are protected sufficiently.

PURPOSE: To foster protection of suspected and accused persons in criminal proceedings and facilitate the application of the principle of mutual recognition of judicial decisions.

To achieve such standards and create the basis for mutual trust, a Roadmap on procedural rights was adopted in 2009 by the Justice Council proposing 6 legislative measures on a step-by-step basis:

- the right to interpretation and translation (Measure A);
- the right to information about rights (Letter of Rights) (Measure B);
- the right to legal advice and legal aid, before and at trial (Measure C);
- the right for a detained person to communicate with family members, employers and consular authorities (Measure D);
- the right to protection for vulnerable suspects (Measure E); and
- a Green Paper on pre-trial detention (Measure F).

The Commission works together with the Council and the European Parliament to implement the Roadmap. Much progress has been made to date. Directives on interpretation and translation, and on the right to information in criminal proceedings were adopted on 20 October 2010 and on 22 May 2012 respectively. The Commission has made a proposal on a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest which is currently at the final stages of negotiations between the European Union institutions,⁶⁵ whilst the European Commission are expected to publish their proposal for Measure C2 (Legal Aid Reform) in 2013.⁶⁶

A Green Paper on the application of European Union criminal justice legislation in the field of detention was launched in June 2011. The Commission has received many replies to this Green Paper from Member States, authorities and many organisations.

⁶⁴ [2009] OJ C295/1.

⁶⁵ See Justice, Fair Trials International and JUSTICIA European Rights Network “Joint Statement on the Directive on Right of Access to a Lawyer and to Communicate Upon Arrest” (14 November 2012), “A Guide to Minimum Standards on the Right of Access to a Lawyer and Communicate upon Arrest” (December 2012), “Joint Briefing on the Directive on Right of Access to a Lawyer and to Communicate Upon Arrest” (22 April 2013) JUSTICIA European Rights Network <www.ejusticia.net>.

⁶⁶ See Maria McDonald “Report on the Compliance of Legal Aid Systems with the European Convention on Human Rights in Seven EU Jurisdictions” (December 2012) JUSTICIA European Rights Network <www.ejusticia.net>.

Initiatives on the presumption of innocence, legal aid and special safeguards for vulnerable suspects and accused persons are planned for this year (2013).

BACKGROUND: European measures such as the Framework Decision on the EAW have generated a demand for the European Union to consider fundamental rights, especially the rights of the defence, in a more concrete way.

The Commission originally proposed a draft Framework Decision which covered five basic rights in 2004, but six European Union countries did not support it.

The subject however remains a priority; many European Union countries, the European Parliament as well as practitioners and other experts strongly support it. The case law of the European Court of Human Rights shows that violations of defence rights, as set out in Articles 5 and 6 of the European Convention on Human Rights (ECHR) do occur.

BRIEF CONTENTS: It sets out six measures: Right to Interpretation and Translation (Measure A); Right to Information (Measure B); Access to a lawyer (Measure C1), Legal Aid (Measure C2); Special safeguards for vulnerable persons (Measure E) and Pre-Trial detention issues (Measure F) which aim to foster protection of suspected and accused persons in criminal proceedings.

J. The Right to Interpretation and Translation in Criminal Proceedings

LEGISLATIVE ACT: Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings.⁶⁷

SHORT EXPLANATION: The European Union is taking action to tackle the problem of varying standards and differing levels of access to legal interpreting and translation available in criminal proceedings throughout its territory.

All European Union countries are signatories to the European Convention on Human Rights (ECHR); this is a requirement for joining the EU. The ECHR provides that anyone facing a criminal charge should be provided with the services of an interpreter, free of charge, if he or she does not understand the language of the proceedings.

PURPOSE: To improve mutual trust between European Union countries and to ensure the right to a fair trial.

BACKGROUND: On 30 November 2009, the Council adopted a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, which called for the adoption of measures also on the right to translation and interpretation. This Roadmap was included in the Stockholm programme adopted on 10 December 2009. At the same time, the Commission was invited to assess further aspects of minimum procedural rights for suspected or accused persons to improve cooperation between European Union countries in this field.

BRIEF CONTENTS: The Directive establishes common minimum rules for European Union countries on the right to interpretation and translation in criminal proceedings as well as in proceedings for the execution of the EAW.⁶⁸

ENTRY INTO FORCE: 15 November 2010.

⁶⁷ [2010] OJ L280/1.

⁶⁸ See Órla Ryan "Report on the Implementation of the Right to Interpretation and Translation Services in Criminal Proceedings (December 2012); JUSTICIA European Rights Network "A New European Instrument in Interpretation and Translation: Guidance for Interpreters in Criminal Proceedings" (December 2012) JUSTICIA European Rights Network <www.eujusticia.net>.

K. Right to Information in Criminal Proceedings

LEGISLATIVE ACT: Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the Right to Information in Criminal Proceedings.⁶⁹

SHORT EXPLANATION: Suspects of a criminal offence need to be informed about the accusation against them and should be granted timely access to the case materials.

PURPOSE: To implement common minimum standards of basic procedural rights applying throughout all European Union countries.

BRIEF CONTENTS: The Directive lays down rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them. It also lays down rules concerning the right to information of persons subject to a EAW relating to their rights.⁷⁰

The Directive provides that suspects who are arrested must be informed of their basic rights in writing through a document drafted in everyday language whether they ask for it or not.

ENTRY INTO FORCE: 21 June 2012.

L. Rights of the Victim

LEGISLATIVE ACT: Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and replacing Council Framework Decision 2001/220/JHA.

SHORT EXPLANATION: Victims must be able to benefit from this minimum level of rights without discrimination across the European Union, irrespective of their nationality or country of residence, whether a minor or serious crime is involved, whether they have reported the crime, and whether they are the victim or a family member.

PURPOSE: To establish minimum standards on the rights, support and protection of victims of crime in every European Union Member State.

The key purpose of this Directive is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings regardless of the place where the damage occurred in the European Union.

ACHIEVEMENTS: The role of victims in criminal proceedings and the relevant national laws and policies on victims' rights differ considerably from one Member State to another. To address the lack of common minimum rules, the European Union has adopted European Union legislation both in relation to all victims and in relation to specific groups of victims.

General minimum standards to address the rights and needs of victims in criminal proceedings were first established through the 2001 Council Framework Decision on the standing of victims in criminal proceedings. This legal instrument was adopted to ensure that victims can participate actively, have adequate rights and are being treated fairly within criminal proceedings.

However, the Framework Decision proved insufficient to properly address the needs of victims and ensure they benefit from procedural rights in the Member States. Therefore, the Council stated

69 [2012] OJ L142/1.

70 See Grace Mulvey and Sinead S Kelly "Know Your Rights to Information on Criminal Charges" (December 2012) JUSTICIA European Rights Network <www.eujusticia.net>.

in the Stockholm Programme (2010–2014) that an integrated and co-ordinated approach to victims is needed and calls on the Commission and European Union countries to examine how to improve legislation in this area.

To reinforce existing national and European Union measures on victims' rights, the Commission adopted the Victims package on 18 May 2011; a package of legislative proposals which included:

- a Communication presenting the Commission's current and future action in relation to victims;
- a proposed Directive establishing minimum standards on the rights, protection and support of victims of crime (replacing the 2001 Framework Decision), which will ensure that victims are recognised, treated with respect and receive proper protection, support and access to justice; and
- a proposed Regulation on mutual recognition of protection measures in civil matters which will help prevent harm and violence and ensure that victims who benefit from a protection measure taken in one European Union country are provided with the same level of protection in other European Union countries should they move or travel there. This measure complements the Directive on the European Protection Order (2011)⁷¹ which applies to protection orders adopted under criminal procedures.

The Directive establishing minimum standards on the rights, support and protection of victims of crime was adopted on 25 October 2012. On 31 May 2013, Council adopted the Regulation on mutual recognition of protection measures in civil matters following a vote in the European Parliament on 22 May. The European Union has also adopted legislation to address the need for victims to get compensation for the damage caused by crime (The 2004 Directive relating to Compensation to Crime Victims).

With regard to specific groups of victims, European Union legislation further establishes protection and support for victims of human trafficking and child victims of sexual exploitation and child pornography. In addition to legislative action, the Commission has funded hundreds of projects aimed at supporting victims of crime, mainly through funding programmes in the fields of criminal justice and combating violence against children, young people and women (the Daphne Programme).⁷²

BRIEF CONTENTS: The Directive considerably strengthens the rights of victims and their family members to information, support and protection as well as their procedural rights when participating in criminal proceedings. It also includes provisions that will ensure that professionals are trained in victims' needs and encourage cooperation between Member States and awareness raising of victims' rights. Victims who choose to participate in restorative justice processes must have access to safe and competent restorative justice services subject to some minimum conditions set out in the Directive.

ENTRY INTO FORCE: 15 November 2012.

71 Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order [2011] OJ L338/2.

72 Decision No 779/2007/EC of the European Parliament and of the Council of 20 June 2007 establishing for the period 2007-2013 a specific programme to prevent and combat violence against children, young people and women and to protect victims and groups at risk (Daphne III Programme) as part of the General Programme Fundamental Rights and Justice [2007] OJ L314/9.

APPLICATION: The United Kingdom and Ireland will take part in the adoption of this Directive. Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application.

NEXT STEPS: This legislative package on victims' rights is a first step towards putting victims at the heart of the criminal justice agenda of the European Union. As set out in the "Budapest Roadmap"⁷³ adopted by the Council in 2011, the European Union needs to continue addressing victims' rights. In line with the priority actions on victims set out in the Roadmap for the next years to come, the Commission is currently reviewing the legal framework on compensation of crime victims and is focusing on ensuring that the 2011 Directive on the European Protection Order and the 2012 Directive on Victims' Rights will be properly transposed into national legislation by the set deadlines in 2015.

73 Resolution of the Council of 10 June 2011 on a Roadmap for Strengthening the Rights and Protection of Victims, in particular in Criminal Proceedings [2011] OJ C187/1.

UNIT TITLES AND THE LAW OF BUILDINGS

BY THOMAS GIBBONS*

I. INTRODUCTION

This article links three distinct phenomena in the law of unit titles. First, the introduction of the Unit Titles Act 2010 (“UTA 2010”) has meant that a “principal unit” must (with one exception) be related to a building. Second, the recent *Berachan* decision has shown that the characteristics of a building may be taken into account in determining maintenance issues under the Unit Titles Act 1972, and, by extension, the UTA 2010. This has had interesting consequences, with subsequent decisions seeming to both endorse and disclaim this approach. Third, the *Chang* series of decisions has shown that property outside a unit plan can be treated as within the body corporate’s auspices. Based on these two phenomena, this article argues that the law of unit titles can, to a greater extent than ever before, be called “the law of buildings”. However, ongoing uncertainty about future decisions means that while it is clear that a principal unit must generally now be a building, determining future maintenance issues will rest primarily on the factual context on buildings. That is, while the law of (principal) units is the law of buildings, resting the law of units on buildings may lead to it becoming less generalised and more unprincipled.

This article proceeds in four parts. The first considers the definition of principal unit introduced by the Unit Titles Act 2010, and how this differs from the position under the Unit Titles Act 1972. The second part considers case law leading up to the *Berachan* decision, showing the divergent paths followed in case law, and the difference between unit titles as “the law of buildings” and “the law of boundaries”. The third part outlines the decision of the Court of Appeal of *Berachan*, and the significance of this decision in reinforcing the approach in the Unit Titles Act 2010 – making unit titles law “the law of buildings”. The fourth part considers a further case study following *Berachan*.

The article concludes by drawing these threads together to illustrate issues arising from unit titles law becoming the law of buildings.

II. UNITS, PRINCIPAL AND OTHERWISE

A. *The Position under the Unit Titles Act 1972*

The long title to the Unit Titles Act 1972 described the legislation as:

An Act to facilitate the subdivision of land into units that are to be owned by individual proprietors, and common property that is to be owned by all the unit proprietors as tenants in common, and to provide for the use and management of the units and common property.

This phrasing uses the term “unit/s” (singular or plural) three times, the term “land” once, but the

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word “building” is absent. Despite this, the notion of a unit title has generally been strongly linked to the notion of a physical building. During its gestation, the Unit Titles Act 1972 was known as the Flat and Office Ownership Bill; this may not seem material until we remember that flats and offices are necessarily buildings (or parts of buildings), while “unit” has a more generic meaning.

The Unit Titles Act 1972 provided for three kinds of units: principal units, accessory units, and future development units. Only the first of these is material here. The definition of “principal unit” provided that:¹

principal unit means a unit that is designed for use (whether in conjunction with any accessory unit or not) as a place of residence or business or otherwise, and that is shown on a unit plan as a principal unit

Again, this definition contains no reference to the idea of a building. However, units were linked to buildings in other provisions of the legislation. Section 4(1) provided that:

4 Subdivision effected when plan deposited

- (1) The subdivision of land so as to provide for units shall be effected by the deposit under the Land Transfer Act 1952 of a plan specifying the units in their relation to a building or buildings already erected on the land. The plan (in this Act referred to as a unit plan) shall comply with the provisions of all regulations as to survey made under the Survey Act 1986.

That is, in order to effect a unit title subdivision, it was necessary to define the units in relation to a building or buildings. However, this did not mean that all units needed to be buildings: it only meant that they needed to be defined in relation to one. It also meant that the unit titles regime could be used for a range of developments and schemes for shared ownership. Unit titles could be obtained for unimproved sites, as long as there was some building – perhaps a shed – to reference on the unit plan. Non-building based schemes, including forestry and farm park developments, could be placed under the unit titles regime, as long as a sole building would allow the requirements of s 4(1) to be met. While the unit titles legislation might itself be quite prescriptive, the notion of a “principal unit” was quite permissive.

The notion that not all principal units needed to be buildings was not uncontroversial. Rod Thomas identified a debate concerning “polyhedronists” – with some wanting a unit to be inherently linked to the dimensions of a building; and others allowing that a unit could be any shape (or polyhedron) of fixed dimensions.² The latter drew support from the general definition of “unit”:³

unit, in relation to any land, means a part of the land consisting of a space of any shape situated below, on, or above the surface of the land, or partly in one such situation and partly in another or others, all the dimensions of which are limited, and that is designed for separate ownership

To reinforce the point, this definition again was not linked to any requirement for a building. Ultimately, however, judicial comment came to favour the polyhedronists,⁴ and a broad range of non-building-based developments were able to be effected.

1 Unit Titles Act 1972, s 2 (as amended by the Unit Titles Amendment Act 1979).

2 Rod Thomas “Unit Titles” in T Bennion and others (eds) *New Zealand Land Law* (Brookers, Wellington, 2005) 887.

3 Unit Titles Act 1972, s 2.

4 See *Cassels v Body Corporate 86975* (2007) 8 NZCPR 740 (HC) at [37].

B. *The Position under the Unit Titles Act 2010*

The Unit Titles Act 2010 defines a “unit” in an identical manner to the Unit Titles Act 1972,⁵ but the definition of “principal unit” is materially different. Section 7(1) of the Unit Titles Act 2010 provides that:

7 **Meaning of principal unit**

(1) In this Act, **principal unit** means—

- (a) a unit that is designed for use (whether in conjunction with any accessory unit or not) as a place of residence or business or for any other use of any nature, and that is shown on a unit plan as a principal unit; and
- (b) either—
 - (i) contains a building or part of a building or is contained in a building (although the unit may or may not be bounded by the physical dimensions of the building); or
 - (ii) is a car park.⁶

Apart from the specific exemption for a car park, s 7(1)(b) sets out a new requirement for a principal unit: that it have a relationship with a building. This might be a unit that contains a building. This might be a unit that contains part of a building. It might be a unit contained within a building. The unit does not have to precisely match the physical dimensions of the building,⁷ but the unit – *each* principal unit – must bear some relationship to a building. Developments under the Unit Titles Act 1972 that provide for multiple units referenced to a single unrelated or unattached building are no longer permissible under the Unit Titles Act 2010. Each and every principal unit must have a direct relationship with a building.

This point is reinforced by s 32(2), relating to the deposit of unit plans under the Unit Titles Act 2010:

- (2) A unit plan for the subdivision of land or for the subdivision of a principal unit must not be deposited—
 - (a) unless a certificate in the prescribed form has been given in writing by an authorised officer of the territorial authority in whose district the land is situated to the effect that—
 - (i) every building (if any) shown on the plan has been erected, and all other development work has been carried out, to the extent necessary to enable all the boundaries of every unit and the common property shown on the plan to be physically measured; and
 - (ii) every principal unit shown on the plan conforms to the definition of principal unit in section 7.

That is, not only must relevant building work be complete, but every principal unit must meet the requirements of s 7: unless it is a car park, it must contain a building, or part of a building, or be contained in a building.

5 See Unit Titles Act 2010, s 5.

6 The definition of carpark is contained in s 5: it means “a space for parking a single motor vehicle”.

7 A point that supports the polyhedronists: see Thomas, above n 2.

C. Comment

This new definition of “principal unit” in the Unit Titles Act 2010 represents a significant shift from the requirements of the Unit Titles Act 1972. The requirement that each principal unit directly relate to a building can be seen to limit the future scope of unit title developments, but also to show that the law of unit titles is now inherently the law of buildings. Some implications of this point are evaluated in the next section.

III. THE LAW OF BUILDINGS AND THE LAW OF BOUNDARIES

A. Units, Buildings, and Maintenance

Units, as buildings, need to be maintained, sometimes repaired. New Zealand has suffered something of a leaky buildings crisis in recent years,⁸ with over 42,000 homes affected – many of them unit titles.⁹ This section of this article discusses various cases on unit title maintenance, teasing out two divergent lines of authority that emerged through a number of cases. Outlining this divergence then sets the scene for a discussion of the Court of Appeal’s decision in *Berachan*,¹⁰ an important case which illustrates that the law of unit titles can be seen as being the “law of buildings”.

A number of these cases relate to body corporate rules. The Unit Titles Act 1972 contained default body corporate rules in schs 2 and 3: these rules bound both owners and the body corporate. These rules – called bylaws in some other jurisdictions – could be amended by resolution of the body corporate.¹¹ Over time, a number of decisions emerged in which body corporate rules were found to be ultra vires (beyond the powers of the body corporate) and unenforceable, whether by their method of passage or their content.¹²

B. The Young Decision

Young v Body Corporate 120066 concerned a dispute between two groups of owners in an apartment complex – the Cowley Group, and the Young Group.¹³ The unit development suffered leak problems over a number of years. In 2004, the body corporate obtained a report showing serious damage to the apartments. Based on the report, the Young Group favoured widespread remedial work. However, the Cowley Group favoured targeted repairs based on the needs of each unit. Each group jockeyed for control of the body corporate committee, with a body corporate meeting ultimately resolving to impose a levy of around one million dollars on unit owners for repair, replacement and painting works. Body corporate rule 2(d) provided that the body corporate was to repair and maintain the building exterior. The Cowley Group argued that this rule was ultra vires, as where

8 See Steve Alexander and others *The Leaky Buildings Crisis: Understanding the Issues* (Brookers, Wellington, 2011).

9 At preface.

10 *Berachan Investments Ltd v Body Corporate 164205* [2012] NZCA 256, [2012] 3 NZLR 72.

11 A unanimous resolution was required to amend rules in Schedule 2; a majority resolution could amend rules in Schedule 3: see Unit Titles Act 1972, s 37(3) and (4).

12 See Thomas Gibbons “Body Corporate Rules: Tensions” (2008) 16 Wai L Rev 167; Rod Thomas “Fifer, Unit Titles and No 8 Wire” [2006] NZLJ 152.

13 *Young v Body Corporate 120066* HC Auckland CIV-2007-404-2375, 6 December 2007.

the exterior was part of a unit (and so not common property), repair was not incidental to the body corporate's powers and duties in terms of s 37(5) of the Unit Titles Act 1972.¹⁴

The High Court disagreed, favouring the approach of the Young Group. In the Court's view, the unique "wedding cake" structure of the building was relevant to the rule being incidental to the body corporate and so *intra vires*. The Court noted that under s 15(1)(f) of the Unit Titles Act 1972, the body corporate was required to maintain common property. In the Court's view, this meant that a body corporate:¹⁵

... must have all powers reasonably necessary to protect the common property in a building including a power to repair and maintain parts of the external structure, the condition of which might expose the common property to consequential physical damage.

This meant that the body corporate was entitled to levy all owners to repair the whole development, even if one or more units would benefit more than others, particularly as these were necessary repairs that did not involve betterment. The Court also noted that s 15(1)(b) of the Unit Titles Act 1972 meant that the body corporate had a statutory obligation to hold and maintain insurance, and that the insurer would likely require the remedial works to be done as a condition of insurance being obtained. Therefore, rule 2(d) was not *ultra vires*.

The *Young* decision is important to the analysis in this article for two reasons. First, it shows the Court accepting that a rule requiring the body corporate to repair and maintain both common property and unit property was *intra vires* and enforceable. As will be shown, not all other cases have taken a similar approach. Second, it shows the Court paying attention to the specific physical characteristics of the building – in this case the wedding cake structure. As the other cases discussed will show, not all courts have paid similar attention to the nature of the building. In this sense, *Young* represents one set of policy choices in relation to unit titles law, and different policy choices have been taken in other cases.

C. *The Sunset Terraces Decision*

The *Sunset Terraces* case ultimately reached the Supreme Court on the question of Council liability in relation to leaky buildings.¹⁶ This section of this article, however, only concerns the High Court judgment of Heath J.¹⁷ As with the *Young* decision, there was a body corporate rule (rule 2(b)), which provided that the body corporate was to keep the exterior and roof of the building (excluding the window exteriors) in a state of good repair. The unit plan defined the boundaries of units as extending to the exterior walls, meaning that the outside faces of exterior walls were parts of individual units, rather than common property.

14 On *ultra vires* rules, see particularly *Velich v Body Corporate 164980* (2005) 6 NZCPR 143 (CA); Thomas, above n 12; Gibbons, above n 12; Liza Fry-Irvine and Thomas Gibbons "Unit Titles Act 2010 – Reading Between the Lines" (paper presented to Property Law Conference, Wellington, 2012) at 17-50.

15 *Young v Body Corporate 120066* HC Auckland CIV-2007-404-2375, 6 December 2007 at [32].

16 *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC); [2010] 3 NZLR 486 (CA); [2010] NZSC 158, [2011] 2 NZLR 289 [*Sunset Terraces*].

17 *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC).

The Court held that rule 2(b) was ultra vires, on the basis that the Unit Titles Act 1972 only contemplated the body corporate being responsible for the maintenance and repair of common property, not unit property. As Heath J put it:¹⁸

The fundamental theme of the statute is the distinction between the individual units (for which each registered proprietor takes responsibility) and common property (the domain of the body corporate). The distinction is logical. Individual registered proprietors can deal only with individual property, whereas “common property” is owned by *all* proprietors and must be managed by the body corporate for the common good of all.

D. Comment

In *Sunset Terraces*, then, a very different line of authority from that in *Young* emerged. In *Young*, a rule allowing the body corporate to repair and maintain individual units was found to be enforceable. In *Sunset Terraces*, a very similar rule was found to be ultra vires and unenforceable. In *Young*, the Court found that the particular characteristics of the relevant development could be taken into account. In *Sunset Terraces*, the nature of the building matters less than the “fundamental theme” of the legislation: a clear delineation between common property and individual units.

These divergent lines of authority created some attention from commentators. Barrister Martin Taylor described the results in these two cases as “surprisingly opposite”, going on to note that the analysis in *Sunset Terraces* was to be preferred, as “individuals must be responsible for damage to individual property”.¹⁹

It could be said that the decision in *Sunset Terraces* is focused on the issue of ownership – the “fundamental theme” of a distinction between common property, under the domain of the body corporate; and unit property, under the domain of an individual owner. This approach is based on a restrictive view of the body corporate’s powers and domain, whether under body corporate rules or otherwise. In simple terms, this could be seen to represent unit titles as “the law of boundaries”. As noted above, *Young*, on the other hand, is based on attention to the physical characteristics of the development, and better represents the notion of unit titles as “the law of buildings”. The next part of this article illustrates these divergent approaches within one case, showing that the latter approach has emerged as dominant – for now.

IV. BERACHAN: A CASE STUDY

A. *Berachah* in the High Court

It is apposite to begin the discussion of *Berachah*²⁰ with an outline of the physical characteristics of the building, and how these related to boundaries. Eighty per cent of the roof of the building was part of accessory unit A3, while 20 per cent was common property. Amended body corporate rule 2(a) – somewhat similarly to those in other cases – provided that the body corporate would

18 At [97].

19 Martin Taylor “The uncertain state of body corporate maintenance” *NZ Lawyer* (online ed, Auckland, 11 July 2008).

20 *Body Corporate 164205 v Berachah Investments Ltd* HC Auckland CIV-2010-404-3324, 22 December 2010. The respondent was recorded as “Berachah” in the High Court, and “Berachan” in the Court of Appeal.

repair and maintain the roof and common property. When an issue arose as to responsibility for the cost of repairs to the roof, the body corporate argued that rule 2(a) was ultra vires and unenforceable, while *Berachah* supported the rule.

The High Court traversed the decisions in *Young*, *Sunset Terraces*, and a third important decision *Velich*.²¹ *Velich* was an important decision of the Court of Appeal on body corporate rules. In basic terms, *Velich* was the owner of a unit and wanted to complete some decking. The body corporate had passed a rule (2.1(f)) providing that the consent of the body corporate was required for decking, and when *Velich* sought consent, the body corporate declined. While the High Court agreed that consent was required, the Court of Appeal had held that amended body corporate rule 2.1(f) was ultra vires, as it appreciably expanded the powers and duties of the body corporate, and so contravened s 37(5) of the Unit Titles Act 1972. More importantly, perhaps, the Court of Appeal had gone on the note that the body corporate was exercising a statutory power in exercising discretion over the grant of consent, and so was required to act reasonably (in a public law sense).²²

Velich, then, related to an issue outside the realm of maintenance. However, the Court in *Berachah* decided that it was bound by *Velich*, and so followed the *Sunset Terraces* line of authority, and decided that the bulk of the cost of the roof repair should be met by the owner of AU3. The Court also considered s 11 of the Unit Titles Act 1972, relating to incidental rights, but decided that this provision did not help *Berachah*. The Court also accepted that its decision created some practical difficulties.

Three comments on this outcome can be made. First, and as noted, the Court chose to follow the *Sunset Terraces* line of authority, aligning itself with an emphasis on “the law of boundaries” – both in terms of the boundary lines indicated on the unit plan, and in terms of the restrictive boundaries on the powers of the body corporate. Second, this can be seen as a policy choice: the Court identified that there were different approaches, and used another case with very different facts to help reach its finding. Third, the Court accepted that there were practical issues with its ruling. All three factors probably contributed to the High Court’s ruling being appealed.

B. *Berachah* in the Court of Appeal

It was noted above that the High Court decision in *Berachah* favoured the *Sunset Terraces* approach over the *Young* approach. The Court of Appeal decision was called *Berachah*,²³ and in its judgment, the Court of Appeal took what can be seen as a pragmatic approach, emphasising the factual characteristics of the building. Noting that the roof was “physically and functionally a single entity”, the Court of Appeal determined that the whole roof needed to be replaced, and that the works needed to be done as a single project,²⁴ because “[b]oth visually and functionally”, the roof was a single entity.²⁵

This emphasis on the physical characteristics of the building deserves some attention: it provides an example of a “law of buildings” approach. The decision of the Court of Appeal to

21 *Velich v Body Corporate* 164980 (2005) 6 NZCPR 143 (CA).

22 See Michael Taggart “Administrative Law” [2006] NZ Law Rev 75; Gibbons, above n 12.

23 *Berachah Investments Ltd v Body Corporate 164205* [2012] NZCA 256, [2012] 3 NZLR 72.

24 At [2].

25 At [48].

follow the *Young* line of authority also deserves attention. Expressly disclaiming the approach taken in *Sunset Terraces*, the Court of Appeal held that:²⁶

... a body corporate is entitled to assume responsibility in relation to the repair and maintenance of items of unit property provided that the duty can fairly be seen as incidental to the duty to maintain and repair common property. Whether a body corporate's assumption of responsibility in a particular case can properly be seen as incidental will depend on all the circumstances, including the characteristics of the building or complex involved.

The Court of Appeal allowed for the body corporate to repair the roof, even though the bulk of it was an accessory unit (unit property), rather than common property. This finding overturned the decision of the High Court in *Berachah*, and showed an emphasis on the Court taking into account the physical characteristics of the building, rather than a strict demarcation of boundaries.

C. Comment

This section of this article has traversed a number of cases on unit title building maintenance. In *Young*, the physical characteristics of the development were taken into account in the Court deciding that the body corporate could repair and maintain the building exterior, in accordance with body corporate rules. In *Sunset Terraces*, a similar body corporate rule was found to be ultra vires and unenforceable, with the High Court emphasising that the distinction between common property and unit property was a fundamental theme of unit titles legislation.

These two divergent approaches – curtly being described as views of unit titles as “the law of buildings” and “the law of boundaries” could not be sustained. The High Court decision in *Berachah* discussed these two earlier decisions and, with reference to *Velich*, came out in favour of the *Sunset Terraces* approach. On appeal, this High Court decision was reversed, with particular attention again being paid to the physical nature of the buildings.

In *Berachan*, the Court of Appeal chose the “law of buildings” approach. It is perhaps significant that *Berachan* was decided after the Unit Titles Act 2010 had been passed, but before the new legislation came into effect, and it is conceivable that the Court of Appeal decided *Berachan* in the shadow of the new legislation, with its emphasis on buildings in the definition of principal units. However, there are points against this suggestion having any substantive impact. We could note that both *Berachah* and *Berachan* were decided under the Unit Titles Act 1972, not the Unit Titles Act 2010. Further, the High Court judgment made express reference to the Unit Titles Act 2010, even though it did not apply as at the date of the decision – and while the High Court made this reference, it came to a very different conclusion to the Court of Appeal. This suggests that not too much should be made of the idea that *Berachan* (in the Court of Appeal) was decided in the shadow of the Unit Titles Act 2010. Rather, the policy choice was made for other reasons, resting on the importance of context, circumstance, and the particular building at hand.²⁷

26 At [46].

27 For criticism of the *Berachan* decision, see Rod Thomas “Berachan and Unit Titles” [2013] NZLJ 111; and Rod Thomas “Degraded Unit Title Property Rights – a Judicial Trend” (2013) NZULR (forthcoming).

V. ENDEANS: A FURTHER CASE STUDY

A. *Phenomena of the Law of Buildings*

So far, this article has identified two distinct but relatable phenomena: the provisions of the Unit Titles Act 2010 that require a unit to be related to a building (that is, be a building, part of a building, or contained within a building – with the one exception of a car park); and the path to the *Berachan* decision in the Court of Appeal, which has allowed maintenance decisions to be determined by reference to the specific physical characteristics of a building.

Lawyers usually analyse cases by reference to the legal principles they enunciate. This part of this article takes a different approach, considering a particular building, the Endeans building on Queen Street, Auckland, which has been the subject of a number of different legal proceedings. Two issues arise from this litigation, which support a “law of buildings” approach.

B. *The Endeans Building and its Verandah*

The building dated back to 1905, with various rebuilding and alterations over a number of years, including new levels, which led to ultimately 37 units. Leasehold unit titles were created in 1982, and these were freeholded in 1994. The unit plan provided that unit boundaries were “the exterior face of external walls and structures unless stated otherwise”. The High Court saw this as unusual;²⁸ the Court of Appeal observed that:²⁹

Unusually, the exterior walls of the building are defined by the unit plan to be the private property of the unit owners rather than common property vested in the BC. The BC rules also contain a number of unusual provisions.

There was correspondence indicating that it was done in this case to keep responsibility for commercial units separate from responsibility for residential units; the Court of Appeal emphasised that the parties had intended the development to have little common property.³⁰

Most importantly for these purposes, there was a verandah extending from units D–I, with some of the verandah attached to the external wall of AU7, which was owned by various residential owners in 1/30 shares. The verandah was permanently fixed to the building, but extended over the footpath, and so beyond the unit plan boundaries. The intrusion into airspace by the verandah was not included in the original lease of the land, nor was it the subject of any easement. The High Court focused on the idea that the verandah being a fixture. There was a great degree of annexation to the unit land (through the building), and the object of annexation was directly related to the use of the building and land. Having decided the verandah was a fixture, the Court also considered whether the verandah might be common property. On this issue, the provision on the unit plan as to separate ownership of the external walls was influential, as were the subjective intention of the parties to the subdivision. As a fixture, the verandah was found to be part of the freehold of the relevant units, and so subject to oversight and control by the body corporate. The verandah was held to be jointly owned by the owners of units D–I, and AU7, in shares reflecting the relative portion of the verandah adjoining those units.

28 *Body Corporate 95035 v Chang* [2011] 3 NZLR 132 (HC) at [9].

29 *Law v Tan Corporate Trustee Ltd* [2012] NZCA 620, [2013] 1 NZLR 651 at [4].

30 At [14].

What is significant about *Chang* is that the High Court held that the unit development (and so the domain of the body corporate) could include land outside the boundaries of the unit plan. Through allowing the body corporate to be responsible for property that was not common property (nor unit property), the High Court can be seen to have taken a “law of buildings” approach, focusing on the physical realities of the building. In doing so, the Court avoided both a sharp distinction between common property and unit property, and a restrictive interpretation of the body corporate’s powers. As the verandah was physically part of the building comprising the units and common property, it was deemed relevant to the body corporate’s powers and duties.

C. *Post-Verandah Matters*

Later, the Auckland Council then ordered demolition of the verandah, because of safety issues and the Rugby World Cup. It was removed in August 2011, though parts of the structure remained, and the District Plan required a new verandah, requiring ongoing attention to ownership, construction, and maintenance.³¹ At one point, the Court noted its agreement with the submission that there was a right to build a new verandah where the old one had been, as the right was an incorporeal hereditament.³² The earlier finding that the verandah was not common property was correct: the verandah formed part of the units to which it was attached, and formed part of the land, but the body corporate had residual responsibility for the verandah.

There were further proceedings concerning the Endeans building in *Law v Tan*,³³ relating to the enforceability of body corporate rules relating to maintenance, and a scheme relating to damage under s 48 of the Unit Titles Act 1972. The relevant parts of s 48 provided:

48 Scheme following destruction or damage

- (1) Where any building or other improvement comprised in any unit or on any land to which a unit plan relates is damaged or destroyed, but the unit plan is not cancelled, the Court may, on the application of the body corporate, an administrator, the proprietor or one of the proprietors of a unit, or a registered mortgagee of a unit, by order settle a scheme including provisions—
 - (a) for the reinstatement in whole or in part of such building or other improvement; or
 - (b) for the transfer of units to the proprietors of the other units so as to form part of the common property.
- ...
- (5) In the exercise of its powers under subsection (1), the Court may make such orders as it considers expedient or necessary for giving effect to the scheme, including orders—
 - (a) directing the application of any insurance money;
 - (b) directing payment of money by or to the body corporate or by or to any person;

31 See *Body Corporate 95035 v Chang* [2012] NZHC 2467.

32 At [29].

33 *Law v Tan Corporate Trustee Ltd* [2012] NZCA 620, [2013] 1 NZLR 651.

- (c) directing the deposit of an appropriate new unit plan; or
- (d) imposing such terms and conditions as it thinks fit.³⁴

After discussing various body corporate rules, the Court of Appeal in *Law v Tan* found that the scheme settled by the High Court was valid, observing that:³⁵

We accept the general proposition that a scheme under s 48 should depart from the general principles of the Act and the terms of the BC rules no more than is necessary. We also accept that, as a general proposition, the owners in a unit title development are not expected to meet the costs of repairs to common property [except] in accordance with the levy system under the 1972 Act and the relevant BC rules. However, as was recognised by this Court in *Berachan*, the exigencies and circumstances of particular cases may justify the BC assuming responsibility for repairs to privately owned parts of a unit title development. That has been accepted as an available function under a s 48 scheme where necessary and appropriate.

D. Comment

The “exigencies and circumstances of particular cases” can be seen as an echo of the recognition in *Berachan* that what ultimately matters is the physical characteristics of the building at hand: the specific nature of the building will allow a departure from usual principles. Certainly, in the Endeans building litigation articulated through *Chang* and *Law v Tan*, the courts recognised the physical realities of the building at hand, and placed considerable weight on these physical characteristics in reaching its findings. A “law of boundaries” approach might well have treated the verandah and the proposed scheme more restrictively.

VI. COMMENT AND CONCLUSION

Some of the substantive issues discussed in cases under the Unit Titles Act 1972 have been more or less resolved by s 138 of the Unit Titles Act 2010, which provides (in part) that:

138 Body corporate duties of repair and maintenance

- (1) The body corporate must manage, maintain, and keep in a good state of repair the common property and any assets owned by the body corporate or designed for use in connection with the common property.
- (2) The body corporate must maintain, repair, or renew all building elements and all infrastructure that relate to or serve more than 1 unit.

This extract sets out that the body corporate is to maintain “building elements”, an inclusive phrase:

building elements includes the external and internal components of any part of a building or land on a unit plan that are necessary to the structural integrity of the building, the exterior aesthetics of the building, or the health and safety of persons who occupy or use the building and including, without

34 Unit Titles Act 1972, ss 48(1) and 48(5). All scheme cases to date have concerned buildings: for a discussion of these cases, see Rod Thomas “Schemes Following Destruction or Damage Under the New Zealand Unit Titles Regime” (2011) 17 NZBLQ 371; Thomas Gibbons “Season of the *Tisch*: A Response to Rod Thomas (Schemes Under the Unit Titles Regime)” (2012) 18 NZBLQ 147; Rod Thomas “*Tisch* and the Winter of Discontent: A Reply” (2012) 18 NZBLQ 163.

35 At [73].

limitation, the roof, balconies, decks, cladding systems, foundations systems (including all horizontal slab structures between adjoining units or underneath the lowest level of the building), retaining walls, and any other walls or other features for the support of the building

The word “building” appears a number of times in this definition, further emphasising that unit titles law is – or has become – “the law of buildings”.

However, two particular implications of the law of unit titles as “the law of buildings” deserve attention. The first is that focusing on specific contextual factors makes it difficult to generalise. What finding will a court come to on a particular maintenance issue? It may depend entirely on the physical characteristics of the building – and, in appropriate circumstances, the building’s background and the expectations of the parties.³⁶ This makes it very difficult for lawyers to give useful advice without a full knowledge of the building itself, and its specific design, issues, and context. General principles on the limits and scope of body corporate powers and duties may be almost useless in the face of a particular building. In short, the “law of buildings” emphasises context over consistency and certainty, and makes it difficult to enunciate or apply general principles. The second is that there may be some overlap between the notion of unit titles as the law of buildings, and the notion of unit titles as the law of boundaries. In *Sunset Terraces*, Heath J described the distinction between common property and unit property as a “fundamental theme” of the Unit Titles Act 1972. However, this distinction has not been a strict requirement in all cases. Various decisions settling schemes under s 48 of the Unit Titles Act 1972 have allowed the Court to make orders covering both common property and unit property within one remedial work: more than once, a scheme has been acknowledged as an exception to the general principle that the body corporate should maintain only common property, and not unit property.³⁷ Further, boundary issues can remain important to building issues: *Berachan* concerned boundaries in two senses: both in the sense of where units end and common property begins, and what the appropriate powers of the body corporate are.

As this article has made clear, treating unit titles as “the law of buildings” reflects deliberate policy choices. The Unit Titles Act 2010 differs from the Unit Titles Act 1972 by requiring a principal unit to directly relate to a building, rather than simply being referenced to one, as was permitted under the Unit Titles Act 1972. Further, two lines of authority under the Unit Titles Act 1972 emerged in relation to building maintenance issues: one provided that a body corporate could maintain property that was not common property, as set out in *Young*; the other line of authority drew on the notion of a clear distinction between common property and unit property to hold that a body corporate could not maintain the latter: this was the approach taken in *Sunset Terraces*. *Berachah*, in the High Court, and then *Berachan*, in the Court of Appeal, favoured the *Sunset Terraces* and the *Young* approach respectively. The *Berachan* approach, as articulated by the Court of Appeal, paid particular attention to the physical context and characteristics of the building at hand. A different but congruent line of authority emerged from the Endeans litigation – various judgments concerning a single building. Most notably, a verandah outside the unit boundaries was held to fall within the auspices of the body corporate.

36 On expectations, see also *St Johns College Trust Board v Body Corporate* [2013] NZCA 35.

37 See for example *Tisch v Body Corporate 318596* [2011] NZCA 420, [2011] 3 NZLR 679.

All of these points reinforce the notion that “the law of buildings” is a more appropriate understanding of unit titles than “the law of boundaries”. Rather than treating unit titles as property in thin air,³⁸ in future we might more properly allow for “the law of buildings” – perhaps as a subset of property as “the law of things”.³⁹

38 Kevin Gray “Property in Thin Air” (1991) 50 CLJ 252.

39 Henry E Smith “Property as the Law of Things” (2012) 125 Harv L Rev 1691.

CASE NOTE: *RE GREENPEACE OF NEW ZEALAND INC*

BY MELISSA GIBSON*

I. INTRODUCTION

The *Re Greenpeace of New Zealand Inc (Re Greenpeace)*¹ decision has been widely publicised in the media and commented on by lawyers and academics for a number of reasons – the institution is a household name; the actions of the organisation are widely reported on and the case is the first to be taken through the Court hierarchy in New Zealand from a decision of the Charities Commission (as it was then known). As at the date of this publication, Greenpeace New Zealand Inc (Greenpeace) has been granted leave to appeal the decision of the Court of Appeal to the Supreme Court.²

The primary issue of the appeal was whether Greenpeace was entitled to be registered as a charitable entity under the Charities Act 2005 (the Act) on the grounds that it is established exclusively for charitable purposes.

The Court of Appeal confirmed the prohibition on the registration of entities under the Act where political purposes are more than ancillary to the charitable purposes of an entity.

The Court of Appeal set aside the decision of the Charities Commission declining to register Greenpeace as a charitable entity under the Act, and referred the application by Greenpeace for registration as a charitable entity to the chief executive of the Department of Internal Affairs and the Charities Board (as it is now known) for reconsideration in light of the Court’s judgment.

II. BACKGROUND

Greenpeace is an incorporated society in New Zealand as well as being a branch of the international organisation. Its objects include promoting a philosophy to protect the planet, including oceans, lakes, flora and fauna as well as creating public awareness around environmental issues. Greenpeace’s object 2.7 aims to promote conservation, disarmament and peace and to promote the adoption of legislation, policies, rules, regulations and plans which further its objects and support their enforcement or implementation through political or judicial processes.

III. CASE HISTORY

Since 1976 Greenpeace has been incorporated in New Zealand under the Incorporated Societies Act 1908 and prior to the passage of the Act, held charitable status under the Income Tax Act 1994.³

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1 *Re Greenpeace of New Zealand Inc* [2012] NZCA 533, [2013] 1 NZLR 339.

2 *Re Greenpeace of New Zealand Inc* [2013] NZSC 12.

3 Income Tax Act 1994, s CB 4(1)(c) and s OB 1, definition of “Charitable purpose”.

When the Act came into force on 1 July 2005,⁴ although Greenpeace had previously held charitable status, it had to apply to the Charities Commission for registration by July 2008 in order to qualify for charitable status (and benefit from the resulting income tax exemptions).⁵ Greenpeace applied for registration in an application dated 25 June 2008.

The Charities Commission declined Greenpeace's application⁶ for registration on the basis that Greenpeace was not established and maintained exclusively for charitable purposes as required by s 13(1)(b)(i) of the Act. In that decision, the Commission referred to provisions of the Act relating to the definition of "charitable purpose" and the matters the Commission needed to take into account when considering an application for registration.⁷ The Commission relied on previous authorities in particular *Molloy v Commissioner of Inland Revenue (Molloy)*,⁸ where the Court of Appeal had held that political purposes which were more than ancillary could not be charitable.

The Commission found that the promotion of the protection and preservation of nature and the environment was a charitable purpose as a matter beneficial to the community, and that the research, programmes and events aimed at increasing public awareness, and undertaking educational activities, were also charitable as matters which were for the advancement of education. However, potentially illegal activity such as trespass was not charitable, and Greenpeace's purposes of promoting disarmament and peace were non-charitable. The extent to which Greenpeace relied on its political activities to advance its causes meant that the political element could not be regarded as ancillary to Greenpeace's charitable purposes.

In the High Court decision *Re Greenpeace of New Zealand Inc*,⁹ Heath J accepted that the Commission was correct to conclude that the Act did not change the meaning of "charitable purpose".¹⁰ Heath J applied *Molloy*¹¹ and held that the Commission was correct to characterise the purpose of promoting disarmament and peace as non-charitable. The Australian case of *Aid/Watch v Commissioner of Taxation (Aid/Watch)*¹² was considered. In that case, the majority of the High Court of Australia held that the generation, by lawful means, of public debate concerning the efficiency of foreign aid directed to the relief of poverty was itself a purpose beneficial to the community and therefore a charitable purpose. Heath J left open that in an appropriate case, a different approach may be relevant, such as the one taken in *Aid/Watch*.

On the issue of whether the advocacy role was merely an ancillary purpose, Heath J said:¹³

On a quantitative assessment, the question of degree involved cannot be measured by the number of pages in a book or website. Rather, it is the way in which the philosophy is championed that must be measured against the relevant charitable purpose to determine whether, as a matter of degree, it is merely ancillary. Ultimately, that is an exercise of judgment, on the facts of any particular case. In my

4 Charities Act 2005, s 2(2).

5 Income Tax Act 2007, s CW 41.

6 *Re Greenpeace of New Zealand Inc* Charities Commission Decision 2010-7, 15 April 2010.

7 At [11]–[15].

8 *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA).

9 *Re Greenpeace New Zealand Inc* [2011] 2 NZLR 815 (HC).

10 At [34]–[49].

11 *Molloy v Commissioner of Inland Revenue*, above n 8.

12 *Aid/Watch v Commissioner of Taxation* [2010] HCA 42.

13 *Re Greenpeace New Zealand Inc* (HC), above n 9 at [73].

view, the extent to which Greenpeace relies on its political activities to advance its causes means that the political element cannot be regarded as “merely ancillary” to Greenpeace’s charitable purposes.

IV. CHANGES TO THE LEGAL FRAMEWORK

After both the decision of the Commission and the High Court were delivered, the Charities Commission was disestablished. Its functions were taken over by the Department of Internal Affairs and a new Charities Board. Greenpeace also chose to amend its rules. The objects were amended to include (together with the existing charitable objects) the promotion of peace, nuclear disarmament and the elimination of weapons of mass destruction.

Greenpeace also proposed that object 2.7 be amended as follows:

Promote the adoption of legislation, policies, rules, regulations and plans which further the objects of the Society listed in clauses 2.1–2.6 and support their enforcement or implementation through political or judicial processes, as necessary, where such promotion or support is ancillary to those objects.

Interestingly, the Act itself was also amended during this period – notably absent from any law reform was the inclusion of political purposes within the definition of what is charitable.

V. ARGUMENTS ON APPEAL

Greenpeace argued a number of points on appeal, including that:

- the Court should not follow *Molloy* on the basis that the exclusion of political activities was no longer relevant for the assessment of charitable purpose in New Zealand, and that New Zealand law should be brought into line with *Aid/Watch*;
- the activities of “disarmament and peace” met the public benefit test: political advocacy was acceptable, only contentious political advocacy was non-charitable, and the High Court erred in its approach to these activities; and
- object 2.7 was an ancillary purpose and the High Court was wrong to decide otherwise.

The Charities Board submitted that a change to the law to allow political activities to be charitable would have far-reaching consequences for the way in which charities are viewed in New Zealand, including the possibility that commercial or political organisations would qualify for registration as charities. The wider contextual evidence and argument necessary to support such a law change was not before the Court and any such change would be better considered by Parliament.¹⁴

VI. DECISION OF THE COURT OF APPEAL

The Court of Appeal stated that Parliament did not intend to alter the well-established principles of law relating to the nature and scope of the expression “charitable purpose” in New Zealand. Accordingly, the Court would not depart from *Molloy* which had effectively been endorsed by the Charities Act 2005 and which established that a society established for contentious political purposes is not established principally for charitable purposes. The Court of Appeal agreed with the Charities Board that any significant change to the law in this respect should be made by Parliament

¹⁴ *Re Greenpeace of New Zealand Inc (CA)*, above n 1, at [24].

and not the Court. The Court of Appeal also identified the changes to the framework (as set out above) following the High Court decision: in particular, that Parliament took no steps to amend the definition of “charitable purpose” in 2012 beyond a reference to amateur sporting clubs. Further, the Court of Appeal noted that there was an underlying concern that taxation benefits should not be available to a society pursuing one side of a political debate.¹⁵ The Court also noted that the law of charity was not static, and that what might be viewed as charitable in one age could be viewed differently in another.¹⁶

The Charities Board accepted that the Courts have consistently held that the promotion of peace itself is for the public benefit and therefore capable of being a charitable purpose.¹⁷ The Court of Appeal agreed with this approach. However, it was noted that the Courts have not always accepted that the promotion of particular views as to how peace is best achieved is a charitable purpose because that is essentially a political decision. The Court of Appeal drew a distinction between the outcome and the means of achieving the outcome.¹⁸ The question of whether peace should be achieved through disarmament or through maintaining military strength is contentious and controversial with views on either side of the debate.¹⁹ As a result, an entity seeking to promote peace on the basis of one or other of these views would be pursuing a non-charitable political purpose.²⁰

The Court of Appeal held that Greenpeace’s object 2.2 prior to the proposed amendment was not charitable as correctly decided by the Commission and by the High Court, as Greenpeace sought to promote peace through disarmament. Further, the Court held that the amendments to the particular object where the reference to “disarmament” was replaced with “nuclear disarmament and the elimination of all weapons of mass destruction”, made a significant difference:²¹

... these amendments will remove the element of political contention and controversy inherent in the pursuit of disarmament generally and instead constitute, in New Zealand today, an uncontroversial public benefit purpose.

The reasons for this view included the following:

- The promotion of nuclear disarmament was in line with New Zealand’s international obligations, and the Act should be read consistently with those international obligations.
- The promotion of nuclear disarmament was in line with domestic law such as through the Arms Control Act 1987.
- The inclusion of “the elimination of all weapons of mass destruction” was for the public benefit and again is in line with New Zealand’s international obligations and with domestic law.

In conclusion, the Court held that the public benefit of nuclear disarmament and the elimination of weapons of mass destruction was so well accepted that the promotion of peace through these avenues should be recognised in its own right as a charitable purpose within the fourth head of charity – being beneficial to the community.

15 At [63].

16 At [66].

17 At [71].

18 At [73].

19 At [74].

20 At [74].

21 At [76].

On the matter of ancillary political activities, the Court held that once object 2.7 was amended as proposed, it would be clear that the advocacy role of Greenpeace was intended to be ancillary to and not independent from Greenpeace's primary charitable purposes. With the change, the objects would meet the requirements of the Act and Greenpeace would have established that it is exclusively for charitable purposes.

The amendments to objects 2.2 and 2.7 when taken together answered the concerns that object 2.7 was not ancillary to a charitable purpose. The Court of Appeal's decision that the amended "peace and nuclear disarmament" object was charitable meant that the amended "political advocacy" object would no longer be ancillary to a non-charitable purpose.²²

On the basis that once Greenpeace amended its objects it would take steps to ensure that through its activities it complied at all times with its new objects, the Court of Appeal found that it was not necessary to focus attention entirely on the past activities of Greenpeace in the same way as the Commission and the High Court were required to. The Court of Appeal stated that the focus should now be on Greenpeace's new objects and its proposed activities in light of those objects. The question whether Greenpeace was now "established and maintained" exclusively for charitable purposes had to be considered by the chief executive and the Board. Greenpeace was given the opportunity to persuade the Charities Board that its proposed "political advocacy" activities will be truly ancillary to its principal objects. It was held that Greenpeace should be given this opportunity because the information provided by Greenpeace to date, and as reinforced by its website, did suggest that its "political advocacy" activities when assessed qualitatively were being pursued as an independent object in their own right.

The Court of Appeal also set out that the question of whether Greenpeace's activities might have involved illegal activities, such as trespassing, should be considered by the chief executive and the Board, and not by the Court on a second appeal. The Court noted that whether such involvement will be sufficiently material or significant to prevent registration or justify deregistration will be a question of fact and degree in each case, and likely to be influenced by a range of factors, such as:²³

- (a) the nature and seriousness of the illegal activity;
- (b) whether the activity is attributable to the society because it was expressly or impliedly authorised, subsequently ratified or condoned, or impliedly endorsed by a failure to discourage members from continuing with it;
- (c) whether the society had processes in place to prevent the illegal activity or has since put processes in place to prevent the activity occurring again
- (d) whether the activity was inadvertent or intentional; and
- (e) whether the activity was a single occurrence or part of a pattern of behaviour.

In conclusion, the Court of Appeal held that the appropriate course was to refer Greenpeace's application for registration to the chief executive and the Board for reconsideration. As a result of the proposed amendments to Greenpeace's objects, the nature of Greenpeace's application for registration had changed so significantly that Greenpeace ought to be given the opportunity to satisfy the chief executive and the Board that it should now be registered. The chief executive and the Board would then have the opportunity to reconsider the application in light of Greenpeace's

²² At [86].

²³ At [97].

amended objects, the Court's decision that object 2.2 as amended is a charitable purpose, and up-to-date information relating to Greenpeace's proposed activities.²⁴

VII. COMMENT

The role of the Charities Board is to review and monitor charitable entities and promote compliance with the Act among other things as set out in section 10 of the Act. It is common anecdotal knowledge among charities lawyers that when the Board reviews an application for registration, one of the tasks the Board completes is a "google" search of the entity. A review is completed of the information about an organisation in the public domain. The *Greenpeace* case is a prime example of this, where the Commission (as it was then known) reviewed the website in detail and other media hits to get an impression of whether the advocacy role was really "ancillary". In this respect, Greenpeace was its own worst enemy. This online review may be to the disadvantage of many long-standing organisations (particularly larger organisations) as these entities often have a significant online presence. Newly established entities seeking registration as a charity in the early stages have to be a charity "on paper". In other words, the objects have to be crafted in such a way as to meet the long-standing definition of "charitable purpose". A new entity is less likely to need to be concerned with offending propaganda in the public domain.

It should go without saying that a new entity will need to be carried on for charitable purposes. That is to say, a charity can have the most compliant rules in the world that say all of the right things and tick the right boxes, but if what the charity is doing is not charitable, it should not remain registered. It is important that the Board has this monitoring role. Charities have bestowed upon them a significant privilege in the tax benefits they receive. These benefits cannot be given lightly and without strings attached. A public benefit in turn brings with it public accountability and the Board is charged with carrying out that responsibility.

An interesting consequence of the *Greenpeace* case is almost the reverse of what the Charities Board is trying to achieve. Firstly, an entity must have rules that reflect charitable purposes within New Zealand. Greenpeace failed on this front. Secondly, an entity must undertake charitable activities. The Commission found that Greenpeace was not undertaking charitable activities and there were some instances of illegal activity. Thirdly, where an entity has a purpose that is not charitable, that purpose must be ancillary to the charitable purposes. The Commission and the High Court both found that the advocacy role of Greenpeace was significant and not merely ancillary.

It is submitted that the Court of Appeal may be setting a dangerous precedent – that is an entity can carry on activities that are not charitable (and in some cases illegal) and then change its rules and all will be forgiven. The Board and the Court should not only focus on what an entity says it does, but also what the entity actually does in practice. It remains to be seen what the result will be in the Supreme Court and when the matter is reconsidered by the Board.

24 At [102].

HOOFT VAN HUIJSDUIJNEN V WOODLEY: THE POTENTIAL EFFECT OF THE REMOVAL OF A PARTY IN WEATHERTIGHT HOMES TRIBUNAL PROCEEDINGS

BY LEONE FARQUHAR*

I. INTRODUCTION

This case commentary examines the leaky building case *Hooft Van Huijsduijnen v Woodley*.¹ The case was an appeal to the High Court from a Weathertight Homes Tribunal (“the Tribunal”) decision² regarding the respondents’ liability in negligence (and, in the case of the first respondents, also in contract) for the defective construction of the appellants’ residential property in Papakōwhai, Porirua, resulting in it becoming a leaky home.

The *Hooft* case is significant as it highlights the potential effect on a claim of the removal of a party in Weathertight Homes Tribunal proceedings. Prior to the Tribunal hearing, two parties were removed – the architect who designed the house and an engineer who provided advice regarding the construction of the house.³ The appellants, Mr and Mrs Hooft (“the Hoofts”), did not challenge the removals. The High Court (Ronald Young J) found that because the architect was removed before the Tribunal hearing, none of the Hoofts’ claims that relied on a finding that the architect’s plans were prepared negligently could succeed, and that to claim the plans had been prepared negligently when the architect had been removed was an abuse of process. The Tribunal had also rejected claims based on allegations that the plans had been prepared negligently, although based on an issue estoppel finding that the High Court did not agree with.⁴

II. BACKGROUND FACTS

The Hoofts’ home was built by the third respondent, Mr Hawinkels (“the builder”), in 1997–1998 for the first respondents, Mr and Mrs Woodley. The code compliance certificate was issued on 18 May 1998. The purchased the house in January 2002 when it was less than three years old.⁵ Shortly afterwards, they discovered dampness in an area backed by a retaining wall at the rear of the house. In 2004 they contacted the Tribunal and obtained an assessor’s report, which identified that remedial work was required to make the home weathertight.⁶

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1 *Hooft Van Huijsduijnen v Woodley* [2012] NZHC 2685.

2 *Hooft Van Huijsduijnen v Woodley* [2012] NZWHT 11.

3 *Hooft Van Huijsduijnen v Woodley*, above n 1, at [4].

4 At [7].

5 *Hooft Van Huijsduijnen v Woodley*, above n 2, at [4].

6 *Hooft Van Huijsduijnen v Woodley*, above n 1, at [2].

The Hoofts filed a claim with the Tribunal in June 2010 against Mr and Mrs Woodley, the builder, the Porirua City Council (“the Council”), the architect and the engineer. Essentially, the claim was that due to multiple defects in the construction of the house, water had entered the house and caused substantial damage.⁷ By the time the Tribunal hearing began, the total amount sought by the Hoofts was \$511,632.93; the bulk of which was for remedial works, including the complete recladding of the house.⁸

III. THE TRIBUNAL’S DECISION

The Tribunal in its decision accepted the Council’s argument that the effect of the removal of the architect was that it was no longer open to the Hoofts to allege that there were design defects. The Council argued that acceptance of the plans and specifications by the builder in building the house and the Council in consenting to the house could not amount to negligence. The Council relied on the case *Body Corporate 344862 (Wellington) v E-Gas Cycle Ltd*⁹ and s 57(2) of the Weathertight Homes Resolution Services Act 2006 (“the Act”).¹⁰ Section 57(2) states that in managing adjudication proceedings, the Tribunal must comply with the principles of natural justice.

The Tribunal summarised the test from the *E-Gas* case with the following questions:¹¹

- (a) Was the issue raised by the defendants’ current pleading distinctly put in issue in the (interlocutory) application which was determined?
- (b) If so, was the issue fundamental to the decision?
- (c) Did the judgment finally determine the issue raised in the defendants’ pleading?

The Tribunal decision indicates that when removing the architect, there was a final determination that the plans were sufficient to allow for the building consent to be granted and for the house to be built in accordance with the building code.¹² The Tribunal noted that before the removal order was made, expert evidence was put forward by the architect as to the adequacy of the plans.¹³

The Tribunal found that if the Hoofts wanted to challenge the removal order, they should have appealed the removal order, rather than attempting to re-litigate the issue at the substantive hearing when the architect was no longer a party.¹⁴ The Tribunal determined that because no appeal was lodged, the parties effectively proceeded on the basis that the architect was properly removed. For this reason the Hoofts were estopped from indirectly challenging the removal order at the substantive hearing.¹⁵

7 *Hooft Van Huijsduijnen v Woodley*, above n 1, at [11].

8 *Hooft Van Huijsduijnen v Woodley*, above n 1, at [10].

9 *Body Corporate 344862 (Wellington) v E-Gas Cycle Ltd* HC Wellington CIV-2007-485-2168, 8 July 2010.

10 *Hooft Van Huijsduijnen v Woodley*, above n 2, at [206]–[207].

11 At [208].

12 At [209].

13 At [211].

14 At [209].

15 At [210].

IV. THE HIGH COURT'S DECISION

A. *Issue Estoppel*

In considering the Tribunal's decision on the estoppel issue, the High Court stated that the Tribunal failed to refer to a "crucial" part of the *E-Gas* test. That is, that "the same parties must be before the Court and they must be litigating in the same capacity as they are in the second decision".¹⁶

The Court then considered whether or not the requirements for issue estoppel were met, applying a different test to that applied by the Tribunal:¹⁷

- (a) the decision was judicial in the relevant sense;
- (b) it was in fact pronounced;
- (c) the tribunal had jurisdiction over the parties and the subject matter;
- (d) the decision was –
 - (i) final; and
 - (ii) on the merits;
- (e) it determined the same question as that raised in the later litigation; and
- (f) the parties to the later litigation were either parties to the earlier litigation or their privies, or the earlier decision was *in rem*.

The Court decided that all but the last requirement for issue estoppel had been met.¹⁸ The decision was not a decision *in rem* (a judgment determining the status of a person or thing, or the disposition of a thing); therefore the parties to the substantive Tribunal hearing had to be the same as the parties to the application for removal, or their privies. It was clear that the parties were not the same given the architect and the engineer had been removed and there were no additional parties involved in the substantive proceeding that could be considered their privies. As a result the Court determined that there was no estoppel.¹⁹

B. *Abuse of Process*

The High Court decision notes that after the appeal concluded, the Court invited submissions regarding whether or not an abuse of process arose. Abuse of process was not argued or raised by any of the parties but by the Judge, who commented in his decision that "[it] seemed to have relevance especially following my conclusion that issue estoppel did not arise in this case."²⁰

The parties (particularly the Hoofts) could have opposed the invitation to make submissions on the abuse of process issue as that claim had not been pleaded. The usual principle is that the Court will make its decision based on the claims and defences put forward by the parties in the pleadings (for instance, the Court will not rule on claims or defences not put forward by the parties).

¹⁶ *Hooft Van Huijsduijnen v Woodley*, above n 1, at [58].

¹⁷ At [61]. The requirements for issue estoppel are taken from the case *Chean v De Alwis* [2010] NZCA 30.

¹⁸ *Hooft Van Huijsduijnen v Woodley*, above n 1, at [63].

¹⁹ At [69].

²⁰ At [70].

However, there does not appear to have been any resistance to the Court's approach and it appears that submissions were simply made as per the Court's invitation.

In addressing the abuse of process issue, the Court began by setting out the principles to be applied in determining whether or not an abuse of process exists:²¹

- (a) whether manifest unfairness or injustice would result to a party; and
- (b) whether the administration of justice will be brought into disrepute.

These factors will be relevant:

- (a) a consideration of the identity of the issues;
- (b) the context of the two sets of proceedings;
- (c) whether there is a right of appeal; and
- (d) whether the proceedings were initiated by a party seeking a ruling inconsistent with an earlier judgment or whether the issue is raised in defence.

For the most part, the Court did not appear to be addressing the submissions of the parties as it applied the relevant facts to the above principles. The Court held that the issues were clearly the same; that was, the adequacy of the architect's plans.²² The context of the proceedings was also held to be indistinguishable as they all arose from allegations that the Hoofts' house was a leaky home and that various people including the builder, the architect and the Council were negligent and caused loss.²³ There was also clearly a right of appeal from the removal decision, by way of s 93 of the Act. The Hoofts did not appeal. The Court noted that they did not even oppose the application for removal of the architect.²⁴

The Court considered that the point of significance was that the proceedings were initiated by the same party, the Hoofts. (This must mean the same party that could have challenged the removal order, as the Hoofts certainly did not initiate the application for removal.) The Court also stated that their allegation that the Council was negligent because it failed to identify the architect's negligence could be seen as a "collateral attack" on the removal decision, which they did not oppose or appeal.²⁵ This was also clearly the Court's view in relation to the Hoofts' allegation of negligence against the builder, given a finding in that regard also relied on a finding that the architect was negligent.

On the question of unfairness or injustice, the Council submitted that since the architect had been removed, it would not be possible to seek a contribution from the architect if the Court held that the Council was negligent in consenting to the architect's plans. The Court noted that the same would apply to the builder.²⁶

Regarding whether or not the administration of justice would be brought into disrepute, the Court considered the need for finality in litigation: that it should only be through the appeals process that a

21 At [71]–[72]; Here the Court relied on *Arthur JS Hall & Co v Simons* [2000] 1 AC 615 (HL); *Walker v Wilson* HC Auckland CP198/00, 16 April 2000.

22 *Hoof van Huijsduijnen v Woodley*, above n 1, at [73].

23 At [74].

24 At [75].

25 At [78].

26 At [79].

litigated and resolved issue should be challenged. The Court accepted the respondents' submissions that the removal decision was a considered one and was similar to a summary judgment decision. The Court also took into account the fact that the Tribunal's decision on the alleged negligence of the Council and the builder depended on a finding that the architect was negligent. This, the Court said, favoured a decision that there was an abuse of process.²⁷

The Court noted that one matter that could point away from an abuse of process was if the Hoofts had obtained new evidence supporting the negligence claim against the architect after his removal that could not have been produced before the architect was removed. Although the Hoofts' allegations against the architect had been "significantly widened" by the time of the substantive hearing, the Court found that there was no evidence that "with diligence" the Hoofts could not have identified the new allegations before the architect was removed.²⁸

In the Court's view, the Hoofts' were responsible for their situation, but there would be a potential injustice to both the Council and the builder if they were allowed to proceed with the relevant parts of their claim. Therefore the Court held that it would be an abuse of process to allow the appellants to base their claim (directly or indirectly) against the Council or the builder on the architect's alleged negligence.²⁹ Although that finding did not affect the Hoofts' entire claim, the majority of their claim failed on that basis.

V. OBSERVATIONS ON REMOVAL APPLICATIONS

Had the Hoofts appreciated at the outset that the majority of their claim would rely on a finding that the architect was negligent, they would have been likely to have opposed the application for removal or appealed the removal decision. Although there is no specific timeframe set out in the Act, applications for removal are generally made at the beginning of proceedings, when documents have not yet been exchanged and evidence has not yet been filed. For these reasons, claimants and their counsel are unlikely to have sufficient information at this stage to fully appreciate the shape that a claim is likely to take.

At such a preliminary stage, the Tribunal is also unlikely to have a sufficient grasp of the facts, and the only evidence it will have access to will be that filed in support of and/or in opposition to removal and joinder applications. In many cases this is unlikely to be sufficient information to make a fully informed decision regarding whether or not a claim against a respondent is tenable. This is particularly so if the evidence being relied on has not been tested by cross examination. However, with the Tribunal's focus in resolving leaky building claims being on speedy and cost-effective processes, the Tribunal is going to be more focussed on the early removal of a party, as long as it is "fair and appropriate in all the circumstances".³⁰

VI. CONCLUSION

The lesson to take from this case is to carefully consider the effect of the removal of a defendant or respondent in any proceeding on the necessary elements of claims against other defendants

27 At [80].

28 At [81]–[83].

29 At [83].

30 *Weatheright Homes Resolution Services Act 2006*, s 112.

or respondents. When acting for a claimant in a Weathertight Homes Tribunal Proceeding it will generally be advisable to do as much of the groundwork as can be done at the outset to make sure that you are as clear as possible about the connections between your client's claims against each of the parties. If an application for removal is made you will be in a better position to assess the effect of a removal order in any given case, and therefore the extent of any resources that should be put in to opposing the application and/or appealing the order.

BOOK REVIEW

SITTING IN JUDGEMENT: THE WORKING LIVES OF JUDGES by Penny Darbyshire (Author), Hart Publishing, 2011, 466 pp, recommended retail price NZ\$ 57.

I recently had the distinct pleasure to sit in on an intimate discussion with Lord Phillips of Worth Matravers during his visit to New Zealand as the New Zealand Law Foundation's 2013 Distinguished Visiting Fellow.¹

Among his many other positions of distinction in his career, Lord Phillips was the first Chief Justice of the Supreme Court of England from 2009 until his retirement in 2012.² I must admit to a great sense of anticipation at sitting in his presence. The portrait of the man on paper created a sense of heightened expectation to do nothing other than listen intently. However, I was pleasantly surprised when our round-table session revealed him to be a welcoming and charming man, wise beyond measure, but deeply interested in the post-graduate research that my colleagues and I were each undertaking. Lord Phillips made an effort to connect to each topic that we all shared with him. The breadth of his experience was clear, but given the interaction the morning provided, I came away with a portrait much different from that on paper.

The types of close encounters with members of the judiciary I was fortunate to experience are rare and special indeed. After reflection on this encounter, I began to more fully appreciate what Penny Darbyshire's book, *Sitting in Judgment*,³ really achieves. A rare glimpse into the modern judiciary in England and Wales, Darbyshire's book provides a close encounter for those who do not have an opportunity to appreciate judges in the light in which they may wish to be portrayed; namely as human. Her book has been described as "social anthropology research"⁴ and it will appeal to both the wider public and the legal profession. The book is not "just" a text on judicial behaviour, but rather it paints a picture of the difficulty that judges face in their jobs and lives, balanced with an overall sense that judges care deeply about the individuals whose lives are affected by the outcomes they decide. It is beautifully presented in hardback and contains a Foreword by Lord Judge, Lord Chief Justice of England and Wales.⁵ Lord Judge observes that the overall objective of Darbyshire's research was achieved by revealing "the practical day to day realities, not the myths or the theories or the misconceptions."⁶

Darbyshire has been shadowing and interviewing judges since 1971.⁷ In her introduction, Darbyshire describes how she selected a wide variety of judges, including county court judges,

1 The Law Foundation "First President of Supreme Court of UK is Law Foundation's 2013 Distinguished Visiting Fellow" (8 February 2013) <www.lawfoundation.org.nz>. In addition to giving three lectures, he was the guest of honour at a post-graduate group round-table at the University of Waikato.

2 The Law Foundation, above n 1.

3 Penny Darbyshire *Sitting in Judgment* (Hart Publishing, Oxford, 2011).

4 Michael King "Sitting in Judgement: The Working Lives of Judges" *Times Higher Education* (online ed, United Kingdom, 3 November 2011).

5 "Lord Chief Justice of England and Wales – The Rt Hon Lord Judge" Judiciary of England and Wales <www.judiciary.gov.uk>.

6 Darbyshire, above n 3.

7 The Law Foundation, above n 1.

district judges, High Court judges, circuit judges and two Law Lords (Supreme Court Justices).⁸ Chapter 2, entitled “Images of Judges”, sees Darbyshire attempt to unfurl, but not necessarily debunk, the cartoon-like imagery⁹ of judges the public hold, based on Hazel Genn’s research in the late 1990’s.¹⁰ This imagery, together with some unfavourable conduct by judges in public arenas in the past, has shaped public opinions in negative ways.¹¹

Chapter 3 outlines where English and Welsh judges come from; Chapter 4, “The First Step on the Ladder”, explains the first hurdles of coming to the bench, and Chapter 5 is titled “Becoming Her Majesty’s Judge”.

Chapter 6, entitled “Training”, was enlightening if for no other reason than to learn that judges, not unlike many other professionals, take courses on judging. These courses are run by the Judicial Studies Board, now the Judicial College, which was established in 1979 during a time of controversial judicial reform in the English system.¹² The Judicial Studies Board has a statutory mandate to ensure that judges gain “subject expertise”, judicial skills (as well as leadership and management skills when necessary) and social context for the job of judging.¹³ The chapter details how diverse the author’s subject pool for this study was, reflecting many age groups and including almost as many female judges as male. The initiative had a chilled response from the judiciary when it was introduced, stemming from concerns about maintaining judicial independence.¹⁴ Despite those initial concerns, the participants in Darbyshire’s research seemed elated with the experience. One likened the course to “doing your finals again”¹⁵ and another observed that “[w]ith your preparation you wouldn’t go to bed until two and by the time you left you could hardly drive but it was brilliant.” These reflections made the subjects of Darbyshire’s study all the more relatable. I found myself smiling at the image of such accomplished people doing a task not unlike that of an undergraduate. The humility the new inductees approached training with at this stage in their careers was intensely interesting.

Chapter 7 is titled “Judges’ Working Personality” and it outlines the varying attitudes and levels of satisfaction in their work amongst the judges.

As they are the first sections that detail the time spent shadowing fully, I looked forward to Chapter 8 on the criminal court District Judges Magistrate Court (DJMC) and Chapter 9 on Circuit Judges in the Crown Court. I was not disappointed. These two chapters go a step further into outlining the hierarchy of the English and Welsh judicial structure and the workload of the

8 Darbyshire, above n 3, at 5–6.

9 At 107.

10 Hazel Genn *Paths to Justice: What people think about going to law* (Hart Publishing, Oxford, 1999) at 214 and 244.

11 Darbyshire, above n 3, at 18–33. A sample of the headings reads “Old Boys Network”, “Up to Hanky-panky, or Perversion, or Drunk; Getting off Lightly” and “Incompetent”. The few explanations that are made do not seek to justify or explain away the perception of misconduct, but rather serve only to highlight, in my view, that some judges are fraught with humanity, not in themselves the model of perfection. It is by virtue of their position alone that, rightly or wrongly, the public seems to assume superiority in all aspects of their lives.

12 At 103.

13 Tribunals, Courts and Enforcement Act 2007 (UK), s 2.

14 Darbyshire, above n 3, at 103.

15 At 107.

DJMC.¹⁶ Darbyshire notes in Chapter 8 that this chapter was published as a journal article in 2008.¹⁷ The chapter is rife with criticism from the DJMC about the workload, sentencing and the court environment. Darbyshire notes that in the article she prompted Lord [Chief Justice] Phillips to visit the DJMC, which he did. She notes that visits from the higher levels of the judiciary have now become more regular,¹⁸ which is some form of feedback as to the importance of Darbyshire's work as a catalyst for change. It seems that not only did the public know little about what happened across all branches of the judiciary as a whole, but also the institution itself was unaware. Seeing some corrective steps come from her research must bring real satisfaction for Darbyshire indeed.

Chapter 9 makes some interesting reading, in which Darbyshire gives a schedule of a circuit judge who was called on to travel, in one instance over an hour by car. Her remarks find little praise for the circuit court she observed, noting the inefficient management of time in the way trials are conducted, namely that so much time is "spent out of court awaiting plea negotiations."¹⁹ She also notes that one of these circuit judges complained of "too much admin work",²⁰ but having browsed the pile of papers herself she found no administrative work among it, but rather judicial decisions awaiting his attention. She found applications made on paper for time extensions or name disclosures or the like and was unsympathetic to his cries that such work was merely "admin".²¹ The chapter records the struggles judges face in managing trials through "delays, disruption, abortion or protract[ion] by poor presentation of evidence or unnecessary evidence."²² One begins to get the impression that the work of judges is not only to apply extensive knowledge of the law, but also to drive the system around these delays and unexpected occurrences.

Chapter 10, "Judges and Juries", gives an account of how judges interact with juries. Among other things, the author remarks on the subject of jurors taking notes, finding there were "clear inconsistencies in judicial approach, reflecting the complete absence of general policy or even discussion of this issue."²³ Other chapters include Chapter 12, "Family Judges: The Patience of Job and the Judgment of Solomon", Chapter 13, "High Court Business", and Chapter 15, "Brenda and the Law Lords Transform into the Supremes". All are thorough and detailed, although layered with social context that I lacked, having never visited the United Kingdom at all, let alone lived there. I say this only to point out that the complex nature of the judicial system was all new to me, so I continually referred to the first chapters for abbreviations. These chapters were not aimed at the casual reader; the target audience, however, which I presume is any legal academic, will be amazed at the level of detail and feedback judges provided Darbyshire.

I read Chapter 16, "Judges on Judges", in which Darbyshire details the views of different hierarchies of judges sounding off about those in both lower and higher ranks and I was won over by her skill as a researcher again. Gaining the trust of judges at all levels to obtain such information is a feat not to be underestimated. The culmination of her efforts, in my view, is in Chapter 16. Darbyshire outlines the collegiality of judges in this chapter, probing their private

16 At 151–168.

17 At 168.

18 At 168–169.

19 At 182.

20 At 184.

21 At 184.

22 At 186.

23 At 214.

world to reveal two distinct levels of judges and the sometimes antagonistic view taken within these perceived “lower ranks”, being magistrates and circuit judges.²⁴ She discovers that the judicial career is a difficult road and one which lacks certainty of promotion in the English system.²⁵ Her research shows that, despite the new merit-based system of appointment introduced in the 2005 Constitutional Reform Act, only one third of the circuit judges expressed interest in advancing to the High Court, even in theory.²⁶ This would be unsurprising given the comments circuit judges made about the senior roles, when asked. Darbyshire notes that several circuit judges “referred to senior judges’ ‘immense intellect and abilities’, and six judges specifically mentioned that their work entailed ‘tremendous work burden and responsibility’.”²⁷

Chapter 17, “Tools of the Trade”, outlines that the facilities, staff, and technology in courts were under-funded and under-delivering as a result. In detailing the work stress and conditions of judges in their jobs, Darbyshire notes that there are unseen hazards in judging, such as one judge with repetitive stress injury from the work and others noting the weight gain from sedentary life and travel.²⁸ She also reminds the reader that judges are not paid as well as one might imagine and that the accommodation perks afforded MPs are not part of the judicial scheme. She gives the example of judges sitting in London having to pay for their own accommodation and travel back home, both post-tax and out of pocket.²⁹

Chapter 18, “The World of Judges from 2011”, summarises the work as a whole and notes again that the stereotype of an elitist judge who is disconnected from real life is no longer a valid one. She notes:³⁰

They are not all from privileged backgrounds ... They do not lead privileged lives. They eat packed lunches. They travel to work by tube or bike or motorbike or car or foot ... They call judging “payback-time”.

Overall I was enlightened by the book and I highly recommend this book to all readers. The portrait Darbyshire paints of the judiciary is vivid and balanced with both praise and criticism.

ERIKA L SCHOLLUM*

24 At 411–415.

25 At 406.

26 At 415.

27 At 412.

28 At 443.

29 At 443.

30 At 448.

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UNLOCKING MĀORI POTENTIAL THROUGH GOOD MĀORI GOVERNANCE PRACTICES

BY RENEE REWI AND DR TORIVIO FODDER

Te Mata Hautū Taketake – the Māori and Indigenous Governance Centre (MIGC) – is a newly formed research centre within Te Piringa – Faculty of Law at the University of Waikato under the Directorship of Dr Robert Joseph and Centre Manager Renee Rewi. Launched last spring on 5 November 2012, the Centre’s central objective is to provide research-led solutions that will help improve the governance and leadership capacities of Māori organisations.

The latest research indicates that good governance is one of the crucial elements for unlocking Māori potential on a number of fronts including the potential within Māori tikanga (customs) and mātauranga (knowledge). The literature suggests that Māori entities can thrive when their governance structures are effective and culturally appropriate.¹ And while good governance structures and practices can help improve the capacities of Māori organisations, it has been demonstrated that bad governance structures and practices not only hinder innovation, but also actively discourage an environment of collaboration and development.²

Given the importance of governance best practices for the future of Māori, the Centre has spent its first year in operation engaged in a two-fold, cutting-edge research agenda that aims to gather insights into the governance best practices models that are relevant to Māori organisations. The first component of the Centre’s research agenda looks inward, evaluating the governance models of Aotearoa – New Zealand, drawing from the existing body of knowledge to inform the work of the Centre. The second component of the Centre’s work looks outward, utilising the very best of international standards to develop a framework for Indigenous governance that can then be applied to the situation of Māori.

In developing this research agenda, the Centre sought strategic input from the expertise of its Advisory Board (the Board). The Centre’s Board consists of governance professionals and experts from across Aotearoa – New Zealand, hailing from some of the nation’s largest corporations and including some of the country’s finest minds. MIGC’s Board members include: Whaimutu Dewes (Ngati Porou and Ngati Rangitihi; Chairman, Aotearoa Fisheries Ltd), Sir Mason Durie (Rangitane, Ngati Kauwhata, and Ngati Raukawa; Emeritus Professor at Massey University, KNZM, CNZM), Susan Huria (Ngai Tahu, Nga Tuahuriri; Deputy Chair, AgResearch, Director of Airways Corporation, Director of Watercare, Director of Northland Port, and Trustee of the First Foundation), and Matanuku Mahuika (Ngati Porou, Ngati Raukawa; Chairman, Sealord Ltd).

The Centre was also able to employ Post-Doctoral Research Fellow Dr Torivio Fodder. Dr Fodder is a recent SJD graduate of the Indigenous People’s Law and Policy Program at the University of Arizona, James E Rogers College of Law. Since his arrival, Dr Fodder has undertaken a number of research projects for MIGC.

1 See generally Miriam Jorgensen (ed) *Rebuilding Native Nations: Strategies for Governance and Development* (University of Arizona Press, Tucson, 2007).

2 Stephen Cornell, Miriam Jorgensen, Joseph Kalt and Katherine Spilde Contreras “Seizing the Future: Why Some Nations Do and Others Don’t” in Jorgensen, above n 1, 296 at 310-311.

Regarding the Centre's domestic research activities, one of the first projects the Centre initiated was a comprehensive review of the available literature on Indigenous governance within Aotearoa – New Zealand. After many months of research, drafting, and peer review to ensure a high standard of academic excellence, the Centre expects to release a series of literature reviews that summarise the state of academic literature on Māori governance in the coming weeks. The Centre has also been active raising awareness of Māori governance issues among the New Zealand legal community through a series of articles published this year in the *NZ Lawyer* magazine.

The Centre has joined government and private sector organisations on a working panel lead by Dr Robert Joseph, to ensure optimum value is gained from Māori assets. Recommendations 14 and 22 of the Maori Economic Development Panel's Action Plan focus on projects to identify governance models for complex Māori ownership structures and for up-skilling the abilities of those governing Māori assets. The working group progresses the dual objectives of research and reporting on improving legal structures for Māori collectives and establishing a website for excellent governance training.

The Centre's largest research undertaking, however, is the recently launched Nationwide Māori Governance Survey, aimed at gleaning insights into the governance structures, governance practices and governance training needs of Māori organisations. The survey marks a first-of-its-kind effort to gather data on the many Māori entities overseeing significant assets on behalf of Māori communities. To accomplish this objective, the Centre developed three different surveys of Māori entities tailored to organisations on the local, regional, and national level. A fourth survey was also developed for Kura Kaupapa secondary schools to determine whether governance training is a viable curriculum to provide to Māori students. The Centre anticipates that the results of the survey will generate a national conversation on Māori governance issues and provide critical insights into Māori governance best practice models.

Regarding the Centre's international research activities, it has undertaken an extensive review of the available literature related to Indigenous governance best practices around the world, with careful attention paid to the experience of American Indians who have enjoyed a governance renaissance of sorts in recent years, thanks in part to similar, research-led efforts in the United States. Formal results from the literature review of American Indigenous governance programmes will be released in the near future. MIGC is also in the midst of a concerted effort to develop international research partnerships with some of the leading institutions on Indigenous governance in the world. In the space of only one year, tentative research partnership agreements have been reached with institutions in North America, Asia and Australia with many more discussions underway. The Centre has also hosted a number of visiting scholars on the University of Waikato campus, who have shared insights into Indigenous governance best practices from their home countries. Visiting scholars have passed through Hamilton from institutions in Australia, Canada and the United States. MIGC plans to further develop these research partnerships by leading a New Zealand delegation to participate in the United Nations Permanent Forum on Indigenous Issues in May 2014. MIGC colleague Valmaine Toki serves as the Vice Chair of the United Nations Permanent Forum on Indigenous Issues.

The vision of our Centre is to improve Māori governance generally, from the smallest marae to the largest Māori corporation. Toward this end, the Centre has launched an ambitious research agenda that has kept its first year of existence moving quickly apace. While much work remains to be done, MIGC has established a solid foundation upon which to further develop its national and international research platform – all within year one.

CENTRE FOR ENVIRONMENTAL, RESOURCES AND ENERGY LAW TE PUTAHI O TE TURE TAIĀO

BY RENEE REWI

The Centre for Environmental, Resources and Energy Law (CEREL) – Te Putahi o te Ture Taiāo was established in 2011. CEREL is hosted by Te Piringa – Faculty of Law at the University of Waikato. CEREL draws on the most substantial concentration of academic expertise in New Zealand in environmental law, natural resources law, and energy law. Working together with the University’s flagship research institutes, including the Environmental Research Institute and Te Kotahi Research Institute, CEREL adds depth to the University’s research platforms in environment and natural resources in matters requiring legal analysis and research. It provides skilled supervision of well-qualified postgraduate students.

A. Carbon Capture and Storage

In November 2012 Professor Barry Barton, Director of CEREL, was awarded a grant from the Ministry of Business, Innovation and Employment to design the legal and regulatory framework for carbon capture and storage (CCS) in New Zealand. The research resulted in a Report authored by Barry Barton, Kimberley Jordan and Greg Severinsen, with contributions by other researchers including Trevor Daya-Winterbottom and Valmaine Toki. The research was supported by an advisory committee. The Report recommends a new CCS Act, and amendments to other environmental legislation including the Crown Minerals Act 1991, Resource Management Act 1991, Climate Change Response Act 2002, and health and safety legislation.

The proposed CCS Act has a permitting regime to facilitate CCS in New Zealand, both onshore and offshore, and provides for long-term liability. Key considerations in this report are the effects on property rights and other sub-surface resources, transportation of carbon dioxide, and the interaction with the emissions trading scheme. The report draws on international experience, with contributors from Australia, Canada and Norway.

Designing the legal and regulatory framework for CCS has been challenging and rewarding. The authors’ hopes are that this Report will provide a sound basis on which legislation can be constructed, facilitating safe and permanent storage of carbon dioxide as one way to reduce emissions of greenhouse gases.

B. Academic Advisory Group

This year CEREL hosted the Academic Advisory Group of SEERIL, the Section of Energy, Environment, Resources and Infrastructure Law of the International Bar Association. The group consisted of the top international energy and resource law academics. The Academic Advisory Group used its meeting in New Zealand (in Raglan) to work on a book called *Energy Underground: Innovative Law and Policy for Transformative Technologies*. The book looks at the new uses of the sub-surface for energy, such as carbon capture and storage, hydraulic fracturing, oil field resource allocation, and hazardous waste disposal.

A public seminar was held in Hamilton where AAG members gave a lecture on global developments in law and policy in energy, resources and the environment. In Wellington, an Energy Underground Conference was held to discuss issues relevant to policy and law-making in New Zealand regarding the uses of the sub-surface. These events were co-sponsored by CEREL, IBA, and the Energy Law Association.

C. Energy Cultures

The Energy Cultures I project, funded by the Ministry of Science and Innovation, used leading social science expertise and several complementary methodologies to improve understanding of the drivers of household energy behaviours. Professor Barton provided the law component and investigated the different modes of regulation that can best affect behaviour. The research resulted in a report called “Energy Cultures: Implication for Policymakers” and was published in February 2013. For more information please visit <www.otago.ac.nz/csafe/research/energy/otago038887.html>.

The research continues with Energy Cultures II, a five year MBIE funded project worth \$3,199,694 from October 2012 to September 2016. The project will work with New Zealand’s transport and business sectors to support a faster and more effective uptake of energy efficiency, including the uptake of new energy efficient transport technologies and practices, and will identify the system-wide changes that will be required. For more information on Energy Cultures II please visit <www.otago.ac.nz/csafe/research/otago049909.html>.

D. Intercoast

Intercoast is a substantial PhD-training programme on coastal zone science, law, and management. It is a partnership between the University of Waikato and Bremen University. Over 20 PhD students in different disciplines are dividing their research time between the two universities. Five of the PhD candidates are researching in Law.

E. Geothermal

CEREL identified Geothermal Resources Law as an area where there is a need for research. The Centre has a contract with the Institute of Geological and Nuclear Sciences Ltd to provide a legal analysis on the following questions:

- Is the Geothermal fluid Crown-owned and subject to the Crown Minerals Act 1991?
- Where minerals are in private ownership (separately from the surface), is the mineral owned by the mineral rights owner?
- Is the mineral the property of the surface owner?

A legal analysis on these questions will assist in determining the implications for commercial operations, with regard to removing barriers to development.

F. IUCN

In June 2013, the IUCN Academy of Environmental Law Annual Colloquium was co-hosted by Te Piringa – Faculty of Law, University of Waikato (New Zealand), in particular Trevor Daya-Winterbottom, and the University of New England (Australia). The Colloquium focused on key emerging themes of international, comparative and domestic environmental law.

HOW DO NEW ZEALAND LABOUR STANDARDS COMPLY WITH THE INTERNATIONAL LABOUR ORGANISATION'S CONVENTIONS AND RECOMMENDATIONS IMPLEMENTED AFTER 1980 AND THE INTRODUCTION OF NEO-LIBERALISM?

BY KIMBERLEY HAYWARD*

In the 1980s, “globalisation” spread throughout the world. Globalisation was an incredibly complex process in which goods, services, cultures and ideas were freely exchanged, between states, in order to maximise profits. Whilst the rise of globalisation was economically favourable for much of the world, there has been a strong negative impact on labour standards for workers, throughout both developed and developing states. To ensure these workers were offered sufficient protection, the International Labour Organisation (ILO), a specialist United Nations agency with a focus on labour rights, has sought to “promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity”.¹ In order to do this, the ILO has, since 1984, been implementing numerous conventions and recommendations to guide states.

As a founding member of the ILO, New Zealand is expected to adhere to, and enforce, such initiatives. This paper will explore whether New Zealand’s statutory framework complies with ILO conventions, with reference to the conventions New Zealand has ratified, as well as the ones it has not.

The scope of this paper will assess the compliance of the New Zealand statutory framework in three key areas. These areas have been selected as they are areas of labour law in which globalisation had a profound impact in New Zealand. As a result of this, there are many ILO conventions and principles which correlate directly to each area. The key areas are:

- (a) collective bargaining and union membership;
- (b) the protection of non-standard workers (workers who are not in an employee-employer relationship); and
- (c) the deregulation of industries in a manner that is unsafe to workers.

This paper will begin with a review of recent events, highlighting issues within New Zealand’s labour law framework. This forms the starting point for evaluating the compliance with ILO standards and how it applies in practice. Where inconsistencies exist between the New Zealand system and the ILO, the author will suggest how New Zealand’s framework could be adapted to be more compliant with ILO initiatives and will discuss whether such amendments might be more favourable for New Zealand workers.

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1 Steve Hughes and Nigel Haworth *The International Labour Organization (ILO): Coming in from the Cold* (Routledge, Oxon, 2011) at 74.

I. THE GLOBALISING ECONOMY AND SHIFT TOWARDS NEO-LIBERALISM

The concept of globalisation has been described as “the increasing integration of physical, financial and services market across the globe”.² The growth of globalisation has resulted in internationalised and liberalised trade and production throughout the world, where goods and services are no longer primarily exchanged domestically but through “cross-border transactions”.³ For a state to be an active member of any global market, the cost of its resources, including labour, needs to be competitive.

As the shift to a global market occurred, many developed countries, including New Zealand, moved towards neo-liberal economies.⁴ Neo-liberalism is a political philosophy which advocates for economic liberalisation, open markets, deregulation and both the privatisation and reduction of the public sector. As neo-liberalism grew, so did the idea that governments should distance themselves from labour regulation, by removing protective controls previously implemented, in order to provide employers with the opportunity to succeed financially.

II. THE IMPACT OF GLOBALISATION AND NEO-LIBERALISM IN NEW ZEALAND

Globalisation and a shift from idealism to neo-liberalism in the 1980s triggered the most dramatic policy changes New Zealand has ever experienced. Throughout the 1970s and early 1980s, New Zealand’s economy was operating under Robert Muldoon’s leadership. Muldoon operated an over-regulated, insulated economy, which was by and large free of competition.⁵ As a result of both internal and external factors during this time, New Zealand faced “a set of highly unfavourable economic conditions including unsustainable levels of public and external debt, rising unemployment and strong inflationary pressures”.⁶ These circumstances, paired with Muldoon’s controlling style of governance, created an environment that was open to radical reform by a new government, enabling New Zealand to compete in global markets through engagement with the globalisation movement.⁷

This occurred through the election of David Lange’s 1984 Labour Government. The election of this government signalled an abrupt change in New Zealand public policy, characterised by Minister of Finance Roger Douglas’s market-driven “Rogernomics”.⁸ Rogernomics consisted of “market-led restructuring and deregulation” and the control of inflation through tight monetary policy, accompanied by “a floating exchange rate and reductions in the fiscal deficit”.⁹ After two terms in office, Lange’s Labour Government was replaced by the Fourth National Government which, for the most part, shared the same objectives as Lange’s Labour Government. National

2 Trent Sebbens “Globalisation and International Trade Unions: ‘The Working Men Have No Country’” (2000) 25(3) *New Zealand Journal of Industrial Relations* 233 at 234.

3 At 234.

4 At 235.

5 Alan Bollard “New Zealand” in John Williamson (ed) *The Political Economy of Policy Reform* (Institute for International Economics, Washington, 1994) at 88.

6 Phillip Morrison “Deregulation of the New Zealand Labour Market” (2004) 59 *GeoJournal* 127 at 128.

7 Bollard, above n 5, at 88.

8 At 89.

9 Paul Dalziel “The Economic Summit: What People Were Thinking” in Brian Easton (ed) *The Making of Rogernomics* (Auckland University Press, Auckland, 1989) 53 at 53.

significantly modified the employment law framework of the time and introduced the Employment Contracts Act 1991 (ECA), reflecting the neo-liberalist agenda of free market economies and personal economic liberty. Whilst the actions taken by the successive Labour and National governments during this time opened New Zealand up to the global market, it also resulted in high unemployment, less desirable working conditions and ultimately less “safety nets” in the form of welfare protections.

In 1999 Helen Clark’s Labour Government saw a change of focus for labour standards in New Zealand. This was reflected in the enactment of the Employment Relations Act 2000 (ERA). Not only did this Act place greater emphasis on the importance of freedom of association, it has been pointed out that the Labour Government’s approach to employment relations in New Zealand at this time had a broader focus on social equity. Howarth states that the ERA:¹⁰

... reflects an explicit commitment to a modern social democratic tradition that recognises the importance of a strong, internationally competitive economy, yet rejects the view that competitiveness can only be achieved by unitary imposition within the employment relationship.

III. THE ILO’S RESPONSE TO GLOBALISATION AND NEO-LIBERALISM

Since its establishment, the ILO has shown a commitment to its tripartite formation, made up of workers, governments and employers, by promoting successful economic performance whilst providing protection to vulnerable workers.¹¹ However, as a shift towards a global market gained momentum, the ILO’s ideas of social protection appeared outdated. In many ways the ILO was at odds with the market fundamentalism of the neo-liberalist agenda. Despite this scepticism, over time concerns about the implications of globalisation grew and once again labour conditions became a topical issue. This put the ILO back into the spotlight.¹²

The ILO underwent huge change from the beginning of the 1980s. The ILO sought to implement a set of universal human rights that would act as the “social rules of the game of globalization”.¹³ Further, the ILO worked to dispel the idea that having good labour standards automatically resulted in reduced profitability. As time progressed the ILO became aware that many influential states were unlikely to comply with a rights-based regime. This prompted the ILO to shift its focus from rights to standards. These standards were aspirational in nature rather than binding on states, causing concern by some that the shift would lessen the ILO’s influence.¹⁴

To refocus its interest, the ILO decided to introduce a set of Core Labour Standards (CLSs). These included freedom of association and bargaining, elimination of forced and child labour, and elimination of discrimination in labour.¹⁵ ILO member states are not only expected to incorporate CLSs in their domestic laws, but to assist other states to do the same. The implementation of

10 Nigel Howarth “Beyond the Employment Relations Act: The wider agenda for employment relations and social equity in New Zealand” in Erling Rasmussen (ed) *Employment Relationships: New Zealand’s Employment Relations Act* (Auckland University Press, Auckland, 2004) 190 at 191.

11 At 194.

12 Hughes and Haworth, above n 1.

13 At 47, citing Michel Hansenne “The ILO, standard-setting and globalisation: Report of the Director-General” (International Labour Organisation, 85th Session, June 1997) at 1.

14 Hughes and Haworth, above n 1, at 46.

15 At 51.

CLSs in ILO member states is monitored through reports which are shared at ILO conferences. Where a member state has not complied, a follow-up plan is created to move forward. This was formalised by the Declaration on Fundamental Principles and Rights at Work 1998. In 1999 the ILO further narrowed its focus, stating that its primary goal as an organisation would be to “promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity”.¹⁶

IV. NEW ZEALAND’S RELATIONSHIP WITH THE ILO: MUST WE COMPLY WITH ALL CONVENTIONS AND RECOMMENDATIONS SUGGESTED BY THE ILO?

As previously mentioned, the ILO’s shift from rights to standards meant that its conventions were aspirational, not binding. However, there is certainly an expectation that member states will take all reasonable steps to ensure their domestic legislation complies with the ILO framework. This is particularly the case for New Zealand, as a developed state who was a founding member of the ILO. Despite this expectation, in practice there are many inconsistencies between New Zealand’s labour law framework and ILO conventions.

At first glance, New Zealand appears to be committed to many CLSs that the ILO promotes. New Zealand was the first country in the world to provide for a compulsory system of state arbitration, a form of labour disputes resolution. This was implemented through the Industrial Conciliation and Arbitration Act 1894, which significantly gave legal recognition to unions. CLS principles are also found in the New Zealand Bill of Rights Act 1990, which allows for freedom of association¹⁷ and also prohibits numerous forms of discrimination.¹⁸ The Human Rights Act 1993 defines prohibited forms of discrimination as including discrimination based on sex, race, employment status, age or disability.¹⁹

However, despite these examples, there are still inconsistencies between New Zealand legislation and the ILO’s framework. These inconsistencies are largely due to the effects of globalisation. The remainder of the paper will explore in-depth how New Zealand has complied with ILO initiatives post-globalisation. The three areas of freedom of association, health and safety and non-standard workers will be used as a framework to evaluate the wider picture of New Zealand’s compliance.

V. WORKERS’ UNIONS AND COLLECTIVE BARGAINING

Major global changes over the past 25 years have significantly impacted on union membership and consequent collective bargaining.²⁰ Like much of the Western World, union membership in New Zealand decreased dramatically as a result of globalisation and neo-liberalism. The 1990s saw a fall in union membership from 50 per cent of wage and salary earners in 1990 to around

16 At 74.

17 New Zealand Bill of Rights Act 1990, s 17.

18 New Zealand Bill of Rights Act 1990, s 19.

19 Human Rights Act 1993, s 21.

20 Bernard Gernigon “ILO Principles Concerning Collective Bargaining” (2000) 139(1) *International Labour Review* 33 at 33.

23 per cent in 1999.²¹ The relative proportion of union membership in private and public sectors has also shifted dramatically as more public sector workers joined collectively. This counter-trend in the public sector was driven largely by the fear of unemployment as many state-owned enterprises were privatised and others publicly deregulated.²²

This decrease in unionism, both in New Zealand and beyond, was largely a result of changes in attitude and ideology, most significantly towards neo-liberalism. Under this view, union membership and collective bargaining undermined the workings of a free market as their presence reduced the rate at which labour could be exchanged, thus raising labour costs as a whole.²³ In this respect, neo-liberalism and unionism were at odds with one another.

To keep up with the demand for “flexible markets”, governments introduced legislative measures to decrease trade union influence.²⁴ Even states that generally supported the union movement and had high union membership rates were forced into discouraging unionism and collective bargaining through their domestic laws. It is likely that governments rationalised these decisions on the basis that if they did not increase their labour flexibility, in order to compete with others, they would fall behind much of the Western World economically.

In the wake of such action, “trade unions found it to be increasingly difficult to maintain membership levels, and union density fell”.²⁵ This meant that “the incidence of collective bargaining similarly fell away”.²⁶ The negative impact on unionism and collective bargaining was further reinforced by the natural changes to the nature of the employment environment that occurred as a result of globalisation. These included high levels of unemployment and the “growth of the informal sector, of subcontracting and of the various forms of non-standard employment relationship”.²⁷ Workers who fell into these categories either could not, or were unlikely to, be union members, meaning that unions found it harder to recruit new members and to retain existing ones.

A. *The ILO’s Response to Union Membership and Collective Bargaining*

As domestic laws promoting unions were eroded, it fell to the ILO to ensure that freedom of association and collective bargaining were safeguarded. For the ILO’s tripartite formation to be successful, the rights to associate freely and bargain collectively were vital. Since its foundation, the ILO has been committed to freedom of association as “one of the primary safeguards of peace and social justice”.²⁸ In the Declaration of Philadelphia of 1944, the ILO confirmed the importance of freedom of association, stating that it is “essential to sustained progress”.²⁹ With this in mind,

21 PF Boxall, PD Haynes and K Macky “Union Reach, the ‘Representative Gap’ and the Prospects for Unionism in New Zealand” (2006) 48(2) *The Journal of Industrial Relations* 193 at 194.

22 At 194.

23 Bob Hepple and Bruno Veneziani (eds) *The Transformation of Labour Law in Europe* (Hart Publishing, Oxford, 2009) 49 at 54.

24 Hughes and Haworth, above n 1, at 34.

25 At 34.

26 At 34.

27 Gernigon, above n 20, at 33.

28 Tonia Novitz “New Zealand Industrial Relations and the International Labour Organisation: Resolving Contradictions Implicit in Freedom of Association” (1996) 21(2) *New Zealand Journal of Industrial Relations* 119 at 119.

29 At 120.

an ILO objective was to further, among member states, “programmes which will achieve ... [inter alia] the effective recognition of the right of collective bargaining”.³⁰ Conventions 87 and 98, which promoted freedom of association and collective bargaining respectively, evolved soon after the Declaration of Philadelphia. These two conventions are stated as two of the eight core ILO conventions in the Declaration on Fundamental Principles and Rights at Work 1998.

The Freedom of Association and Protection of the Right to Organise Convention 1948 (Convention 87) embodies the legal standard protecting the principal right of freedom of association, which has been recognised by the ILO since its establishment in 1919.³¹ In summary, this convention provides that workers have the right to join and establish organisations of their own choice without government interference.³² This includes an organisation’s right to choose its own rules and representatives, organise its administration and programmes as desired, and affiliate with whoever it wishes.³³ Under pt 2 of the convention, ILO member states have a duty to take “all necessary and appropriate measures” to ensure they are fulfilled.³⁴

Closely related to Convention 87 is the Right to Organise and Collective Bargaining Convention 1949 (Convention 98). Convention 98 aims to implement effective collective bargaining through the autonomy of the parties and voluntary nature of negotiations.³⁵ This convention also provides that workers must be protected against discrimination based on their union membership or for participating in union activities. As with Convention 87, art 2 of Convention 98 prohibits interference in the establishment, functioning or administration of workers’ and employers’ unions.³⁶

Like art 4 of Convention 87, art 3 of Convention 98 places a “promotional” duty on member states to take active steps to enforce the convention. This includes assisting in the “full development and utilisation of machinery for voluntary negotiation”.³⁷ This duty has since been extended to an independent convention, the Collective Bargaining Convention 1981 (Convention 154), which New Zealand has ratified.

To monitor the implementation of these conventions, the ILO established the Committee on Freedom of Association (CFA). The CFA monitors complaints made in member states relating to violations of freedom of association.³⁸

30 Declaration Concerning The Aims And Purposes Of The International Labour Organisation (Declaration Of Philadelphia) (10 May 1994), art 3.

31 Geraldo von Potobsky “Freedom of Association: The Impact of Convention No.87 and ILO Action” (1998) 137(2) *International Labour Review* 195 at 195.

32 Paul Roth “International Labour Organisation Conventions 87 and 98 and the Employment Relations Act” (2001) 26 *New Zealand Journal of Industrial Relations* 145 at 147.

33 At 147.

34 Convention concerning Freedom of Association and Protection of the Right to Organise (ILO C087), art 11.

35 Convention concerning the Application of the Principle of the Right to Organise and to Bargain Collectively (ILO C098), art 4.

36 ILO C087, above n 34, art 11.

37 ILO C098, above n 35, art 5.

38 Novitz, above n 28, at 121.

B. New Zealand's Compliance with ILO Principles on Collective Bargaining and Freedom of Association

As noted previously, New Zealand was ahead of the world when it introduced the Industrial Arbitration and Conciliation Act in 1894, providing for both recognition of unions and a strong outlet to settle disputes between employers and unions. This early Act seemingly complied with future ILO expectations surrounding freedom of association.³⁹ Despite this, since the shift to neo-liberalism in the 1980s, New Zealand has not fully complied with ILO guidelines relating to freedom of association.⁴⁰ Compared to previous legislative frameworks, the ERA illustrates a desire to better adhere to ILO guidelines surrounding freedom of association. However, proposed amendments to this framework, if enacted, will negatively affect the ERA's compliance with the ILO.

Despite Conventions 87 and 98 being so closely related, only Convention 98 has been ratified in New Zealand law. The New Zealand Council of Trade Unions is currently considering whether Convention 87 should be ratified by New Zealand.⁴¹ However, despite the failure to ratify Convention 87, the Declaration on Fundamental Principles and Rights at Work 1998 suggests that New Zealand is bound by its rules nevertheless. In the 1998 Declaration, the rights to form organisations and bargain collectively were stated as two of the ILO's eight standards. If a state is an ILO member, it is expected that it will comply with the eight core standards of the declaration, regardless of whether or not it has ratified the relevant convention or treaty. Therefore, in order for New Zealand to be a compliant member state, it follows that all ILO initiatives relating to freedom of association and collective bargaining should be observed.

The Industrial Relations Amendment Act 1983 completely outlawed union membership clauses, arguably a breach of freedom of association. However, when Lange's Fourth Labour Government was elected, union membership was promoted by making membership compulsory for 18 months. This was to be followed by national industry-wide ballots to determine whether this compulsory membership should continue. However, the ILO intervened, holding that the 18-month compulsory membership period was not consistent with the notion that "workers should be able to form and join obligations of their own choosing".⁴² This highlighted the fact that freedom of association contains not only a right to associate, but also a right to dissociate.⁴³ The CFA also emphasised that whilst a government's duty is to facilitate industrial organisations and collective bargaining, it cannot interfere.

Lange's Fourth Labour Government implemented the Labour Relations Act 1987 which, again, sought to modify the rules surrounding union membership. This Act was also scrutinised by the ILO. The Labour Relations Act introduced enterprise agreements which allowed for groups of workers to enter into direct negotiations with employers. Registered unions still had enhanced negotiation rights, but the Act "significantly modified the conditions for registration".⁴⁴ The main modifications were the introduction of the thousand-member application rule, and the authorisation

39 At 123.

40 At 125.

41 "New Zealand" International Labour Organisation <www.ilo.org>.

42 Novitz, above n 28, at 126.

43 Roth, above n 32, at 147.

44 Novitz, above n 28, at 127.

of mixed-industry unions. Labour explained its reasons for the reform, stating that the legislation would provide a means by which workers could:⁴⁵

Form unions that were larger and more capable of providing the services and protections workers need. The legislation provides the means for unions to move toward a more unified structure.

Despite this justification, the CFA found the minimum membership requirement was a violation of the principle of association as it limited workers' right to form organisations as they pleased.⁴⁶ Further, the CFA found that encouraging workers to join registered combined unions effectively "hampered workers' ability to join unregistered unions".⁴⁷ Consequently, the CFA found the 1987 Act to be in breach of ILO conditions.

In 1991, New Zealand had a new National Government which brought with it a new employment law framework. The ECA followed the neo-liberal trend, a key objective of the Act being to "promote an efficient labour market".⁴⁸ The ECA also sought to formally provide for freedom of association in a neutral manner.⁴⁹ Despite this objective, the CFA found that the statute was generally non-compliant with the ILO objectives governing freedom of association and collective bargaining.⁵⁰

Ironically, it was the ECA's "formal neutrality" that made it non-compliant. The ECA provided employers and employees with the choice as to whether they wanted collective or individualised employment agreements. By giving employers and employees a choice, it was argued that the Act "effectively diminished the capacity of representative associations to negotiate on members' behalves".⁵¹ In some instances, there were reports of employers intentionally offering better contractual terms to individual employees to undercut unions.⁵² The Act also had limited provisions for strike action, again diminishing the capacity of representative associations. In light of these changes, the CFA found that the promotion of collective bargaining, as required by art 4 of Convention 98, was lacking.

In making its decision, the CFA emphasised that the economic improvement gained by introducing the ECA, or any other Act, was irrelevant if such development sacrificed a fundamental labour right of freedom of association. This judgment was in line with the Declaration on Fundamental Principles and Rights at Work 1998, which states that all national policies, "in particular those of an economic and financial character ... should be ... accepted only in so far as they may be held to promote and not hinder the achievement of this fundamental objective [social justice]".⁵³

The politicised nature of New Zealand's employment law framework meant that with the introduction of a new Labour Government in 1999 another substantial change in employment laws occurred. The introduction of the ERA by Helen Clark's Labour Government was a big step forward for New Zealand in terms of ILO compliance. In contrast to the ECA, the ERA showed

45 At 127.

46 At 128.

47 At 128.

48 Employment Contracts Act 1991, long title.

49 Employment Contracts Act 1991, s 5.

50 Novitz, above n 28, at 129.

51 At 129.

52 At 129.

53 International Labour Constitution (10 May 1944), annex II.

a commitment to collective bargaining and freedom of association, as per the ILO's conventions. The ERA sets out its commitment to Conventions 87 and 98 at s 3(b), which states that a purpose of the Act is to:⁵⁴

promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.

In contrast to its response to the previous legislation discussed, the ILO confirmed unofficially that, as a whole, the ERA appears to comply with Conventions 87 and 98.⁵⁵

C. The ERA and the Establishment of Union Membership

In terms of creating unions, in contrast to the 1987 requirements, the ERA requires there to be a minimum of 15 members for a union to be registered.⁵⁶ Although the CFA has not evaluated the ERA's "15-member rule", in other cases the CFA found that a requirement of having a minimum of 20 members was not excessive and fulfilled the right, in art 2 of Convention 87, of parties to "establish and ... join organizations of their own choosing".⁵⁷

In the establishment of unions, an important aspect is that they remain independent from employers. This is expressed in art 2(2) of Convention 98, which prohibits interference from employers, whether by financial or other means. Interference of this kind is also prohibited in s 14(1)(d) of the ERA.

With regard to existing unions, the ILO also states that a "government administrative authority should not have undue discretionary powers in relation to the registration or deregistration of a union".⁵⁸ Section 17 of the ERA reflects this principle, stating that a union's registration cannot be cancelled unless the union applies to be deregistered, or the Employment Relations Authority (Authority) orders that the union be deregistered.⁵⁹

The ILO recognises that for a union to have influence, it needs to be able to communicate with workers. This includes communicating the benefits of joining the union.⁶⁰ The ERA reflects this in permitting unions to enter the workplace. Whilst the ERA does not explicitly state that unions can promote themselves, the Act permits the following purposes of a union visit: "to discuss union membership", "to recruit members" and "to provide information on the union".⁶¹ As most, if not all, recruitment processes require some "selling" or "promotional" aspect, by allowing unions to recruit members, it seems the ERA accepts a certain level of self-promotion.

54 Employment Relations Act 2000, s 3(b).

55 Novitz, above n 45, at 129.

56 Employment Relations Act 2000, s 13(1).

57 Roth, above n 32, at 152.

58 At 153.

59 Employment Relations Act 2000, s 17.

60 Roth, above n 32, at 155.

61 Employment Relations Act 2000, s 20(1) and (3).

D. Collective Bargaining

An important element of the ERA is the notion of good faith, which has been argued to be “the heart of the [ERA]”.⁶² Section 4 of the ERA states that good faith “is wider in scope than the implied mutual obligations of trust and confidence”, and that it requires parties to be “responsive and communicative” and “active and constructive”.⁶³ Clearly, parties to an employment relationship are expected to act in good faith throughout the relationship, but doing so is particularly important when parties engage in collective bargaining. Section 32 of the ERA outlines the minimum good faith requirements of parties when engaged in collective bargaining. These requirements align with the ILO requirements that expect parties to “endeavour to reach an agreement, engaging in genuine and constructive negotiations, avoiding unjustified delays in negotiation and mutually respecting the commitments entered into”.⁶⁴

Despite the ERA’s compliance with the ILO requirements, many workers still have inadequate rights to collective representation under New Zealand law. At present the legislation applies only to employee-employer relationships, excluding certain classes of non-standard workers, namely contractors. Whilst contractors can join collectively in “guilds”, organisations of this character do not have the negotiating strength that registered unions have. Further, guild members do not have the right to strike and be paid, which effectively nullifies their practical ability to take industrial action.

This is a long-standing issue, but was recently “highlighted” by the Employment Relations (Film Production Work) Amendment Act 2010 (the *Hobbit* Legislation).⁶⁵ The implications of the *Hobbit* Legislation will be discussed at length later under “non-standard work”, but the opinions which were released as a result of the amendment provide useful explanations as to why contractors are denied the right of joining registered unions.

Part of the government’s reasoning for excluding contractors from the right to bargain collectively was made clear in statements by the Attorney-General in response to claims that the *Hobbit* Legislation was unlawful. It was claimed that in the case of the *Hobbit* Legislation, and generally, if independent contractors were to join together in a union in the hope of securing certain working conditions, this would be a restraint of trade under the Commerce Act 1986.⁶⁶ The Attorney-General affirmed this view at the time, stating:⁶⁷

Section 30 of [the Commerce Act 1986] effectively prohibits competing independent contractor performers from entering into or giving effect to a contract, arrangement or understanding that has the purpose, effect or likely effect of fixing, maintaining or controlling process for good or service ...

62 Bill Hodge “Good Faith in Employment Law” (2005) 11 NZBLQ 490 at 490 (abstract).

63 Employment Relations Act 2000, s 4(1A)(a)–(b).

64 Bernard Gernigon, Alberto Otero and Horacio Guido “ILO principles concerning collective bargaining” (2000) 139(1) *International Labour Review* 33 at 51.

65 Helen Kelly “The *Hobbit* Dispute” (2011) 36(3) *New Zealand Journal of Employment Relations* 31 at 31.

66 Margaret Wilson “Constitutional Implications of ‘The *Hobbit*’ Legislation” (2011) 36(3) *New Zealand Journal of Employment Relations* 89 at 91.

67 Kelly, above n 65, at 32, citing letter from Chris Finlayson (Attorney-General) to the producers of *The Hobbit* and New Zealand Actors’ Equity regarding *The Hobbit* dispute (29 September 2010).

There was also a concern that contractors entering into a collective agreement would undermine competition in the market place.⁶⁸ Kelly points out that these arguments failed to consider various other elements of the Commerce Act 1986 and the relevance of the Trade Unions Act 1908.⁶⁹ In particular, there are exceptions in the Commerce Act and the Trade Unions Act which protect groups vulnerable to exploitation as employees. The Trade Unions Act states that “trade union”:⁷⁰

... means a combination ... for regulating the relations between workers and employers, ... or for imposing restrictive conditions on the conduct of any trade or business, whether such a combination would or would not ... have been deemed to have been an unlawful combination by reason of one or more of its purposes being in restraint of trade.

Irrespective of the reasons for justifying such exclusion, denying contractors the right to join collectively and bargain is a breach of New Zealand’s ILO obligations. This view was confirmed by the ILO in 2008, when the organisation stated: “No provision in Convention No. 98 authorizes the exclusion of staff having the status of contract employee from its scope”.⁷¹ This statement, together with the inadequacy of reasons for excluding contractors from freedom of association rights, suggests that the framework should be changed. If contractors, or guilds, were accorded negotiating power and more rights to join collectively, the framework would more closely comply with Convention 98. However, given the example of the Hobbit Legislation, the chances of this being implemented are quite slim, particularly when flexible labour remains a priority.

E. Case Study: The Proposed Changes to Collective Bargaining under the ERA, the Duty to Conclude and the 30-day Rule

Although New Zealand’s current employment law framework complies with Conventions 87 and 98, with regard to employee rights, the amendments to the ERA proposed in April 2013, if implemented, will make New Zealand’s framework less compliant with the ILO. It will do this by weakening union negotiating strength and by failing to promote union membership to employees.

The proposed amendments aim to remove some of the obstacles employers currently face when engaged in collective bargaining, particularly when negotiations between employers and unions have come to a deadlock or standstill. An example of this is the proposal to remove the duty on parties to conclude bargaining in all circumstances.⁷² This will overturn the current duty to conclude bargaining under s 33 of the ERA, which states:

The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to.

Under the proposed amendment to the ERA, acting in good faith in bargaining would not require collective bargaining to be concluded. If negotiations come to a deadlock, the amendment would

68 At 32.

69 At 33.

70 Trade Unions Act 1908, s 2.

71 International Labour Organisation *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th ed, International Labour Office, Geneva, 2006) at [898].

72 Jennifer Mills and Christie Hall “2013 set to bring significant changes to employment law” *The National Business Review* (online ed, Auckland, January 2013).

give the Authority the power to decide that the collective bargaining has come to an end. This decision would be binding on both parties.

These new amendments could substantially reduce the bargaining strength of unions and give employers an unfair advantage. As long as there is a perception that employers are fulfilling their s 32 obligations and acting in good faith, they would have the ultimate right of refusing to settle on an agreement. This is of concern to unions, who heavily rely on collective bargaining to be appealing to new and current members. Novitz emphasises the importance of collective bargaining for unions, stating:⁷³

Trade unions are founded on the premise that the power imbalance inherent in the employment contract can be overcome only by the collective negotiation of the terms and conditions of employment.

Applying this perception of unionism, if the proposed amendment to collective bargaining is passed as law, a union's main source of influence would be diminished. If unions cannot bargain effectively and secure better contractual terms for employees, their relevance and purpose may be questioned.

The proposed amendment would also repeal s 62 of the ERA (known as the "30-day rule"). Section 62 currently states:⁷⁴

... during the first 30 days of the employee's employment, the employee's terms and conditions of employment comprise—

- (a) the terms and conditions in the collective agreement that would bind the employees if the employee were a member of the union ...

Under this section, the employer and employee can negotiate additional terms to the collective agreement; however, if any of these terms conflict with the collective agreement, they are invalid.⁷⁵ If the proposed amendments are introduced, this rule will be revoked, meaning that employers will be entitled to employ employees on individual terms and contracts which differ from collective agreements, at any time they wish.

Whilst the proposed changes do not discriminate against unions and prevent them from engaging in collective bargaining, if implemented the proposed changes would make the ERA less compliant with ILO standards, in particular a member state's duty to promote and encourage effective collective bargaining, as emphasised in both Convention 87 and Convention 98. By removing the duty to conclude bargaining, it could be argued that the government would not be taking all measures to "encourage and promote" effective negotiation between parties, as the amendment gives parties a way to end negotiations without a collective agreement.

Compliance with ILO principles may also be breached by allowing employers to enter into individual employment agreements without union input. By revoking the 30-day rule, there is no compulsory or formal acknowledgment of the existing collective agreements to new employees. In this sense, the amendment would fail to promote union membership and existing collective agreements, which is argued to be a step back from the ERA's current compliance with the ILO.

Whilst the proposed amendment to the conclusion of collective bargaining is likely to undermine the effectiveness of unions and collective bargaining, from a contractual perspective it could also

73 Novitz, above n 28, at 128.

74 Employment Relations Act 2000, s 62(2)(a)(v)(A).

75 Employment Relations Act 2000, s 62(2)(a)(v)(B).

be argued that the duty to conclude collective bargaining is undermining each party's freedom of contract. The ILO's CFA has said that governments must be careful not to impinge upon workers' (or employers') freedom of choice.⁷⁶ In *Biotechnology Australia Pty Ltd v Pace*, Kirby P questioned whether forcing parties to come to an agreement could be a breach of a party's right to contract or not to contract. Whilst it is noted that collective bargaining is the negotiation of agreements, not contracts, Kirby P stated that it is an "attribute of a free society" that people should be able to "make bargains".⁷⁷ This sometimes means that parties may "fail to make bargains or fail to agree on particular terms".⁷⁸ In this respect, Kirby P questioned whether forcing parties to come to an agreement would interfere with one's individual autonomy to make their own decisions. Kirby P's statement provides a reminder that whilst compliance with the ILO is very important, there must be a balance within the framework between promoting freedom of association and collective bargaining, whilst not being unfairly restrictive on employers from an economic perspective.

With Kirby P's comments in mind, an alternative to the current regime, which is compliant with ILO standards, should be considered. Whilst the duty to conclude collective bargaining is more compliant with ILO standards and the notion of good faith, there is some validity to the concern that this requirement could unfairly encroach on employers' autonomy and have a detrimental impact on the running of their businesses. Kirby P provided a clear statement that by forcing a party to conclude collective bargaining, this could be considered a breach of one's individual autonomy. In addition to this, it must be accepted that there are times when bargaining becomes "very protracted and very acrimonious".⁷⁹ In such circumstances, it is questionable whether the current New Zealand framework provides an adequate solution for when such situations arise, or whether an alternative framework could be considered.

Under the current New Zealand framework, when parties reach a deadlock in negotiations, they can seek mediation to resolve certain issues or they can receive a non-binding recommendation from the Authority. However, neither of these actions is guaranteed to resolve the dispute. The Australian model appears to provide a possible new framework for parties to conclude bargaining in New Zealand. The Fair Work Association (FWA) of Australia is a judicial body, which has the authority to make a binding determination in place of a negotiated agreement where parties are unable to reach an agreement.⁸⁰ When making this decision, the FWA must take into account the merits of the case, the public interest, how productivity may be improved, and incentives to continue bargaining at a later time.⁸¹

Providing parties in New Zealand with a similar option would give them freedom to negotiate as they please, but would also provide an alternative way for resolving negotiations that would otherwise be unlikely to be resolved, without a strike or lockout taking place. As parties would generally rather negotiate terms themselves instead of asking a third party to make a decision, parties would have more incentive to negotiate effectively in good faith from the outset. Furthermore, if the FWA is asked to make a decision, the offers, which parties put forward, are much more likely

76 Novitz, above n 28, at 121.

77 *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130 (CA) at 133.

78 At 133.

79 Richard McIlraith and Simon Mitchell "Collective Bargaining – a View from Both Sides" (paper presented at New Zealand Law Society Employment Law Conference – Good Faith, Auckland, 8–9 November 2012) 197 at 207.

80 At 207.

81 At 208.

to be fair and reasonable for both sides, as they would know that unreasonable offers are unlikely to be considered in the FWA's determination.

VI. NON-STANDARD WORK

Prior to globalisation, New Zealand's workforce consisted of mostly standard employment. The term "standard employment" generally refers to full-time employment of an unlimited duration which is governed by an employment contract between a single employer and employee, although this varies depending on the circumstances.⁸² These contractual agreements generally contain protections against unjustified dismissal and include rights to holiday, sick and bereavement leave. However, as unemployment grew, pressure from global agencies, such as the International Monetary Fund and World Bank, were imposed on employers to remove such protections, in order to reduce labour costs.⁸³ These agencies imposed such pressure based on the assertion that "worker protections were preventing the growth of jobs and therefore had to be removed to create more jobs".⁸⁴

Non-standard work is favourable in a market-driven economy, as fixed-term contracts and on-call terms mean labour costs can be increased and decreased as easily as desired by the employer. Closely tied with non-standard work is the notion of contracting out, which generally saves employers investing in resources, whether they are physical or intangible.

It should be noted that some workers, such as contractors with high skill sets, find contracting more appealing than being an employee. In this instance, the lack of "job security" associated with the work may be outweighed by the money that can be made from contracting. However, this is not always the case. Much non-standard work is deemed to be "precarious" in nature, meaning it is poorly paid, insecure, unprotected and cannot support a household.⁸⁵ Precarious work has been identified "most closely with women, young workers and older workers, in other words, those who work on the margins of the labour market".⁸⁶

Non-standard precarious workers are excluded from much of New Zealand's employment law framework. This means they do not have the ability to take paid sick leave, annual leave or bereavement leave. They also do not have the security of continued employment, a characteristic that is part of the ILO's "decent work" agenda. Generally speaking, such a group of the labour market arguably requires the most statutory protection and security, yet the law provides quite the opposite. As previously discussed, in New Zealand these workers cannot join collectively, which means they cannot bargain for better employment terms.

82 Barbara Burton "Non-Standard Work: An Employer Perspective (2011) 36(3) *New Zealand Journal of Employment Relations* 38 at 39.

83 Sebbens, above n 2, at 235.

84 Margaret Wilson "Precarious Work: The Need for a New Policy Framework" in *Perspectives* (Whitlam Institute, Sydney, 2012) at 6.

85 Kerry Rittich "Rights, Risk, and Reward: Governance Norms in the International Order and the Problems of the Precarious Work" in Judy Fudge and Rosemary Owens (eds) *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Hart Publishing, Oxford, 2006) 35 at 35.

86 Wilson, above n 84, at 4 (footnote omitted).

A. *The ILO Response to the Rise in Non-Standard Work and New Zealand's Compliance with This Response*

As a part of its reaction to the changes in labour standards from globalisation, the ILO implemented recommendations to protect non-standard precarious workers. In 2006 the ILO released Recommendation 198. Part of this recommendation suggested that one should look beyond an employment contract to ascertain the true nature of an employment relationship. It states that national policies should attempt to look at the true nature of employment relationships, by attempting to:⁸⁷

... combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due ...

This element of the recommendation provides a response to the issue that employer's may take advantage of hiring workers under a non-standard contract, even though such workers fulfil the duties of true employees, meaning that the workers are under-rewarded as a result of the words in their contract.

In the early years following the shift to neo-liberalism, New Zealand courts were reluctant to look beyond the contractual terms, to decipher the true nature of the employment relationship. In *TNT Worldwide Express (NZ) Ltd v Cunningham* the Court of Appeal rejected the notion that the degree of control exercised by the alleged "employer" was a decisive factor in determining the true nature of the contract.⁸⁸

However, the implementation of s 6(2) of the ERA gave the Authority or relevant Court the jurisdiction to look beyond a contract to ascertain the true nature of an employment relationship. The section states:⁸⁹

In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

Section 6(2) was applied by New Zealand's Supreme Court in *Bryson v Three Foot Six Ltd*.⁹⁰ In this appeal the applicant was granted leave to raise a personal grievance, the Court holding "the true nature" of the relationship was that the applicant was an employee, not an independent contractor as listed in his contract.

New Zealand courts have also acknowledged that s 6(2) can apply when the nature of an employment relationship changes over time. In *Koia v Carlyon Holdings Ltd* the Employment Court recognised that:⁹¹

87 ILO Employment Relationship Recommendation 2006 (Recommendation 198), art I(4)(b).

88 *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681 (CA).

89 Employment Relations Act 2000, s 6(2).

90 *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721 (SC).

91 *Koia v Carlyon Holdings Ltd* [2001] ERNZ 585 (EmpC) at [31].

The real nature of a relationship may have evolved or developed in a way that is ... different to the nature of the relationship at the time of its formation or at subsequent times ...

These cases are evidence that s 6(2) of the ERA can be used to successfully override what is in writing, in order to ensure workers receive their full entitlements.

The ILO's Recommendation 198, on employment relationships, goes beyond simply considering the true nature of a worker's employment relationship as provided under s 6(2) of the ERA. In order for workers to be able to receive their full entitlements, the ILO suggests that member states should also:⁹²

... provide effective access of those concerned, in particular employers and workers, to appropriate, speedy, inexpensive, fair and efficient procedures and mechanisms for settling disputes regarding the existence and terms of an employment relationship ...

Not only does the recommendation endorse having better mechanisms available to ascertain the nature of the employment relationship, the recommendation also suggests "the inclusion in any national law of a presumption of an employment relationship until proven otherwise".⁹³ The goal of these recommendations is to remove practical barriers that prevent workers from gaining full recognition and protections they are entitled to.

Whilst s 6(2) of the ERA is a valuable tool for non-standard workers, there is a common "access to justice" problem in New Zealand, which is inconsistent with Recommendation 198. Section 6(2) still puts the onus on a worker to bring a claim and argue that the true nature of their employment is different to what is stated in their employment contract. Whilst many employment disputes are resolved through mediation, as employment law partner Peter Kiely notes, bringing a claim under s 6(2) can be a long running contentious issue and has been the subject of much litigation.⁹⁴ Such legal action is also costly, and for this reason can often be out of the reach of non-union members. Further, to even consider bringing a claim in the first place, the person would need to have an awareness of the law and what their entitlements are. As previously mentioned, precarious workers are often the more vulnerable workers in society. Therefore they are unlikely to have the financial means to bring a claim under s 6(2), or the fear of losing work as a result of such action will deter them from taking such action. On the other hand, an employer could be faced with large legal bills if their worker brings an action under s 6(2), even when they genuinely believe they have engaged a worker one way or the other.

To conquer this problem and be fully compliant with Recommendation 198, it must be considered how these disputes can be resolved without the need for costly legal intervention. An example of this could be an advice bureau that either party could contact, to get information about their legal status in the working relationship, before a dispute arises.

B. The Hobbit Legislation: What Issues Arise Regarding New Zealand's Compliance with the ILO?

In 2010 the highly controversial Hobbit Legislation was introduced to Parliament. The Hobbit Legislation effectively made every worker in the film industry a contractor, unless they had a

92 ILO, above n 87, art I(4)(e).

93 Wilson, above n 84, at 8.

94 Peter Kiely "Independent Contractor vs Employee" (2011) 36(3) *New Zealand Journal of Employment Relations* 58 at 59.

contract stating otherwise.⁹⁵ The amendment is an example of legislative change being used to create a more flexible and cost-effective labour market. In this instance it was to generate income in the film industry, by encouraging multi-national film makers, Warner Brothers, to invest in New Zealand, through the making of *The Hobbit* films. Prior to the Hobbit Legislation, the production industry had a “high concentration of independent contractors and freelancers” compared to other industries, as flexibility is considered a “necessary prerequisite of a project-based industry”.⁹⁶ The Prime Minister, John Key, argued that the amendment was not just about creating revenue for this industry, but about “safeguard[ing] work for thousands of New Zealanders”.⁹⁷

Whilst it was argued that there were large economic advantages for implementing the Hobbit Legislation, the constitutional and legal implications of the Bill were substantial. The amendment was passed through Parliament as urgent, with little public consultation or scrutiny. Further, the amendment covered many workers beyond those actually working with Warner Brothers, due to the extensive definitions of “film production work” and “film workers”. Because of these definitions, the amendment was to apply to all those who “engage in film production work as an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer or entertainer” or who are “engaged in film production work in any other capacity ... [in] all production work from pre-production through to post-production and related promotional or advertising work”.⁹⁸

Through labelling such a broad group of workers as contractors, regardless of their individual circumstances, the Hobbit Legislation proposed the exact opposite of the ILO’s recommendation, that there should be a presumption of an employment relationship.⁹⁹ By making such a presumption, the amendment removed the right of film workers to ascertain the true nature of their employment under s 6(2) of the ERA. The ease in which the amendment removed this right highlights the vulnerability of non-standard workers, particularly contractors, in New Zealand’s law. This raises the question as to how New Zealand’s framework can be modified to better protect such workers. It is argued that better compliance with ILO provisions is a fundamental starting point for doing so.

C. Moving Forward: How New Zealand’s Framework Can Better Comply with ILO Standards so Non-Standard Workers Can Be Better Protected

As previously mentioned, fully complying with Recommendation 198 is an excellent starting point in better protecting non-standard workers, particularly independent contractors. However, Owens and Wilson agree that a broad view of regulation should be taken for non-standard workers, in that regulating employment relationships will not be a final solution.¹⁰⁰ Wilson argues that the ILO initiatives of a Social Protection Floor and the Decent Work Agenda are two instruments that are of practical use in the development of a new policy.¹⁰¹

95 AF Tyson “A Synopsis of the ‘Hobbit Dispute’”(2011) 36(3) New Zealand Journal of Employment Relations 5 at 10.

96 Rupert Tipples and Bernard Walker “Editorial: Introducing the Forum” (2011) 36(3) New Zealand Journal of Employment Relations 5 at 2.

97 John Key “Hobbit movies to be made in New Zealand” <<http://johnkey.co.nz>>.

98 Jim Roberts “The Hobbit law – What does it mean for workers?” *New Zealand Herald* (online ed, New Zealand, 28 October 2010), quoting Employment Relations (Film Production Work) Amendment Bill 2010 (229-1), cl 4(1).

99 Wilson, above n 84, at 8.

100 Australian Council of Trade Unions “Lives on Hold: Unlocking the Potential of Australia’s Workforce: Report on the independent enquiry into Insecure work in Australia” (2012) <www.actu.org.au> at 28–29.

101 Wilson, above n 84, at 8.

As previously discussed, the Decent Work Agenda seeks to implement adequate income, social protection and stability for people and families.¹⁰² The Social Protection Floor could also be used to help sculpt a new framework for non-standard workers in New Zealand. Wilson argues that the Social Protection Floor is a useful tool for developing a framework for non-standard workers as the regime.¹⁰³

... acknowledge[s] the reality of globalisation and the need for flexibility in the labour market with the need to preserve and promote security for workers whatever their role in the labour market.

To incorporate these initiatives, New Zealand could consider implementing a statutory framework that allows “industry, trade and competition policy, taxation regimes, rules relating to pensions and benefits, and welfare provisions” for non-standard workers.¹⁰⁴ Security of ongoing employment is also something that should be addressed. Whilst New Zealand’s welfare framework provides a “safety net” in the result of discontinued employment, it is argued that a provision to give precarious workers security that their work will be ongoing is a more constructive way of protecting their interests. The notion of job security is also in line with the Social Protection Floor and decent work initiatives.

VII. THE IMPACT OF THE DEREGULATION OF NEW ZEALAND’S HEALTH AND SAFETY SECTOR

The neo-classical rationale of labour regulation is strongly in favour of the deregulation and decentralisation of the labour market. Such a rationale operates under the belief that “capital ... [and] employers should have greater flexibility to affect wages and conditions in accord with specific product market and local conditions”.¹⁰⁵ When labour regulation operates under a centralised model, employers are bound by legislative requirements and therefore do not have much flexibility to determine their own conditions. In the neo-liberalist view, a decentralised system with little state intervention is most effective as it leads to “greater market efficiency than a centrally controlled system of employment relations and wage setting”.¹⁰⁶ Health and safety is just one of the ways New Zealand’s labour regulation was deregulated, when the country sought to engage in global markets.

Unfortunately, making such changes has substantially reduced the scope and effectiveness of New Zealand’s health and safety system, and has resulted in tragedy. This section will analyse how deregulating New Zealand’s health and safety system is at odds with ILO recommendations and how it could be repaired to be more compliant.

102 At 9.

103 At 9.

104 At 8, citing Rosemary Hunter “The Legal Production of Precarious Work” in Fudge and Owens, above n 85, 283 at 289.

105 Morrison, above n 6, at 127.

106 At 127.

A. *Health and Safety: ILO Standards Post-Globalisation and New Zealand's Compliance*

Since its establishment in 1919, the ILO has considered health and safety to be one of its top priorities. The ILO's 1919 constitution states that workers should be protected from sickness, disease and injury arising from their employment. Further, the organisation identifies that a comprehensive health and safety framework is in the best interest of all three parties of their tripartite formation. This is because health and safety frameworks not only protect workers from injury, but also protect employers from lost revenue as well as a loss of skilled staff, absenteeism, and high accident compensation levies.¹⁰⁷ From a state perspective, it is also in a government's best interest to regulate the state's health and safety regime, as occupational injuries, diseases and deaths have a negative effect on productivity and on economic and social development.¹⁰⁸

The ILO's Decent Work Agenda also aims to "promote both inclusion and productivity by ensuring that women and men enjoy working conditions that are safe".¹⁰⁹ At the centre of the ILO's health and safety framework is the Occupational Safety and Health Convention 1981 (Convention 155). As this section will discuss, New Zealand's labour regulation framework lacks the detail that compliance with Convention 155 requires. However, given that New Zealand only ratified this convention in 2007, it is understandable that the framework is yet to fully comply.

Convention 155 requires that member states should "formulate, implement and periodically review a coherent national policy on occupational safety".¹¹⁰ Article 5 of Convention 155 gives member states guidelines as to what "main spheres" their domestic health and safety policies should consider, which include:¹¹¹

...

- (b) ... relationships between the material elements of work and the persons who carry out or supervise the work, and adaptation of machinery, equipment, working time, organisation of work and work processes to the physical and mental capacities of the workers;
- (c) training, including necessary further training, qualifications and motivations of persons involved, in one capacity or another, in the achievement of adequate levels of safety and health;
- (d) communication and co-operation at the levels of the working group and the undertaking and at all other appropriate levels up to and including the national level[.]

These provisions suggest that detailed legislation should be in place which suit the nature of the work being done, and the mental and physical capabilities of the person doing that work. Further, it seems to place a clear responsibility on the state to implement such legislation and ensure that it is up to date.

107 "International Labour Standards on Occupational safety and health" The International Labour Organisation <www.ilo.org>.

108 Convention concerning the promotional framework for occupational safety and health (ILO C187).

109 International Labour Organisation "Decent work agenda" The International Labour Organisation <www.ilo.org>.

110 Convention concerning Occupational Safety and Health and the Working Environment (ILO C155), art 4(1).

111 Article 5.

In *Central Cranes Ltd v Department of Labour*, New Zealand's "pre-globalisation" health and safety framework was described as being "specific to a particular industry and prescriptive in its terms establishing detailed standards for health and safety in the work place".¹¹² The legislation governing each industry often outlined what was the safest way in which a task could be performed. For example, the Construction Act 1959 had both general rules for the construction industry as well as specific standards for excavations, scaffolding and the use of tools, gear and explosives.¹¹³

Similarly, this framework showed the state taking on much responsibility for health and safety. For example, in the Coal Mines Act 1979 there were provisions for a specialist inspectorate body, which had wide statutory requirements, to ensure mines were health and safety compliant. The Coal Mines Act 1979 and Construction Act 1959 were just two of many examples that imposed, and monitored the enforcement of, strict health and safety codes on employers. These Acts show that the state had taken responsibility to closely regulate and monitor industries, in a way which would provide safe work for workers.

Post-globalisation, New Zealand's health and safety framework reflected the neo-liberal shift to self-regulation. The transition to a deregulated model was assisted by declining union membership. This resulted in removal of specific legislative measures surrounding labour regulation, and the introduction of one primary piece of legislation, the Health and Safety in Employment Act 1992. This Act replaced many provisions of the existing industry-specific health and safety legislation, and sought to impose a "basic level of safety" that could apply to all industries.¹¹⁴

The changes to New Zealand's health and safety framework were critiqued in the Royal Commission's Report on the Pike River Coal Tragedy. This accident occurred in November 2010, when 29 miners were trapped in a coal mine near Greymouth following an explosion. Despite subsequent attempts to rescue the miners, there were no survivors. This resulted in the establishment of a Royal Commission on the Pike River Coal Tragedy. The Royal Commission's findings were extensive, but in short found that the Pike River health and safety systems were inadequate, and that the disaster could have been avoided.¹¹⁵ The report also found shortcomings with New Zealand's system as a whole. These shortcomings will be used as a starting point to evaluate New Zealand's current compliance with ILO Convention 155.

The Health and Safety in Employment Act 1992 imposed the responsibility of monitoring and preventing workplace hazards on employers. In the 2002 amendment, this responsibility was extended, by stating that employees also had a duty to participate in health and safety initiatives.¹¹⁶ In its review, the Royal Commission did not dispute this idea of shared responsibility, and stated that the Health and Safety in Employment Act, and its amendments, are generally "fit for purpose".¹¹⁷ Giving employers primary responsibility is also consistent with art 16 of Convention 155, which states that:¹¹⁸

112 *Central Cranes Ltd v Department of Labour* [1997] 3 NZLR 694 (CA) at 700.

113 Doug Tennent *Accident Compensation Law* (LexisNexis, Wellington, 2013) at 291.

114 At 291–292.

115 Graham Panckhurst, Stewart Bell and David Henry "Royal Commission on the Pike River Coal Mine Tragedy" (October 2010) vol 1 at 12.

116 Health and Safety in Employment Amendment Act 2002, s 12.

117 Royal Commission, above n 115, at 13.

118 ILO C155, above n 110, art 16(1).

Employers shall be required to ensure that, so far as is reasonably practicable, the workplaces, machinery, equipment and processes under their control are safe and without risk to health.

If employers are given the authority to monitor their own health and safety systems, the ILO states that governments must ensure that employers have the guidance needed to provide a safe workplace.¹¹⁹ According to the Royal Commission, the New Zealand government is currently not providing such guidance. The Royal Commission stated that through giving employers enhanced responsibility; the Department of Labour saw this as “somehow reducing its responsibility to actively administer the legislation”.¹²⁰

To address this issue, the Royal Commission stated that the “creation of a single-purpose Crown agency would be the best way to urgently improve New Zealand’s poor health and safety performance”.¹²¹ Provided such an agency played an active part in helping employers and workers implement legislation, the current regime could be improved drastically, without needing to significantly amend existing legislation.

The report also acknowledged the importance of the prescriptive terms in the Coal Mines Act 1979, which had developed over some years. The report stated that these rules “were swept away by the new legislation, leaving mining operators and the mining inspectors in limbo”.¹²² As a result, the Commission found that the regime inadequately supports miners in carrying out the tasks of their jobs. This is a breach of Convention 155, which asks that workers be equipped with adequate training and support to fulfil the duties of their employment.¹²³ This highlights a flaw with the “one size fits all” approach adopted by the Health and Safety in Employment Act 1992, as it imposes generic, basic rules to all industries regardless of size or the nature of the work being conducted.

Moving forward, the Royal Commission suggested that an approved code of practice for the mining industry should be implemented, to prevent another Pike River disaster from occurring. The author agrees that such a code of practice should be adopted not only for mining, but for many other high-risk industries, in order to comply with ILO standards. This would be particularly useful in industrial industries, where contracting out is very common. Unlike the current framework, which requires employers to implement their own systems, an industry-specific code or Act would provide set rules for all workers in the industry. Therefore, if there were a number of different employers, employees and contractors on a site, there would still be a cohesive approach to how a particular task should be conducted. Such a framework should also include training and assessment mechanisms, as suggested by the ILO, to ensure that workers were fully equipped to perform their duties. As suggested by the ILO, such a regime should be reviewed periodically, to monitor compliance and consider any required amendments.¹²⁴

119 Article 10.

120 Royal Commission, above n 115, at 30.

121 At 31.

122 At 32.

123 ILO C155, above n 110, art 14.

124 Article 4.

VIII. CONCLUSION

New Zealand's employment law framework has undergone dramatic change in the last 20 years in order to become a player in the global market. Like many other jurisdictions, the shift to neo-liberalism has created vast economic opportunities, but arguably such economic gain has come at a cost to labour standards. Whilst initially the changes to labour standards were in many ways at odds with the ILO's ideas, over time New Zealand's labour law framework has adapted to this change, and removed some of the disadvantages that were caused to workers by this shift to a free economy. The introduction of the ERA was at the centre of this, as it provided for adequate freedom of association and collective bargaining, and sought to impose obligations of good faith requirements on employers and employees. Unfortunately, New Zealand's framework requires more development before our health and safety legislation and policies governing non-standard workers are of a standard that can be considered "ILO compliant".

Further, it must be noted that legislative change can easily alter New Zealand's compliance with the ILO for the worse. As the *Hobbit* Legislation and proposed amendments to collective bargaining show, New Zealand's legislature can easily turn a blind eye to the ILO and legislate in a way that contravenes its principles.

Therefore, moving forward, it is important that New Zealand's employment law framework continues to develop in all areas this paper has discussed: freedom of association, non-standard work and health and safety. The more entrenched and accepted ILO conventions become in New Zealand's framework, the less likely they are to be undermined in the future.

