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TIKANGA IN DEVELOPING THE COMMON LAW OF CONTRACT

Julia Harper-Hinton* and Jodi Gardner**

Abstract

There has been limited discussion of tikanga in the law of obligations in Aotearoa. Considering the judicial engagement with tikanga in Smith v Fonterra *and* Ellis v R*, this article explores the potential role of tikanga in the development of the common law of contract. It highlights the key themes in settler common law, namely the (over) emphasis on freedom, the value of procedure, the lack of concern regarding unfairness or inequality, and the rejection of good faith. These themes are largely grounded in the approaches of the United Kingdom. The relationship between contract law and tikanga remains to be seen. This article considers how results under tikanga could interact with the settler law of contract. Three scenarios are outlined: (1) supporting settler legal principles; (2) illuminating or gap-filling; or (3) challenging legal principles. The article does not advocate for specific legal change but does, however, provide a starting point for promoting an additional approach to contract law in Aotearoa.*

* Lecturer, Faculty of Law, University of Auckland. Our sincere thanks to Maureen Malcolm, Anaru Erueti and Claire Charters for reviewing earlier drafts and their very helpful comments. All errors remain our own. For any queries, please contact julia.harper-hinton@auckland.ac.nz.

** Brian Coote Chair in Private Law, Faculty of Law, University of Auckland.

I. Introduction

Smith v Fonterra is a ground-breaking case in several ways;[1] it provides hope for environmental lawyers, reconsiders the role of nuisance, hints at the possibility of a novel climate change tort, and engages with tikanga in a meaningful and nuanced manner. This article focuses on the emerging role of tikanga in the development of private law principles in Aotearoa's legal landscape. We focus particularly on contract law, an overlooked but important area of law for every person in the country. We enter into contracts every day – often without thinking of it. Having a law that ensures contracting can be done on a fair and free basis is crucial for society in Aotearoa New Zealand. This article engages with the Law Commission's *He Poutama* Study Paper with two limited, but important purposes. First, to highlight key themes in existing common law contract principles, and secondly to provide an outline of three different ways in which tikanga may interact with existing 'settler' private law principles, as a source of law when the common law of contract is engaged. The purpose of this article is not to provide substantive recommendations of what the outcome may be in specific cases, as this would be the role of an expert or body of experts responding to the individual facts. Instead, we observe how tikanga may interact with the settler law of contract.

There has been little discussion of tikanga in the law of obligations, despite the law's impact on pre-existing vulnerabilities in our society.[2] This makes the discussion and application of *Ellis v R* and *Smith* even more important.[3] We do also note that judicial recognition of tikanga within the current constitutional structure raises fundamental divisions of thought and some deeply held convictions. It is therefore important at the outset to recognise the limitations of this article. The first is perspective. In looking at how tikanga may interact with private law principles following recent developments in judicial recognition, it is important to keep these developments in perspective. These developments are occurring within

1 *Smith v Fonterra Co-Operative Group Ltd* [2024] NZSC 5.

2 We do note however that there has been work on the relationship with the common law more generally: see Joseph Williams J "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern NZ Law" (2000) 21 Wai L Rev 1; Nicole Roughan "The Association of State and Indigenous Law: A Case Study in 'Legal Association'" (2009) 59 UTLJ 135; Natalie Coates "What Does Takamore Mean for Tikanga? *Takamore v Clarke* [2012] NZSC 116" (2013) Feb Māori LR 14; Robert Joseph "Re-creating Legal Space for the First Law of Aotearoa-New Zealand" (2009) 17 Wai L Rev 74; Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" [2015] NZ Law Review 1; and Peter Watts KC "*Ellis v R*: A Revolution in Aotearoa New Zealand, Welcome or Not" [2025] NZ Law Review 47.

3 *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239.

a system that does not reflect the agreement made in Te Tiriti o Waitangi.[4] Secondly, we limit our analysis to settler common law concepts and the window potentially available within common law for tikanga to be recognised. Thirdly, as outlined in *He Poutama*,[5] any consideration of tikanga should occur through a clear, principled approach engaging with relevant experts and the parties impacted.

On that basis, this article has three key parts. The first outlines key themes associated with the common law of contract, both from the United Kingdom and also the settler contract law in Aotearoa New Zealand. The second provides an outline of tikanga principles as identified in *He Poutama*. The final part looks at engagement between tikanga and some contract law principles.

II. Key Themes in the Common Law of Contract

This section describes the foundation of the common law of contract in Aotearoa New Zealand, acknowledging the complex relationship with its British colonial roots. There are two key sections; the first outlines the traditional libertarian approach of the British common law of contract and the second considers how this has (and sometimes has not) been implemented in Aotearoa New Zealand. It is beyond the scope of this article to provide a detailed analysis of the historical development of the law of contract in either country,[6] although this section draws on key themes to provide a general overview of the approaches taken. We also recognise that there have been frequent legislative inroads into contract law principles that have made significant amendments and protected various groups of people, such as debtors,

4 Ani Mikaere "Cultural invasion continued: the ongoing colonisation of tikanga Māori" (2005) 8(2) Yearbook of New Zealand Jurisprudence 134; Moana Jackson "The Treaty and the word: the colonization of Māori philosophy" in Graham Oddie and Roy W Perrett (eds) *Justice, Ethics and New Zealand Society* (Oxford University Press, Auckland, 1992); and Annette Sykes "The myth of tikanga in the Pākehā law" (2021) 8 Te Tai Haruru Journal of Māori and Indigenous Issues 7. We recognise the valid and important points raised by this approach and our discussion in no way undermines or disagrees with this line of thought. However, in light of the existing common law engagement and the guidance provided by *He Poutama* (below n 5), until there is more transformative constitutional change, there is a need to articulate areas in all aspects of our legal system where engagement with tikanga may occur. And, if it does, it should proceed in a principled, respectful and meaningful manner.

5 Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023).

6 We note that, unlike Australia, there is no detailed legal treatise of the legal history of Aotearoa New Zealand, Moens and Zimmermann *Foundations of the Australian Legal System: History, Theory and Practice,* (LexisNexis, St Leonards NSW, 2023); Peter Cane, Lisa Ford and Mark McMillan (eds) *The Cambridge Legal History of Australia* (CUP, Cambridge, 2022). We do, however, recognise Swain has made the significant contribution to the history of contract law in Aotearoa New Zealand (see, for example, Warren Swain '"The Great Britain of the South': the Law of Contract in Early Colonial New Zealand" (2020) American Journal of Legal History 30; Warren Swain "A Reputation for Boldness: Statutory Reform of Contract Law in New Zealand" in TT Arvind and J Steele (eds) *Contract Law and the Legislature* (Hart Publishing, Oxford, 2020).

consumers, employees, and tenants.[7] Despite these statutory developments, it is important that the common law is agile and fit for purpose; people and situations can easily fall between the cracks of legislative regimes and the common law remains the legal fallback in these circumstances.[8]

A. Foundation of Contract Law in the United Kingdom

The orthodox approach to the common law of contract is founded on allowing parties to operate independently in a self-centred, individualistic manner; the binding contract will create a connection between the parties to ensure that promises are enforced. There is therefore no need for pre-existing relationships or trust between the parties. The general approach of the common law was effectively described by Thomas:[9]

> Contract law is imbued with the spirit of liberal individualism. The transcendent drive in Western industrial society is the desire for freedom of choice and freedom of action. Liberal individualism is the distinct ideology. This libertarian ideal spawns an economic regime in which freedom of choice is endemic. From the laissez faire economies of the 19th century, through the regulated or mixed economies of the mid-20th century, to the free market and global economies of today, freedom from interference has been and remains a fundamental premise. Market forces and competition, it is avowed, require freedom of choice and freedom from interference. But, if unrestrained, this freedom means that the strong and powerful will necessarily prevail over the weak and vulnerable. Even its strongest proponents do not deny that capitalism can be a brutal and cruel process. As Mason CJ and Wilson J have said: "Competition by its very nature is deliberate and ruthless". The market place is not an accommodating place for the insecure and frangible.

7 For a general discussion on this approach, see PS Atiyah "Common law and statute law" (1985) 48(1) MLR 1; for a focus on Aotearoa New Zealand, see Warren Swain "A Reputation for Boldness: Statutory Reform of Contract Law in New Zealand" in TT Arvind and J Steele (eds) *Contract Law and the Legislature* (Hart Publishing, Oxford, 2020).

8 For example, the common law concept of unconscionable bargains was used to project the UberEats driver in *Heller v Uber Technology* 2020 SCC 16, in a situation where they fell outside the remit of both the consumer and employment legislative protection.

9 EW Thomas "Good Faith in Contract: A Non-Sceptical Commentary" (2005) 11 NZBLQ 391 at 402.

Whilst this has been described as a strength of contract law as it provides a way to hold people accountable to their obligations, we submit that it has often created limitations which make it an unfair and inappropriate vehicle for situations. Like all law, it does not appear in a vacuum, the historical developments of contract are not merely legal and are closely linked with economic, social and political movements.[10] Many of these concepts and limitations have strong roots in the Enlightenment period which was associated with individual and market-based freedom, with scholars advocating against government intervention into either economic or individual affairs. The common law of contract in the United Kingdom is therefore not only reflective of legal principles and developments but also strongly rooted in the historical and political movements.

The history of the common law of contract in the United Kingdom is long, detailed and complex. We acknowledge that contractual approaches are also not consistent and often ebb and flow across time points of history.[11] There are however key – often overlapping – themes that are frequently referred to by judges in their determinations, and remain largely dominant in most contexts. This section will briefly provide four examples of these themes, namely the (over)emphasis on freedom, the value of procedure, the lack of concern regarding unfairness or inequality, and the rejection of good faith.

First, the (over)emphasis on freedom. It is commonly stated that freedom is the starting point of the English common law on contracts, with an emphasis on ensuring that people are free to enter into contracts of their choosing and to act however they wish once in these agreements – limited only by the provisions of the contractual agreement. The oft-cited judgment of Sir George Jessel MR in *Printing and Numerical Registering Co v Sampson* is one of many examples where freedom of contract is assumed to be the predominant factor when determining the enforceability of potentially unfair contractual arrangements.[12] In holding that an agreement to assign all future patent rights was enforceable, his Lordship commented:[13]

10 PS Atiyah *Essays on Contract Law* (Oxford University Press, Oxford, 1990) at Essay 12, 355.

11 For a general discussion, PS Atiyah *The Rise and Fall of the Freedom of Contract* (Oxford University Press, Oxford, 1979); and, for a discussion focused on contractual unfairness, Warren Swain "Reshaping Contractual Unfairness in England 1670–1900" (2014) 35(2) The Journal of Legal History 120.

12 *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 (CA); *Fender v St John-Mildmay* [1938] AC 1 (HL) 12 as per Lord Aiken; *Lancashire County Council v Municipal Mutual Insurance Ltd* [1996] 3 All ER 545 (CA) 555–556 as per Simon Brown LJ; Hugh Collins *The Law of Contract* (4th ed, LexisNexis, London, 2003) especially at ch 6.

13 *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 (CA) 465.

> … you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. Therefore, you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract.

The primacy of freedom of contract has been the dominant value in the philosophy of the common law of contract.[14] The courts are often hesitant to intervene in an agreement between parties, or to impose substantive requirements of fairness of exchange. A contract will generally not be invalidated merely because of vague notions of 'justice', such as the fact that the terms were harsh, unreasonable or grossly unfair.[15] Freedom of contract often reigns supreme in the common law – regardless of the adequacy of consideration, the appropriateness of the agreement, or the financial consequences to the parties.[16]

Secondly, the value placed on procedure over substantive fairness. The common law of contract in the United Kingdom is more comfortable ensuring that an agreement contains procedural fairness as opposed to resulting in a substantively fair outcome. As a result, contractual principles often focus on the procedural nature of the transaction. Provided that all the relevant steps are fulfilled, there will be a binding contract – regardless of whether it is an appropriate or fair outcome for

14 As stated by Benson, "the common law conception of contract gives individuals an unfettered liberty to do as they please", see Peter Benson "The Unity of Contract Law" in Peter Benson (ed) *The Theory of Contract Law* (Cambridge University Press, Cambridge, 2001) 200; this is clearly an exaggeration but makes an interesting point.

15 Jack Beatson and Daniel Friedman "Introduction: From 'Classical' to Modern Contract Law" in Jack Beatson and Daniel Friedman (eds) *Good Faith and Fault in Contract Law* (Oxford University Press, Oxford, 1997) at 8–9.

16 PS Atiyah "The Liberal Theory of Contract" in PS Atiyah "Essay 6" in *Essays on Contract Law* (Oxford University Press, Oxford, 1990); and John Cartwright *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (Oxford University Press, Oxford, 1991).

the parties involved.[17] This approach (and potential justifications for the rejection of substantive fairness) was captured by Smith in his comments:[18]

> What role should substantive fairness play in the law of contract? The orthodox answer is that substantive fairness – defined here, provisionally, as fairness with respect to a contract's terms – should play a very small role, if any role at all, in contract law. Substantive fairness, it is widely believed, is either meaningless, indistinguishable from procedural fairness (fairness in the formation of a contract), impossible to assess, not valuable, beyond the competence of the courts to protect, or some combination thereof.

An example of this can be seen with the consideration rules; agreements will only be binding if both parties provide 'something' of value.[19] This means that one-sided transactions (gifts) are prima facie not enforceable.[20] However the law does not look behind the value of the 'something' given to determine if it was substantively fair; it just ensures that the procedural steps are present. Whilst there are many doctrines that are concerned with 'fairness' of the resulting contract, even in the most extreme examples – such as unconscionability – the common law still remains more comfortable assessing the fairness of the process as opposed to its substantive outcome.[21]

The third key theme of the common law of contract is that it is purposefully and wilfully blind to existing inequalities of bargaining powers between parties. Inequalities between parties, even ones that result in the creation of substantively unfair contracts, are generally not considered sufficient to allow the vulnerable

17 Steven Smith "In Defence of Substantive Unfairness" (1996) LQR 138; Mindy Chen-Wishart, "'The O'Brien Principle and Substantive Unfairness' (1997) 56 CLJ 60; Jeffrey L Harrison "Quality of Consent and Distributive Fairness: A Comparative Perspective" in Larry DiMatteo and Martin Hogg (eds) *Comparative Contract Law: British and American Perspectives* (Oxford University Press, Oxford, 2016); Mindy Chen-Wishart "The Nature of Vitiating Factors in Contract" in Prince Saprai, George Letsas and Greg Klass (eds) *Philosophical Foundations of Contract Law* (Oxford University Press, Oxford, 2014); Spencer Thal "The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness" (1988) 8 Oxford Journal of Legal Studies 17.

18 Steven Smith "In Defence of Substantive Unfairness" (1996) LQR 138, at 138.

19 *Rothmans of Paul Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 523; and *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847.

20 *Chambers v Commissioner of Stamp Duties* [1943] NZLR 504.

21 See recent confirmation in *Times Travel v Pakistan International Airlines Corporation* [2021] UKSC 40; [2021] 3 WLR 727, [3] (Lord Hodge); see also AA Leff "Unconscionability and the Code: The Emperors New Clause" (1967) 115 U Penn LR 485.

party out of binding agreements. The impact this has on contracting is highlighted by Thomas, who comments that:[22]

> In the interpersonal relationships which make up contractual dealings, there is both the potential for and reality of inequality. Individuals are not equal. A variety of factors, from the chance make-up of one's genes to luckless ill fortune, result in marked and at times gross disparities between the capacity and capabilities of people. In rank, capital, wealth, and other material resources, disparities are self-evident. So, too, in wisdom, judgment, knowledge, personal skill, willpower, discipline, perception, common-sense, and a host of other acknowledged personal attributes, some persons will be superior and some will be inferior. These disparities lead to an imbalance of power in the interaction and interpersonal relationships of individuals. Some will be in a position to assert power over others; yet others will be vulnerable to the assertion of that power.

Despite the existence of glaring inequalities in many different types of contracts, there has been an ongoing refusal to even recognise (let alone address) this in the common law of contract. Lord Denning's efforts to develop a vitiating factor based on inequality of bargaining power in *Lloyds Bank Ltd v Bundy* were unsuccessful,[23] with later courts (and academics) strongly criticising this approach.[24]

The final key theme is the rejection of a freestanding, overriding duty of good faith in contract law. Whilst there were some initial promising signs of good faith being recognised in settler law, largely single-handedly through the valiant efforts

22 EW Thomas "Good Faith in Contract: A Non-Sceptical Commentary" (2005) 11 NZBLQ 391 at 402–403.

23 *Lloyds Bank Ltd v Bundy* [1975] QB 326 (CA); see analysis in Jeannie Marie Paterson and Elise Bant "*Lloyds Bank Ltd v Bundy*: The Influence of the Omnibus Principle of Unequal Bargaining Power" in Jodi Gardner and Iain Ramsay (eds) *Landmark Cases in Consumer Law* (Hart Publishing, Oxford, 2023) ch 10.

24 *Pao On v Lau Yiu Long* [1980] AC 614 at 632; *National Westminster Bank plc v Morgan* [1985] 1 AC 686, 708 (Lord Scarman); and *Times Travel v Pakistan International Airline Corp* [2021] UKSC 40 at [26] (Lord Hodge; Lords Reed, Lloyd-Jones and Kitchin agreeing); LS Sealy "Undue Influence and Inequality of Bargaining Power" (1975) 34(1) CLJ 21; Marcus Moore "Why Does Lord Denning's Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability" (2018) 134 LQR 257; compare Spencer Nathan Thal "The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness" (1988) 8 Oxford J Legal Stud 17.

of Lord Leggatt,[25] this has not continued successfully. Whilst there can be indications of limited duties in very specific circumstances, the country has "committed itself to no ... overriding principle [of good faith] but has developed piecemeal solutions in response to demonstrated problems of unfairness".[26] This was most recently confirmed (on numerous occasions) by the Supreme Court in *Times Travel v Pakistan International Airlines Corporation.*[27]

These four key themes – an (over)emphasis on freedom, a focus on procedure, a lack of consideration of inequality of bargaining power, and the hesitancy to engage with notions of good faith – provide a general overview of the orthodox approach to the common law of contract in the United Kingdom. It is recognised that these concepts are not doctrinal or historically absolute; the common law is complex, agile and evolving. The themes do however provide a high-level summary of the general approach taken by the courts when determining disputes between parties over contractual arrangements. [28]

B. Foundation of Contract Law in Aotearoa New Zealand

This section considers how much the United Kingdom's approach to contract law, and the key themes discussed above, is reflected in Aotearoa New Zealand. This legal framework will be referred to as 'settler law' for the remainder of the article.

Contract law in Aotearoa has been labelled as "resolutely monocultural",[29] in that it closely followed English law, both in terms of legal principles and philosophical foundations.[30] Notably, Aotearoa New Zealand adopted the British common law system, which has been described by Swain as "one of the most controversial and enduring legacies of the British Empire".[31] The characterisation of "resolutely monocultural" is not uniformly accepted. Swain disagrees with the general belief that contract law in Aotearoa is a pure repetition of British principles. He reflects on the characterisation of the country by Scottish-born poet William Golder as "the

25 See, in particular, *Al Nehayan v Kent* [2018] EWHC 333 (Comm); and *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111.

26 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 at 439.

27 *Times Travel*, above n 21, at [1], [3], [26] per Lord Hodge and [95] per Lord Burrows.

28 As indicated by multiple comments in *Times Travel v Pakistan International Airline Corp* [2021] UKSC 40; [2021] 3 WLR 727 discussed elsewhere in this article.

29 Stephen Todd *Contract Law in New Zealand* (5th ed, Kluwer Law International, Alphen Aan Den Rijn, 2024) at 36.

30 At 35–36, 225; as a result, discussion and analysis are largely based on case law and academic commentary from the United Kingdom, we have, however, referred to local cases when appropriate.

31 Swain "The Great Britain of the South", above n 6, at 31.

Great Britain of the south", stating that this does not reflect a true recognition of the complexities of legal development. Swain further comments:[32]

> This challenge to a binary analysis of common law and local law is evident in New Zealand. The colonial authorities, the settlers and the indigenous populations were all part of the process. The law that applied was a result of interactions between these interested parties. When set against this modern historiography, the phrase "the Great Britain of the south" fails to capture the full complexity of the way that English law was applied in the early colony. The law administered throughout the British Empire reflected the common law origins of colonial legal systems, but it did not mean that the law was identical to that in England. Scholars have emphasised the adaptability of English law in various colonial settings.

It therefore appears that a close review of relevant historical developments in Aotearoa undermines a description of contract law as being "resolutely monocultural".[33] One area where settler law diverged from the United Kingdom approach, although potentially temporarily, was in regards to fairness with "clear instances in which consideration of fairness seem to have influenced the outcome of contract litigation in a way that they would not do so in England".[34] In general, however, the approach of settler law largely mirrored that in the United Kingdom, with significant reference to English cases, academics, and other sources by judges in Aotearoa New Zealand,[35] although at times the engagement with United Kingdom precedent was described as "light touch".[36]

The four key themes discussed above, an (over)emphasis on freedom, a focus on procedure, a lack of consideration of inequality of bargaining power, and the hesitancy to engage with notions of good faith, are however generally reflective of the approach of settler law of contract. This is evident in the Court of Appeal's approach to unconscionability, recognising that the "equitable jurisdiction is not intended to relieve parties from 'hard' bargains or to save the foolish from their foolishness", and that "a qualifying disability or disadvantage does not arise simply

32 At 32.
33 Todd, above n 29, at 36.
34 Swain "The Great Britain of the South", above n 6, at 39.
35 At 40–41.
36 At 42.

from an inequality of bargaining power".[37] This focus was also reflected in earlier decisions, with Swain reporting that "there was a real attempt to align contract law and commercial expectations".[38]

Developments of good faith in Aotearoa have also been stymied, and the courts have not been willing to go against traditional concepts to imply additional relational obligations on parties to contracts. When writing on this in the New Zealand Business Law Quarterly, Justice Paul Finn noted that:[39]

> ... good faith's roots in New Zealand law are less than secure, and such vitality as they have seemed to owe as much to what the Privy Council has not said as to what it has.

In conclusion of this section, despite historical and cultural ebbs and flows, some key themes can be drawn from the approach to contract law in the United Kingdom and settler New Zealand. These themes are an (over)emphasis on freedom, a focus on procedure, a lack of consideration of inequality of bargaining power, and the hesitancy to engage with notions of good faith. Whilst there may be some justifications for this approach in contracts between large companies that have lawyers to write, negotiate and enforce the agreements, many questions remain as to whether it is fit for purpose for the spectrum of contracting that occurs in an individual's everyday life. It also contrasts with Durie's description of Māori approaches to transacting as "primarily social contracts bent on maintaining relationships through ongoing reciprocal obligations".[40] As outlined by Durie, contracts were considered "personal and directed more to establishing beneficial relationships than to gaining immediate returns".[41] This next section therefore outlines the tikanga principles identified in *He Poutama* which, if applied by experts to a factual situation, produce a result that might be considered by courts when developing the common law of contract in Aotearoa New Zealand.

37 *Gustav and Co Ltd v Macfield Ltd* [2007] NZCA 205 at [30].
38 At 45.
39 P Finn "Good Faith and Fair Dealing: Australia" (2005) 11 NZBLQ 378 at 379.
40 ET Durie *Custom Law* (Treaty of Waitangi Research Unit, 1994) at 100.
41 At 99.

III. Contract Law and Tikanga

The previous part outlined potentially significant limitations arising from settler common law of contract, namely an (over)emphasis on freedom, a focus on procedure, a lack of consideration of inequality of bargaining power, and the hesitancy to engage with notions of good faith. In light of these limitations, this part discusses the role of tikanga in private law in Aotearoa New Zealand, specifically in the development of the common law of contract. There are two sections. The first highlights how *Smith* has opened the gateway for a consideration of the central role tikanga can play in how common law principles in the law of obligations apply or develop in Aotearoa, and the second outlines the relevant tikanga concepts.

A. Smith v Fonterra: Opening the Gateway

Kós J's decision in *Smith* has stoked the debate and discussion on the role of tikanga in the development of the common law in Aotearoa New Zealand.[42] This decision addressed a tort law claim, and the majority of the discussion was specifically focused on the role that tikanga could play in the development of tort law principles. However, Kós J does consider the role more broadly in terms of developing the common law principles:[43]

> In more recent times, the common law has re-engaged with tikanga. For example, in 2003, a five-judge bench in the Court of Appeal affirmed that Māori land rights (including in the foreshore and seabed) derived from tikanga were cognisable at common law. Citing extensive authority, the Court found that this had been the position since the common law's arrival in 1840. And in *Takamore v Clarke*, *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* and *Ellis v R (Continuance),* this Court considered the relationship between tikanga and the common law as it operates outside the sphere of customary title. To summarise the essential conclusions reached, tikanga was the first law of New Zealand, and it will continue to influence New Zealand's distinctive common law as appropriate according to the case and to the extent appropriate in the case.

42 See further analysis in Sam Bookman "*Smith v Fonterra* and the Climatisation of Tort Law" (2024) 88(1) MLR 192.

43 *Smith*, above n 1, at [187].

Prior to this ground-breaking decision, there had been limited recognition of tikanga in the law of obligations. Whilst there have been cases looking at private law and tikanga, this is contrasted with other areas where more engagement with tikanga has occurred; notably in environmental law, criminal law, family law,[44] and youth justice.[45]

It is widely acknowledged that tikanga Māori is the first law of Aotearoa; the oft-quoted decision in *Nireaha Tamaki v Baker* being a noteworthy acceptance from within the colonial system that Māori have customary law of which the courts of law can take cognisance.[46] How and whether the two legal systems should intertwine over space, place and people is a challenging and layered question which is examined in the Te Aka Matua o te Ture | Law Commission report, *He Poutama.*[47] This report tracked the developments in engagement between tikanga and state law where Aotearoa has moved from requiring tikanga to meet tests as a foreign law, as outlined in *Public Trustee v Loasby*,[48] to *Ellis*, holding that these tests are no longer required or appropriate.[49]

According to *Ellis*,[50] tikanga is one of a number of appropriate legal sources from which the legal position is reasoned and then revealed.[51] This represents a turning point in judicial recognition of tikanga. Since the release of *He Poutama*, Kós J's engagement in *Smith* is further judicial endorsement of tikanga as a source of law and sets a precedent for judges to recognise tikanga as an independent legal source informing the development of the common law of Aotearoa New Zealand. In light of these developments and the settler approach to contract law discussed in Part II, it is apt to consider how this could play out in situations when there are common law decisions to be made.

44 *He Poutama*, above n 5, see ch 7 for a discussion of Tikanga and State Law today.
45 See Heemi Taumaunu "Rangatahi Courts of Aotearoa New Zealand: an update" (2014) Nov Māori LR 1.
46 *Nireaha Tamaki v Baker* [1901] NZPC 1.
47 *He Poutama*, above n 5.
48 *Public Trustee v Loasby* [1908] NZGazLawRp 71; (1908) 27 NZLR 801 (HC).
49 *Ellis,* above n 3.
50 *Ellis*, above n 3.
51 At [212]; this framework therefore represents the development of common law appropriate for New Zealand, drawing on appropriate sources of legal influence. It reflects an interpretation of r 5(2) consistent with tikanga and with the existing principles of the common law, as expressed both here and in overseas jurisdictions. Indeed, it is appropriate to acknowledge that the issue for the Court could in essence be expressed as which course of action – continuing to determine the appeal, or discontinuing it – is most likely to restore ea.

B. Tikanga: Substantive Concepts

He Poutama considers a core group of concepts central to tikanga as a system,[52] classifying these into five categories. Each category contains tikanga concepts with attendant functions, as below:[53]

a. Concepts of connection, namely whakapapa and whanaungatanga, which provide structural norms.
b. Concepts of equilibrium or balance, namely mauri, utu and ea, which give rise to prescriptive norms.
c. Concepts relating to the status of an entity, namely mana, tapu and noa, which provide relational norms.
d. Concepts of responsibility, namely kaitiakitanga, manaakitanga, aroha and atawhai, which provide associated norms.
e. Processes and procedures, or kawa, which are significant in upholding all the norms and for administering tikanga as a system.

A comprehensive explanation of each concept is contained in *He Poutama*. This will not be repeated here; rather we provide excerpts and refer readers to the appropriate sections of *He Poutama*.

The first category is concepts of connection,[54] and the operation of whakapapa and whanaungatanga as structural norms is summarised in *He Poutama*:[55]

> Whakapapa and whanaungatanga ensure that the order of things is properly understood and that connections to the natural world, place and people are acknowledged, maintained and nurtured. In these ways, whakapapa and whanaungatanga function as underlying structural norms within tikanga. We see this as their primary normative and jural significance. The connections understood and upheld through whakapapa and whanaungatanga establish the framework and basis for interests in Māori society, including powers, rights and duties

52 *He Poutama*, above n 5 at 3.16.
53 At 3.16.
54 See *He Poutama*, above n 5 at 3.22–3.48.
55 At 3.48.

The second classification is concepts of equilibrium or balance; mauri, utu and ea.[56] These concepts function as prescriptive norms as they demand actions and behaviours, as explained in *He Poutama*:[57]

> Mauri refers to the vitality and wellbeing of an entity. It is prescriptive to the extent that tikanga makes demands to protect and maintain this essence or wellbeing. Similarly, utu also demands action or behaviours to constantly restore and maintain balance. Utu may enable the settled state of ea to be achieved.

The second concept of equilibrium and balance is utu, which prescribes that action or behaviours are done to continuously ensure balance, as explained in *He Poutama*:[58]

> Utu is "the action undertaken for reciprocity". Utu maintains harmony and balance and "conveys the ethic of striving to achieve balance in all things". The action taken can either be positive or may take the form of retribution.

The final concept of equilibrium or balance is ea, described in *He Poutama* as a resolved or settled state. Ea is "a state of satisfaction where a sequence has been successfully closed, relationships have been restored, or peaceful interrelationships have been secured".[59]

The third concepts are those relating to the status of an entity; mana, tapu and noa.[60] *He Poutama* describes these as relational concepts that identify the status of an entity, in order that it is known how to appropriately interact with that entity.

Mana applies at an individual and collective level as described in the *Ellis* statement of tikanga:[61]

56 At 3.49–3.70.
57 At 3.49.
58 At 3.60, citing Wiremu Doherty, Hirini Moko Mead and Pou Temara "Tikanga" (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) [3.85].
59 *He Poutama*, above n 5, at 3.72, citing Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia, Wellington, 2016) at 374.
60 See *He Poutama*, above n 5, at 3.71–3.114.
61 *Ellis*, above n 3, "Statement of Tikanga", at 76.

> Mana is one of the fundamental principles of tikanga, and words that have been used to convey the principle of mana include: power, presence, authority, prestige, reputation, influence and control. Mana applies at both an individual and collective level, and the application of mana at either level can affect the other.

The second concept relating to status is tapu. According to *He Poutama*, the concept of tapu works closely with mana and mauri, as it regulates, protects and preserves mana and mauri "through prescribing behavioural restrictions or requiring that certain actions or processes have to be followed".[62] Two major aspects of tapu are described, citing Mikaere:

> First, recognition of the inherent value of each individual and the sacredness of each life (sometimes called intrinsic tapu), and second, spiritual prohibition or protection to safeguard people, property and sacred sites and to maintain social discipline.

The second sense of tapu "represents sacrosanct or untouchable matters, there are processes that enable engagement with things or people that are tapu and that remove tapu safely or suspend it for a particular purpose".[63]

The final status concept is noa which refers:[64]

> ... to a state where strict processes are not required. Noa, which indicates some degree of freedom, is important because it is too difficult to always live in a tapu state. However, the relationship between tapu and noa is complex, and the concepts are not opposites. Rather, tapu and noa work in tandem, each needing to be maintained at appropriate levels for Māori society to function in different situations.

He Poutama provides a summary of mana, tapu and noa as relational norms standing alongside structural and prescriptive norms and explains that:[65]

62 *He Poutama*, above n 5, at 3.87; and Mikaere, above n 4, at 137–138.
63 *He Poutama*, above n 5, at 3.89.
64 At 3.101.
65 At 3.114.

> In summary, mana, tapu and noa are significant in establishing correct relationships and regulating relationships. By establishing the standing of a person or entity, they clarify how others should relate to that person or entity and thereby regulate behaviour. Relational norms established by mana, tapu and noa are among the most fundamental norms governing Māori society. They stand alongside the structural norms of whakapapa and whanaungatanga and prescriptive norms of mauri, utu and ea. In a sense mana, tapu and noa might be termed the tikanga "engine room" because of the essential regulative role that they play.

The final substantive concepts are those of responsibility, and include kaitiakitanga, manaakitanga, aroha and atawhai,[66] which are all closely connected with mana and whanaungatanga. *He Poutama* describes these as associated norms. The associated norms have obligations that attach to the concepts that are structural, prescriptive and relational, as explained in *He Poutama*:[67]

> We have termed kaitiakitanga, manaakitanga, aroha and atawhai "associated norms". They each reflect obligations that are associated with and intrinsic to concepts earlier described in the chapter, including whanaungatanga and mana. Fulfilling these responsibilities works towards or maintains a desired situation such as mana, whanaungatanga, utu or ea. Such responsibilities are fundamental to upholding tikanga as a structured system.

Tikanga principles and precedent was applied by experts to a factual situation in *Ellis* to produce an outcome that could then be considered in the judicial decision-making process.

66 At 3.115–3.127.
67 At 3.127.

C. Tikanga and Common Law Procedure

> Given potential differences between tikanga and the settler approach to contract law, we will now consider how outcomes under tikanga may interact with those under settler common law. In *Ellis*, a determination under tikanga was made by applying tikanga principles to the particular facts at hand. The statement of tikanga in *Ellis* cautions that decisions about principles will be affected by circumstances: "decisions about mātāpono (principles) are always subject to variables such as concepts, practices, and values, as relevant to the circumstances".[68]

As described in *He Poutama,* tikanga as a framework has flexibility whilst maintaining "the coherence and consistency that is vital for any legitimate regulatory system".[69] This description of flexibility yet consistency also features in the settler common law process, as described by Dame Helen Winkelmann:[70]

> Even binding precedent does not provide a code containing all the answers. That is because the common law, although contained in the detailed precedent deriving from individual cases, is made up of values that are big enough and flexible enough to allow the law to change to meet the needs of place, people and times. And because these values and concepts … contain big and flexible ideas, they must be applied carefully to the facts of each case. It is this concern – a concern to ensure that the values and concepts that determined the outcome in the case cited as precedent also apply in the case before the court – that lies behind the common law technique of distinguishing cited case law.

The *Ellis* statement of tikanga explains that the fundamental principles of tikanga operate in an interconnected matrix,[71] and "when a new matter or issue arises for resolution, recourse is always had to the fundamental principles that

68 *Ellis*, above n 3, at "Statement of Tikanga".
69 *He Poutama*, above n 5, at 3.11.
70 Dame Helen Winkelmann "Picking up the threads: The story of the common law in Aotearoa New Zealand" (2021) 19(1) NZJPIL 1 at 4.
71 *Ellis*, above n 3, at "Statement of Tikanga" – they operate in an interconnected matrix.

underlie tikanga as well as drawing on historical precedent and how tikanga has been recognised in similar situations".[72] A recent example of this is *Doney v Adlam*, where the Māori Land Court commented:[73]

> … as the mātanga (experts) noted … tikanga is a principles-based system of law that is highly sensitive to context and sceptical of unbending rules. This is not a matter of compromising tikanga, but of applying it to context. …. mana whenua need not be the controlling tikanga because other tikanga principles were also in play. These included principles such as hara, utu, ea and mana. Taken together, they reflect the importance of acknowledging wrongdoing and restoring balance in a way that affirms mana.

As Harvey J highlighted, the application of tikanga is not the strict "laying down" of rules but about applying the relevant principles. In *Ellis*, there was a two-day wānanga where tikanga experts contended with the facts of the case. The application of tikanga by experts to a factual situation through wānanga to obtain a result under tikanga, was considered the appropriate process by the tikanga experts in *Ellis*:[74]

> Given the nature of tikanga, being law that is comprised of principle and the custom and practice of people, we consider that the convening of this hui and forum of tikanga experts to be an appropriate way of determining the relevant tikanga that applies to an issue at hand.

In having a decision under tikanga available to the judiciary, the result under tikanga will be clear, even if it alone is not determinative of the final judicial outcome. *He Poutama* notes the importance of perceiving the component parts of tikanga as integrated, as this can "safeguard tikanga by ensuring it is not treated simply as a "grab bag" from which to extract isolated values".[75]

This leads us onto our next and final section, considering how tikanga might interact where existing settler contract law is presently applied.

72 At "Statement of Tikanga" [33].
73 *Doney v Adlam* [2023] NSHC 363; [2023] 2 NZLR 521 at [76]–[77].
74 *Ellis*, above n 3, at "Statement of Tikanga" [37].
75 *He Poutama*, above n 5, at 310, citing Nin Tomas "Key concepts of tikanga Maori (Maori custom law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present" (PhD Thesis, Waipapa Taumata Rau | University of Auckland, 2006) at 33.

IV. Tikanga and Settler Contract Law

Before we commence this final part, it is important to reconfirm a number of limitations and exclusions. Specifically, our analysis in this section is designed to shine a light on an unexplored area and provide three potential ways to meaningfully and respectfully engage with tikanga in the common law of contract.[76] We note that tikanga continues to operate autonomously, irrespective of statutory or judicial recognition.

In light of these comments, this section reports on three scenarios that may occur when tikanga provides a result on a factual situation and settler contract law also does. The first occurrence is that tikanga may produce a result that supports existing legal principles or the outcome (supporting). The second situation that may occur is if the result produced by tikanga happens to align with a particular direction the common law could take, and here tikanga can provide direction, or fill gaps when there are considered to be inadequate or insufficient legal principles (illuminating).[77] Finally, tikanga can be used to challenge existing settler laws, highlighting potential flaws and providing different potential approaches (challenging).

A. Tikanga as Supporting Settler Legal Principles

As outlined in part III, utu is "the action undertaken for reciprocity".[78] It maintains harmony and balance and "conveys the ethic of striving to achieve balance in all things". As explained by Dame Joan Metge, "[u]tu was one of the most important ordering principles in traditional Māori society".[79] The normative significance of utu is explained in *He Poutama*, citing Durie:[80]

> Utu concerned the maintenance of harmony and balance. It was fundamental to most Māori tikanga and thinking, governing social relationships, the creation and maintenance of reciprocal obligations, the conceptual avenging of death, the appeasement of killings, the punishment of wrongdoing, the maintenance of the cycles of nature, gift exchange,

76 We also note that there have been similar discussions on the application of tikanga in other circumstances, such as *Doney v Adlam*, above n 73, at [75]–[95].

77 For the importance of gap-filing as a judicial interpretation method, see Justice Susan Glazebrook, "Filling the Gaps" in R Bigwood (ed) The Statute: Making and Meaning (LexisNexis New Zealand Ltd, Wellington, 2004).

78 *He Poutama*, above n 5, at 3.60, citing Doherty, Mead and Temara, above n 58, at [3.85].

79 At 3.65,

80 At 3.65, citing Durie, above n 40, at 6.

> the formation of controls, the maintenance of alliances, the performance of fiduciary obligations and the like. Utu underpinned the essential "give and take" nature of the Māori social and legal order.
>
> Because utu underpins the legal and social order, utu prescribes that behaviours and actions need to be continuously calibrated and recalibrated, when necessary, in order to achieve and then keep things in balance,[81] thus leading to protocols, as explained by Durie: "Reciprocity protocols were formulated for commerce, social intercourse, behavioural controls, and peace-making, all encapsulated in utu."[82]

The importance of reciprocity is seen in the legal principles for the formation of a binding contract. The concept of contract law is based around offer and acceptance (forming agreement or consensus) and consideration. Consideration is one of the most controversial aspects of the settler law of contract, and there have been many calls around the world for reform, largely to remove the requirement for consideration as a necessary element for a binding contract.[83] Regardless, the principle of consideration has continued steadfast in light of the many criticisms and remains an important part of the settler common law.

In light of the practical difficulties associated with consideration, there have been many attempts to provide an appropriate justification for retaining the legal principle as part of the settler common law.[84] The main justifications include valuing procedure over substantive fairness (as discussed in part II above), holding people

81 At 3.66.

82 At 3.66.

83 For example, Lord Wright "Ought the Doctrine of Consideration to be Abolished from the Common Law?" (1936) 49 Harv LR 1225; TM Scanlon "Promises and Contracts" in Peter Benson (ed) *The Theory of Contract Law: New Essays* (Cambridge University Press, Cambridge, 2001); *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR 502 per VK Rajah JC at [139]; English Law Revision Committee *The Statute of Frauds and the Doctrine of Consideration* (Cmd5449, 1937) at [24]; for a defence of consideration, see Mindy Chen-Wishart "Reform of Consideration: No Greener Grass" in S Degeling, J Edelman and J Goudkamp (eds) *Contract in Commercial Law* (Thomson, Sydney, 2016); and Mindy Chen-Wishart, "In Defence of Consideration" (2013) 13 OUCJL 209.

84 Brian Coote "Consideration and Benefit in Fact and in Law" (1990) 3 JCL 23; see, for example, in the famous exchanges on consideration's purpose between Atiyah and Treital, Patrick Atiyah "Consideration in Contracts: A Fundamental Restatement" (1971) 27, reprinted (with slight revision) as "Essay 8" in *Essays on Contract* (1986) 206; Gunter Treitel "Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement" (1976) 50 ALJ 439; and Patrick Atiyah "When is an Enforceable Agreement not a Contract? Answer: When it is an Equity" (1976) 92 LQR 174.

to their promises, enforcing reasonable expectations, and protecting contracting parties' intentions.[85]

Another justification for consideration, as outlined by Chen-Wishart, is the value of respect and reciprocity in society. In her article defending the doctrine of consideration, Chen-Wishart comments:[86]

> The norm of reciprocity, one of the "principal components" of a universal moral code, is an important concrete expression of the attitude of respect in contracting. Reciprocity is a generalized moral norm, a deep intuition, and the foundation of human interactions. Gouldner refers to extensive anthropological studies, which highlight reciprocity as the basis of the entire social and ethical life of "primitive" civilizations. It is a mutually gratifying pattern of exchange, which fosters mutual dependence and facilitates the division of labour. Evolutionary biologists, social biologists, evolutionary psychologists, and Darwinian anthropologists agree that "humans have developed an innate sense of fairness" expressed by the internalised norm of reciprocity.

We believe that this provides a stronger, richer and more nuanced justification for a central tenet of contract law and aligns with one of the fundamental concepts of tikanga. In this vein, traditional reasoning on consideration in contract and a tikanga outcome may result in alignment under both legal systems. If the principle of consideration needs to be explained or justified, the parties (and judges) could draw not only on the writings of legal scholars and cases from around the world, but also on tikanga relevant to and illuminating of the legal principles in question. This would recognise the important role that tikanga plays in developing the common law of contract in Aotearoa.

There are already examples of this approach in the courts of Aotearoa New Zealand. The statement of tikanga by experts in *Ellis* showed that the result on the factual situation according to tikanga supported a continuance. The statement of tikanga was used by Glazebrook J to assist in assessing the test for continuance and

85 Dean Valente "Enforcing Promises: Consideration and Intention in the Law of Contract" [2010] UOtaLawTD 18.

86 Chen-Wishart, above n 82, at 219; and a similar focus on reciprocity can be seen in local cases, for example, *Garratt v Ikeda* [2002] 1 NZLR 577 at 584.

to solidify the decision to add to the factor's reputational issues.[87] In determining the legal outcome, the Chief Justice applied a framework of principles which included tikanga principles. This principles-based approach was preferred by Williams J. Notably, tikanga principles are not positioned within this framework as inferior to common law principles.[88] The outcome in *Ellis* is an instance where both the settler law and the tikanga result supported a continuance.

B Tikanga as Illuminating or Gap-Filling Settler Legal Principles

Contract law, like most areas of the common law, has many "grey areas". Very few litigated legal issues – particularly those that come before apex courts – have a clear yes or no answer. The role of the judge is to balance the legal precedent, the policy arguments, and the facts to determine on what side of the line the case should fall.

In a factual situation, tikanga may provide a result that supports a particular path in an unsettled area. As *Ellis* has outlined, tikanga is a source of law from which courts can derive assistance when dealing with attendant complexities and uncertainties. In these cases, the outcome under tikanga might provide an answer, particularly where there is a controversial debate or competing approaches. At what point courts should protect people against substantively unfair agreements on the basis of unconscionability has been a debate in many countries, and different courts have come to differing conclusions on the level of support and protection that should be provided. There is general agreement on the three elements required for a successful claim, which have been outlined in *Gustav and Co Ltd v Macfield Ltd* as requiring:[89]

87 *Ellis*, above n 3, at [146]. Glazebrook J commented that "the submissions on tikanga were also beneficial in that they helped to clarify my view on the appropriate test in cases such as this by making explicit values underpinning the factors outlined in R v Smith. The consideration of tikanga solidified my decision to add to the R v Smith factors the reputational issues relating to the deceased appellant, the deceased appellant's whānau and the interests of the victims and their whānau."

88 *Ellis*, above n 3 at [210]–[211] and [236].

89 *Gustav*, above n 37, at 30.

1. The party seeking assistance from the court to be under a significant disability or disadvantage;
2. The stronger party must have taken advantage of that disability or disadvantage; and
3. This advantage-taking resulted either in the active extraction or the passive acceptance of a benefit to the extent that the stronger party could not in good conscience accept the transaction.

There is however disagreement and competing approaches on a number of other aspects, such as whether inequality is sufficient to be a significant disadvantage,[90] the extent of the knowledge of the disability required (especially if the transaction was completed online),[91] whether the focus is on the motives of the stronger party,[92] and the role of independent legal advice.[93]

There are many different approaches to unconscionability around the common law world. The Canadian Supreme Court case of *Heller v Uber Technology* resulted in significant academic uproar after the court held that Uber's arbitration clause in their contract with UberEats drivers was unconscionable and therefore unenforceable.[94]

The case raised a number of challenges. The first was that the claimant, Heller, fell through the cracks of existing statutory protections: namely employment and consumer law. As he was a self-employed UberEats driver,[95] Heller was excluded from the consumer law protections (he entered into the contract in his trade, craft, business or profession) and did not receive the legal benefits provided to 'workers'. This meant that if the common law could not find a path to hold the contract or the offending term unconscionable, it would be enforceable.

The case however created two significant hurdles for an orthodox application of unconscionable conduct and pushed against the key themes discussed in part II. First, there was nothing particularly vulnerable about Heller that may have been sufficient to meet the standard requirement of special disadvantage. The requirement of special disadvantage has been discussed by Arnold J in the following manner:[96]

90 *Jenkins v NZI Finance Ltd* [1991] 3 NZBLC 102; and *Moffat v Moffat* [1984] 1 NZLR 600.
91 *Nichols v Jessup* [1986] 1 NZLR 226 per Cooke P at 231.
92 See discussion in *Fa'agutu v Derhamy* [2020] 2 NZLR 774 at [87]–[89].
93 *Nichols v Jessup*, above n 90.
94 *Heller v Uber*, above n 8.
95 This was the classification by Uber and was being contested by Heller as the starting point to the Supreme Court litigation.
96 *Gustav*, above n 37, at [30].

> A qualifying disability or disadvantage does not arise simply from an inequality of bargaining power. Rather, it is a condition or characteristic which significantly diminishes a party's ability to assess his or her best interests. It is an open-ended concept. Characteristics that are likely to constitute a qualifying disability or disadvantage are ignorance, lack of education, illness, age, mental or physical infirmity, stress or anxiety, but other characteristics may also qualify depending on the circumstances of the case.

Heller had none of the characteristics we would normally classify as vulnerable. Yet, when coming against the behemoth of Uber, the Canadian Supreme Court was comfortable holding that the extreme inequality between the parties was sufficient to find that the weaker party "may be vulnerable to exploitation in the contracting process".[97] As outlined in part II, this approach goes against the existing approach in the United Kingdom,[98] and under settler law.[99]

Secondly, it was difficult to show what – if any – notice was given to Uber. The contract in question was downloaded by an app to Heller's phone; the agreement occurred by clicking "Yes, I Agree" on the phone before proceeding. This meant that there was no notice or meaningful relationship between the parties. Uber had no way of knowing who was downloading the app, what their circumstances were, and if there was any vulnerability. If the courts required evidence that the stronger party had actual notice of the disadvantage, it would have been very difficult to prove this on the facts of *Heller v Uber*.

The majority of the Supreme Court were willing to modernise and develop the common law of unconscionability. Abella and Rowe JJ wrote the majority decision, citing academic support for a two-element approach to unconscionability: one that requires, first, an inequality of bargaining power arising from a weakness or vulnerability, and secondly an improvident transaction.[100] The notice requirement, which has been included as part of settler law for unconscionability,[101] was removed.

Heller v Uber highlights the important role of the common law of contract in illuminating and gap-filling by judges in the development of legal principles. In this

97 *Heller v Uber*, above n 8, at [72].
98 *Hart v O'Connor* [1985] UKPC 1.
99 *Gustav*, above n 37; and *Jenkins*, above n 89.
100 *Heller v Uber*, above n 8, at [62]–[65].
101 Although we note that Arnold J in *Gustav*, above n 37, at [30] comments: "The requisite knowledge may be that of the principal or an agent, and may be actual or constructive … in the particular circumstances the stronger party may be put on enquiry, and in the absence of such enquiry, may be treated as if he or she knew of the disability or disadvantage."

case, the Canadian Supreme Court interpreted the law in a manner suitable for the modern-day contracting process. In this way, the Court distinguished their legal approach from that of the United Kingdom and developed their own path forward.

Tikanga is a legal source for courts here, including when confronted with areas of the law that have no clear answer to a particular set of facts. The application of unconscionability to novel scenarios, such as seen in *Heller v Uber*, is one of those situations. When courts in Aotearoa come across an unconscionable conduct case, they will have to determine whether to continue the orthodox approach discussed in part II, follow Canadian developments, or potentially develop their own legal principles in this complex area of contract law.

Williams J considers that tikanga may be relevant where the common law in a particular area is developing, and such development would benefit from a consideration of relevant tikanga principles.[102] Again, a detailed consideration of how tikanga principles apply and what outcome their application will produce is clearly beyond the current article. However, in light of the key challenges presented by the factual scenario in *Heller v Uber,* some brief points can be made.

In *Heller v Uber*, an individual entered into a contract containing a clause that effectively disables them from having recourse if their rights are breached. Whether this clause (or potentially the entire contract) is unconscionable is the issue under contract law. As tikanga is law in and of itself, it is applied first to the facts themselves. We submit that the tikanga outcome might be applied after this exercise and direct the approach taken, so that the development of the common law would be consistent with the outcome at tikanga. Glazebrook J outlines how the principles developed must be capable of meeting the needs of all New Zealanders, including Māori.[103] We submit that the same reasoning be applied to contract law.[104]

As we saw in *Ellis,* a determination at tikanga law in respect to the factual situation considered the application of tikanga precedent and principles, including utu and ea, to the continuance question. The principles of utu and ea are likely to be engaged when dealing with factual situations such as that in *Heller v Uber*, especially if they impact on parties' abilities to obtain a legal resolution. Closing off any possible

102 *Ellis*, above n 3, at [263] per Williams J.

103 At [80] per Glazebrook J.

104 For an example of how this could have worked in a non-contractual setting, see *Takamore v Clarke* [2012] NZSC 116 at [145], where the Supreme Court referred to the common law in England and Australia to determine a grey area of law regarding rights over a deceased person's body when they die intestate. Under our framework, the court would have recourse to tikanga to determine an appropriate legal response instead of relying on the common law of foreign jurisdictions.

legal recourse appears inconsistent particularly in relation to participating in the resolution, as noted in the following expression of ea cited in *He Poutama*:[105]

> In tikanga, a state of ea could not be reached unless all affected parties … were involved in the process of resolution – this would otherwise be inconsistent with the principles of whanaungatanga and mana. In our opinion, a state of ea could not be reached where whenua is involved unless tangata whenua were involved and respected in the process.

In a similar vein to *Ellis*, tikanga may support ameliorating the power imbalance here by supporting at least the potential to reach resolution.

C. Tikanga as Challenging Settler Legal Principles

The final approach is where tikanga can be used to challenge existing principles and obtain law reform. This will understandably be the most controversial contribution as it involves: (a) a direct conflict between existing settler legal principles and tikanga; and (b) the courts actively choosing to follow tikanga in favour of the previous approach.

This is a valid and important issue. Whilst common law in Aotearoa is strongly grounded in the United Kingdom's legal system and we look to English courts (amongst others) for guidance, it is crucial that our laws develop in a manner suitable for the unique attributes of our country. Dame Helen Winkelmann, writing on the common law in Aotearoa, commented that there has at times been an over-reliance of English precedent in determining legal principles. She highlights that:[106]

> In his extrajudicial writing, Lord Cooke highlighted the drift away from reliance upon English precedent in New Zealand case law, which was discernible by the 1960s. But even when I was at law school in the 1980s, the cases I was taught were almost exclusively English. This drift away came very late in our history.

105 *He Poutama*, above n 5, at 3.63, citing Jacinta Arianna Ruru and Mihiata Rose Pirini Joint affirmation, 14 September 2020 at [81], [83] and [85], as cited in Coates and Irwin-Easthope "Beneath the herbs and plants", Appendix 2 at [4.291].

106 Winkelmann, above n 70, at 20.

Tikanga may push back and challenge the legal precedent of English cases, particularly when the outcome is considered unfair or inappropriate. This, we suggest, is an important and valid engagement and one from which the courts should not shy away. Aotearoa has its own unique cultural identity, and this should be celebrated; as highlighted by Edward Thomas J, "the law should be developed to meet the needs and expectations of the community".[107]

Kós J in *Smith* stated that tikanga was used to "inform tort law's development in New Zealand in relation to climate change", deploying not merely the existing English-based approach to nuisance.[108] Whilst we recognise this was a strike-out action as opposed to a full hearing, it highlights the potential for tikanga to be used to challenge the existing legal principles. This was summarised by the plaintiff's legal submissions in *Smith*:[109]

> She argued that the essence of Mr Smith's case is not that tikanga Māori creates direct obligations on the parties to this case; rather it is that its principles must inform tort law's development in New Zealand in relation to climate change. There are aspects of tikanga, she submitted, that speak to the existing torts of public nuisance and negligence but, in particular, tikanga principles would assist in framing the proposed climate system damage tort. For example, she argued, tikanga would push against a narrow conception of proximity founded on individualism.

We found the comments of "pushing against" the colonial emphasis on individualism particularly enlightening. In light of this, and in the context of contract law, we suggest that tikanga law outcomes may challenge, as an example, the English approach to lawful act duress. This would pave a new way forward to address this area in a manner that promotes fairness and respect in business dealings.

We recognise that in the event of a difference in outcome between tikanga and the settler common law, the methodology for resolving any differences is to be worked through on a case-by-case basis.[110] A contract law example of where this can (and we believe should) occur is in the development of lawful act duress, specifically

107 Edward Thomas J "Good Faith in Contract: A Non-Sceptical Commentary" (2005) 11 NZBLQ 391 at 395.

108 *Smith,* above n 1, at [169].

109 At [179].

110 *Ellis*, above n 3, at [119] per Glazebrook J, [182] per Winkelmann CJ and [266] per Williams J.

a challenge to *Times Travel v Pakistan International Airline Corporation*,[111] which recently confirmed a very limited role for lawful act duress.

This case involved a significant power imbalance between the parties and overtly unfair behaviour by the stronger party that, in the eyes of the United Kingdom's Supreme Court, fell short of "unlawful" conduct. The question was therefore whether the behaviour was sufficient to ground a claim in lawful act duress. Times Travel was originally successful before Warren J, who held that, despite the lack of unlawful conduct, the combination of factors was sufficient for a finding of economic duress. Pakistan Air was, however, then successful in the Court of Appeal and the Supreme Court. In both instances – albeit taking different approaches – the courts held that, despite the inequality and substantive unfairness, the contract was binding. There was a concern in both courts about using lawful act duress as a means of controlling the otherwise legal use of monopoly power. The courts did not go so far as to find that lawful act duress should be abolished,[112] but the scope was restricted to such a large extent that it is difficult to see how it has any valid meaning left.[113] This case can be seen as the embodiment of the key themes discussed in part II. There was an (over)emphasis on procedural fairness, a lack of consideration of the inequalities of the parties and as a result, we believe, a substantively unfair agreement was reached and then enforced by the courts.

He Poutama envisages a weaving of tikanga and state law values which retains the integrity of both. Tikanga is identifiable as a source of the law under the common law method which takes account of the values of contemporary Aotearoa New Zealand.[114] *He Poutama* noted that:[115]

> When considering whether tikanga conflicts with existing common law and principles, the question is whether there is a conflict with underlying tikanga values/principles (rather than any particular observed tikanga practice). Further, there is no presumption in favour of non-Māori legal norms.

111 *Times Travel*, above n 21.

112 Although, we note that there are academic arguments on this basis, see Paul Davies and William Day, '"Lawful Act" Duress' (2018) 134 LQR 5.

113 Mindy Chen-Wishart and Jodi Gardner "Schrödinger's Lawful Act Duress: Dead or Alive?' in Peel and Probert (eds) *Shaping the Law of Obligations: Essays in Honour of Professor Ewan McKendrick KC* (OUP 2023) 75.

114 *Takamore v Clarke*, above n 103, at [94].

115 *He Poutama*, above n 5, at [8.39(h)]; for example in *Takamore v Clarke, above n 103,* at [96], Elias CJ said that the underlying tikanga values of whenua and whakapapa and their relevance to burial should be taken into account in New Zealand law and that the competing claims of whakapapa and cultural association present in that case did not make such values "unreasonable in law"; and see, for example *Attorney-General v Ngāti Apa* [2003] NZCA 117, [2003] 3 NZLR 643..

As we have said throughout this article, we are not going to provide details on what the outcome of a particular situation might be under tikanga. We note that tikanga law may provide an outcome that is different from existing settler legal principles. We also note that there is no structural impediment to the tikanga result being applied, should it produce a different outcome.

We submit that lawful act duress is an ideal example of where tikanga law may potentially improve the approach taken by the courts. We cannot and should not assume the United Kingdom's approach is fit for purpose for our unique, bi-cultural system. When determining the boundaries of lawful act duress, the courts we suggest should free themselves of the restraints of *Times Travel* and engage with the relevant tikanga outcome.

V. Conclusion

The common law is one window where tikanga is recognised in the state legal system. It is important to understand the wider system and the limitations of the common law methods, as explained in *He Poutama*: "the common law method has guardrails or boundaries that frame the limits of its law-making capacity".[116] These guardrails include "precedent, case-by case development, and consideration of the social and legislative context, and external; the separation of powers, parliamentary supremacy, and Te Tiriti o Waitangi."[117] Parliamentary supremacy means that legislation may trump the common law and parliament can overturn a court decision through legislation.[118] This does not however undermine the crucial role that the common law plays in our society. In a similar vein, tikanga cannot override a clearly worded statute, as confirmed by Winkelmann CJ in *Ellis*.[119] However, contract law in Aotearoa remains strongly grounded in common law (with some notable statutory inroads).[120] As a result, there is potentially a larger role for tikanga to play in shaping legal developments when compared with other areas of law that have become significantly codified.

116 *He Poutama*, above n 5, at 8.16.

117 At 8.16–8.17.

118 At 8.19.

119 *Ellis v R*, above n 3, at [98], although in the same paragraph, her Honour also highlights that "there is a presumption that statutes are to be interpreted consistently with Te Tiriti as far as possible" we note that as tikanga is protected under the guarantee of tino rangatiratanga statutes should be interpreted consistently with tikanga, academics have also highlighted this: see 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, Oxford, 2005) at 330. "

120 See, notably, the Contractual Mistakes Act 1977; Contract and Commercial Law Act 2017; Illegal Contracts Act 1970; and the Contracts (Privity) Act 1982.

This article has considered the potential for tikanga to be a part of the development of contract law in Aotearoa New Zealand. On one hand, that is perhaps ground-breaking – there has been little, if any, discussion of tikanga and its potential influence in the law of obligations. On the other hand, our goal is in no way a radical one. We do not advocate for a specific legal change or provide a detailed description of the impact tikanga should have on contract law. This needs to occur through a series of dialogue and discussion. We hope that our raising tikanga's potential role strikes a positive chord for development of our law. We have highlighted not only the ability, but also what we view as the necessity, for review of contract law principles through this important lens.

AI REVOLUTION IN NEW ZEALAND'S LEGAL PROFESSION: EXPLORING JUNIOR LAWYERS' EXPERIENCES AND CULTURAL IMPLICATIONS

Finnegan Ferguson-Lees, Erik Brogt and Katharina Näswall*

Abstract

This study investigates the impact of artificial intelligence (AI), particularly large language models (LLMs), on junior lawyers in New Zealand's legal profession. While existing research focuses on AI's technical capabilities, the lived experiences of legal professionals remain underexplored. To address this gap, 10 semi-structured interviews were conducted with a diverse purposive sample of junior lawyers across New Zealand. Using thematic analysis, two major themes were identified: Transforming Legal Practice and Challenges and Opportunities for Junior Lawyers, underpinned by the overarching theme of Te Tiriti o Waitangi, which is interwoven throughout all findings. The study highlights the psychological and practical effects of AI on junior lawyers, the misalignment between legal education and AI-integrated practice, and the intersection of AI, law and Māori customs – particularly te ao Māori and tikanga. While AI enhances efficiency and shifts junior lawyers' roles toward more analytical and interpersonal tasks, it also raises concerns around job security, ethical challenges, and algorithmic bias – especially affecting Māori clients. The findings underscore the need for legal education reform, culturally informed ethical frameworks and targeted AI training. This research provides valuable insights for law firms, educators and policymakers, contributing to the development of a more resilient and culturally responsive legal workforce in the face of technological change.

* Finnegan Ferguson-Lees (LLB) is a Master of Science student in the School of Psychology, Speech and Hearing at the University of Canterbury; Erik Brogt is an adjunct associate professor in the industrial and organisational psychology programme, and an educational, staff and organisational development consultant at E3 Consulting; and Katharina Näswall is a Professor of Psychology in the School of Psychology, Speech and Hearing at the University of Canterbury.

I. Introduction

> AI is rapidly emerging as a tool that opens exciting new opportunities for the provision of and access to legal services. However, there are also risks and ethical issues that need to be carefully managed for lawyers.[1]

Since the release of ChatGPT in late 2022, artificial intelligence (AI) has become central to discussions across media, workplaces and academia. AI can no longer be considered a future phenomenon; it is actively shaping nearly all domains.[2] Organisations across industries are integrating AI technologies into their business structures through change initiatives to remain competitive, with experts predicting that 57 per cent of jobs in OECD countries could be replaced by AI.[3] AI's transformative influence on work has led many to refer to it as the Fourth Industrial Revolution.[4]

Although AI has existed for nearly a century, no single widely accepted definition exists. For this article, AI is defined as any technique that approximates aspects of human cognition using machines.[5] The most prominent form of AI today is large language models (LLMs), systems that interpret human language and generate text-based outputs, such as document summarisation or translation.[6] ChatGPT is one such example. Due to the text-heavy nature of legal work, LLMs are highly suited to many junior lawyer tasks, including case summarisation and document drafting.[7] While all LLMs are a form of AI, not all AI tools are LLMs. In this article, AI and LLMs are used interchangeably, as the distinction, though relevant, is not central to the study's findings.

The effectiveness of LLMs in legal tasks has contributed to their rapid uptake among lawyers. However, understanding on LLMs risk remains limited, in particular, how LLMs are trained on vast amounts of internet data, which can

1 New Zealand Law Society *Guidance on the use of Generative AI for lawyers* (New Zealand Law Society, March 2024) at 1.

2 Leili Babashahi and others "AI in the Workplace: A Systematic Review of Skill Transformation in the Industry" (2024) 14 Administrative Sciences 127 at 127–130.

3 David Brougham and Jarrod Haar "Technological disruption and employment: The influence on job insecurity and turnover intentions: A multi-country study" (2020) 161 Technological Forecasting and Social Change 161 at 161.

4 At 130.

5 Ivey Matthew "The ethical midfield in artificial intelligence: Practical reflections for national security lawyers" (2020) 33 Geo J Legal Ethics 109 at 114.

6 Rajvardhan Patil and Venkat Gudivada "A review of current trends, techniques, and challenges in large language models" (2024) 14 Applied Sciences 1 at 4.

7 Adam Bent "Large Language Models: AI's Legal Revolution" (2023) 44 Pace Law Review 91 at 118–125.

perpetuate societal biases.[8] These biases may result in discriminatory outputs based on age, race, gender, sexual orientation or political ideology.[9] In New Zealand, such risks could disproportionately impact Māori across domains such as health care and law.[10] Yet, no overarching policy currently regulates AI use by lawyers, nor are there systems to mitigate these biases.[11] Despite AI's growing adoption, limited research exists on how it affects employees, especially junior lawyers.[12] This article investigates junior lawyers' lived experiences with AI, and their perspectives on AI's intersection with law and Māori customs.

Junior lawyers in New Zealand typically have 0–5 years of post-admission experience. After completing an LLB and the Professional Legal Studies course, they are admitted to the Roll of Barristers and Solicitors of the High Court of New Zealand. Their main tasks include legal research, document drafting, and supporting senior lawyers. These tasks are frequently theorised,[13] and increasingly evidenced,[14] to be highly susceptible to AI automation. At the same time, junior lawyers are likely among the most confident and adaptable to new AI tools, making them a key demographic in the changing legal landscape.

II. Literature Review

AI utilisation has recently proliferated across nearly every global sector.[15] A study of 800 American lawyers found that 74 per cent now use AI,[16] particularly for legal research and document drafting.[17] While there is growing research on AI's organisational impact, little has focused on its effects on legal professionals.[18] This review examines the literature across three domains: organisational, employee, and

8 ISACA "The AI reality: New research from ISACA identifies gaps in AI knowledge, training and policies" (7 May 2024) <www.isaca.org>.

9 Noel Ayoub and others "Inherent Bias in Large Language Models: A Random Sampling Analysis" (2024) 2 Mayo Clinic Proceedings: Digital Health 186 at 186.

10 At 186.

11 New Zealand Law Society, above n 1, at 2.

12 Rene Hohmann (2024) "Building Bridges: How Organizations Can Foster a Positive Attitude Among Their Employees When Integrating AI Systems in the Workplace" (Bachelor International Business Administration Dissertation, University of Twente, 2024) at 1.

13 See, for example, John Bliss "Teaching Law in the Age of Generative AI" (2024) 64 Jurimetrics J 111.

14 Ambareen Beebeejaun and Rajendra Parsad Gunputh "A study of the influence of artificial intelligence and its challenges: The impact on employees of the legal sector of Mauritius" (2023) Global Business Review 1 at 6–13.

15 Brougham and Haar, above n 3, at 127–130.

16 Ironclad "State of AI in Legal: 2024 Report (2024) Ironclad <https:ironcladapp.com>.

17 LexisNexis "International Legal Generative AI Report" (22 August 2023) LexisNexis <www.lexisnexis.com>.

18 Beebeejaun and Gunputh, above n 14, at 1.

client impacts, to provide context for how AI may shape the experiences of junior lawyers. It also identifies gaps in the literature that this research aims to address.

A. Impacts of AI on Organisations

AI enhances organisational efficiency and supports growth in competitive environments. By mechanising repetitive tasks and improving data processing capabilities, AI has been shown to increase employee productivity significantly, up to 35.5 per cent in some sectors.[19] For junior lawyers, tasks like document drafting, proofreading and case summarisation can be automated, allowing greater focus on client interaction and legal strategy.[20] This shift can alleviate workload pressures, promote meaningful work engagement and indirectly support well-being through decreased stress and workloads.[21] Moreover, AI enables employees to respond more quickly to client needs, boosting perceived performance and enhancing positive role perceptions.[22] With increased autonomy and flexibility, AI also offers employees greater confidence in their roles, promoting a cycle of productivity and psychological well-being.[23]

B. Impacts of AI on Employees

While AI can bring efficiencies, its implementation may also introduce psychological challenges. Rapid technological changes can contribute to stress, fatigue and burnout among employees, especially where support systems are lacking. Additionally, AI has been found to reduce human interaction in certain roles, potentially increasing loneliness and weakening interpersonal skills.[24] Employee perceptions play a critical role in shaping the outcomes of AI integration. Positive perceptions are associated with greater acceptance and well-being, while negative attitudes, particularly fears around job replacement, can heighten job insecurity.[25] Job insecurity is among the most widely studied psychological

19 Natalia Schepkina and others "Human-Centric AI Adoption and Its Influence on Worker Productivity: An Empirical Investigation" (2024) 86 BIO Web Conf 1 at 1.

20 Beebeejaun and Gunputh, above n 14.

21 WanQing Wei and Linyu Li "The impact of artificial intelligence on the mental health of manufacturing workers: the mediating role of overtime work and the work environment" (2022) 10 Frontiers in public health 1 at 1.

22 Keith Kirkpatrick "AI in Contact Centres" (2017) 60 Communications of the ACM 18 at 18–19.

23 See, for example, Fatima Shaikh "Analyzing the impact of artificial intelligence on employee productivity: the mediating effect of knowledge sharing and well-being" (2023) 61 Asia Pacific Journal of Human Resources.

24 Xinying Yu and others "Antecedents and outcomes of artificial intelligence adoption and application in the workplace: the socio-technical system theory perspective" (2023) 36 Information Technology & People 454 at 463.

25 Byung-Jik Kim and others "The impact of an unstable job on mental health: the critical role of self-efficacy in artificial intelligence use" (2024) 43 Current Psychology 16445 at 16445–16452.

constructs in AI literature,[26] linked to reduced job satisfaction, increased turnover intentions and diminished organisational commitment.[27] Organisational training and support are essential in mitigating these risks. Studies consistently highlight the benefits of upskilling and fostering self-efficacy among employees to reduce AI-related anxiety and improve adaptability.[28] While this literature is useful, few studies tailor training to specific professions, and qualitative research into how employees interact with AI in practice remains scarce. Moreover, most studies focus on healthcare, manufacturing or service industries with Asian populations, with only one known study exploring AI's impact on employees in New Zealand.[29] This creates a significant gap regarding culturally contextualised, legally specific applications of AI in New Zealand workplaces.

Even before the rise of LLMs like ChatGPT, gaining employment in the legal profession post-graduation was considered challenging. The adoption of AI tools capable of automating entry-level legal tasks has intensified concerns that junior lawyers may become less economically viable to firms. This fear is supported by theoretical and empirical literature suggesting that many junior lawyer tasks are among the most susceptible to AI-driven automation. This potential has been found to be a considerable concern for current law students, and existing junior lawyers will require reskilling to avoid massive termination of employment contracts. [30]

C. Impacts of AI on Clients

Despite its persuasiveness, knowledge of LLM's functionality, along with their associated issues, remains low. Law students and legal professionals might believe that the writing of AI sounds intelligent but may fail to acknowledge that this is not because the AI is intelligent but has assimilated and synthesised words of others, which can lead AI to incorporate biased content, hate speech and discrimination.[31] Law students and legal professionals must be educated on the biases of AI so that these biases are not brought into the legal profession and ensure AI innovation is not obstructed.

26 Ci-Jyun Liang and others "Ethics of artificial intelligence and robotics in the architecture, engineering, and construction industry" (2024) 162 Automation in Construction 1 at 18.

27 Kim and others, above n 25, at 16445–16452.

28 See, for example, Po-Chien Chang and others "Does AI-Driven technostress promote or hinder employees' artificial intelligence adoption intention? A moderated mediation model of affective reactions and technical self-efficacy" (2024) 17 Psychology Research and Behavior Management 413.

29 David Brougham and Jarrod Haar "Smart technology, artificial intelligence, robotics, and algorithms (STARA): Employees' perceptions of our future workplace" (2018) Journal of Management & Organization 239.

30 See, for example, Bliss, above n 13; and Beebeejaun and Gunputh, above n 14.

31 Ayoub and others, above n 9, at 186.

D. Māori Data Sovereignty Concerns

AI tools such as LLMs like ChatGPT have raised concerns among Māori scholars due to their mechanisms' potential incongruence with te ao Māori values. When information is entered into an LLM, it can be integrated into its training data, allowing the LLM to access and reuse that information globally.[32] While this raises standard privacy concerns, the implications for Māori are more complex.

For te ao Māori, this reuse of information is particularly problematic. Māori data – defined as any data produced by or about Māori or their relationships with the environment – is increasingly recognised as taonga.[33] As taonga, art 2 of Te Tiriti o Waitangi affirms Māori governance over their data. In legal practice, Māori data includes a client's name, case details or family history. The use of such data in third-party LLMs without consent breaches tino rangatiratanga (absolute authority) and Māori data sovereignty, which promotes Māori-led governance of their data.[34]

The absence of Māori data sovereignty in public policy heightens these risks. Existing systems like the Integrated Data Infrastructure (IDI) are criticised as Eurocentric, storing data offshore and ignoring Māori values, thus undermining Māori control over their taonga.[35] Until policy designed by Māori is enacted, Māori data remains vulnerable. For instance, a junior lawyer may unknowingly enter a Māori client's information into an LLM to save time, unaware that the data is now accessible to offshore entities, violating Māori sovereignty principles, resulting in the stripping of tino rangatiratanga of Māori as the data is taken and then utilised by the third party outside of Māori data sovereignty principles.

In addition, a further concern is AI bias. The lack of regulation around which LLMs are permissible could lead to discriminatory outcomes. Like law, AI processes and transforms information. Since it relies on historical data, it can reinforce systemic biases, especially against indigenous peoples. In New Zealand, while Māori constitute 16.5 per cent of the population, they comprise 56 per cent of the prison population.[36] Without safeguards, AI systems may reflect this overrepresentation in their outputs, worsening disparities in bail, sentencing and prosecution decisions.

Internationally, AI-driven case predictions have already shown racial bias. Without culturally informed regulation, Māori could face harsher bail conditions

32 Ping Yu and others "Leveraging generative AI and large language models: a comprehensive roadmap for healthcare integration" (2023) 11 Healthcare 2776 at 2777.

33 Waitangi Tribunal *The Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (Wai 2522, 2023) at 49.

34 Te Tiriti o Waitangi 1840, art 2.

35 Donna Cormack and Tahu Kuktai "Indigenous peoples, data, and the coloniality of surveillance" in *New perspectives in critical data studies: The ambivalences of data power* (Springer International Publishing, Auckland, 2022) 121 at 129.

36 At 131.

or over-prosecution due to biased historical data. If used to assist litigation or predict outcomes, AI risks embedding existing inequities deeper into the justice system.[37] To prevent historical injustices from being reproduced through AI, legislative intervention is needed. Without policy or legal training that addresses the implications of LLM use for Māori clients, these risks will likely rise alongside AI adoption.

III. Methods

The study adopted an exploratory qualitative approach to gain in-depth insight into the lived experiences of junior lawyers in relation to AI implementation in the workplace. A qualitative, interview-based approach was used to explore the subjective experiences of junior lawyers from multiple perspectives. Semi-structured interviews were conducted to collect data.

Participants were selected through purposive sampling from the primary researcher's professional network. Eligibility criteria required participants to meet the definition of a junior lawyer and to represent diverse demographic backgrounds. Given the lack of a universal definition for a junior lawyer, this study operationalised the term as having three years or fewer of post-qualification experience. While purposive sampling may limit the generalisability of findings and risks reproducing ideological biases due to the reliance on professional networks, it nonetheless enabled the recruitment of participants whose diverse experiences and perspectives could offer rich data for interpretation. Future research may address this limitation by utilising broader recruitment methods to capture a wider spectrum of views. A total of 10 participants were interviewed, with data collection ceasing when no new themes were observed. After each interview, the data were reviewed iteratively to confirm that additional interviews were unlikely to provide novel insights. Participant demographics were four females, six males; one tangata whenua, one Asian and eight Caucasians. Participants practised in various areas, including three in litigation, two in criminal, two in property, one in commercial, one in family and one judge's clerk.

This study received ethical approval from the University of Canterbury's Human Research Ethics Committee (2024/67/HREC). Informed consent was obtained prior to each interview through an information sheet and consent form detailing the study's purpose, participants' rights and measures for confidentiality. Verbal consent was also obtained at the start of each interview, including permission to record. Interviews ranged from 16 to 63 minutes, averaging 31 minutes.

37 Ayoub and others, above n 9, at 186.

Thematic analysis was used to identify patterns in the interview data.[38] The process began with data familiarisation through repeated listening to the recordings, reading transcripts, and taking notes on tone and emphasis to capture participants' intended meaning. Transcripts were systematically coded to identify recurring ideas and patterns. Transcripts were reviewed, and key phrases or statements were coded for both directly stated ideas and implied concepts. Both explicit comments and implied ideas were coded to capture a wide range of perspectives. A total of 69 open codes were created. Table 1 illustrates how raw participant responses were systematically translated into codes and then grouped into themes.

Table 1. Example of code derivation from participant data.

Interview Question	Participant Quote	Initial Code	Theme
Do you think that AI will impact Māori legal considerations?	"Lots of knowledge is oral and is passed down through generations" (P4)	Tension between oral and written traditions	Cultural incongruences

The open codes were examined to identify overarching themes. These themes were defined as patterns in the data that addressed the research question and captured key participant insights.[39] Codes were grouped to identify conceptual similarities. Throughout, raw data excerpts were revisited to ensure that emerging themes were grounded in the data. This process resulted in three initial core themes and six subthemes. To ensure coherence and reduce analytical complexity, the themes were reassessed and reconstructed, ultimately resulting in two overarching themes – *Transforming Legal Practice* and *Challenges and Opportunities for Junior Lawyers* – which encompassed four subthemes and 10 conceptual categories, as summarised in Table 2 (below).

To reduce the 69 open codes into the 10 conceptual categories, similar codes were combined to streamline the dataset, ensuring that the most important and recurring participant experiences were captured. Some open codes were combined; others were discarded where they did not meaningfully contribute to the broader themes.

The next stage entailed reviewing the themes, including revisiting the raw data to guarantee consistency within each theme and clear differences between

38 Virginia Braun and Victoria Clarke *Thematic Analysis: A Practical Guide* (SAGE, London, 2022) at 126.

39 Virginia Braun and Victoria Clarke "Using thematic analysis in psychology" (2006) 3 Qualitative Research in Psychology 77 at 82.

themes.[40] Once satisfied that the themes accurately reflected the data, they were refined, titled using pithy names and compiled into a final thematic report.

Throughout this entire process, regular discussions were held with co-authors to reflect on and refine thematic arrangements. Reflexive journal entries were kept on analytic decisions and potential biases to ensure transparency in how conclusions were reached. This process helped ensure that findings were clearly grounded in the data and not influenced by researcher assumptions.

The methods employed allowed the research to gather detailed insights into how AI is influencing junior lawyers in New Zealand, both practically and psychologically, within the broader context of organisational and legal change.

IV. Results

The 69 open codes were grouped based on conceptual similarity, yielding four subthemes across the dataset. These subthemes were then synthesised into two overarching themes that captured the primary dimensions of junior lawyers' experiences with AI (Table 2 below): *Challenges and Opportunities for Junior Lawyers* and *Transforming Legal Practice*. *Challenges and Opportunities for Junior Lawyers* encapsulates how AI directly influences the role and experience of junior lawyers (individual impacts). *Transforming Legal Practice* explores AI's impact on law firms, clients, and society more broadly (organisational and systemic impacts). Each theme includes several subthemes, encompassing specific categories of lived experience. This section examines these themes and subthemes in depth, beginning with a high-level summary and then discussing the individual categories.

40 See, for example, Michael Quinn *Qualitative evaluation and research methods* (SAGE, California, 1990).

Table 2. Thematic framework for junior lawyers' experiences.

	Theme	Subtheme	Categories
Te Tiriti o Waitangi (Woven Theme)	Challenges & Opportunities for Junior Lawyers	Psychological Adaptations	Embracing Technological Change
			Navigating Job Security
			"Not my role" bias
	Transforming Legal Practice	Shifting Dynamics	AI Policy
		Efficiency & Access	Decreased Cost
			Decreased Time
			Increased Access to Justice
			AI Maturity
		Client Experiences & Expectations	Balancing Innovation and Confidentiality
			Cultural Incongruence

Before examining how AI will impact junior lawyers and the legal profession, it is essential to discuss Te Tiriti o Waitangi and its relevance to the Challenges & Opportunities for Junior Lawyers and Transforming Legal Practice themes. These themes address AI's influence on the legal profession and junior lawyers. Since they reflect the New Zealand legal context, it is important to recognise how Te Tiriti o Waitangi is intricately woven throughout both themes and their related subthemes and categories. As New Zealand's foundational legal document, it underlines how the legal profession and legal professionals operate as partners to it. There was a worryingly high amount of first realisations when the topic was brought up in conversation. This data, or lack thereof, indicates an issue that needs to be remedied in junior lawyers' foundational knowledge of Te Tiriti o Waitangi. The aspects of how AI's implementation into the legal profession would be particularly detrimental to Māori will be discussed more in-depth in the *Cultural Incongruence* category. However, it must be acknowledged that Te Tiriti is a document that underpins all law and is woven through all aspects of the *Transforming Legal Practice* theme. Thus, a lack of data in this area needs to be addressed as AI becomes increasingly prevalent.

A. Challenges and Opportunities for Junior Lawyers

Thematic analysis highlighted various ways junior lawyers perceived AI's influence on their roles. These ranged from personal psychological impacts to significant changes in day-to-day tasks.

1. Psychological adaptations

This subtheme reflects AI's psychological effects on junior lawyers, focusing on how they, as individuals, are adapting to technological change. Participants expressed mixed emotions. While many were enthusiastic about AI's potential to enhance efficiency, they also demonstrated significant self-taught knowledge about AI risks. Their confidence often stemmed from being "digital natives" (Participant 2). Still, underlying concerns about job security emerged, reflecting a nuanced blend of optimism and insecurity.

(a) Embracing technological change

Participants often showed openness to AI's integration into the legal profession. They expressed excitement about AI's potential to address inefficiencies, demonstrated advanced knowledge of tools like LLMs and exhibited confidence and eagerness to learn more.

Many explained their excitement stemmed from AI's promise to increase efficiency, aligning with points discussed later in the Efficiency and Access subtheme (see s IVB2 below). Participants often possessed sufficient understanding of how LLMs work, including their input/output functions, training processes and associated security risks. Crucially, this knowledge was self-taught, indicating a proactive attitude toward emerging technology. Their willingness to learn, combined with confidence using AI outside of work, appears linked to generational traits. All participants were from Generation Z, describing themselves as "digital natives", with several attributing their tech fluency to growing up with technology. This generational familiarity likely contributes to their eagerness to "push the boundaries with AI" (Participant 2).

(b) Navigating job security

While participants did not report immediate job insecurity, they acknowledged AI's potential to automate junior lawyer roles in the future. Some joked about AI replacing them, but common phrases like "currently" and "short term" revealed underlying concerns about long-term prospects. Participants agreed that while AI would not fully automate legal practice, it could transform specific roles. Some believed AI would assist with efficiency rather than replace them. However,

more pessimistic participants suggested AI could severely disrupt the industry, especially as its capabilities evolve. A recurring belief was that law requires complex judgment and nuance that AI cannot replicate. This complexity was seen as a form of job security. Nonetheless, participants conceded that future automation could become more advanced. Participant 10 speculated that junior lawyers would remain valuable only as long as they are more cost-effective than AI tools. Many menial tasks, which comprise much of junior lawyers' work, were viewed as "at risk of automation" (Participant 7).

> If I were a second-year law student today, I would be petrified, because I simply don't think there will be jobs for junior lawyers in two or three years, or at least there'll be one-twentieth of the number there are currently. (Participant 2)

2. "Not my role" bias

A recurring pattern in the data was the "not my role" bias, where participants initially justified why their current role was unlikely to be impacted by AI. This was often followed by mentioning other areas, typically more transactional fields like property, contract (Participant 5) and corporate/commercial law (Participant 6), as being more susceptible to automation. Interestingly, property lawyers did not share this view, instead offering reasons why they believed AI posed a low risk to their area of practice.

B. Transforming Legal Practice

This theme broadens the focus from junior lawyers' individual experiences to consider AI's wider impacts on firms, legal systems, and society.

1. AI-policy

As AI is a new influence in the legal profession, there is currently a lack of policies to help manage its influence in a way that is safe for the profession and society. A lack of policy to safeguard against AI usage could have catastrophic consequences, such as data breaches and societal biases like racism legally perpetuated. Participants reported variation in firm-level AI policies. Some firms had no AI policy at all (participants 3, 5, 6, 8 and 9), highlighting a notable gap. Others had policies banning AI outright, often under directives from senior staff. A third group allowed AI use but prohibited inputting any confidential information, ranging from client names to less obvious details like case facts. One participant shared a breach example where a colleague, while not inputting identifying information, asked ChatGPT a hypothetical

based on real case details, raising confidentiality concerns. Information such as case facts being confidential is a less obvious type of confidential information that junior lawyers could potentially breach if AI usage proliferates in law firms without proper mechanisms being put in place, participating in areas with highly confidential client facts, such as criminal or family law. However, it is important to note that AI use in legal practice, given its current capabilities, is primarily safeguarded by the Lawyers and Conveyancers Act 2006 and the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, which honour clients' confidential information input into LLMs such as ChatGPT. However, as AI capabilities grow, these general protections may become insufficient.

2. Efficiency and access

Participants highlighted AI's potential to increase efficiency and access to legal services. They discussed benefits such as reduced costs and time, improved access to justice, and concerns about AI's current limitations.

(a) Decreased cost

Legal services in New Zealand are often inaccessible due to the high cost of legal aid. Participants stated that AI has the potential to increase equity by reducing these costs. Suggesting that standardised legal processes, like billing and conveyancing, could soon be expedited using AI, benefiting both clients and junior lawyers.

Participant 9 illustrated how AI could significantly lower costs through automation of discovery tasks: "Discoveries can just be so immense and take forever; I was involved in one that was just under 50,000 documents." At 100 documents per hour, this task would take 500 hours – 12.5 work weeks. This results in the "average discovery bills of 60,000 to 100,000 dollars being quite normal because it takes so many hours" (Participant 9). AI could drastically streamline this process, allowing more cases to be heard in court and reducing the burden on junior lawyers. This aspect of decreased cost has the potential to revolutionise the legal profession and make it more equitable for all, with the potential to overturn cliches in law that have been around for centuries, such as "if your dispute is less than $10,000, it's not worth disputing it" (Participant 2).

(b) Decreased time

As noted in the Decreased Cost section (IVB2(a)), AI can automate time-consuming tasks, allowing junior lawyers to settle cases faster and assist more clients. While their core duties may remain, tools like AI-assisted legal research (Participant 9) can ease workloads. Participant 4 estimated the time saved could be "weeks, frankly". This increased efficiency not only boosts junior lawyers' well-

being by freeing time for interpersonal tasks but also helps reduce the case backlog in New Zealand's courts. By expediting legal processes, AI enables more cases to be heard, thereby improving access to justice.

(a) Increased access to justice

Access to justice includes not only fair legal access but also fair treatment and resolution. Participants noted that AI could increase the efficiency of legal services, improving access to justice for New Zealand society. These benefits stem from the time and cost savings discussed in the Decreased Time and Decreased Cost sections (ss IVB2(a) and (b)). Enhanced access could particularly benefit underrepresented groups, such as Māori and Pacific peoples, who historically face barriers to justice.

(b) AI maturity

The previous sections highlighted several benefits of AI integration into the legal profession, such as decreased time and cost, and improved access to justice. However, these benefits are largely unrealised due to the current limitations of AI tools. Participants frequently stated that before AI can significantly influence legal practice, its overall maturity must improve. When asked about AI's future impact, many emphasised that current abilities are insufficient. Participant 1 noted they "have not noticed more efficiency from AI in my workflow or those around me", while Participant 9 added, "if it improves", when discussing AI's future potential.

Participants struggled to predict when AI might reach a level where junior lawyers could use it reliably in daily practice. They expressed that many human-centric aspects of law, such as court advocacy, team meetings and client interactions, are areas where AI is unlikely to be effective in the near future. Several participants also identified frequent issues with hallucinations. Partners were concerned that "ChatGPT can make mistakes" (Participant 3), and many participants shared real-world hallucination stories. These concerns mirror warnings from the New Zealand Law Society, reinforcing the need for junior lawyers to cross-check outputs. The need for vigilance was also illustrated through examples from the United States, referenced by Participants 3 and 4. Despite widespread awareness of hallucinations, only one participant could explain why ChatGPT hallucinates.

Beyond hallucinations, participants expressed concern about AI's limitations in producing legally usable outputs. For instance, legal submissions often require the client's own voice, making AI-generated content unsuitable. Furthermore, ChatGPT lacks access to essential legal databases such as Lexis Advance and Westlaw (Participant 3), severely limiting its relevance for case-specific research. Participant 9 stated that without access to these tools, it remains "largely unhelpful". This challenge is particularly evident in criminal and family law, where cases are

assessed individually and require deep contextual understanding. Participants working in these areas emphasised that AI's generalised outputs are currently incompatible with the level of specificity required.

3. Client experiences and expectations

This subtheme explores AI's potential impacts on clients. Key issues include client privacy, ethical risks and the potential for biased or culturally inappropriate outcomes.

(a) Balancing innovation and confidentiality

As mentioned in the AI Maturity section (s IVB2(d)), AI must advance further before it can be reliably used in legal practice. However, a key concern beyond technical limitations is client privacy and confidentiality, one of the most frequently raised issues among participants. Many noted they interact with clients directly or indirectly in nearly every aspect of their roles, making the protection of private, confidential or privileged information a central concern. All such information is prohibited from being entered into LLMs, creating a clear obstacle to AI use in practice.

Participant 5 noted that junior lawyers would breach their legal obligations by inputting anything into AI tools. Two criminal law-related quotes from participants revealed that not just names and identifying details, but even case facts, are protected. Participant 7 noted that inputting case facts could breach obligations like s 25(c) of the New Zealand Bill of Rights Act 1990, which upholds the right to be presumed innocent. Participant 4 illustrated how easily such breaches could occur unintentionally, while Participant 3 highlighted the risk of more deliberate misuse.

Although AI could boost productivity, its use must be weighed against confidentiality risks. Participant 3 discussed the real-world trade-off between privacy and efficiency, noting how people often accept such compromises with private companies. Yet, in legal contexts, the stakes are much higher. These issues arise from how LLMs retain and use training data, something participants were aware of, as discussed in the Embracing Technological Change section (IVA1(a)). Participants also shared legal-context-specific concerns about AI inputs: the risk lies not only in what is remembered but in how it might be used. This balance is potentially crucial because a vast number of client-related issues can arise if it is not properly addressed.

(b) Cultural Incongruences

Another factor that must be balanced against AI's innovative potential in the legal profession is cultural considerations, specifically those relating to te ao

Māori and tikanga. These themes were not imposed from existing frameworks but emerged from participant responses, some offered spontaneously, and others when prompted during interviews. They are therefore grounded in the empirical data, while still reflecting critical New Zealand-specific factors when evaluating the efficiency versus humanity trade-off in AI adoption. As discussed in the Te Tiriti o Waitangi paragraph at the start of the results section, most participants lacked knowledge about the intersection between Māori customs, AI and legal practice, though they were able to identify potential issues when prompted.

The most common incongruence raised was that te ao Māori and tikanga are grounded in oral traditions, in contrast to Western law and AI systems, which are primarily written or text-based: "Lots of knowledge is oral and is passed down through generations" (Participant 4). Participant 1 highlighted the role of spirituality, face-to-face interaction and body language. Participant 7 described how tikanga evolves organically through practice, unlike Western law, which develops through formal written processes like legislation, case law and legal scholarship. Because of the adaptable nature and the oral traditions within te ao Māori and tikanga, participants thought AI systems like LLMs, which rely purely on text-based inputs and outputs, might be incompatible with these cultural customs. The text-based nature of AI contrasts with the oral nature of te ao Māori and tikanga, leading participants to question the ability of AI to consider and incorporate these cultural practices adequately.

A less commonly mentioned incongruence by participants, but equally as salient, is Māori data sovereignty. As Māori data is considered taonga, inputting such data into an LLM, especially one owned by an external party, would strip Māori of ownership over their taonga. Participant 4 acknowledged this risk, although their use of "if" taonga status applies indicates a gap in understanding. In contrast, Participant 7 demonstrated a deeper, unprompted grasp of how Māori data sovereignty could be violated by AI use. This participant clearly articulated why Māori data is taonga and how its misuse by AI could erode cultural ownership. Despite this strong insight, only one participant showed this level of understanding, highlighting the need for broader education on Māori data rights. Participants widely agreed that AI implementation must be accompanied by robust policy protections, such as a national framework that incorporates a bicultural lens. However, creating such a policy will be complex due to varying iwi customs and interpretations of data sovereignty.

Participant 7 discussed the potential of AI embedding a misrepresented version of tikanga into its algorithms by relying on a single interpretation, potentially resulting in miscarriages of justice. Similarly, Participant 3 noted a concerning

future scenario where lawyers might avoid representing Māori clients due to the complexities of using AI in a culturally respectful way: "people [Māori] might end up in a position where they have to do it, which is its own ethical concern". The scenario suggests AI could be implemented and cause significant efficiency increases in deciding cases. Due to a drive to solve cases as quickly as possible to maximise financial gain, lawyers might become reluctant to represent Māori clients. Such an approach could result in Māori being forced to either allow the lawyer to use AI and waive their te ao Māori and tikanga rights or potentially not receive legal advice. Although it was mentioned in the Access to Justice section (s IVB2(c)) that AI could increase access to justice for Māori, AI could potentially decrease Māori access to justice if the correct mechanisms are not put in place.

V. Discussion

This study explored the lived experiences of junior lawyers amid AI disruption in the workplace. Two key themes were identified: *Challenges and Opportunities for Junior Lawyers* and *Transforming Legal Practice*. Together, these themes reveal the multifaceted impact of AI on junior lawyers and New Zealand's legal profession.

A. Impacts of AI on Junior Lawyers

The current study supports and extends the emerging literature on junior lawyers' experiences of AI. Using a qualitative approach allowed rich insights into this under-researched area.

1. Low job insecurity among junior lawyers

While the psychological impact of external workplace changes is well-researched, studies on AI's specific influence remain limited. Job insecurity is one of the most examined psychological outcomes linked to AI in workplaces,[41] making it a natural starting point. Participants consistently reported low job insecurity regarding AI's near-future impact on their roles. This marks the first study to highlight New Zealand junior lawyers' limited concern about AI-driven job threats. Despite acknowledging AI maturity as a variable, participants' excitement about efficiencies, knowledge of LLMs, eagerness to learn and confidence using AI tools suggest high self-efficacy, which may explain these low insecurity levels.

A common theme was the absence of formal firm-led AI training. Instead, participants developed their AI knowledge independently, consistent with findings

41 Ci-Jyun Liang and others, above n 26, at 18.

that employees often upskill through self-directed learning,[42] though contrasting research suggesting rising firm-sponsored workshops.[43] This lack of training, however, did not correspond with increased job insecurity, possibly due to other factors like high self-efficacy or AI familiarity. Rather than challenging prior research on the benefits of organisational support, these findings may reflect AI's early-stage adoption in New Zealand law firms, where day-to-day impact remains minimal.

Although participants did not express current job insecurity, it remains a critical aspect of employee wellbeing as AI adoption expands. Under New Zealand's Health and Safety at Work Act 2015, while job insecurity is not explicitly mentioned, the Act mandates training to protect employees from risks to health, including mental health.[44] As AI progresses, targeted legislation may be necessary, but even under current frameworks, firms are responsible for preparing employees for technological change. Participants also voiced concerns about possible job insecurity in the distant future, particularly regarding mass layoffs due to automation. Therefore, current low levels of insecurity should not be seen as permanent but part of an evolving trajectory. Future organisational policies must remain responsive as AI capabilities grow.

2. Positive Psychological Factors Mitigating Job Insecurity

Despite low job insecurity, participants acknowledged that many aspects of their roles could be automated. This aligns with prior non-empirical,[45] and empirical research suggesting junior lawyers' tasks are at risk of automation.[46] Yet, participants did not report corresponding insecurity. This suggests that certain internal psychological mechanisms – such as self-efficacy, AI knowledge, positive perceptions or "not my role" bias – may be buffering against insecurity. These factors may help junior lawyers frame AI as a challenge rather than a threat, enabling more adaptive coping and enhanced wellbeing.

(a) Self-efficacy in AI usage

Recent literature shows that self-efficacy can buffer job insecurity in the context of AI adoption, with more confident employees reporting lower insecurity.[47] Although

42 See, for example, Lili Aunimo and others "Factors affecting the adoption of AI by organizations-from the perspective of knowledge workers" in *Working Conference on Virtual Enterprises* (Springer Nature Switzerland, Cham, 2023) 467.

43 See, for example, Dubey Chandra and others "A Novel Conceptualization of AI Literacy and Empowering Employee Experience at Digital Workplace Using Generative AI and Augmented Analytics: A Survey" (2024) 20 Journal of Electrical Systems 2582.

44 The Health and Safety at Work Act 2015, s 36(3)(f).

45 See, for example, Bliss, above n 13.

46 Beebeejaun and Gunputh, above n 14, at 11.

47 Kim and others, above n 25, at 16445–16452.

not formally measured, participants consistently demonstrated confidence and competence in using AI tools – suggesting high self-efficacy, which may explain their low job insecurity.

(b) AI knowledge and understanding

Participants also showed strong understanding of LLMs, which may further explain their low job insecurity. This supports existing research showing that AI knowledge can reduce negative perceptions and encourage employees to view AI as a challenge rather than a threat.[48] Such knowledge may also promote proactive behaviours like job crafting.

(c) Positive Perceptions of AI Implementation

Participants generally viewed AI positively, expressing enthusiasm about the efficiency gains for routine tasks. This aligns with literature showing that employee perception significantly shapes responses to AI implementation – positive perceptions often lead to more favourable outcomes.[49] These attitudes may also explain the low job insecurity expressed by participants. Future research should explore which specific factors drive positive perceptions, allowing organisations to design targeted interventions that support both employee wellbeing and organisational outcomes.

3. "Not my role" bias: A novel psychological construct

Another psychological factor that may explain low job insecurity is the emergence of what this study terms the "not my role" bias. This concept builds upon previous findings which showed that HR professionals believed AI was unlikely to affect their own roles but more likely to impact their colleagues or other departments.[50] Similarly, participants in this study frequently deflected the potential impact of AI onto other roles or areas of law, suggesting that automation would affect others, but not themselves. This belief may foster a false sense of security that reduces motivation to upskill or engage with training initiatives. This has significant implications for firms. If junior lawyers assume AI will not meaningfully affect their role, they may not voluntarily engage in training, which may be particularly problematic given that voluntary training typically yields higher learning transfer than mandatory

48 Changqing He and others "Linking employees' challenge-hindrance appraisals toward AI to service performance: the influences of job crafting, job insecurity and AI knowledge" (2023) 36 International Journal of Contemporary Hospitality Management 975 at 975.

49 At 975.

50 Patrick Weber "Unrealistic optimism regarding artificial intelligence opportunities in human resource management" (2023) 19 International Journal of Knowledge Management 1 at 13.

sessions.[51] Organisations may therefore face challenges in encouraging adoption and innovation unless they address this bias directly. Further research is needed to validate "not my role" bias as a construct, but its early identification may help prevent wasted resources on ineffective training and ensure psychological wellbeing is protected as AI continues to advance.

The potential influence of this bias remains relevant even when participant assessments of AI's limits appear valid. For example, participants working in criminal or family law pointed out that LLMs are poorly suited to tasks involving emotional nuance or case-specific context. These views are supported by existing literature, which highlights LLMs' limitations in handling emotionally complex or novel legal scenarios.[52] However, acknowledging AI's current limitations does not rule out bias. The "not my role" bias involves two layers: underestimating AI's potential to affect one's own role and overestimating its impact on others. Even accurate observations about AI's limitations can coexist with misplaced confidence in personal immunity to its effects. Left unaddressed, this bias could slow the legal profession's adaptation to AI, reduce innovation and create inequities in training uptake. Junior lawyers who believe their roles are exempt from change may neglect to develop relevant AI competencies, leaving them and their firms unprepared as technology continues to evolve.

4. Junior lawyer AI tool utilisation

Participants reported low usage of AI tools in their roles compared to other industries such as IT, healthcare and manufacturing. This aligns with existing literature noting the legal profession's slower and more cautious approach to AI adoption.[53] According to participants, barriers such as privacy concerns and AI maturity limit practical implementation in many legal tasks, particularly at the junior level.

(a) AI maturity issues

Participants identified AI maturity as a major barrier to its use in legal practice, especially in areas involving complex, case-specific issues like criminal and family law. These insights align with prior research noting that while LLMs excel at pattern

51 Janos Salamon and others "The interplay between the level of voluntary participation and supervisor support on trainee motivation and transfer" (2021) 32 Human Resource Development Quarterly 459 at 459.

52 Georgios Chochlakis "The strong pull of prior knowledge in large language models and its impact on emotion recognition" (2024) 12th International Conference on Affective Computing and Intelligent Interaction arXiv preprint arXiv:2403.17125 1 at 1.

53 John Armour and Maki Sako ""AI-enabled business models in legal services: from traditional law firms to next-generation law companies?" (2020) 7 Journal of Professions and Organization 27 at 28–29.

recognition and precedent-based reasoning, they struggle in novel, emotionally nuanced or context-rich scenarios.[54]

In criminal law or family law, AI may struggle to understand the unique emotional elements and subtle contextual factors that could affect the interpretation of the case facts. For example, under New Zealand's Sentencing Act, s 27 reports require courts to consider a defendant's personal, cultural and community background.[55] This type of nuanced, human-focused analysis is beyond the scope of current LLMs, which rely heavily on historical data. Participants correctly noted that such tools would likely misinterpret – or fail to grasp – the layered meaning of these reports. In addition, LLMs can "hallucinate" when faced with limited or unfamiliar data – likely in underrepresented domains such as family or criminal law. This can lead to biased or inaccurate outputs, raising the risk of miscarriages of justice. While AI may be effective in more precedent-driven areas, its limitations must be understood and respected. Firms should be cautious of blanket AI adoption across legal disciplines and ensure usage is context-sensitive and properly monitored.

(b) Future potential and practical applications

Participants acknowledged that if current limitations are addressed, AI, particularly LLMs, has strong potential to transform the legal profession. These views reflect existing research suggesting AI can improve efficiency, accuracy and speed in legal tasks such as research and contract analysis.[56] As automation takes over repetitive or routine duties, junior lawyers may be freed to focus on more human-centric responsibilities, including ethical decision-making, interpersonal communication and navigating complex legal dynamics. This aligns with prior findings that AI can augment rather than replace, allowing employees to dedicate more time to meaningful work. Participants also saw promise in AI-powered legal research and drafting, particularly for standardised documents like contracts or wills. With access to legal databases (for example, LexisNexis or Westlaw NZ), AI could complete initial drafts rapidly – what one participant called "0 to 70 per cent very quickly" – leaving only context-specific revisions for the lawyer. For this to happen, however, collaboration between AI developers and legal content providers would be essential.

54 Chochlakis, above n 52, at 1.
55 The Sentencing Act 2002, s 27.
56 Beebeejaun and Gunputh, above n 14, at 6–13.

B. Impacts of AI on Clients

As discussed in the Efficiency and Access section (IVB2), AI has the potential to significantly benefit the legal profession. These positive outcomes are supported by the data and align with academic findings, such as improved time efficiency, reduced legal representation costs and greater access to justice.[57] However, before these benefits can be fully realised, specific barriers must first be addressed.

1. Client confidentiality issues

Participants expressed that for AI to be successfully implemented in the legal profession, privacy concerns must first be addressed. While previous literature has discussed AI-related privacy issues in general organisational contexts,[58] this study adds a legal profession-specific perspective. Confidentiality is not just a logistical concern in law – it is foundational. Participants noted that legal work often involves "confidential", "serious" or "extremely confidential" case details. Therefore, weighing innovation against confidentiality presents a particularly difficult challenge for legal professionals.

Junior lawyers inputting client information into an LLM, such as ChatGPT, would risk breaching confidentiality obligations. The complexity is heightened by the specificity and uniqueness of each legal case; even fragments of information might reveal a client's identity. Once entered, such data could inadvertently be absorbed into the model and later appear in outputs provided to other users. This becomes especially problematic in cases where legal proceedings are ongoing. For example, if a defendant's information is entered before conviction or acquittal, it could breach name suppression orders or violate the New Zealand Bill of Rights Act, which guarantees the presumption of innocence.[59]

Breaches of confidentiality may also occur unintentionally. For instance, Participant 4 highlighted how a junior lawyer might paste an email into ChatGPT and forget to remove a name. This seemingly minor slip, exacerbated by fatigue, a common issue in legal professions, would still constitute an ethical breach. Additionally, Participant 3 pointed out that ethical concerns may be consciously overridden due to intense time pressures, especially when AI offers time-saving benefits. These insights build upon recent research predicting misuse, security

57 See, for example, Alieen Nielsen and others "Building a better lawyer: Experimental evidence that artificial intelligence can increase legal work efficiency" (2024) 21 JELS 979.

58 See, for example, Anil Kumar Yadav Yanamala and others "Balancing innovation and privacy: The intersection of data protection and artificial intelligence" (2024) 15 International Journal of Machine Learning Research in Cybersecurity and Artificial Intelligence 1.

59 The New Zealand Bill of Rights Act, s 25(c).

incidents, and data privacy violations as key future risks of AI in professional settings,[60] while demonstrating how these issues can directly affect the legal field.

Given these concerns, a key question emerges: is current legislation enough to protect client confidentiality in the age of AI? In New Zealand, three main pieces of legislation currently provide such safeguards: the Privacy Act 2020, the Lawyers and Conveyancers Act 2006, and the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. The Privacy Act governs how organisations handle personal information and mandates breach reporting. The 2006 Act establishes the regulatory framework for lawyers, while the 2008 Rules impose clear standards for maintaining confidentiality. At present, these legislative protections appear sufficient. Participants' general reluctance to use AI tools on confidential matters reflects the deterrent effect of these legal obligations. However, given the rapid development of AI technology, future amendments to these laws may be necessary. AI's ever-evolving nature requires a similarly adaptive legal response – one that develops linearly alongside technological advancement.

(a) Client confidentiality issues and policy considerations

Policymakers must also avoid enacting reactionary, ill-considered laws in response to public anxiety over AI. Historically, such "knee-jerk" legislation can be costly and ineffective.[61] Instead, deliberate and thoughtful policy development is needed to ensure client protection without stifling innovation. Importantly, this discussion so far has focused primarily on the privacy side of the confidentiality–innovation balance. Any future legislation must also consider how to facilitate the responsible use of AI in law, not just how to restrict it.

Interestingly, current legal provisions already allow junior lawyers to use client data with informed consent. Rule 8.4(a) of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 permits lawyers to input client information into AI systems with the client's explicit agreement. Over time, however, public comfort with data sharing may increase. As previous literature suggests, individuals have gradually become more willing to waive privacy in exchange for convenience and efficiency.[62] This cultural shift may reduce resistance to AI in legal services, particularly if it leads to lower legal costs and faster case resolutions.

60 Mohammed Yaseer Nazeer "Algorithmic Conscience: An In-Depth Inquiry into Ethical Dilemmas in Artificial Intelligence" (2024) 8 International Journal of Research and Innovation in Social Science 725 at 725.

61 See, for example, Elisabeth Staksrud "Online grooming legislation: Knee-jerk regulation?" (2013) 28 European Journal of Communication 152.

62 See, for example, Jan Holvast "History of privacy" in *The History of Information Security* (Elsevier, Amsterdam, 2007) 737.

(b) Technological solutions to address client confidentiality issues

Rather than amending legislation, one way to balance confidentiality and innovation in the legal profession is through technological change. Current LLMs used by junior lawyers are external and public, meaning inputting client information can breach confidentiality obligations. A potential solution is for law firms to develop internal LLMs – private systems trained on firm-specific data and legal databases. These could summarise and compare cases without privacy risks, supporting efficiency while upholding ethical standards. Internal LLMs offer a viable alternative but come with trade-offs: they require manual updates to stay current and may lack access to broader legal trends. Maintaining these systems could create new roles or shift existing ones, illustrating the idea that AI may not replace jobs, but rather transform them.

2. Māori Considerations in AI Implementation

Another influence AI will have on the legal profession that must be carefully monitored is its impact on te ao Māori and tikanga, particularly the potential for cultural incongruence. This concern is supported by recent literature showing a mismatch between AI and Māori values across other domains such as education,[63] healthcare,[64] and in frameworks exploring how te ao Māori can inform AI development.[65] However, to date, no published research has addressed this issue within the legal profession, making the present study's findings particularly significant. By highlighting this incongruence, the study helps fill a critical gap and contributes to the necessary dialogue on how AI implementation could clash with Māori cultural values in law.

This knowledge is essential for informing policy and creating safeguards to prevent the misuse of AI in ways inconsistent with Māori principles. Te ao Māori and tikanga are grounded in oral traditions and cultural narratives that often extend beyond written expression. Because LLMs operate by interpreting text, they are ill-equipped to understand the cultural and historical depth inherent in Māori knowledge systems. Participants repeatedly raised this concern, and while some grey literature has alluded to this issue, the findings here offer theoretical depth by presenting empirical evidence to support those discussions.

63 See, for example, Josiah Koh and Gerson Tuazon "A proposal to include Māori perspectives in AIed" ASCILITE Publications, Australian Society for Computers in Learning in Tertiary Education 462.

64 See, for example, Vithya Yogarajan and others "Data and model bias in artificial intelligence for healthcare applications in New Zealand" (2022) 4 Frontiers in Computer Science 1.

65 Luke Munn "The five tests: designing and evaluating AI according to indigenous Māori principles" (2024) 39 AI & Society 1673.

Recent developments have recognised Māori data as taonga, or treasures, under tikanga and te ao Māori perspectives.[66] When a junior lawyer inputs Māori client data into a public LLM without appropriate safeguards or consultation, it risks stripping the client of control over their taonga. This violates art 2 of Te Tiriti o Waitangi, which guarantees tino rangatiratanga over taonga, and also breaches principles of Māori data sovereignty. Without consent, this form of data handling could be seen as a digital extension of colonisation, where Māori knowledge is extracted, appropriated and potentially exploited by technologies developed without Māori involvement or oversight.

(a) Policy gaps in protecting Māori interests

Although earlier sections of this thesis discussed how the Privacy Act 2020, the Lawyers and Conveyancers Act 2006 and the Lawyers: Conduct and Client Care Rules 2008 provide a robust framework for maintaining client confidentiality, they are insufficient to fully address Māori-specific concerns. New Zealand currently lacks AI-specific legislation, and more notably, lacks legislation that specifically protects Māori interests in the context of AI. Given the potential cultural harm if this is overlooked, the present study underscores an urgent need for policy responses that are both proactive and culturally grounded. Such a policy must be created with Māori, not simply for Māori. Developing effective protections requires avoiding Eurocentric assumptions and ensuring Māori representation in AI policymaking, whether through a dedicated working group or discussions facilitated by the Waitangi Tribunal. Doing so would align policy development with principles of partnership and participation enshrined in Te Tiriti o Waitangi.

Beyond cultural protection, the study also reveals practical concerns around access to justice. As AI is increasingly used to streamline legal work, law firms may become incentivised to prioritise cases that can be resolved more quickly using AI tools. If Māori clients require culturally appropriate practices that preclude the use of certain AI tools, firms may view these cases as less efficient and less profitable. Participants noted that this could lead to Māori clients being deprioritised or denied representation, not due to overt bias, but due to economic incentives shaped by AI integration.

This efficiency-driven disparity risks creating a two-tiered legal system: one where non-Māori clients benefit from fast, AI-assisted representation, while Māori clients either face reduced access or must accept AI-driven services that conflict with their cultural values. In effect, Māori may be forced to choose between reduced access to justice or legal services that breach tikanga and Te Tiriti principles. If

66 Waitangi Tribunal, above n 33, at 49.

unaddressed, such disparities will not only perpetuate existing inequities but also directly undermine the legal profession's obligations under Te Tiriti.

(b) Implications for Māori

An avenue to address Māori data sovereignty and the risk of Māori being denied legal representation due to AI inefficiencies is the development of a Māori Legal LLM. This tool would be created by Māori, for Māori, and used exclusively for cases involving Māori clients. Such a system would ensure that any taonga, or data, entered into the LLM remains under Māori ownership and control, thereby preserving tino rangatiratanga and aligning with Māori data sovereignty principles. By streamlining tasks specific to representing Māori clients, it would also eliminate efficiency-related disincentives, ensuring Māori are not excluded from legal services due to an inability to use generic AI tools.

This LLM could be trained specifically on te ao Māori and tikanga, avoiding the Eurocentric biases embedded in mainstream models like ChatGPT. Involving only Māori evaluators; representing diverse iwi, ages and an equal gender balance. This inclusive approach would ensure that a wide range of perspectives shape the model's outputs, enhancing its cultural sensitivity and legitimacy. A Māori Legal LLM would offer culturally congruent legal support, and potentially reduce systemic bias, such as higher prosecution rates for Māori by applying the correct cultural lens when interpreting case facts.

(c) Addressing Māori considerations in AI education

As outlined in the Te Tiriti o Waitangi section, the findings reveal a striking lack of awareness among junior lawyers about these implications. This knowledge gap may be due to the relative novelty of the topic – many participants graduated before it gained traction. For instance, Participant 4, who graduated in 2021, questioned whether Māori data was considered taonga, despite it being explicitly recognised as such recently.[67] This highlights the need to embed te ao Māori and tikanga considerations into AI education at the university level and reinforce this knowledge post-graduation. As legal influence from te ao Māori continues to grow, such as the recognition of mana in court decisions,[68] ongoing education is crucial. Legal professionals must stay informed to prevent unintended harm to Māori and uphold their obligations under Te Tiriti.

67 Waitangi Tribunal, above n 33, at 49.
68 See, for example, *Ellis v R* [2022] NZSC 114; and *Green v R* [2024] NZCA 155.

C. Limitations and Directions for Future Research

While this study provides valuable insights into AI's impact on New Zealand's junior lawyers, its findings may not be generalisable to other jurisdictions due to differences in legal systems, culture and AI integration. However, this jurisdictional focus enabled a deep exploration of New Zealand's unique legal and cultural context, including te ao Māori and tikanga, and serves as a foundation for comparative research in other regions. Additionally, due to the rapid evolution of AI technologies, especially LLMs, findings may become outdated as new tools emerge and reshape legal practice. This underscores the need for ongoing, longitudinal research into AI's effects on legal professionals, policy development and culturally responsive AI implementation, particularly for Māori, where future work should be led by Māori researchers to ensure alignment with tikanga and tino rangatiratanga.

VI. Conclusion

This study has contributed to the emerging literature on AI, the legal profession and employee experiences by exploring the lived experiences of junior lawyers navigating AI disruption in the workforce. Key findings include junior lawyers' current use of AI, their generally positive attitudes toward AI implementation, and their low levels of job insecurity – likely due to their confidence in using these tools through independent learning. Despite this confidence, participants revealed a lack of formal AI training interventions in their workplaces, which presents an important area for improvement given the proven benefits of such training in the literature.

Participants also strongly advocated for integrating AI and law into university curricula, recognising its inevitable and growing influence in the legal sector. Additionally, the study uncovered a lack of awareness among junior lawyers regarding the incongruence between AI and te ao Māori and tikanga, highlighting an urgent need for safeguards to protect Māori data sovereignty and cultural values. The findings extend existing organisational psychology models by incorporating contemporary AI-related dynamics and offer a foundation for broader research across professions. In the New Zealand context, this research contributes to the growing literature on Māori data sovereignty, offering practical implications for policymakers to preserve Māori cultural integrity in the digital age.

Practically, the study informs legal practitioners and firms about commonly automatable junior lawyer tasks, helping support job crafting and wellbeing. It also provides legal educators with a framework for developing AI-focused courses

to improve graduate employability. Culturally, the research emphasises the urgent need for culturally sensitive AI implementation, suggesting proactive strategies to prevent bias and uphold equity for underrepresented groups. As AI's role in law continues to grow, this study encourages future research into optimising AI for job crafting, exploring the interaction between AI-related job demands and resources, and developing culturally congruent tools such as a Māori Legal LLM.

Echoing New Zealand Law Society Chief Executive Katie Rusbatch's remarks, the findings reflect the revolutionary potential of AI for legal services, benefiting not just junior lawyers but also the clients they serve and society at large. However, this potential must be balanced with thoughtful training, policy development and ongoing education to mitigate ethical risks. As the legal profession evolves, it is essential that legal professionals help shape AI standards to ensure these tools enhance, rather than diminish, justice in Aotearoa.

BORDERED JUSTICE: LEGAL ERASURE AND THE PERFORMANCE OF ACCOUNTABILITY IN THE MONTARA COMMISSION OF INQUIRY

Fia Hamid-Walker*

Abstract

This article critically examines the Montara Commission of Inquiry through the lens of critical legal theory. Drawing on NVivo-coded analysis of stakeholder submissions and grounded theory method, the article reveals how the Inquiry, while formally designed to investigate Australia's worst offshore oil disaster, ultimately reinforced jurisdictional boundaries and technocratic state legitimacy. The Inquiry's exclusion of West Timorese perspectives and transboundary environmental harms is interpreted as an instance of legal bordering – a process whereby law constructs spatial, epistemic, and political limits on what can be recognised as harm. The article argues that public inquiries serve not only as mechanisms for seeking truth but also as sites of sovereign performance, where accountability is performed without recourse to structural mechanisms. By reframing the Montara Inquiry as a bordered juridical field, the article demonstrates how disaster governance under conditions of settler colonialism and neoliberalism operates to erase postcolonial suffering while reaffirming state authority. The findings call for a reevaluation of legal geography, public inquiry design, and the politics of environmental accountability in the context of an ecological crisis.

Keywords: Montara oil spill; public inquiry; disaster law; environmental justice; legal geography; jurisdiction; transboundary harm; critical legal theory; legal erasure

* Transnational Legal Advisor and Doctoral Candidate in Disaster Jurisprudence and Critical Theory at Melbourne Law School.

I. Framing the Inquiry: Law, Disaster, and the Limits of Accountability

On 21 August 2009, the Montara wellhead platform exploded in Australian-controlled waters of the Timor Sea, releasing an uncontrolled flow of oil and gas into the ocean over a 74-day period. Known as the Montara oil spill (also referred to as the Spill), it remains one of the worst offshore environmental disasters in Australia's recent history. The incident prompted the Australian Government to establish a federal public inquiry under pt 9.10A of the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth). The Montara Commission of Inquiry was endowed with the powers of a Royal Commission, tasked with investigating the cause of the incident and assessing its environmental impacts. Despite the severity and transboundary nature of the Spill, the Montara Inquiry's official Terms of Reference narrowly focused its investigation, sidelining critical questions of accountability and silencing the voices of affected communities beyond Australia's territorial boundaries.

This article argues that the Montara Commission of Inquiry functioned as a technocratic apparatus that strategically foregrounded institutional narratives of procedural adequacy while marginalising broader public discourses, particularly those emerging from Indonesia's West Timor region. While the Inquiry appeared participatory and independent, its structure and framing reveal an underlying executive logic designed to manage reputational risk, reassert control over offshore regulation, and defer political accountability. Drawing on the discourse analysis and grounded theory methods, this article examines the Inquiry's documentary archive and selected submissions to uncover how certain representations of the Spill were privileged. In contrast, others were systematically omitted or devalued.

To support this argument, the article is divided into seven parts. Part II situates the Montara Inquiry within the broader legal context of Australian public inquiries, with attention to their structure, authority, and limits, particularly as understood by international readers unfamiliar with Australian Administrative law. Part III outlines the methodological framework, which combines discourse analysis with grounded theory coding using NVivo software to identify thematic patterns in the submissions to the Montara Inquiry. Part IV presents the empirical findings, identifying the dominant themes – Environmental, Monitoring, Accountability, and Environmental Impacts – and tracking how they were differentially framed by government agencies, corporate actors, and civil society groups. Part V analyses the conflicting narratives that emerged in relation to regulatory failures, evidentiary omissions, and civil society marginalisation. Part VI critiques the political function of the Montara Commission of Inquiry, arguing that its structure precluded

meaningful engagement with transboundary harm, international accountability or the possibility of systemic reform. The article concludes in Part VII by reflecting on the implications of this silencing, particularly for affected communities in West Timor, and calls for a rethinking of inquiry design in transboundary environmental crises.

II. Legal and Institutional Context

Public inquiries in Australia are executive-appointed, quasi-administrative investigations convened to examine issues of public concern. While commonly perceived as independent, their structure and function are legally and politically shaped by the executive branch.[1] At the federal level, inquiries can be established either under the Royal Commissions Act 1902 (Cth) or specific enabling legislation, such as pt 9.10A of the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth), which authorised the Montara Commission of Inquiry.[2] Both frameworks confer significant investigatory powers: inquiries may compel testimony, subpoena documents, and convene hearings.[3] However, they do not adjudicate legal liability or issue binding decisions. Their findings are advisory, and their recommendation are implemented (or not) at the discretion of the sponsoring government.[4] Findings may, however, form the basis of civil or criminal proceedings.[5] The Montara Commission of Inquiry is not bound by evidence rules and can gather information in any manner it deems appropriate.[6]

What distinguishes Australian public inquiries from judicial proceedings is the control the executive retains over their design and conduct.[7] The Terms of Reference, the foundational instrument that delineates the inquiry's scope, are unilaterally drafted by the appointing Minister.[8] These terms define what may be examined, what questions are permissible, and crucially, what is excluded.[9] In the Montara Inquiry, for instance, the Terms of Reference were framed to focus narrowly on technical

1 George Gilligan "Royal Commissions of Inquiry" (2002) 35(3) Aust NZ J Crim 289 at 292.
2 Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth), s 780A.
3 Royal Commissions Act (Cth) 1902, ss 2–3; Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth), s 780E.
4 Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth), s 80A(1), (4).
5 Australian Law Reform Commission Royal Commissions and Official Inquiries (Discussion Paper 75, 2009) rec 16.
6 Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth), s 780C.
7 Scott Prasser *Royal Commissions and Public Inquiries in Australia* (LexisNexis, Chatswood, 2021) at 103.
8 ABC News, 'East Timor Wants Compo for Oil Spill Fallout' (5 November 2009) <www.abc.net.au>.
9 Scott Prasser *New Directions in Royal Commissions & Public Inquiries: Do We Need Them?* (Connor Court Publishing, Redlands, 2023).

causation and domestic environmental impact.[10] The framing thus foreclosed any substantive examination of transboundary harm, accountability to foreign states, or the lived experiences of affected Indonesian communities. This was not a neutral omission, but a political decision executed through the legal architecture of the inquiry itself.[11]

By contrast, public inquiries in New Zealand and the United Kingdom exhibit more substantial commitments to public engagement and broader procedural balance. In New Zealand, the Inquiries Act 2013 was introduced to modernise and depoliticise inquiry processes.[12] It introduced more explicit rules on appointment, independence, and engagement with affected communities.[13] Notably, it permits a more participatory design and more transparency in relation to submissions and evidence.[14] In the United Kingdom, inquiries established under the Inquiries Act 2005 (UK) are similarly subject to enhanced procedural safeguards, including greater independence in selecting panel members and a more precise separation between government and inquiry administration.[15] While neither jurisdiction is immune to executive influence, they provide stronger legal mechanisms for resisting narrow, executive-driven terms and for accommodating dissenting or marginalised voices.[16]

In contrast, Australian inquiries remain structurally vulnerable to executive framing, which limits their capacity to function as genuine truth-seeking exercises. In the case of the Montara Commission of Inquiry, the legal form of the Inquiry, although procedurally robust, was tightly circumscribed by its terms of reference, its single-member structure, and the exclusion of international law or regional environmental governance from its deliberative scope.[17] These choices were not accidental. They reflect a longstanding use of inquiries in Australia as instruments of reputational management and regulatory containment, rather than as a forum of

10 Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth), s 780E.

11 JD Whelen "A Response to the Royal Commission into Institutional Responses to Child Sexual Abuse in Australia" (2020) 52(14) Educational Philosophy and Theory 1458 at 1466–1469; and Matthew Mitchell "The Discursive Production of Public Inquiries: The Case of Australia's Royal Commission into Institutional Responses to Child Sexual Abuse" (2021) 17(3) Crime Media Culture 353 at 363–364.

12 Inquiries Act 2013 (NZ), s 3.

13 Section 10.

14 Rebecca McKee and Jack Parnell "Public Inquiry Reform in New Zealand" (14 April 2025) Institute for Government <www.instituteforgovernment.org.uk>.

15 Inquiries Act 2005 (UK), s 6.

16 Emma Ireton "Public Inquiries: Irreconcilable Interests and the Importance of Managing Expectations" (2023) 45(3) Journal of Social Welfare and Family Law 212–233 at 225; see also House of Commons Library (UK), *Statutory Public Inquiries: The Inquiries Act 2005* (Research Briefing, 22 July 2025) <https://commonslibrary.parliament.uk>.

17 J Rochette and G Wright "Brief for GSDR 2015: Strengthening the International Regulation of Offshore Oil and Gas Activities" UN Sustainable Development Knowledge Platform (2015) <https://sustainabledevelopment.un.org>; see also Australian Government *Final Government Response to the Report of the Montara Commission of Inquiry* (Canberra, 2011).

public reckoning.[18] The scale of the oil spill represented a government scandal that compelled immediate action to establish an Inquiry ahead of the Senate Inquiry. Setting up the Inquiry or a Senate Inquiry served as a political tactic. Typically, the goals of public inquiries led by executives are often depoliticised.[19]

Understanding the Montara Inquiry involves not just examining its findings but also questioning how it was legally constructed to highlight only certain aspects. This disconnection between the Inquiry's formal appearance of independence and its inherent limitations forms the basis for this article's critical examination.

III. Methodological Framework

This article adopts a qualitative, interpretive methodology that draws on the Grounded Theory Method and critical discourse analysis to interrogate how the Montara Commission of Inquiry structured knowledge, responsibility and visibility in the aftermath of the oil spill. While the Grounded Theory Method originated in sociology,[20] its application here is jurisprudential: to trace the emergent logics and regulatory narratives that shaped the inquiry's official record.[21] By coding themes inductively across multiple documentary sources, including the Inquiry's Report, submissions by governments, government agencies, industry actors and NGOs, this article identifies patterns of emphasis, exclusion and rhetorical construction that shaped the public record.[22] The Grounded Theory Method is not meant to be executed mechanically, nor to include all the steps used in the process. Often, one or more steps overlapped. It was a data analytical process that needed to be continually revisited as the analysis progressed.[23]

The Grounded Theory Method is a method of inductive reasoning that allows themes to emerge from the data itself, rather than imposing an *a priori* theoretical framework.[24] This approach was selected to avoid prematurely framing the analysis through predetermined legal categories or assumptions about regulatory

18 Prasser, above n 7, at 103.

19 Dominic Elliott and Martina McGuinness "Public Inquiry: Panacea or Placebo?" (2002) 10 Journal of Contingencies and Crisis Management 14 at 16–17.

20 Cathy Urquhart *Grounded Theory for Qualitative Research: A Practical Guide* (Sage, Thousand Oaks, 2013) at 5–13.

21 Audrey Plan "Taking Law Seriously: The Challenges of Law as Research Data in Socio-Legal Scholarship" (2024) 6(3) Law, Technology and Humans 46 at 48.

22 Janice M Morse and others *Developing Grounded Theory: The Second Generation Revisited* (2nd ed, Routledge, Abingdon, 2021) at 12.

23 See discussion of challenges of coding legal research in Plan, above n 21, at 48–54.

24 Juliet Corbin and Anselm Strauss *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (ebook ed, SAGE, Thousand Oaks, 2008) at ch 5.

failure.[25] Instead, GTM facilitates the mapping of contested meanings, such as "accountability", "environmental risk" or "public interest", as they were variously deployed by actors involved in the Inquiry process.[26] This enables an analysis of how these terms were mobilised not simply as neutral descriptors, but as normative tools in the struggle over how the Montara oil spill would be understood.[27]

The use of NVivo software supported this analysis by enabling systematic coding across a diverse body of texts, including over 800 pages of submissions and the 174-page final report.[28] The Inquiry received more than 50 written submissions; 190 exhibited documents from the petroleum industry, government agencies, environmental scientists and engineers, academics, civil society organisations, and individuals; as well as 65 documents referred to in the Inquiry's report and hearing transcripts. A number of submissions were redacted or not made public.[29] The software was used to identify frequency and clustering of terms, track discursive shifts between actors and surface contradictions or silences within and across institutional voices. For instance, it allowed a comparative view of how "accountability" was invoked by civil society groups, versus how government agencies or corporate actors deflected it.

This combination of grounded theory method and critical discourse analysis does not claim objectivity in a positive sense;[30] rather, it reveals the ways in which legal and bureaucratic processes operate as technologies of power.[31] In doing so, the method foregrounds the symbolic violence of legal silencing, that is, how the form and function of public inquiries may produce legal truth not merely by what is said, but by what is rendered unsayable.[32] By foregrounding these analytical dimensions, this article diverges from conventional legal doctrinal approaches. It situates itself

25 N Aarts, M van Lieshout and C van Woerkum "Competing Claims in Public Space: The Construction of Frames in Different Relational Contexts" in RG Rogan, WA Donohue and S Kaufman (eds) *Framing Matters: Perspectives on Negotiation Research and Practice in Communication* (Peter Lang, Berlin, 2011) 234 at 239–247; R Entman "Framing: Toward Clarification of a Fractured Paradigm" (1993) 43(4) Journal of Communication 51 at 53–55.

26 N Phillips and C Hardy *Discourse Analysis: Investigating Processes of Social Construction* (Sage, Thousand Oaks, 2002) (Qualitative Research Methods Series, vol 50).

27 N Fairclough and R Wodak "Critical Discourse Analysis" in TA van Dijk (ed) *Discourse as Social Interaction:* (Sage, London, 1997) vol 1 277.

28 Pat Bazeley and Kristi Jackson *Qualitative Data Analysis with NVivo* (2nd ed, Sage, Thousand Oaks, 2013).

29 Department of Industry, Science and Resources (Cth), *Montara Commission of Inquiry* (Australian Government, 2010) <www.industry.gov.au>.

30 Kathy Charmaz *Constructing Grounded Theory: A Practical Guide through Qualitative Analysis* (Sage, Thousand Oaks, 2006).

31 Stuart Hall *Representation: Cultural Representations and Signifying Practices* (Sage, London 1997); N Phillips and C Hardy *Discourse Analysis: Investigating Processes of Social Construction* (Sage, Thousand Oaks, 2002).

32 Pierre Bourdieu "The Force of Law: Toward a Sociology of the Juridical Field" (1987) 38 Hastings LJ 805.

within a critical legal tradition that is attentive to the performativity of law and the politics of evidence.[33] The Montara Commission of Inquiry was not analysed simply as a forum for fact-finding, but as a site of knowledge production, boundary-making and erasure.[34]

Critical discourse analysis was used to examine how institutional actors constructed meaning through language in the Montara Inquiry. Critical discourse analysis, as developed by scholars such as Fairclough and van Dijk, approaches discourse as a social practice shaped by power relations, ideology and institutional positioning.[35] This method enables a deeper analysis of how key actors, such as PTT Exploration and Production Australasia (Ashmore Cartier) Pty Ltd (PTTEP-AA), the Department of the Environment, Water, Heritage and the Arts (Australia) (DEWHA) and West Timor Care Foundation (WTCF), strategically mobilised narratives of responsibility, risk and accountability. Their submissions were chosen because their content encapsulated the main characteristics of several other submissions, making them broadly representative of the larger body of evidence. It was also not feasible to review every submission in equal detail. By coding submissions in NVivo and thematically analysing them through a critical discourse analysis lens, this article reveals how certain narratives were legitimised while others were marginalised or rendered unintelligible. This discursive stratification is not simply rhetorical; it reflects and reproduces deeper structures of legal exclusion, epistemic authority and sovereign control.[36] Critical discourse analysis thus complements the empirical coding by foregrounding the politics of language within the juridical field of inquiry, enabling a critical engagement with how law itself becomes a medium of bordered knowledge production.[37]

IV. Empirical Findings: Foregrounding, Silencing, and the Politics of Inquiry Discourse

The qualitative analysis of the Montara Commission of Inquiry's documentary collection identified three primary themes: Environmental Monitoring,

33 See, for example, SS Silbey and A Sarat "Critical Traditions in Law and Society Research" (1987) 21(1) Law and Society Review 165.

34 M Foucault *The Archaeology of Knowledge* (Routledge, Abingdon, 1989).

35 Norman Fairclough *Discourse and Social Change* (Polity Press, Cambridge, 1992); Fairclough and Wodak, above n 27.

36 Mark Cousins and Athar Hussain *Michel Foucault* (Macmillan, New York 1984).

37 Norman Fairclough *Critical Discourse Analysis: The Critical Study of Language* (2nd ed, Routledge, Abingdon, 2010).

Accountability and Environmental Impacts. These themes were not presented neutrally; instead, they were framed differently by various institutional actors such as government agencies, corporations and civil society organisations based on their interests and narrative approaches. This section outlines those findings, highlighting how specific portrayals of the oil spill were emphasised, while others, especially those concerning transboundary harm and the suffering of West Timorese people, were systematically sidelined. This empirical analysis relies on the qualitative coding of submissions to the Montara Inquiry, using the grounded theory method and critical discourse analysis, supported by NVivo 12.

Submissions included those from government agencies such as the Australian Maritime Safety Authority (AMSA) and the Department of Environment and Water (DEWHA), the corporate sector, PTTEP-AA and the Australian Marine Oil Spill Centre (AMOSC), as well as civil society organisations, including the Worldwide Fund for Nature (WWF) and the West Timor Care Foundation (WTCF). Coding was performed on documents related to ToR #1 (which pertains to the cause of the oil Spill) and ToR #7 (which discusses environmental impacts). This process revealed the same three dominant themes: Environmental Monitoring, Accountability and Environmental Impacts. Tables 1 and 2 give an overview of the representations that were foregrounded in the documentation of the oil spill.

Column 1: Themes	Column 2: Files	Column 3: References
Accountability	6	33
Human Error	1	6
Operator Negligence, Deficiencies	5	20
Responsibility	3	5
Coordination	1	2
Governance	2	2
Management System	2	10
Logistics Management	1	1
Well Construction	2	5
Risk Assessment	1	1

Table 1: Nodes from Term of Reference #1

Column 1: Themes	Column 2: Files	Column 3: References
Accountability	8	31
Conflict of Interest	3	3
Economic damage	1	2
Environmental Impacts	8	15
Environmental Monitoring	7	35
Monitoring Adequacy	2	6
Monitoring Agreement	3	5
Operational Monitoring	5	8
Scientific Monitoring	4	7
Environmental Protection	2	2
Insurance Arrangement	1	1
Marine Bioregional Planning	1	3
Operational Effectiveness	1	3
Risk Assessment	1	2
Scientific Evidence	1	3

Table 2: Nodes from Term of Reference #7

The data were then analysed in two main clusters aligned with the Inquiry's Terms of Reference. The table below presents the most referenced themes.

Actor	Dominant Theme	Narrative Frame
PTTEP-AA	Accountability	Regulatory compliance and technical error
DEWHA	Environmental Monitoring	Science-led collaboration, state legitimacy
AMOSC	Operational Readiness	Industry responsiveness, de-politicised function
WWF	Environmental Impacts	Gaps in monitoring, transboundary concern
WTCF	Accountability, Impacts	West Timor's exclusion, state neglect

Table 3: Institutional Contrasts in Narrative Construction

These themes were strategically mobilised; foregrounded by institutional actors seeking to assert technical competence, shift liability or challenge the Inquiry's framing.[38] Civil society groups were systematically sidelined in the final report, despite raising valid critiques and presenting transboundary concerns. These contrasts reveal a discursive hierarchy: government and corporate actors dominated the legal register, invoking technical expertise and procedural propriety.[39] By contrast, civil society submissions, particularly those from WTCF, invoked moral, legal and transnational concerns that fell outside the Inquiry's bounded logic.[40]

Across the Montara Commission of Inquiry's materials, references to "environmental monitoring" were primarily deployed by government agencies (notably DEWHA) and the operating company, PTTEP-AA. These actors framed the oil spill as a regulatory learning opportunity, emphasising post-incident monitoring efforts and the need to strengthen safety protocols. For instance, DEWHA described itself as a "faultless, accountable agency" that had followed appropriate procedures.[41] At the same time, PTTEP-AA focused on its compliance with the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth) and highlighted its post-spill remediation activities.[42]

However, these representations did not take into account the limited geographical and temporal scope of environmental monitoring. The assessments were restricted to Australia's maritime zones and concluded soon after the well was sealed. Submissions from the Worldwide Fund for Nature (WWF) and the West Timor Care Foundation (WTCF) highlighted that there was no significant effort to evaluate ecological impacts beyond Australian waters, despite ocean currents carrying contaminants towards Indonesian maritime areas.[43] WWF explicitly urged the Inquiry to obtain relevant data on the Spill's effects in Indonesian waters, but this recommendation was omitted from the Inquiry's final report.[44] While the

38 Barbara Gray "Framing of Environmental Disputes" in RJ Lewicki, B Gray and M Elliott (eds) *Making Sense of Intractable Environmental Conflicts: Frames and Cases* (Island Press, Washington DC, 2003) at 20–23.

39 See, for example, Richard Hindmarsh and Anne Parkinson "The Public Inquiry as a Contested Political Technology: GM Crop Moratorium Reviews in Australia" (2012) 22(2) Environmental Politics 293.

40 All submissions can be accessed at: Department of Industry, Science and Resources "Montara Commission of Inquiry: Submissions" <https://consult.industry.gov.au>.

41 Australian Government Department of the Environment, Water, Heritage and the Arts "Submission No 35 to the Montara Commission of Inquiry" (17 April 2019) <https://.consult.industry.gov.au> at 51.

42 PTTEP Australasia (Ashmore Cartier) "Submission No 20 to the Montara Commission of Inquiry" (16 April 2019) <https://consult.industry.gov.au> at 1.

43 WWF Australia "Submission No 37 to the Montara Commission of Inquiry" (17 April 2019) <https://consult.industry.gov.au> at 23–27.

44 Department of Industry, Science and Resources *Montara Commission of Inquiry: Final Report* <www.industry.gov.au> at 343–350.

absence of such crucial information indicates a failure in accountability by both Governments (Indonesia and Australia), it may also be interpreted as a strategy to safeguard the institutional interests of actors.[45] The discursive strategy of government and corporate actors thus foregrounded technocratic control and institutional legitimacy, while obscuring questions of geographic accountability and long-term ecological harm. Environmental monitoring was framed as a closed regulatory cycle rather than a site of transboundary responsibility.[46]

The theme of accountability was extensively debated in the submissions to the Inquiry. Government agencies and PTTEP-AA framed accountability in terms of regulatory reform and proactive risk management. For example, PTTEP-AA's submission acknowledged procedural failures but attributed them to systemic gaps in approval processes, effectively shifting responsibility to the Australian Government.[47] Meanwhile, AMOSC, the oil industry's emergency response body, emphasised its preparedness and downplayed any shortcomings.[48]

By contrast, WTCF and other civil society organisations framed accountability as a matter of structural injustice and institutional indifference. WTCF accused both PTTEP-AA and the Australian Government of neglecting the rights of Indonesian fishing communities affected by the contamination of marine ecosystems.[49] They argued that the Inquiry actively excluded West Timorese voices and that the Terms of Reference effectively prevented any consideration of cross-border harm. These concerns were heightened by the fact that neither the Indonesian Government nor the affected Timorese communities were allowed to submit formal evidence, raising serious concerns about procedural fairness and the legitimacy of representation.[50]

Notably, the Inquiry's final report overlooked these submissions by failing to include any discussion of transboundary environmental damages resulting from the oil spill in either the final report or the findings.[51] This finding exemplifies what Baxi calls the epistemology of state indifference, where the absence of evidence is used not as a prompt for further investigation but as justification for inaction.[52]

45 Peter McCawley "Governance in Indonesia: Some Comments" (Asian Development Bank Institute, Tokyo, 2005) <www.adb.org>.

46 Aarts, van Lieshout and van Woerkum, above n 25, at 237–239.

47 PTTEP Australasia (Ashmore Cartier), above n 41, at 11.

48 Australian Marine Oil Spill Centre "Submission No 5 to the Montara Commission of Inquiry" (16 April 2019) <https://consult.industry.gov.au> at 11.

49 R Ryan "Class Actions: The Montara Oil Spill Class Action – Time Extended for Indonesian Seaweed Farmers" (2018) (42) Law Society of NSW Journal 84 at 84–86.

50 West Timor Care Foundation "Submission No 38 to the Montara Commission of Inquiry" (17 April 2019) <https://consult.industry.gov.au>.

51 Department of Industry, Science and Resources, above n 43, at 343–350.

52 Upendra Baxi and Indian Law Institute *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case* (NM Tripathi, Mumbai, 1986) at 694.

The environmental impact was the least developed theme in terms of empirical detail. PTTEP-AA and DEWHA essentially regarded the oil spill as a contained event with short-term consequences. DEWHA's Environmental Monitoring Plan (EMP) concentrated on Australian waters, and its findings were utilised to support the claim that the environment had "substantially recovered" within a year of the incident.[53] These representations invoked closure, both ecological and political, and reinforced the narrative that the regulatory system had responded effectively to the issue.[54]

Civil society submissions, however, contested this closure. WTCF insisted that the EMP neglected to consider the cumulative or delayed effects of oil exposure on marine biodiversity, particularly in Indonesian fisheries. They also questioned the legitimacy of a monitoring program conceived and funded by the same company responsible for the Spill. The Montara Commission of Inquiry did not address these concerns comprehensively, indicating an institutional reluctance to broaden the temporal and spatial scope of environmental damage.[55] The Montara Commission of Inquiry's findings, therefore, suggest that the Inquiry's discursive architecture was designed to contain the event, both geographically and temporally. By framing the Montara oil spill as a bounded incident with clear parameters, the Inquiry sidestepped engaging with broader structural, geopolitical and ecological implications.[56]

The repetition and institutional convergence around selected themes served to narrow the scope of legally recognisable harm. This aligns with what Bourdieu describes as the juridical field's "symbolic violence" – a system wherein certain representations gain legal currency while others are rendered invisible.[57] Here, the Montara Inquiry's legal structure and discursive apparatus collectively produced a bordered environmental narrative, one that erased the possibility of transboundary justice. To sum up, civil society submissions were cited only selectively and often stripped of their critical edge. The NVivo data thus support the article's broader claim: that the Montara Commission of Inquiry's discursive practices operated not only to produce factual findings, but also to regulate visibility, responsibility and the boundaries of legal recognition.

53 Australian Government Department of the Environment, Water, Heritage and the Arts, above n 40, at 30.

54 Gray, above n 37, at 30–34.

55 West Timor Care Foundation, above n 49.

56 John H Knox "The Myth and Reality of Transboundary Environmental Impact Assessment" (2002) 96(2) AJIL 291 at 295.

57 Pierre Bourdieu "The Force of Law: Toward a Sociology of the Juridical Field" (1987) 38 Hastings LJ 805 at 812.

V. Legal and Theoretical Analysis: Inquiries, Borders, and the Technologies of Legal Erasure

The empirical findings demonstrate not only institutional bias but also a legal mechanism of bordering. Despite its procedural formality and investigatory powers, the Montara Commission of Inquiry operated as a constrained realm of legal visibility, reinforcing territorial sovereignty, limiting accountability, and disregarding ecological suffering that spanned borders. This section utilises critical legal theory and the sociology of law to explore these dynamics. Essentially, the Montara Inquiry illustrates what Baxi refers to as the "politics of adjudicative silence", where the perception of law's neutrality is maintained by excluding disruptive claims, particularly those from the fringes of the legal framework.[58] The Montara Inquiry's decision to disregard submissions from Indonesian stakeholders, or to probe transboundary effects, was not merely a bureaucratic error; instead, it was a jurisdictional manoeuvre, one that emphasised the spatial and epistemic boundaries of Australia's legal obligations.[59]

The Inquiry's omission of transboundary environmental effects highlights a fundamental aspect of Australian legal thought: the normalisation of territoriality as a boundary for legal accountability.[60] The Terms of Reference, set unilaterally by the Minister for Resources and Energy, intentionally excluded cross-border legal considerations and responsibilities.[61] This resulted in what I term "a bordered narrative of responsibility", in which the ecological harm and socio-economic effects faced by West Timorese communities were depoliticised and redefined as lacking scientific evidence or relevant jurisdiction.[62] The government's neglect to initiate or suggest a transboundary environmental impact assessment (EIA), despite the Spill clearly entering Indonesian waters, highlights a legal oversight that emphasises the precedence of national political interests over ecological concerns.[63]

58 Upendra Baxi "The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In] Justice" in S Verma and Kusum (eds) *The Indian Supreme Court: Fifty Years Later* (OUP, Oxford, 2000) 156–209 at 173.

59 OD Thomas, C Pennell and M Tudor "Making Sense of State Violence: Understanding Public Inquiries as Political Devices" (2024) 10(3) Critical Military Studies 249 at 257.

60 See Richard Marles, Minister for Defence (Australia) "Securing Australia's Sovereignty" (statement, 9 February 2023).

61 Simon Marsden "Regulatory Reform of Australia's Offshore Oil and Gas Sector after the Montara Commission of Inquiry: What About Transboundary Environmental Impact Assessment?" (2013) (1) Flinders Law Journal 41.

62 Jae Sundaram "Offshore Oil Pollution Damage: In Pursuit of a Uniform International Civil Liability Regime" (2016) 28 Denning LJ 66.

63 Elliott and McGuinness, above n 19, at 16–17.

In the Montara case, the Terms of Reference emerged as the primary instrument for containment. Established by the Executive, the Terms of Reference specified what could be legally articulated, scrutinised and recognised.[64] This framework aligns with Bourdieu's perception of the juridical field, which operates by regulating permissible discourse through "structured and structuring structures".[65] The Inquiry's dismissal of cross-border claims, contrary to the empirical evidence provided by WWF and WTCF, indicates that it functions not as an impartial forum, but as a technical extension of state rationality in its relations with other nations.[66]

Critical legal scholarship has consistently maintained that colonial continuities endure in transnational legal forums by marginalising the experiences of the Global South and epistemologies.[67] Public inquiries, such as Montara, serve as domestic reflections of this logic. By assuming that harm stops at maritime boundaries and dismissing foreign narratives as legally irrelevant, the Montara Inquiry reinforced a Eurocentric logic of territoriality, which starkly contradicts the ecological reality of oceans' spillover.[68]

The Inquiry's perspective on "accountability" highlights its performative role instead of a remedial one. The NVivo data demonstrate that government and industry representatives primarily referenced accountability in procedural or managerial contexts, neglecting any framework of reparative justice. This rhetorical use of accountability, devoid of structural impact, illustrates the concept of the evolution of legal terminology into "governance speak," marking a transition from rights and responsibilities to best practices and standards.[69] Importantly, the Inquiry's denial of foreign submissions, cited under the Royal Commissions Act 1902 (Cth), conflicts with its assertion of public engagement.[70] The law does not specify the admissibility of foreign governments or non-citizens, indicating that exclusion arises from discretionary decisions rather than a statutory requirement. This gap aligns with the concept of "structural bias", where legal systems seem neutral on the surface but are internally influenced by racial and geopolitical factors influenced.[71]

64 Sabra Lane "Minister Releases Montara Findings" (The World Today programme, ABC, 25 November 2009) <www.abc.net.au>.

65 Bourdieu, above n 56, at 807.

66 S DeCanio "Introduction: Rationality and the State in International Relations" (2024) 36(4) Critical Review 409 at 414.

67 Bhupinder S Chimni "The Past, Present and Future of International Law: A Critical Third World Approach" (2007) 8(2) MJIL 499 at 507.

68 See, for example CM Roberts and others "Effects of Marine Reserves on Adjacent Fisheries" (2001) 294(5548) Science 1920.

69 David Kennedy "The Mystery of Global Governance" (2008) 34(3) Ohio NUL Rev 827 at 859.

70 Royal Commissions Act 1902 (Cth) s 7A.

71 Makau Mutua *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press, 2002) ch 6, 155.

The Montara Inquiry not only failed to provide justice to West Timorese communities; it also contributed to their legal erasure. The lack of transboundary environmental impact assessments, the refusal to monitor Indonesian waters and the omission of Indonesian civil society voices created a scenario of legal oblivion, where suffering is made invisible not through ignorance, but by institutional neglect and design.[72] This scenario raises questions about the liberal assumption that public inquiries are inherently progressive and participatory. As critical legal theory suggests, the procedural framework of legal institutions in settler-colonial and postcolonial countries often masks deeper acts of violence and denial of state-building.[73] In this context, the Montara Inquiry served more as a sovereign performance than a means for uncovering truth, reinforcing Australia's regulatory legitimacy while shifting environmental burdens onto those least capable of opposing them.

A prominent example of legal silencing is the sidelining of "Human Impact" in the submissions. While this issue was raised in civil society submissions, including WTCF's documentation of economic losses and health concerns in West Timor, it was merely classified in NVivo as a sub-theme under "Environmental Impacts", without substantive attention in the Inquiry's conclusions. This neglect of human suffering reflects a broader trend: technical expertise often takes precedence over lived experiences. The Montara Inquiry significantly depended on data produced or financed by the very agencies under examination, namely PTTEP-AA and DEWHA. As a result, ecological knowledge was leveraged to support state-aligned narratives, while alternative viewpoints were excluded via procedural and epistemic frameworks that served as gatekeepers.[74]

While the Inquiry's report emphasised the need for legislative measures to align with EPBC Act approval, it overlooked the crucial requirement for a transboundary Environmental Impact Assessment in the offshore drilling approval process. According to international law, signatory nations must: (1) prevent transboundary pollution; (2) ensure their actions do not negatively impact environments outside their territorial boundaries; and (3) conduct a transboundary EIA for projects that could lead to such effects.[75] Although Indonesia and Australia have ratified

72 Chimni, above n 66, at 507.

73 Sundhya Pahuja *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, Cambridge, 2011) ch 3, 44.

74 Teresa Kramarz and Susan Park "Accountability in Global Environmental Governance: A Meaningful Tool for Action?" (2016) 16(2) Global Environmental Politics 1 at 1.

75 Knox, above n 55, at 291.

multiple bilateral agreements regarding their maritime boundaries, none of them specifically address transboundary maritime issues of pollution.[76]

The discussion of transboundary EIA should have been included in the Inquiry, as it was evident, supported by Government submissions, that the oil spill reached Indonesian waters even before the Inquiry commenced. Therefore, it is reasonable to assume that it would impact the communities in the coastal region. However, any transboundary EIA agreement, even if established between Indonesia and Australia, is inherently political rather than legal. This implies that the details of such transboundary EIA could be subject to negotiations that balance environmental protection with other priorities.[77] The AMSA's action in notifying the Government of Indonesia about the Spill was a goodwill gesture indicating the possibility of a transboundary EIA agreement between the two nations.[78] The effectiveness of this agreement, irrespective of its weaknesses, is secondary; what matters is its existence in the Indo-Pacific region, which is characterised by intricate maritime boundaries involving multiple actors that continually dispute these boundaries.[79]

While there is no transboundary EIA agreement in place, a transboundary water pollution liability agreement operates within the domestic legal system.[80] For example, the victims of the Deepwater Horizon oil spill received compensation under the Oil Pollution Act of 1990.[81] Similarly, the West Timorese seaweed farmers, who suffered due to the Montara oil spill in Australia, have been successfully pursuing compensation.[82] Pursuing a civil class action in an Indonesian court might be feasible.[83] Nonetheless, I argue that seaweed farmers are more likely to achieve justice and fair compensation in an Australian court compared to an Indonesian one. For instance, in 2017, Indonesia's Ministry of Environment and Forestry initiated a lawsuit against PTTEP-AA and its parent companies in the Central Jakarta District Court, seeking damages for the environmental damage caused by the 2009 spill.

However, the case was retracted due to procedural errors, mainly the incorrect naming of the defendants, a critical concern under Indonesian civil procedure law. The Government expressed intentions to refile the case but has yet to do so to

76 Department of Foreign Affairs and Trade *Plan of Action for the Indonesia–Australia Comprehensive Strategic Partnership (2020–2024)* (2019) <www.dfat.gov.au>.

77 Knox, above n 55, at 294–296.

78 Australian Marine Safety Authority "Submission No 23 to the Montara Commission of Inquiry" at 18 <https://consult.industry.gov.au>.

79 Marles, above n 59.

80 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 391 allows the environment minister to consider the impacts of Australian projects overseas, but this is discretionary and rarely operationalised in transboundary terms.

81 Sundaram, above n 61, at 108.

82 *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd* [2023] FCA 242.

83 Iman Prihandono and Esty Hayu Dewanti RK "Litigating Cross-Border Environmental Dispute in Indonesian Civil Court: The Montara Case" (2015) 5(1) Indonesia Law Review 14 at 14–32.

date.[84] There are two clear advantages to pursuing this class action in an Australian court: 1) West Timorese seaweed farmers potentially stand to gain higher financial compensation; and 2) an Australian court's decision could establish a new precedent, encouraging compliance with transboundary protocols and ideally facilitating the establishment of a transboundary EIA agreement with neighbouring countries. Faced with these obstacles, Indonesian seaweed farmers took legal action in the Australian Federal Court, culminating in a significant victory. In 2021, the Court determined that PTTEP-AA had a duty of care to the farmers and had violated it, causing harm to their seaweed crops. This ruling led to a settlement in 2023, with PTTEP agreeing to pay $192.5 million in compensation to over 15,000 affected farmers.[85]

A central issue discussed in the Inquiry was the nuanced endorsement of Public-Private Partnerships (PPPs) in the offshore oil and gas sector. As noted earlier, the Montara Inquiry encouraged a closer collaboration between the Government and the Oil and Gas Industry. Although this backing was not formalised as a recommendation, the Government's Final Report on the implementation of the Recommendations distinctly conveyed a desire to collaborate with the industry in executing the Inquiry's findings and recommendations.[86] The Australian Government aimed to convince the Montara Inquiry, and consequently the public, that they could trust the collaboration between the Government and the Industry, ensuring that all regulations, contingency plans, technologies, resources and governance structures were established in case a similar event arose in the future.[87]

While the term 'PPPs' might be absent from the Inquiry documents, its fundamental presence is evident throughout. In contrast to the United States, which embraces private sector engagement, Australia is gradually shifting towards this model. A notable example of this transition is the implementation of a 'managerialism' approach designed to boost government accountability. Managerialism involves a combination of processes and values primarily shaped by private sector practices, representing an alternative method for providing public services.[88] Over the years, Australia has developed and broadened its judicial and

84 Richard Li "Indonesian Government Sues PTTEP over Montara Oil Spill" Legal One Global (31 May 2023) <www.legaloneglobal.com>.

85 *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7)* [2021] FCA 237.

86 Department of Industry, Science and Resources, above n 43, at 343–350.

87 Australian Government *Report on the Implementation of the Recommendations from the Montara Commission of Inquiry* (September 2017) <www.industry.gov.au>.

88 Arie Freiberg "Managerialism in Australian Criminal Justice: RIP for KPIs?" (2005) 31(1) Monash University Law Review 12 at 13–18.

public service accountability and performance management capabilities.[89] This shift towards a managerial perspective was evident in the emphasis on Accountability in the Montara Inquiry. This was seen in the selection of submissions and expert opinions included in the Montara Inquiry Report and was ultimately reiterated in the Government's Final Report on Implementing Recommendations.[90] The Inquiry's support for PPP advocates is not a new phenomenon in Australia. In 2007, the pro-genetically modified development sector in New South Wales and Victoria was permitted to present its argument, resulting in outcomes that benefited the commercial interests of agricultural biotechnology in Australia.[91]

Moreover, the Montara Inquiry's exclusionary approach was further complicated by a significant silence: the Government of Indonesia did not submit evidence or assist the West Timor Care Foundation (WTCF) in its efforts. This lack of engagement should not be viewed as indifference; instead, it highlights the structural imbalances inherent in postcolonial governance and regional diplomacy. Three interrelated factors contribute to this institutional silence. First, a history of diplomatic deference has shaped the Australia–Indonesia relationship, particularly in matters of resource collaboration and maritime issues sovereignty.[92] The Indonesian government's critique of Australia's legal management of Montara might jeopardise broader bilateral interests, especially amidst growing trade and (in) security relations.[93] Second, West Timor's internal marginalisation as a peripheral area within Jakarta's centralised developmental regime silenced local voices.[94] The ecological vulnerability of West Timor, historically linked to military oppression and developmental neglect, continues to be institutionally overlooked within Indonesia's national environmental agenda.[95] Third, the lack of clarity regarding foreign involvement in Australian public inquiries might have further deterred intervention. The Royal Commissions Act 1902 (Cth) does not provide standing for foreign states or their citizens, which leaves participation up to the discretion of the

89 See, for example David Kinley "Governmental Accountability in Australia and the United Kingdom: A Conceptual Analysis of the Role of Non-Parliamentary Institutions and Devices" (1995) 18(2) UNSWLJ 409.

90 Australian Government, above n 86.

91 Richard Hindmarsh and Anne Parkinson "The Public Inquiry as a Contested Political Technology: GM Crop Moratorium Reviews in Australia" (2012) 22(2) Environmental Politics 293.

92 Senia Febrica "Securing the Sulu–Sulawesi Seas from Maritime Terrorism: A Troublesome Cooperation?" (2014) 8(3) Perspectives on Terrorism 64 at 65.

93 Mark Beeson, Alan Bloomfield and Wahyu Wicaksana "Unlikely Allies? Australia, Indonesia and the Strategic Cultures of Middle Powers" (2021) 17(2) Asian Security 178.

94 Y Tjoe "Decentralization and Poverty Reduction in Indonesia: The Case of East Nusa Tenggara (NTT)" in Moazzem Hossain, Malcolm McIntosh and Yasmin D Luximon (eds) *The Asian Century, Sustainable Growth and Climate Change* (Edward Elgar Publishing, Cheltenham2013) ch 8.

95 Tjoe, above n 93; and also see G Pauker "The Role of the Military in Indonesia" in John J Johnson (ed) *The Role of the Military in Underdeveloped Countries* (Princeton University Press, Princeton, 1962) 185–230.

Inquiry.[96] The discretionary power, along with the geopolitical imbalance between Australia and Indonesia, effectively acted as an unofficial barrier to regional accountability.

From a critical legal theory perspective, the Indonesian state's silence reflects the Inquiry's bounded logic: both uphold the denial of postcolonial harm through procedural neglect. The politics of absence – where affected states face structural disincentives against asserting claims – underscore how Global South participants are silenced in legal processes that prioritise diplomatic manoeuvring over transboundary justice. The Montara Inquiry, examined through critical legal theory and supported by NVivo's empirical findings, should not be seen simply as an administrative failure. Instead, it serves as a discursive strategy – an official performance that manages a crisis, reaffirms sovereign authority, and conceals uncomfortable truths about postcolonial harm and ecological violence. Through its design, methodology, and outcomes, the Inquiry demonstrates how legal systems enable erasure masquerading as independence, while marginalising the suffering of affected communities and rendering that suffering legally incomprehensible.

VI. Discussion: Rethinking Inquiry, Responsibility, and Legal Geography

The Montara Inquiry presents a paradox: a legal process ostensibly aimed at promoting public accountability ultimately created a restricted, technocratic narrative of harm. These narrative marginalised voices, overlooked human suffering and reinforced the legitimacy of the states. Such a paradox calls for a more thorough examination of not just the design of the inquiry but also the legal frameworks that determine how environmental harm can be expressed, addressed and compensated. This discussion situates the Inquiry in a wider context of jurisdictional constraints, settler-colonial/postcolonial governance and legal narratives of silence, with implications for both Australian legal practices and international legal thought.

In theory, public inquiries are intended to serve as independent and transparent methods for uncovering facts and gaining insights within institutions. However, in practice, they are significantly swayed by directives imposed by executives, discretionary procedural rules, and epistemic filters.[97] The Montara Inquiry demonstrated that the Terms of Reference not only organised the inquiry topics but also pre-emptively ruled out transboundary claims, delineating what could be legally deemed relevant harm. The Inquiry's neglect of West Timorese claims

96 *Royal Commissions Act 1902* (Cth), s 7A.
97 Prasser, above n 7, at 2–5.

about ecological and economic damages – submitted via NGO intermediaries – illustrates a broader trend: the acceptance of the nation-state as the boundary for legal consideration. This legal reasoning is reinforced by frameworks like the Royal Commissions Act 1902 (Cth), which, while not explicitly exclusionary, permits narrow interpretations of standing and submissions eligibility.[98] Thus, the Montara Inquiry functioned not only as a responsive entity but also as a strategic legal actor, subtly shaping the discussion and geographical limits of accountability.

Legal responses to disasters often follow a predictable arc: identifying procedural failures, recommending reform, and reaffirming institutional legitimacy.[99] This process blurs the law's performative role in tackling political crises by employing technocratic language. The Montara Inquiry exemplifies this development. As mentioned in Part IV, the most referenced themes – Environmental Monitoring, Accountability, and Environmental Impacts – reflect a technocratic perspective where regulation acts as a substitute for justice and closure is seen as an alternative to redress.

This is particularly evident when examining the submissions from the WTCF. The Inquiry reassessed its focus on bodily harm, economic instability and exclusion from public participation, stating that these lacked scientific backing and were outside its procedural limits. Thus, the Inquiry not only ignored transboundary accountability but also reframed political disputes as mere technical deficiencies. Kennedy suggests that this shift toward technocracy represents a retreat of the law from adversarial politics into a more managerial domain, known as "governance".[100] It allows legal institutions to be responsive while also excluding structurally marginalised viewpoints. The Montara case necessitates a re-examination of the legal system's response to cross-border environmental disasters. Issues like oil spills, climate change and ocean pollution disregard sovereign boundaries. However, the regulatory frameworks the state employs, such as public inquiries, environmental assessments, and standing doctrines, remain domestically bound, procedurally intact and structurally indifferent to transboundary harm.[101]

This contradiction is deliberate, not accidental. As critical legal theorists have long argued, contemporary legal frameworks are structured to sustain dominant political and economic orders. Far from offering neutral principles or universal justice, law often operates as a legitimising discourse – one that manages dissent, contains counter-narratives and systematically excludes marginalised voices from

98 At 13–15.

99 David Kennedy "Challenging Expert Rule: The Politics of Global Governance" (2005) 27(1) Syd LR 5; and Baxi and Indian Law Institute, above n 51.

100 Kennedy "The Mystery of Global Governance", above n 68, at 859.

101 Philippe Sands and others *Principles of International Environmental Law* (3rd ed, Cambridge University Press, Cambridge, 2018) at 655–656.

meaningful participation in legal decision-making.[102] In the Montara case, Australia's regulatory framework illustrated a settler-colonial geography of accountability – one that made harm beyond maritime borders appear invisible, unverifiable or legally irrelevant. This was not merely a procedural gap, but a manifestation of bordered legality, where jurisdiction is fixed territorially and epistemic legitimacy is monopolised. Addressing this systemic erasure requires more than merely reforming inquiry designs; it demands a fundamental reimagining of legal space. What is necessary is a shift from territorial jurisdiction to ecological jurisdiction, and from procedural independence to epistemic plurality, that is, an openness to knowledge practices beyond the state, the settler, and the technocrat. This article contributes to legal scholarship in three key ways:

- First, it offers an empirical analysis of how inquiry design, discourse, and legal form interact to produce structural exclusions, using original NVivo-coded data from the Montara Inquiry.
- Second, it develops a critical framework – drawing on critical legal theory to interpret how legal processes operate not just as neutral institutions but as technologies of governance, erasure and sovereign performance.
- Third, it makes a normative claim: that public inquiries should be understood not as transparent instruments of accountability, but as contested legal-political spaces shaped by design, ideology and global power hierarchies, with their exclusions influenced by these factors.

The Montara Inquiry reflects a wider crisis in environmental law and governance, highlighting issues of jurisdiction, epistemology and legal imagination. For public inquiries to effectively deliver justice in ecological disasters, they need to broaden their legal scope, democratise their knowledge structures and prioritise the voices of those historically marginalised by rigid legal boundaries.

VII. Conclusion

This article argues that the Montara Commission of Inquiry, although officially established to investigate one of Australia's most catastrophic offshore oil disasters, primarily served to deflect contestation, minimise recognition of transboundary damage and reinforce the limited authority of the Australian state. By employing a critical legal theory analysis of the Inquiry's legal framework, discursive structure

102 David Kennedy *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, Princeton, 2008) at 142–144.

and empirical results, this study demonstrates how law operates not only by what it includes, but significantly through what it excludes. Through NVivo-based thematic coding, the article examined how institutional actors highlighted technocratic frames, such as compliance, monitoring and risk, while overlooking issues of environmental injustice and cross-border responsibility. These findings are not coincidental; they expose a legal framework that is systematically designed to uphold domestic institutional legitimacy, particularly in disaster response. The article reconceptualises the Montara Inquiry by merging perspectives from critical legal theory, Bourdieu's sociology of law and critiques of postcolonial governance, framing it as a limited legal domain. In this context, the state prioritises accountability while sidelining transnational solidarity, ecological justice, and historical reparations. For semi-legal proceedings, such as public inquiries, to function as legitimate sites of justice rather than mere assertions of sovereignty, they must move beyond jurisdictional separations and adopt a pluralistic, decolonial understanding of knowledge.

AN EVALUATION OF THE NO ASSET PROCEDURE AS A FRESH START FOR INSOLVENT CONSUMER DEBTORS IN AOTEAROA NEW ZEALAND

Lynne Taylor*

Abstract

The No Asset Procedure (NAP) is the most recent addition to the range of collective, personal insolvency procedures available to insolvent individuals in Aotearoa New Zealand under the Insolvency Act 2006. The NAP has served as a template for personal insolvency law reform in England and Wales, Scotland, Ireland and Australia. The NAP is aimed at insolvent consumer debtors with no assets and no means to repay their debts. Notwithstanding that the NAP has been available since December 2007 and has prompted a proliferation of similar procedures in other jurisdictions, there is a lack of recent analysis in Aotearoa New Zealand and internationally as to whether it (or the schemes for which it has served as a template) meets the objectives it/they was/were enacted to achieve: the provision of a simple and low cost (in administrative terms) procedure with appropriate safeguards against abuse under which insolvent consumer debtors with no means to pay their debts receive a fresh start. These objectives are largely reflected in the NAP statutory scheme, although there is scope for some "tweaks" or improvements. The available evidence of NAP use in Aotearoa New Zealand suggests that it is achieving some of its objectives, but that gaps or a lack of evidence with respect to others mean that, at this point, a definitive conclusion on its effectiveness and/or utility is not possible.

* Lynne Taylor, Professor of Law, University of Canterbury.
Iain Ramsay "Towards an International Paradigm of Personal Insolvency Law? A Critical View" (2017) 17(1) QUT Law Review 15 at 22.

I. Introduction

Readers may be surprised to learn that one of the collective, personal insolvency procedures in the Insolvency Act 2006, the No Asset Procedure (NAP), has served as a template for the enactment of similar procedures in other jurisdictions.[1] The NAP was transplanted to England and Wales under a different name, the Debt Relief Order.[2] The Debt Relief Order has been modified for adoption as the Minimal Asset Procedure in Scotland,[3] and as the Debt Relief Notice in Ireland.[4] The NAP has been mooted recently as a model for adoption by Australia.[5]

The NAP is the most recent addition to the Aotearoa New Zealand personal insolvency framework.[6] It was enacted in 2006 and has been an option for debtors since 3 December 2007. The NAP's "target market" is consumer debtors who have total debts of not more than $50,000,[7] no assets, and no means to repay their debts. The NAP is debtor-initiated, but it is the Assignee who decides whether the debtor is eligible to be admitted to the procedure.[8] Once admitted, a NAP debtor is subject to restrictions on obtaining credit, and enforcement action by their creditors is mostly halted. The NAP lasts for one year, and on exiting the procedure a debtor's debts are mostly discharged. A public record of NAP debtors is kept, and a debtor's name is kept on this record for four years after their exit from the procedure.[9]

Notwithstanding the proliferation of NAP-like procedures, "[l]ittle systematic research exists on … [their] success".[10] In Aotearoa New Zealand, the Ministry of Economic Development undertook a substantive evaluation of the NAP in 2011, but the short time period between the introduction of the procedure and the evaluation resulted in an acknowledgement that its full impact could not be determined, and

1 Iain Ramsay "Towards an International Paradigm of Personal Insolvency Law? A Critical View" (2017) 17(1) QUT Law Review 15 at 22

2 Iain Ramsay "The new poor person's bankruptcy: Comparative Perspectives" (2020) 29(S1) International Insolvency Review S4 at S7; and Insolvency Act 1986 (UK), Pt 7A.

3 Bankruptcy (Scotland) Act 2016, s 2(2), sch 1.

4 Personal Insolvency Act 2012 (EI), pt 3, ch 1.

5 Attorney-General's Department "Minimal Asset Discussion Paper" (July 2024) at 2; adoption of the NAP by South Africa has also been suggested, see Hermie Coetzee and Melanie Roestoff "Consumer Debt Relief in South Africa: Should the Insolvency System provide for NINA debtors? Lessons from New Zealand" (2013) 22(3) International Insolvency Review 188.

6 For earlier accounts of the NAP, see David Brown and Thomas G W Telfer *Personal and Corporate Insolvency Legislation* (LexisNexis NZ, Wellington, 2007) 28; and Trish Keeper "New Zealand's No Asset Procedure: A Fresh Start at No Cost?" (2014) 14 (3) QUT Law Review 79.

7 A consumer debtor is one whose debt is domestic rather than business-related.

8 The office of the Assignee or Official Assignee sits in the Insolvency and Trustee Service, a division of the Ministry of Business, Innovation & Employment (MBIE).

9 Insolvency Act 2006, ss 449(1), (4A).

10 Ramsay "Towards an International Paradigm of Personal Insolvency Law?" above n 1, at 22.

that it was difficult to assess whether observable trends were attributable to the availability of the procedure or other events, such as the 2008 global financial crisis.[11]

This paper presents the story of the NAP across the 17 years it has been available, in conjunction with an evaluation, founded on publicly available data, of the extent to which its objectives have been achieved. These objectives are, in summary, the provision of a simple and low cost (in administrative terms) procedure with appropriate safeguards against abuse under which insolvent consumer debtors with no means to pay their debts receive a fresh start.[12] Part II situates the NAP within the wider Aotearoa New Zealand personal insolvency framework, and Part III traces the path to its enactment. Part IV assesses the impact of the NAP, and Part V reviews the detail of its statutory scheme in subpt 4 of Pt 5 of the Insolvency Act 2006 (Insolvency Act). Part VI presents and evaluates the evidence as to the extent to which the NAP's objectives are or have been achieved and, where relevant, offers reform suggestions. Part VII concludes.

II. Aotearoa New Zealand Personal Insolvency Framework

The NAP is one of five collective personal insolvency procedures available under the Insolvency Act. Prior to the NAP's enactment, bankruptcy was the only collective insolvency procedure available to consumer debtors unable to repay their debts. As with the NAP, a debtor may apply to the Assignee to be adjudicated bankrupt (a voluntary bankruptcy).[13] Unlike the NAP, bankruptcy may also be involuntary in the form of a High Court order founded on a creditor's application.[14] The Assignee administers all bankruptcies. The process of bankruptcy is more complex than the NAP as it assumes that a bankrupt has some assets available to pay their creditors. Following a debtor's adjudication, their property (subject to some exceptions, including necessary furniture and clothing, and tools of trade) vests in the Assignee,[15] as does all property acquired by or passing to the bankrupt during the three-year

11 Ministry of Economic Development "Evaluation of the No Asset Procedure Final Report" (July 2011) at 12; note that the Ministry of Economic Development became the Ministry of Business, Innovation and Employment (MBIE) on 1 July 2012.

12 Office of the Minister of Commerce "Bankruptcy Administration: No Asset Procedure and Insolvency Act Changes" (2003) at [15]; these objectives were repeated in a further Discussion Paper released in 2004 and accompanying a draft Insolvency Law Reform Bill, see Ministry of Economic Development "Draft Insolvency Law Reform Bill Discussion Document" [2004] NZAHGovDP 2 (1 April 2004); and also see the Regulatory impact statement and business compliance cost statement for the Insolvency Law Reform Bill 2005 (14-1).

13 Insolvency Act, s 12.

14 Sections 11, 13.

15 Sections 156(1), 101.

bankruptcy period.[16] The Assignee may call meetings of creditors, and creditors submit proofs of the debts they are owed to the Assignee. The Assignee distributes to creditors the property of the bankrupt that is available to meet accepted proofs of debt according to the statutory scheme of priorities in the Insolvency Act.[17] The bankrupt is subject to duties to assist the Assignee and is also subject to restrictions during the period of their bankruptcy, including restrictions on obtaining credit, on travelling overseas, and on being a director, manager or otherwise involved in the carrying on of a business.[18] A bankrupt's liability for most of their debts ends on their discharge from bankruptcy,[19] as is also the case under the NAP. In other similarities, the Assignee maintains a register of current bankrupts, and a public record of a debtor's bankruptcy is kept for four years after the date of their discharge.[20]

Debtors with the means to repay some of their debts have three options under the Insolvency Act. The first and most frequently utilised option is a debt repayment order (DRO). The DRO is targeted at consumer debtors with total unsecured debts of not more than $50,000.[21] A debtor subject to a DRO pays their debts by instalments under the watch of a supervisor appointed by the Assignee.[22] Most DRO's are debtor initiated and, as with the NAP, the Assignee determines debtor eligibility.[23] In a further similarity with the NAP, the Assignee maintains a public register of the names of debtors subject to a DRO.[24]

The final two procedures available to debtors who can repay some of their debts are compositions and proposals.[25] Both require court and creditor approval. A composition is available only after a debtor is adjudicated bankrupt.[26] The court and creditor approval requirements (and associated costs and delays) count against debtors' use of these procedures.[27] In a difference with the NAP, no public register is kept of the names of those who have entered a composition or proposal.

16 Section 102.
17 Part 3, subpt 10.
18 Part 7, subpt 3.
19 Section 304.
20 Sections 449(1), (4).
21 Sections 341, 343(1).
22 PD McKenzie, *Spratt and McKenzie's Law of Insolvency* (2nd ed, Butterworths, Wellington, 1972) at 1–2; and Insolvency Act, ss 340—345.
23 A creditor may apply to the Assignee for a debt repayment order in respect of a debtor with that debtor's consent: s 341(b).
24 Section 449(1).
25 Part 5, subpts 1 and 2; the composition is the oldest of the available alternatives to bankruptcy, see, for example, Bankruptcy Act 1892, part IX.
26 Insolvency Act, s 312.
27 Ministry of Economic Development "Insolvency Law Review: Tier One Discussion Documents" (January 2001) at 38.

In summary, the NAP and the DRO are procedures designed for consumer debtors, but the NAP caters for those with no means to repay their debts. The NAP is an alternative to bankruptcy for consumer debtors unable to repay their debts.

III. The Path to the NAP's Enactment

The NAP is a legislative response to an increase in consumer insolvencies in Aotearoa New Zealand that was identified at the turn of the century.

A. Consumer Insolvency

The enactment of the NAP was an outcome of the review of New Zealand's insolvency framework undertaken at the turn of the century. By this time, consumer bankruptcies out-numbered business-related bankruptcies, a reverse of the position when predecessor legislation, the Insolvency Act 1967, was enacted.[28] Consumer bankruptcies totalled 55 per cent of all bankruptcies in 1988, and 63 per cent of all bankruptcies in 1999.[29] The available data on those adjudicated bankrupt in this period is consistent with increasing numbers of consumer bankruptcies. For example, in the period 1 July 1997–30 June 2001, 70 per cent of bankrupts self-reported that they were unemployed, 50 per cent reported they were receiving some form of income support, most were in the 25–40 age bracket, and only 20 per cent reported that they had been in business in the two-year period prior to their bankruptcy.[30] Creditors received no returns in 79 per cent of bankruptcies in the year ended 30 June 2000.[31]

An initial Ministry of Economic Development Discussion Paper attributed the growth in the proportionate number of consumer bankrupts to the increasing availability of consumer credit.[32] This finding occurred against a backdrop where Aotearoa New Zealand moved from being one of the most regulated economies in the world at the beginning of the 1980s, to one of the least regulated at the end of that decade. A full account of these broader changes is beyond the scope of this paper,[33] but they and technological developments are generally accepted as resulting in an increase in both the availability and forms of consumer credit.[34] Commentary

28 At 11.
29 At 27.
30 At 30.
31 At 30.
32 At 31.
33 Paul Heath "Consumer Bankruptcies: A New Zealand Perspective" (1999) 37 Osgoode Hall Law Journal 427 at 431–433.
34 Oliver Valins "When Debt Becomes a Problem: A Literature Study" (Ministry of Social Development, 2001) at 1.

in 1999 noted a move to a "cashless society".[35] By 2016, the Ministry of Business, Innovation and Employment (MBIE) reported that Aotearoa New Zealand had the "lowest proportion of cash to GDP in circulation in the world",[36] with electronic card transactions representing 68.5 per cent of retail trade revenue in core industries and credit card sales accounting for just under 50 per cent of this total.[37] Credit card spending continues to increase over time.[38]

The Government responded to the increase in the availability of consumer credit with amendments, frequently reactive, to consumer credit law.[39] At the beginning of the insolvency law review leading to the NAP's enactment, consumer credit contracts were largely regulated by the Credit Contracts Act 1981. This legislation provided for compulsory disclosure of information by lenders with penalties for non-compliance.[40] Replacement legislation, the Credit Contracts and Consumer Finance Act 2003, imposed increased responsibilities on lenders, including from 2015 a requirement to make reasonable enquiries before entering into an agreement so as to be satisfied that a consumer borrower is able make the payments under the agreement without suffering substantial hardship.[41] A comprehensive Responsible Lending Code offers guidance on how creditors may implement their obligations.[42] The Credit Contracts and Consumer Finance Act also makes provision for changes to credit contracts on the grounds of a debtor's unforeseen hardship,[43] and regulates repossession of consumer goods under consumer credit contracts.[44] Lenders are subject to various oversight and/or licensing requirements.[45] Developments in consumer credit law continue apace.[46]

The reality is that consumer credit law has not (and probably cannot) prevent some consumers from accruing more debt than they can afford. The inter-relationship between consumer credit and insolvency is complex. Responses to an

35 Heath, above n 33, at 428; and MBIE "Retail Payment Systems in New Zealand Issues Paper" (October 2016) at [83].
36 As noted above, MBIE is the successor to the Ministry of Economic Development.
37 MBIE "Retail payment systems in New Zealand Issues Paper" above n 35, at [6].
38 See Reserve Bank of New Zealand, "Credit card spending (C13)" (18 July 2025) <www.rbnz.govt.nz>.
39 Reform initiatives have been ongoing since the 1980s, see MBIE "Review of consumer credit law" (24 April 2024) <www.mbie.govt.nz>.
40 Credit Contracts Act 1981, ss 24–30.
41 Credit Contracts and Consumer Finance Act 2003, part 1A, s 9C; see MBIE "Review of consumer credit law 2009–2015" <www.mbie.govt.nz>.
42 Section s 9E; see MBIE, "Responsible Lending Code" (revised July 2024, in force 31 July 2024) <www.mbie.govt.nz>.
43 Part 2, subpt 8.
44 Part 3A.
45 Financial Service Providers (Registration and Dispute Resolution) Act 2008, pt 2; and Credit Contracts and Consumer Finance Act, pt 5A.
46 For example, the Credit Contract and Consumer Finance (Buy Now, Pay Later) Amendment Regulations 2023 were introduced to respond to the previously unregulated proliferation of buy now, pay later consumer contracts.

online survey of 3,500 consumers by MBIE and the Commerce Commission in July 2024 revealed that a just over a third of respondents had entered a buy now, pay later agreement or an agreement to pay something off over time in the last two years and, of those, just over 80 per cent felt confident in their understanding of the agreement and its suitability for their needs.[47] On the other hand, a smaller percentage (just over half) were confident the creditor had considered their income and expenses.[48] A recent, independent report identified several issues in the enforcement of lender obligations, including a lack of enforcement action by the regulator, the Commerce Commission.[49] The use by "high-risk" consumers of "fringe" (or second or third tier) lenders is unknown, as is the extent to which such lenders comply with their legal obligations.[50] A Ministry of Economic Development evaluation of the NAP in 2011 reported "a view across evidence streams from creditors to budget advisors, that cultural problems are emerging with individuals' attitudes towards 'spend now, and pay later'".[51] At the same time, the Ministry reported that some financial institutions (lenders) were of the view:[52]

> ... that the problem of over-lending is exacerbated by consumers' behaviours: consumers are dishonest and unrealistic in declaring their ability to repay credit, and amass too many liabilities too easily with too many different lending institutions.

It is possible that a responsible lender's ability to recover from a particular debtor may be adversely affected not only by the behaviour of that debtor, but by the actions of other less responsible lenders. As the Ministry of Economic Development identified in 2001, consumer over-indebtedness may arise because of changed personal circumstances (such as illness or the loss of employment), having the consequence that previously affordable debt becomes unaffordable.[53]

47 MBIE and Commerce Commission "New Zealand Consumer Survey 2024" (2024) at 33.
48 At 33.
49 Victoria Stace and Emily Chan "Enforcement Issues: Working Towards a Fairer Consumer Credit Market: A Study of the Issues in New Zealand's Consumer Credit Market and Proposals for Reform" (Victoria University of Wellington Legal Research Paper No 4/2021, 1 April 2019).
50 See the discussion of fringe lenders in Ministry of Consumer Affairs "Review of the Operation of the Credit Contracts and Consumer Finance Act 2003" (September 2009).
51 Ministry of Economic Development "Evaluation of the No Asset Procedure", above n 11, at 42.
52 At 42.
53 Ministry of Economic Development "Tier One Discussion Documents", above n 27, at 32; see also Valins, above n 34, at 37, where five reasons for consumer over-indebtedness are identified: "life events", "over commitment and money management skills" and "structural factors, such as credit-lending practices and the role of government".

Another development potentially relevant to a proportionate increase in consumer insolvencies, although evidence of its significance or impact is unavailable, is an increase in the number of unregulated gambling options, including overseas online gambling.[54]

A final factor that may have contributed to a proportionate increase in consumer insolvencies is the coming into force of the Companies Act 1993 on 1 July 1994. The Law Commission reported in 1987 that there were 147,158 companies registered under predecessor legislation, the Companies Act 1955.[55] The New Zealand population in 1987 was approximately 3.3 million, resulting in a per capita company rate of one company for every 23 humans. The Companies Act permits the incorporation of a "one-person" company, that is, a company with the same individual as the company's sole director and sole shareholder.[56] Separate corporate personality and limited liability for shareholders are default rules under the Companies Act 1993.[57] In the absence of a contractual obligation to the contrary, a director and shareholder of an insolvent one-person company has little or no personal responsibility for its obligations. Company incorporation is an online and low-cost process that can be undertaken without professional advice and/or assistance.[58] The proportionate increase in the use of the limited liability company as a business structure is significant. On 31 March 2025 there were 738,687 registered companies and a population of 5.2 million, giving a per-capita rate of one company for every seven humans.[59] The limited liability company is now, by a large margin, the most prevalent form of business structure in Aotearoa New Zealand.[60] A corresponding proportionate decrease in the use of business structures, such as sole traderships and partnerships (where the business owner is personally responsible for business debts) may have resulted in a decrease in the proportion of business-related bankruptcies.

B. The Legislative Response

The path to the NAP's enactment began in 2001 with the release of a Ministry of Economic Development discussion paper. The paper referenced the proportionate increase in the number of consumer bankrupts, described above, and concluded

54 Ministry of Internal Affairs "Online Gambling in New Zealand" (2019); note that s 9 of the Gambling Act 2003 largely prohibits remote interactive gambling by gambling operators located inside New Zealand.

55 Law Commission, *Company Law* (NZLC PP 5, 1997) at [34].

56 Companies Act 1993, s 10.

57 Sections 15, 97.

58 See New Zealand Companies Office Companies Register "Incorporating a company" (2025) <https://companies-register.companiesoffice.govt.nz>.

59 See New Zealand Companies Office "Insights and articles" <https://www.companiesoffice.govt.nz/>.

60 See Stats NZ "New Zealand business demography statistics: At February 2024" (31 October 2024) <www.stats.govt.nz>.

that the existing bankruptcy administration process focused as it was (and is) on distribution of assets to creditors was unsuited to a situation where there were no or few assets in a bankrupt's estate.[61] Most estates without assets were categorised as consumer bankruptcies.[62] No preferred solution was advanced, and public comment was sought on reform options.[63]

The introduction of NAP as "an alternative to bankruptcy for low-income debtors with few or no realisable assets" was announced at the beginning of 2003 in a press release which stated that the new procedure would address "a concern that some of the more punitive restrictions of bankruptcy are not appropriate for these debtors".[64] Although the press release made no direct reference to consumer debtors, the targeted consultation that preceded this announcement was with consumer and creditor groups. All but two of those consulted were reported as supporting an alternative and more streamlined procedure for consumer debtors, although for a number their support was dependent on appropriate safeguards to preserve debtors' incentives to repay debt.[65] Two consumer lenders objected, viewing the proposed procedure "as a 'soft option' and … [were] concerned that it … [would] greatly lessen the threat of bankruptcy for debt repayment."[66]

The most sophisticated analysis of the mischief the NAP was intended to address is contained in a 2003 Cabinet Paper which identified "a significant and increasing number of debtors whose circumstances are not adequately dealt with by bankruptcy" or its alternatives.[67] Such debtors were categorised as "longtime borderline bankruptcy debtors" who had accumulated (largely domestic) debt (that is, consumer debtors). Alternatives to bankruptcy (such as a composition, proposal or a DRO) were not available to them as they were unable to repay their debts.[68] These debtors were described as able to avoid bankruptcy by "managing their outgoings until some 'life event' occurs."[69] On becoming bankrupt they had little incentive to improve their financial position as, after acquired property and income passes to the Assignee.[70] Other punitive consequences (such as restrictions on travel or involvement in business) were largely inappropriate,[71] and the stigma associated with bankruptcy might cause "socio-psychological" effects.[72] Additionally, although the

61 Ministry of Economic Development "Tier One Public Discussion Documents", above n 27, at 46.
62 At 39.
63 At 46.
64 Liane Dalziel "Insolvency Changes Announced" (press release, 19 February 2003).
65 Office of the Minister of Commerce, above n 12, at [39]–[40].
66 At [40].
67 At [12], [39]–[40].
68 At [12].
69 At [13].
70 Insolvency Act, s 102.
71 Office of the Minister of Commerce, above n 12, at [14].
72 At [14].

administration of asset-less consumer estates was reported as typically completed by the Assignee within three–six months of adjudication, ongoing administrative inefficiencies were identified and attributed to the Assignee's obligation to monitor the restrictions operating during the three-year period of bankruptcy. The need to address potential risks was also referenced, and these were identified as providing an "out" for those for whom bankruptcy is appropriate and encouraging debtors to incur debt they are unable to pay.[73]

The Cabinet Paper described the proposed NAP as an alternative to bankruptcy for debtors with debts not exceeding $40,000 and "no assets and who cannot repay the[ir] debt while maintaining minimum living expenses according to normal community standards".[74] It was proposed that the NAP would operate for a shorter time (12 months) and with fewer restrictions than bankruptcy, and so would "facilitate swifter recovery from financial failure, provide incentives for individuals to become a productive member of society and be likely to have less social stigma than bankruptcy".[75] Other proposed details were a moratorium on creditor enforcement action for the duration of the procedure, and the debtor's discharge from their debts when the procedure ended.[76] To address identified risks, it was proposed that the Assignee act as the gatekeeper for admission. As described below in Part V below, the enacted NAP largely follows this proposed format.

The Cabinet Paper set out four objectives for the proposed NAP:[77]

> a. to acknowledge that the targeted debtor usually cannot avoid bankruptcy and therefore the punitive and deterrent aspects of the current regime are inappropriate and have limited relevance;
> b. to give the targeted debtor the opportunity of a fresh start;
> c. to provide appropriate safeguards against risk of abuse; and
> d. to provide a simple procedure which minimises administrative costs to the State.

73 At [4], [5].
74 At [3].
75 At [15].
76 At [15], [21].
77 At [15].

C. Policy Considerations

The NAP objectives are consistent with the wider objectives of the insolvency law review and Aotearoa New Zealand insolvency framework, including proving a predictable and simple regime for financial failure able to be administered quickly and efficiently, and enabling insolvent individuals to participate fully in the economic life of the community.[78]

The NAP objectives are broadly consistent with internationally identified (and inter-related) policy objectives for personal insolvency regimes. The first and second of the objectives reference a "debtor-rehabilitation" policy aim, although there is a divergence in views as to how this is best achieved.[79] Putting this question aside for the moment, the recognised benefits of a fresh-start include reducing the social costs "of leaving debtors [and their families] to languish in a state of perpetual debt distress",[80] and increasing debtors' incentives to re-engage in economic life.[81]

The fourth of the NAP objectives, reduction in the State's administration costs, references one of several identified societal benefits of collective personal insolvency regimes. To the extent that targeted debtors take advantage of their fresh start and re-enter employment, an increase in tax revenue is likely, along with a corresponding reduction in the State's welfare burden.[82] The World Bank identifies the "disciplining of creditors" as a further societal benefit. By way of explanation in the NAP context, the "escape" it offers to debtors may encourage greater responsibility in lending practices and, to the extent this occurs, the achievement of a more equitable distribution of the costs of inevitable, albeit unpredictable financial distress, amongst borrowers.[83] A further societal benefit is the greater likelihood of an accurate valuation of accounts receivable in creditors' financial statements, to the advantage of those who invest in such entities.

Given that NAP debtors have no available assets for distribution to creditors, a lack of reference in the NAP objectives to creditor-focused policy aims is unsurprising. Achieving an equitable distribution of available assets is not a

78 Insolvency Law Reform Bill 2005 (14-1), "Explanatory Note" at 2.

79 See Paul Ali, Lucinda O'Brien and Ian Ramsay "Bankruptcy and Debtor Rehabilitation: An Australian Empirical Study" (2017) 40 MULR 688 at 691–692; Ramsay "Towards an International Paradigm of Personal Insolvency Law", above n 1, at 19; and Iain Ramsay 'Mandatory Bankruptcy Counselling: The Canadian Experience' (2002) 7 Fordham Journal of Corporate and Financial Law 525.

80 World Bank "Report on the Treatment of the Insolvency of Natural Persons" (April 2017) at [70], [100]; and Richard M Hynes & Nathaniel Pattison "A Modern Poor Debtor's Oath" (2022) 108 Virginia Law Review 915 at 917.

81 World Bank, above n 80, at [99], [104], [107]; and Hynes & Pattison, above n 80, at 917.

82 At [103].

83 At [95].

concern.[84] Nevertheless, and illustrating the inter-relationship between policy aims, creditors may individually and collectively benefit from the wider societal benefits described in the previous paragraph.

The third of the NAP objectives, provision of appropriate safeguards to prevent abuse, is directed at minimising the concerns identified in relation to personal insolvency regimes more generally. The World Bank identifies these as "moral hazard" and "fraud", concepts which encompassed in the risks posed by the NAP and identified in the 2003 Cabinet Paper. In a further illustration of the inter-relationship between policy objectives, prevention of moral hazard and fraud benefits individual creditors in their dealings with consumer debtors. The literature also recognises that minimising the possibility of moral hazard or fraud must be balanced with the achievement of an overall scheme that is sufficiently attractive for targeted debtors to choose to enter, with measures of "attractiveness", including ease and cost of entry, and the perceived or actual stigma consequent on entry to and/or discharge from the scheme.[85] For example, significant actual or perceived post-discharge stigma may reduce debtors' ability to re-engage in economic life and so reduce the intended benefits to debtors and, if so, wider societal benefits as well.

Concerns relating to fraud and moral hazard received the most attention in the parliamentary process leading to the NAP's enactment. Opposition representatives from the National Party referenced the encouragement of a "lack of personal responsibility" on the part of debtors, and the adverse consequences for creditors, particularly small-business creditors. A flavour of these objections emerges from the speech of MP, Pansy Wong:[86]

> I think allowing someone to recklessly rack up debts then be let off the hook to the tune of $40,000 shows a total disregard for what it is like to be in business, to carry risk, and to lie awake at night worrying about whether the bills can be paid. That is a serious sum if one is a plumber, or runs the local dairy, or runs the local furniture shop.

Notwithstanding opposition concerns, the NAP was enacted on 7 November 2006 and was available to debtors from 3 December 2007.

84 At [58]; and Ramsay "Towards an International Paradigm of Personal Insolvency Law", above n 1, at 27.
85 World Bank, above n 80, at [120], [189].
86 (24 October 2004) 634 NZPD 6041.

IV. The NAP's Impact

The NAP's enactment had immediate impact on patterns of use of personal insolvency procedures available under the Insolvency Act.[87] Voluntary bankruptcies as a percentage of total insolvency procedures decreased from around 80 per cent in the years immediately prior to the NAP's enactment to 37 per cent in the year ended 30 June 2015,[88] and 28 per cent in the years ended 30 June 2022 and 30 June 2023.[89]

The insolvency rate per population has varied to a small degree since 2008 (from a high of 0.19 per cent in the year ended 30 June 2010,[90] to a low of 0.03 per cent in the years ended 30 June 2023 and 30 June 2022),[91] but the NAP as a percentage of total personal insolvency procedures administered by the Assignee has remained relatively steady across time.[92] In the year ended 30 June 2008 (covering the first six months the NAP was available), the NAP made up 32 per cent of total personal insolvency procedures. This increased to 50 per cent in the year ended 30 June 2009, and then settled between a low of 34 per cent in the year ended 30 June 2014,[93] and a high of 47 per cent in the years ended 30 June 2010 and 30 June 2018. In the years ended 30 June 2022 and 30 June 2023, the NAP made up 42 per cent of all personal insolvency procedures administered by the Assignee.[94]

87 Ministry of Economic Development "Evaluation of the No Asset Procedure", above n 11, at 10; because the New Zealand population has steadily increased over the period the NAP has been available, references are to percentages rather than numbers; the New Zealand population increased from 4.2 million in 2007 to 5.2 million in 2023, World Bank Group, "Population, total: New Zealand" <https://data.worldbank.org>.

88 Insolvency & Trustee Service "Insolvency Statistics and Debtor Profile Report 1 July 2014–30 June 2015" (2016) at 4.

89 Insolvency and Trustee Service "Insolvency Statistics and Debtor Profile Report 1 July 2021–30 June 2022" (2023) at 4; and Insolvency & Trustee Service "Insolvency Statistics and Debtor Profile Report 1 July 2022–30 June 2023" (2024) at 4.

90 Insolvency & Trustee Service "Insolvency Statistics and Debtor Profile Report 1 July 2013–30 June 2014" (2015) at 3.

91 Insolvency & Trustee Service (2024), above n 89, at 5.

92 Employment growth and house price inflation have been identified as the two variables affecting total numbers of personal insolvencies, that is, "lower rates of employment growth (and economic activity more generally) are likely to have been associated with small and medium enterprise failures, bankruptcies, and insolvencies, and increases in house price inflation (reflecting household net wealth/collateral), can be associated with a decline in the rate of insolvencies", Viv Hall & C John McDermott "Changes in New Zealand's Business Insolvency Rates after the Global Financial Crisis" (Motu Working Paper 19-15, School of Economics and Finance, Victoria University of Wellington, August 2019) at 16; on the other hand, personal insolvency rates are presently very low during a widely acknowledged "cost of living" crisis; see Stats NZ "Household living costs increase 7.0 percent" (1 February 2024) <www.stats.govt.nz>; corporate insolvencies, in contrast, are steadily rising, see Stats NZ "Latest company statistics" (31 July 2025) <www.companiesoffice.govt.nz>.

93 Insolvency and Trustee Service (2015), above n 90, at 4.

94 Insolvency and Trustee Service (2023), above n 89, at 4; and Insolvency and Trustee Service (2024), above n 89, at 4.

The Insolvency and Trustee Service reports numbers of voluntary and involuntary bankruptcies separately. On this analysis, the NAP has been the most frequently occurring personal insolvency procedure administered by the Assignee in all but one of the past 10 years, the period in which published data is available. Table 1 below shows NAP numbers as a percentage of total insolvency procedures administered by the Assignee across the years ended 30 June 2014–30 June 2023.

Table 1: NAP numbers as a percentage of total personal insolvency procedures 30 June 2014–30 June 2023.

Year ended 30 June	Number of NAPs administered by the Assignee	NAPs as a percentage of total personal insolvency procedures administered by the Assignee
2014	1,145	34
2015	1,223	35
2016	1,563	40
2017	1,349	38
2018	1,464	44
2019	1,218	42
2020	1,121	44
2021	893	45
2022	519	42
2023	476	42

V. The Nap Legislative Scheme

The detail of the NAP scheme and the extent to which it is framed to reflect the objectives it was enacted to achieve is assessed below.

A. Entry

The NAP is debtor initiated. Prior to making an application to enter the NAP, a debtor may access the general information about personal insolvency available on the Insolvency and Trustee Service's webpage, and/or may also seek personalised online or telephone advice from the Insolvency and Trustee Service.[95] To access the online application process, an applicant must complete a "Help me choose" section that identifies the insolvency procedure that is best suited to their circumstances.[96]

The debtor must specify that they wish to be admitted to the NAP when applying for entry by filing an application and statement of affairs with the Assignee.[97] The content of these documents is prescribed in the Insolvency (Personal Insolvency) Regulations 2007 and applicants are required to provide detailed information about their financial affairs over the five-year period immediately prior to the filing of their application.[98] For example, debtors must provide details of bank accounts (sole and joint), a statement of income, itemised expenses, assets, details of assets disposed of, liabilities (including contingent liabilities), financial transactions, and involvement with any trust (as settlor, trustee or beneficiary).[99]

The Assignee is the gatekeeper for entry to the NAP and has oversight of debtors admitted to the procedure. The Assignee's role is consistent with their administrative role within the wider personal insolvency framework under the Insolvency Act and likely provides creditors with a degree of confidence in the robustness of the scheme. Given that NAP debtors are assessed as having no or minimal assets available to pay their creditors, the reality is that if the Assignee did not perform this role, the State would have to pay for private insolvency practitioners to do so.

The Assignee may admit a debtor applicant to the NAP if satisfied on reasonable grounds that the debtor meets six eligibility criteria and is not otherwise disqualified from entry.[100]

95 See New Zealand Insolvency and Trustee Service "Contact us" <https://www.insolvency.govt.nz >.

96 See New Zealand Insolvency and Trustee Service "Help me choose" <https://www.insolvency.govt.nz>.

97 See New Zealand Insolvency and Trustee Service "How do I apply for insolvency?" <https://www.insolvency.govt.nz>; the Assignee may reject an application if of the opinion that these documents are incorrect or incomplete, Insolvency Act, s 363(3).

98 Insolvency (Personal Insolvency) Regulations 2007, regs 6, 65.

99 Regulation 6.

100 Insolvency Act, s 364(a)–(d).

1. Eligibility criteria

The first eligibility criterion is that the applicant debtor has no realisable assets.[101] Excluded from this calculation are the assets a debtor is entitled to retain following admittance to the NAP (necessary tools of trade, necessary household furniture and effects (including clothes) for the applicant and their relatives, and a motor vehicle up to a maximum value of $6,500).[102] These are the same assets a bankrupt is entitled to retain after adjudication.[103] Addressing the possibility that a debtor may dispose of property to meet this entry criterion (a potential risk of abuse), included in the calculation of realisable assets are any assets that would be recoverable by the Assignee as an irregular transaction if the debtor was adjudicated bankrupt. This would include, for example, assets gifted by the debtor in the two-year period prior to adjudication.[104]

The second criterion is that the applicant has not previously been admitted to the NAP,[105] and the third is that the applicant has not previously been adjudicated bankrupt.[106]

The fourth criterion is that the applicant debtor has total debts (apart from excluded debt) of not less than $1,000 and not more than $50,000.[107] Secured debts are not excluded from this calculation. It is at this point that the eligibility criteria for the NAP and the DRO diverge as the maximum debt entry threshold for the DRO is specified as $50,000 of *unsecured* debt.[108] Consistent with the bankruptcy scheme, excluded debts under the NAP include amounts payable under a maintenance order under the Family Proceedings Act 1980 or as child support under the Child Support Act 1991.[109] In a difference with the bankruptcy scheme, "excluded debt" includes student loan balances.[110] Student loan balances are provable debts in bankruptcy, and bankrupts are released from this debt on their discharge from bankruptcy. NAP debtors remain eligible for student loans for the time they are

101 Section 363(1)(a).
102 Sections 158, 363(2)(a).
103 Section 158.
104 Sections 204, 363(2)(b); see also pt 3 subpt 7.
105 Section 363(1)(b).
106 Section 363(1)(c).
107 Section 363(1)(d); these sums may be varied by the Governor-General by Order in Council to take account of increases in the all-groups index number of the Consumers Price Index, s 363(3).
108 Section 343(1)(a); note that secured debt is excluded from the calculation of a debtor's qualifying debts under the UK equivalent of the NAP, see Insolvency Act 1986, s 251A(2), (3); however, the recent proposal for the adoption of a Minimal Asset Procedure in Australia makes no recommendation as to whether secured debt should be excluded when determining a debtor's eligibility to enter the proposed new procedure, see Attorney General's Department, above n 5.
109 See the definition of "excluded debt" in s 3; compare Child Support Act 1991, s 182; Insolvency Act, s 304; the exclusion of these debt categories is consistent with international accepted policy objectives, World Bank, above n 80, at [368].
110 Insolvency Act, s 3.

subject to the procedure, unlike those adjudicated bankrupt during the period of their bankruptcy.[111]

The fifth criterion is that the applicant debtor does not, on the basis of a prescribed means test, have the means of repaying any amount towards their debts.[112] The prescribed test is whether, taking into account the income of the debtor personally and that of any relative with whom the debtor lives, the debtor has a surplus of money after paying the household's usual and reasonable living expenses.[113]

The final criterion is that the outcome for any creditor would not be materially better if the debtor were adjudicated bankrupt, a further factor addressing the possibility of risk of abuse of the procedure.[114] A debtor might not meet this criterion if, for example, there are circumstances in which the Assignee could recover value for the benefit of creditors if the debtor was adjudicated bankrupt.[115]

In the round, the six eligibility criteria are largely focused on the NAP objective of targeting debtors who usually cannot avoid bankruptcy and for whom the punitive and deterrent aspects of the bankruptcy regime may be inappropriate. Although the available law reform materials describe the NAP as a procedure targeted at consumer debtors, there is no reference to such debtors in the eligibility criteria. The NAP is available to any debtor who meets the eligibility criteria and is not otherwise disqualified. The extent to which NAP debtors are consumer debtors is explored in Part VI below.

2. Disqualifying factors

The Assignee must not admit an otherwise eligible applicant debtor to the NAP if the Assignee is satisfied on reasonable grounds of any of the following factors that are largely focused on potential fraud and/or moral hazard:[116]

> a. the debtor has concealed assets with the intention of defrauding his or her creditors, for example, by transferring property to a trust; or
> b. the debtor has engaged in conduct that would, if he or she were adjudicated bankrupt, constitute an offence under … [the Insolvency Act]; or

111 See Studylink "Student Loan" Ministry of Social Development <www.studylink.govt.nz>.
112 Insolvency Act, s 363(1)(e).
113 Insolvency (Personal Insolvency) Regulations, reg 66.
114 Insolvency Act, s 363(1)(f).
115 See *Murray v Official Assignee* [2014] NZHC 1710; irregular transactions are dealt with in pt 3, sub-pt 7 of the Insolvency Act and include insolvent transactions, insolvent charges, insolvent gifts, and transactions at undervalue.
116 Section 364(a)–(d).

c. the debtor has incurred a debt or debts knowing that he or she does not have the means to repay them; or
d. a creditor intends applying for the debtor's adjudication as a bankrupt and it is likely that the outcome for the creditor if the debtor is adjudicated bankrupt will be materially better than if the debtor is admitted to the no asset procedure.

The evidence of the extent to which disqualified debtors may be attempting to enter the NAP is examined in Part VI below.

A further measure to prevent abuse is that from the time that the debtor applies to enter the NAP, they must not obtain credit (alone or jointly) of more than $100 without informing the credit provider that they have applied to enter the NAP.[117]

3. Admittance process

As noted above, it is the Assignee who determines whether a NAP applicant is eligible for entry to the NAP and, if so, is not otherwise disqualified from admittance. In making this assessment, the Assignee works from information provided by the debtor and their own records (such as the public registers of individuals subject to the NAP and/or adjudicated bankruptcy) or other publicly available information. For example, in *Murray v Official Assignee*, the Assignee reported ascertaining that a debtor admitted to the NAP had a potential involvement in a company (when this had not been disclosed in the debtor's statement of affairs) via a search of public registers maintained under the Companies Act 1993.[118] The Assignee may also make further enquiries from the debtor. In *Re Tracy Lee Gifkins*, the Assignee reported seeking confirmation of the precise amounts of certain debts where the applicant's disclosed debts were close to the upper eligibility level.[119] The Assignee may reject an application if of the opinion that it or the debtor's statement of affairs is incomplete or incorrect.[120]

Applicants are advised of the outcome of their application within 10 working days.[121] A debtor's entry to the NAP takes effect from the time the Assignee sends the debtor a written notice. The notice provided by the Assignee must contain a summary of the debtor's statutory obligations under the procedure.[122] The Assignee

117 Section 366.
118 *Murray* v *Official Assignee*, above n 115, at [20].
119 *Re Tracy Lee Gifkins* HC Auckland CIV-20090404-281, 25 May 2009 at [13].
120 Insolvency Act, s 362(3).
121 See New Zealand Insolvency and Trustee Service "No Asset Procedures" <www.insolvency.govt.nz>.
122 Insolvency Act, s 367(1); and Insolvency (Personal Insolvency) Regulations, reg 67.

must advertise that the debtor has been admitted to the NAP in the *New Zealand Gazette* and enter the debtor on the public register of NAP debtors.[123] The debtor's admittance must also be advertised on the Insolvency and Trustee Service's website, with this record available for four years after the date of the debtor's exit from the procedure.[124] The actual and perceived stigma associated with the public record of a debtor's NAP is addressed in Part VI below.

As an additional safeguard against ineligible or disqualified debtors being admitted to the NAP, the Assignee is required, as soon as practicable, to notify each of the debtor's known creditors that the debtor has been admitted to the NAP and must send each creditor a summary of the debtor's assets and liabilities.[125] The Insolvency and Trustee Service reports that this notification is provided to creditors within five working days after a debtor is admitted to the NAP.[126] Following receipt of the notification, a creditor may apply to the Assignee for termination of the debtor's NAP on two grounds: (1) that the debtor did not meet the NAP entry criteria; or (2) there are reasonable grounds for the Assignee to conclude that the debtor was disqualified from entry.[127] A creditor may also advise the Assignee of the amount of the debt owed to them which may take the debtor over the maximum allowable total debts.[128]

Following a creditor's objection or of their own accord, the Assignee may terminate a debtor's participation in the NAP on two grounds. The first is that the debtor was wrongly admitted to the NAP (also a ground on which creditors may object to a debtor's entry to the NAP). If the Assignee terminates (or intends to terminate) a NAP on this ground, the Assignee may apply to the court for an order preserving the debtor's assets pending an application for the debtor's adjudication as a bankrupt,[129] and there are two reported cases where this has occurred.[130] The Assignee may also terminate the NAP if satisfied that the debtor's financial position has changed so that the debtor is able to repay an amount towards their debts.[131]

The process of termination is simple. The Assignee sends a written notice of termination to the debtor's last known address and the notice is effective from the

123 Section 368(1).
124 Regulation 71(1).
125 Section 367(2)(a).
126 New Zealand Insolvency and Trustee Service "No Asset Procedures", above n 121.
127 Insolvency Act, s 376; *Chopra v Official Assignee* CIV-2009-441-432 at [12]; and *Murray v Official Assignee*, above n 115, at [24].
128 See *Re Tracy Lee Gifkins*, above n 119, at [15].
129 Insolvency Act, s 374(1)(a), (2)–(3).
130 *Official Assignee v Kennedy* CIV-2008-441-000751 HC Napier, 21 November 2008; and *Official Assignee v Stretton* [2015] NZHC 33.
131 Insolvency Act, s 373(1)(b).

time it is sent.[132] The Assignee must also notify the debtor's known creditors of the termination.[133]

The online application process for the NAP means that it is readily available throughout Aotearoa New Zealand, and applicants have the option to seek personalised online or telephone information, and/or to seek assistance from a budget advisor or "financial mentor".[134] The information provided on the Insolvency and Trustee Service's website is presented in written and video format, the latter increasing ease of access for debtors who have a degree of spoken English language fluency. It has been noted that entry to a Debt Relief Order (the "transplanted" NAP) in England and Wales "may be paradoxically no less onerous a process than bankruptcy".[135] The same appears to be true in Aotearoa New Zealand, at least insofar as the debtor must provide detailed and prescribed information that allows the Assignee to assess their eligibility for admittance. Appropriately, given an eligible debtor's lack of assets, it is the State that bears the cost of the gatekeeping function from the time the debtor submits their application.

Notwithstanding the form, simplicity and/or ease of access to the NAP, it can only assist those who are aware of it. The Ministry of Economic Development's 2011 evaluation of the NAP addressed this point,[136] noting that most NAP debtors responding to an online survey (70 per cent) reported that it had been easy for them to find out about the NAP, either by "word of mouth", an internet search, or via advice provided by a budget advisors.[137] At the same time, budget advisors participating in focus groups reported that just over 40 per cent of debtors using their services had no knowledge of the NAP.[138] As the NAP has now been available for almost 18 years, a greater degree of knowledge of its availability within the general community is now likely.

B. Consequences of Entry

The prescribed consequences of a debtor's entry to the NAP define the opportunity provided under the scheme for a fresh start. The key benefit for the debtor (and corresponding consequence for creditors) is that creditors must not begin or continue any step to recover or enforce a debt owed by the debtor at the

132 Section 373(2).
133 Section 373(3).
134 See the list of free financial mentoring services available, MoneyTalks "Find a local financial mentor" <www.moneytalks.co.nz>.
135 Ramsay "The new poor person's bankruptcy", above n 2, at S12.
136 Ministry of Economic Development "Evaluation of the No Asset Procedure", above n 11, at 8.
137 At 26; note that MBIE acknowledged that the survey respondents were not entirely representative of NAP debtors as beneficiaries were under-represented, at 15.
138 At 27.

time the debtor applied for entry to the NAP and that would be provable if the debtor was adjudicated bankrupt.[139] This does not prevent secured creditors from realising property subject to a charge (if the secured creditor is entitled to do this), as in general terms a secured debt is not provable in a bankruptcy.[140] Excluded debt (that is, debt arising under maintenance orders, child support obligations, and student loan balances) remains enforceable.[141]

Addressing the possibility of risk of abuse, the Assignee has an ongoing monitoring role following a debtor's admittance to the NAP. The debtor must comply with any reasonable request made by the Assignee to provide assistance, documents and information necessary for applying the NAP to the debtor.[142] The debtor must notify the Assignee as soon as practicable of any change in their circumstances that allows them to repay an amount towards a debt that would be provable if they were adjudicated bankrupt.[143] Finally, as a creditor-protection mechanism, the debtor must not obtain credit, alone or jointly, of more than $1,000 without first informing the credit provider that they are subject to the NAP.[144]

C. Discharge

A debtor's participation in the NAP may end in four ways: termination by the Assignee, voluntary adjudication as a bankrupt, involuntary adjudication as a bankrupt where the court order following a creditor's application for the debtor's adjudication is founded on a debt that remained enforceable during the NAP, and by discharge from the NAP. [145] The first two ways are self-explanatory, and termination of a NAP is dealt with above.

The rules relating to discharge complete the defined fresh start provided to debtors admitted to the NAP. In the usual course of events, a debtor is automatically discharged from the NAP 12 months after the date on which they were admitted to the procedure.[146] Following discharge, the debtor's debts that became unenforceable

139 See the definition of "provable debt" in Insolvency Act, s 232(1): "A provable debt is a debt or liability that the bankrupt owes – (a) at the time of adjudication; or (b) after adjudication but before discharge by reason of an obligation incurred by the bankrupt before adjudication"; note also the exception for fines and penalties, and so on, in s 232(2).

140 Section 243; a secured creditor has three options: they may realise property subject to the charge and prove in a bankruptcy for any shortfall, they may value the property subject to the charge and prove in the bankruptcy as an unsecured creditor for any balance after deducting the amount of the valuation, or they may surrender the charge to the Assignee for the benefit of creditors and prove in the bankruptcy as an unsecured creditor for the whole debt.

141 Section 369(2).

142 Section 370(1).

143 Section 370(2).

144 Non-compliance with this requirement is an offence, s 371.

145 Section 372(a)–(d).

146 Section 377(1).

on their entry to the NAP are (with two exceptions directed at fraud and/or moral hazard) cancelled so that the debtor is not required to pay any part of them or any penalties or interest that have accrued during the period of the NAP.[147] The two categories of debt that become enforceable on discharge are (1) any debt or liability incurred by fraud or fraudulent breach of trust to which the debtor was a party; and (2) any debt or liability for which the debtor obtained forbearance through fraud to which the debtor was a party.[148] Debts that were enforceable during the NAP (a debt arising under a maintenance order, a child support obligation, or a student loan balance) remain enforceable after discharge.

A debtor's discharge from the NAP does not release the following individuals who were, at the date of discharge: (1) a business partner of the debtor; (2) a co-trustee with the debtor; (3) a guarantor of the debtor; or (4) "jointly bound or had made any contract with the discharged debtor".[149]

The Assignee may, on giving notice to the debtor, extend the usual 12-month NAP period but only if satisfied this should occur for properly considering whether the debtor's participation in the procedure should be terminated.[150] The Assignee must also notify all known creditors of an extension to a debtor's NAP.[151]

A final rule directed at prevention of fraud and/or moral hazard is that the Assignee and/or a creditor of the debtor may apply to the Court for an order reversing the cancellation of the debtor's debts after discharge.[152]

VI. Evaluation

The NAP was enacted to achieve four objectives that are largely consistent with the wider objectives of the Aotearoa New Zealand insolvency law framework and internationally accepted policy aims for personal insolvency regimes. Each of the objectives is referenced in the detail of the statutory NAP scheme. In this section, the available evidence as to the way the NAP has operated in practice to achieve (or not) its objectives is presented and evaluated.

147 Section 377A(1).
148 Section 377A(2); the debtor also becomes liable for any penalties and interest that may have accrued in respect of these debts during the NAP period, see s 377A(2).
149 Section 377B.
150 Section 377(2)–(7).
151 Section 377(5).
152 Section 377C.

A. NAP Debtors

The NAP's first objective is to acknowledge that the debtors targeted by the scheme usually cannot avoid bankruptcy and that the punitive and deterrent aspects of the bankruptcy regime are inappropriate and have limited relevance.

The Insolvency and Trustee Service's annual statistical reports, available for the past 10 years, contain details of the characteristics of debtors entering the NAP and the information in these reports is collated and presented below. Across the years ended 30 June 2014–30 June 2023, between 56–65 per cent of all NAP debtors identified as female.[153] Putting this in context, most of those subject to a DRO over the same period also identified as female. In contrast, most of those adjudicated bankrupt across the same period identified as male, and the proportion of males adjudicated bankrupt involuntarily exceeded those adjudicated voluntarily. For example, 74 per cent of those adjudicated bankrupt involuntarily in the year ended 30 June 2023 were male compared with 57 per cent of those adjudicated voluntarily.[154]

Across time, those entering the NAP or becoming subject to a DRO were younger than those adjudicated bankrupt. In the years ended 30 June 2014–30 June 2021, the age group most frequently entering the NAP was aged 25–29, increasing to those in the 30–34 age bracket in the years ended 30 June 2022 and 2023.[155] The age group most frequently subject to a DRO across the past 10 years was those aged 25–29.[156] In the years ended 30 June 2018–30 June 2023, the age group most frequently adjudicated bankrupt was 40–44.[157] There was more variation in bankrupts' reported ages in the period 30 June 2014–30 June 2017, although in each of these years the most frequently reported age group adjudicated bankrupt was higher than 25–29.

Across time, most NAP debtors (approximately 70 per cent) identified as European, a percentage that largely represents the proportion of this ethnic group in the overall Aotearoa New Zealand population.[158] Those identifying as Māori made up nearly 18 per cent of the population, but NAP debtors identifying as Māori made up a larger proportion of the total: 28 per cent in the years ended 30 June 2020 and

153 This is consistent with available data from England and Wales as to the gender of the majority of debtors subject to a Debt Relief Order, see Ramsay, "The new poor person's bankruptcy, above n 2, at S11.

154 Insolvency and Trustee Service (2024), above n 89, at 23; this is consistent with Australian data, see Lucinda O'Brien and others "More to Lose: The Attributes of Involuntary Bankruptcy" (2019) 38(1) Economic Papers 15 at 19.

155 Insolvency and Trustee Service (2024), above n 89.

156 Above n 89.

157 The reported ages of those adjudicated bankrupt are the combined ages of those reported bankrupt voluntarily and involuntarily.

158 Stats NZ "2023 Census population counts (by ethnic group, age, and Māori descent) and dwelling counts <www.stats.govt.nz>.

30 June 2021,[159] 27 per cent in the year ended 30 June 2022, and 30 per cent in the year ended 30 June 2023.[160] These percentages are largely consistent with the proportion of those identifying as Māori who were subject to a DRO across the same period.[161] In comparison, the proportion of those adjudicated bankrupt who identified as Māori was closer to the percentage of Māori within the general population.[162] The proportion of NAP and DRO debtors identifying as Pacific Peoples was largely consistent with the proportion of those identifying as Pacific Peoples in the wider population (approximately 9 per cent).[163]

Across the years ended 30 June 2014–2018, most NAP debtors reported total debts of less than $20,000. From the year ended 30 June 2019 onwards, an increasing majority reported total debts over $20,000.[164] Unsurprisingly, a far smaller proportion of those adjudicated bankrupt reported debt levels lower than $20,000: seven per cent in the years ended 30 June 2020 and 2021, and eight per cent in the years ended 30 June 2022 and 2023.[165]

For each of the years ended 30 June 2014–30 June 2020, the Insolvency and Trustee Service's annual statistical reports included NAP debtors' self-reported causes of insolvency. The most frequently reported cause was unemployment or loss of income (between 30 and 48 per cent).[166] Between 70–80 per cent of NAP debtors reported that they were unemployed at the time they entered the procedure.[167] Excessive use of credit facilities was the second most frequently reported cause of insolvency, with ill health or absence of health insurance and relationship breakdowns alternating as the third most frequently reported cause.[168] These self-reported causes suggest that an unexpected life event may be a more frequent cause of NAP debtors' insolvency than is incurring debt that a debtor is unable to repay at the outset. Between zero and two per cent of NAP debtors in each year reported their employment status as trading on their own account, or as a company director and/or shareholder.[169]

The Insolvency and Trustee Service does not include an analysis of causes of insolvency by gender or age, but the Ministry of Economic Development's 2011

159 Insolvency and Trustee Service "Insolvency Statistics and Debtor Profile Report 1 July 2019–30 June 2020" (2021).
160 Insolvency and Trustee Service (2024), above n 89.
161 See Insolvency and Trustee Service "Insolvency Statistics and Debtor Profile Reports" <www.insolvency.govt.nz>.
162 Insolvency and Trustee Service "Insolvency Statistics", above n 159.
163 Stats NZ, above n 158.
164 Insolvency and Trustee Service "Insolvency Statistics", above n 159.
165 Insolvency and Trustee Service, (2024), above n 89, at 11.
166 Insolvency and Trustee Service "Insolvency Statistics", above n 159.
167 Insolvency and Trustee Service "Insolvency Statistics", above n 159.
168 Insolvency and Trustee Service "Insolvency Statistics", above n 159.
169 Insolvency and Trustee Service "Insolvency Statistics", above n 159.

evaluation reported budget advisors' view that older NAP debtors were more likely to become insolvent due to a significant life event (such as a relationship breakdown), and that younger NAP debtors were more likely to have lacked budgeting skills and/or had problems with credit.[170]

Those adjudicated bankrupt voluntarily also self-reported unemployment or loss of income as the most frequent cause of their bankruptcy, followed by ill health or the absence of health insurance, and a relationship breakdown.[171] Business-related reasons were reported less frequently by those adjudicated bankrupt voluntarily. For example, in the year ended 30 June 2020, 97 per cent of the 786 individuals voluntarily adjudicated bankrupt self-reported the cause of their bankruptcy, with unemployment or loss of income the most frequently reported cause (20 per cent), followed by excessive use of credit facilities (17 per cent) and a relationship breakdown (15 per cent). A failure to provide for taxation was reported by four per cent, failure to keep proper books or records by three per cent, economic conditions affecting industry by two per cent, and lack of sufficient working capital by one per cent.[172]Although many of those adjudicated bankrupt involuntarily did not respond to this question,[173] business-related causes of insolvency were reported more frequently, although not by a significant margin. For example, in the year ended 30 June 2020, 56 per cent of the 316 individuals involuntarily adjudicated bankrupt reported the cause of their bankruptcy. Just three per cent reported the cause of their bankruptcy as unemployment or loss of income, none reported excessive use of credit facilities, and a relationship breakdown was reported by six per cent.[174] On the other hand, failure to provide for taxation was reported by 11 per cent, lack of business ability by five per cent, failure to keep proper books or records by two percent, and lack of sufficient working capital by two per cent.[175]

As expected, a greater proportion of those subject to a DRO reported that they were employed: 57 per cent in the years ended 30 June 2020 and 2021, and 63 per

170 Ministry of Economic Development "Evaluation of the No Asset Procedure", above n 11, at 15.

171 This is consistent with the available data on Australian bankrupts, O'Brien and others, above n 154, at 19.

172 Insolvency & Trustee Service "Insolvency Statistics and Debtor Profile Report 1 July 2019–30 June 2020" (2021) at 27; additional self-reported causes of bankruptcy were unemployment, excessive use of credit facilities, relationship breakdown, ill health, adverse legal action, gambling/extravagance in living, impact of COVID-19 (selected by one per cent), and seasonal conditions including floods or drought.

173 This is because a debtor adjudicated bankrupt must complete documentation from which this information is drawn prior to their application being accepted by the Assignee, but this is not the case when the High Court makes an order of adjudication on a creditor's application, see Insolvency Act, s 46.

174 Different reported reasons for those adjudicated bankrupt on a creditor's petition is also evident in Australian data, see O'Brien and others, above n 154, at 19.

175 Insolvency & Trustee Service (2021), above n 172, at 27; additional self-reported causes of bankruptcy were as noted above, n 172.

cent in the years ended 30 June 2022 and 30 June 2023.[176] The most frequently self-reported cause of insolvency over time by those subject to a DRO was excessive use of credit facilities, followed by unemployment or loss of income.[177]

The Ministry of Economic Development's 2011 evaluation adds a detail not apparent in the above demographic data and it is that focus groups of budget advisors reported "large numbers of NAP debtors with low general literacy and financial literacy skills".[178] The extent to which this is also the case for those adjudicated bankrupt or subject to a DRO is unknown.

Data released by the Insolvency and Trustee Service indicates that the introduction of the NAP has reduced the proportion of bankruptcies in the total of the personal insolvency procedures administered by the Assignee. NAP entrants appear to be largely drawn from debtors who would previously have been voluntarily adjudicated bankrupt. However, the available data on the self-reported causes of bankruptcy for this group reveals the same most frequently reported causes of insolvency as those entering the NAP, that is, unemployment, excessive use of credit facilities, and a relationship breakdown. It may be that some consumer debtors are forced into bankruptcy because they have already been through the NAP, or because that their total debts (apart from any excluded debt) are more than $50,000.[179]

The calculation of "total debts" for NAP eligibility purposes includes both secured and unsecured debt. Secured debt remains enforceable during and after a debtor's discharge from the NAP as, with certain exceptions, secured debt is not provable if a debtor is adjudicated bankrupt.[180] The equivalent eligibility criterion for a DRO is that "the debtor's total unsecured debts (apart from any excluded debt) that would be provable in the debtor's bankruptcy are not more than $50,000".[181] Fifty thousand dollars is a considerable sum, and it is not suggested that this be increased. However, consideration could be given to amending the NAP entry criteria relating to debt levels so that it is consistent with that for the DRO and international adoptions of the NAP, that is, secured debt is not included in the calculation of debts for eligibility purposes. Exclusion of secured debt from the calculation of "total

176 Insolvency & Trustee Service (2024), above n 89, at 11.

177 At 14; Insolvency & Trustee Service "Insolvency Statistics and Debtor Profile Report 1 July 2018 to 30 June 2019" (2020) at 13; Insolvency & Trustee Service "Insolvency Statistics and Debtor Profile Report 1 July 2017 to 30 June 2018" (2019) at 14; and Insolvency & Trustee Service "Insolvency Statistics and Debtor Profile Report 1 July 2016 to 30 June 2017" (2018) at 13.

178 Ministry of Economic Development "Evaluation of No Asset Procedure", above n 11.

179 Insolvency Act, s 363(1)(d).

180 For example, when a secured creditor surrenders their charge, see s 243(1)(c).

181 Section 343(1)(a); and, as noted above, the United Kingdom adaption of the NAP also excluded secured debt from the calculation of a debtor's qualifying debts, see Insolvency Act 1986, s 251A(3), (4).

debts" is consistent with secured creditors' rights to realise property subject to their charge during and after a debtor's entry to the NAP.

In summary, NAP debtors' self-reported causes of insolvency are consistent with consumer over-indebtedness, for example, loss of employment or income, or a relationship breakdown (that is, an unexpected life event), and excessive use of credit facilities. Most were not employed at the time they entered the NAP, many were in receipt of a State benefit, and many had total debts of less than $20,000. A very small percentage of those employed reported that they were carrying on business on their own account or were a company director or shareholder. The age group most frequently making use of the NAP were young adults aged 25–29, and it may be that some debtors in this group lacked the necessary financial skills and/or experience to manage the array of credit options newly available to them on reaching adulthood. Females and Māori are also over-represented as NAP debtors, but this may be a consequence of their generally lower socio-economic status, meaning that they are more likely (than males) to be eligible to enter the NAP because their total debts are less than $50,000.[182]

B. A Fresh Start?

The degree to which the NAP has met its second objective, providing targeted debtors with a fresh start, is more difficult to assess. The duration of the NAP is shorter than the duration of bankruptcy, and NAP debtors are not subject to the deterrent and/or punitive general aspects of bankruptcy, such as restrictions on involvement as a director or manager of a business. NAP debtors are also not subject to some of the career or position limiting restrictions applicable to undischarged bankrupts under other legislation, such as, for example, disqualification as an officer of a charitable entity.[183]

A supporting rationale for the enactment of the NAP is that the bankruptcy scheme provides bankrupt consumer debtors with little incentive to improve their financial position as (with few exceptions) after acquired property and income passes to the Assignee during the three-year bankruptcy period.[184] NAP debtors have an obligation to inform the Assignee of any change in their circumstances that would allow them to repay an amount towards a debt that otherwise falls within the moratorium on creditor enforcement action,[185] and the Assignee may terminate

182 See Ministry of Social Development, "The Social Report 2016 | Te pūrongo oranga tangata" (Wellington, June 2016) <www.msd.govt.nz>.

183 Charities Act 2005, s 36B(2).

184 Insolvency Act, s 102; and Office of the Minister of Commerce "Bankruptcy Administration: No Asset Procedure and Insolvency Act Changes" (2003).

185 Section 370(2).

their NAP if this occurs.[186] It may be that this counts against NAP debtors having an incentive to improve their financial position during the period of the procedure and so delays their fresh start, albeit that this disincentive applies for a much shorter period than under the bankruptcy scheme.

NAP debtors do benefit from the general moratorium on enforcement action by unsecured creditors that applies for the duration of the procedure. NAP debtors responding to an online survey conducted as part of the Ministry of Economic Development's 2011 evaluation reported reductions in many of the recognised and adverse consequences of over-indebtedness.[187] For example, debtors reported improvements to their financial position, debt levels, standard of living, health and relationships.[188]

NAP debtors also benefit from the rule that their debts that would have been provable if they had been adjudicated bankrupt are (with specified exceptions) discharged on their exit from the NAP. This fresh start is available to all NAP debtors no matter what the cause of their insolvency.

A review of numbers of second-time bankruptcies across the past 10 years reveals a discernible trend. In the year ended 30 June 1998, prior to the enactment of the NAP, second time bankruptcies accounted for six per cent (64) of all bankruptcies (1068).[189] It is not known whether this figure is representative of the years immediately preceding and following it. Nevertheless, across the past 10 years, the rate of a previously reported NAP or bankruptcy for those adjudicated bankrupt has increased, and the rate is higher for those adjudicated bankrupt voluntarily. In the years ended 30 June 2014–30 June 2023, the overall reported rate of a prior bankruptcy or NAP ranged from a low of 10 per cent of all bankruptcies in the year ended 30 June 2023,[190] to a high of 17 per cent in the year ended 30 June 2020.[191] A previous NAP or bankruptcy was reported by four–eight per cent of those adjudicated bankrupt involuntarily, but 14–22 per cent for those adjudicated bankrupt voluntarily.[192] As the available data does not distinguish between numbers of prior NAPs and numbers of prior bankruptcies, the extent to which this data is indicative of a failure of NAP debtors to achieve a fresh start is unclear.

186 Section 373(1)(b).

187 Recognised consequences of over-indebtedness include adverse effects on health, family relationships, and standard of living, see Valins, above n 34, at 6; similar benefits have been reported for debtors subject to a Debt Relief Order in England and Wales, see Ramsay "The new poor person's bankruptcy", above n 2, at S14; similar benefits have also been reported for those adjudicated bankrupt in Australia, see Ali, O'Brien and Ramsay, above n 79.

188 Ministry of Economic Development "Evaluation of the No Asset Procedure", above n 11, at 18.

189 Ministry of Economic Development "Tier One Discussion Documents", above n 27, at 30.

190 Insolvency and Trustee Service (2024), above n 89, at 23.

191 Insolvency and Trustee Service "Insolvency Statistics and Debtor Profile Report 1 July 2020 to 30 June 2021" (2022) at 24.

192 Insolvency & Trustee Service (2023), above n 89.

The data reported in the previous paragraph may be an indication that not all of those entering the NAP have taken, or were able to take, full advantage of the available fresh start. Supporting this proposition is anecdotal evidence reported in the Ministry of Economic Development's 2011 evaluation that some NAP debtors were not altering their behaviour during or after the NAP. Budget advisers were split on the issue of whether the NAP "was helping people in genuine situations …, or encouraging a 'get-out' of financially irresponsible behaviour".[193] Banks reported "seeing NAP debtors continuing to spend irresponsibly on consumer luxuries even once they have been accepted for NAP".[194] On the other hand, as budget advisors reported that many NAP debtors had low financial literacy or general literacy skills,[195] it may be that some debtors lack the skills to alter their behaviours. The circumstances of others may limit their options. For example, the 2011 evaluation noted that some beneficiaries were continuing to accrue debt to Government agencies in the form of repayable benefit advances.[196] Australian evidence, albeit in a bankruptcy context, suggests that bankruptcy is less likely to result in "permanent or lasting" rehabilitation for low-income individuals,[197] with some consumer advocates reporting that bankruptcy does not address the underlying causes of their clients' financial hardship.[198] These reports chime with United States evidence, again in a bankruptcy context, that achievement of a fresh start in terms of "post-bankruptcy financial health" is less likely for those who lack "an adequate and steady income".[199]

The 2011 evaluation recommended that further consideration be given to "introducing budgeting skills as a condition of NAP, where appropriate".[200] There is mixed evidence as to the effectiveness of mandatory education requirements from Canada, where such a requirement has been in place since 1992 for all debtors who file for a personal insolvency procedure.[201] The Canadian mandatory counselling scheme aims to promote a "fresh start" and to allow debtors to "take control …

193 Ministry of Economic Development "Evaluation of the No Asset Procedure", above n 11, at 36.

194 At 36.

195 At 29.

196 At 23; see Work and Income, "Advance Payment of Benefit" <www.workandincome.govt.nz>

197 Ali, O'Brien and Ramsay, above n 79, at 723–725, 728, 730.

198 At 723.

199 See Katherine Porter and Deborah Thorne "The Failure of Bankruptcy's Fresh Start" (2006) 92 Cornell Law Review 67 at 70.

200 Ministry of Economic Development "Evaluation of the No Asset Procedure", above n 11, at 25; note Keeper's endorsement of this recommendation, Keeper, above n 6, at 97.

201 Bankruptcy and Insolvency Act (RSC 1985 c B-3), s 157.1(1); note that there is no provision for mandatory counselling or education in the United Kingdom adaption of the NAP, or in the proposal for the adoption of a Minimal Asset Procedure in Australia, see Attorney General's Department, above n 5.

and plan for a more financially secure future".[202] All debtors filing an insolvency procedure must complete two online modules and attend two in-person counselling sessions.[203] The in-person counselling is provided by the private administrator of an insolvent estate (a licensed insolvency trustee), or by a qualified insolvency counsellor appointed by a licensed insolvency trustee. The costs of the in-person counselling are paid by the debtor's estate. A 2013 Government Report referenced debtors' views that mandatory counselling had a positive impact, although the extent to which the reported views were representative of all (or consumer) debtors is unclear.[204] Administrators of bankrupt estates reported that mandatory counselling was less relevant for three categories of debtors: business bankrupts, debtors living with addiction (for example, gambling or substance addiction), and debtors who were "victims of circumstances".[205] The Canadian Report also noted that "evidence suggests that debtors who cited overuse of credit for their financial difficulties were less likely to be repeat filers" of insolvency procedures following mandatory counselling,[206] but this finding is not replicated in another analysis of trends in repeat bankruptcies.[207] Both the Canadian Report and academic commentary acknowledge the difficulty of assessing the value of the mandatory counselling scheme.[208]

In the Aotearoa New Zealand context, as noted above, NAP debtors self-report that unexpected life events are a more frequent cause of their insolvency than is excessive use of credit. The view of Canadian budget advisors (described in the previous paragraph) is that mandatory budgeting education is less relevant for such debtors. It is also likely that there are limits on the utility of mandatory education for debtors whose insolvency is a result of excessive use of credit facilities. The literature suggests that a fresh start is less likely for debtors on a low or inadequate income (and the author interpolates that this is likely to be so even if such debtors have enhanced budgeting skills). For NAP debtors in receipt of a State welfare benefit, there is a likely intersection between the likelihood of a fresh start and the adequacy of the State-provided social network, although an exploration of the latter is beyond the scope of this paper.

202 See the information available on the Office of the Superintendent of Bankruptcy's website, Government of Canada "Insolvency Counselling Program introduction" <https://ised-isde.canada.ca>.

203 Office of the Superintendent of Bankruptcy, above n 202.

204 Industry Canada "Evaluation of Mandatory Counselling: Final Report" (2013) at [2.4], [3.2.1].

205 At [3.1.1].

206 At [3.2.1].

207 Thomas GW Telfer "Repeat Bankruptcies and the Integrity of the Canadian Bankruptcy Process" (2014) 55 Can Bus LJ 231 at 259.

208 Industry Canada, above n 204, at [3.2.1]; Ramsay, above n 79, at 541.

Even if it is possible in the Aotearoa New Zealand context to conclude that mandatory counselling for NAP debtors should be introduced, which seems doubtful, other questions arise. These include how the education would be provided (online or in person)? Who would provide it (the Assignee's office or a private provider)? What form it would take (learning outcomes, content, and how debtors with poor literacy skills would be accommodated)? How would it be funded? If a mandatory programme is introduced only for NAP debtors who have no or very limited assets available to pay their debts, the cost would likely fall on the State.

Rather than focusing on an "all or nothing" mandatory approach, it may be that a targeted approach to the provision of educative material is appropriate. For example, if a debtor self-reports the cause of their insolvency as excessive use of credit facilities, consideration could be given as to how the Assignee could provide relevant self-help material and/or information about free in-person budgeting advice.[209] Possibly this could be included in the NAP acceptance notice sent to the debtor. Although associated costs might initially be perceived as contrary to one of the objectives of the NAP scheme (minimisation of administrative costs to the State), it is possible (although difficult to assess) that these costs might be outweighed by wider, societal benefits of having a group of former NAP debtors who are less likely to incur credit debt that they are unable to repay.

An alternative and perhaps more proactive solution, given the relative youth of many entering the NAP, is to include the teaching of budgeting and financial skills in the school curriculum.[210] The Government has recently endorsed this option, although without specific reference to it as a preventative measure to reduce numbers of personal insolvencies.[211] The impact, if any, of this change will take some years to assess.

Turning to a final point relevant to the assessment of NAP debtors' achievement of a fresh start, just under half of those responding to a survey conducted as part of the Ministry of Economic Development's 2011 evaluation reported difficulties in obtaining credit. This was attributed to the names of NAP debtors being published on a public register.[212] Many debtors reported that they were not fully aware of this consequence on entering the procedure. The implications of entering a personal insolvency procedure on credit options and ratings is detailed on the Insolvency

209 This would include the budgeting tools available from New Zealand Insolvency and Trustee Service "What are my options?" <www.insolvency.govt.nz>.

210 See Ministry of Economic Development "Evaluation of the No Asset Procedure", above n 11, at 35; this has been a perennial suggestion, see Paul Heath, above n 33.

211 Erica Stanford and Scott Simpson "Transforming financial education in schools" (New Zealand Government press release, 30 April 2025).

212 Ministry of Economic Development "Evaluation of the No Asset Procedure", above n 11, at 20.

and Trustee Service's website,[213] although it may be that some debtors discount this information, or do not understand if their literacy skills are poor.

Restrictions on a debtor obtaining credit operate during the NAP. Although these end on a debtor's exit from the NAP, the reality is that some creditors may be reluctant to deal with previous NAP debtors.[214] The period in which a debtor's name remains on a public register after exit from the NAP was fixed at four years in 2009. This extension was intended to "allow future lenders or credit rating agencies access to information beyond … [a 12-month timeframe] in order to undertake a proper assessment of the creditworthiness of an individual".[215] The extension of the public notification period, rather than permanent notification, was viewed as preserving the "fundamental principle of rehabilitation that underpins personal insolvency law".[216] The four-year post-exit public notification period for NAP debtors is the same as for those discharged from bankruptcy,[217] and so is arguably onerous given the NAP is intended to give debtors the opportunity of a fresh start after a shorter period. A debtor's name appearing on a public insolvency register is "credit information" for the purposes of the Credit Reporting Privacy Code.[218] Credit agencies may retain this information for five years.[219] Any reduction in the post-discharge notification period would have a corresponding reduction in the period for which a debtor's entry and discharge from the NAP appears on their credit rating. This may be merited to differentiate NAP debtors from those adjudicated bankrupt. To the extent that NAP debtors are unable to obtain affordable credit, and this prevents their return to "normal life", the achievement of the fresh start objective is impinged, although it is unknown what proportion of debtors over time have been or are affected by ongoing limitations on their ability to obtain credit.

C. Safeguards Against Abuse

The third objective of the NAP is to provide appropriate safeguards against the risk of abuse. Features of the NAP scheme that go towards achieving this objective

213 See New Zealand Insolvency and Trustee Service "Life after insolvency" <www.insolvency.govt.nz>.

214 Ministry of Economic Development "Evaluation of the No Asset Procedure", above n 11, at 41.

215 Insolvency Amendment Bill 2009 (19-1), Regulatory Impact Statement.

216 Above n 215; a four-year post-discharge public record is mooted for Australia, see Attorney General's Department, above n 5 at 3; compare with the United Kingdom adaption of the NAP, where a debtor's Debt Relief Order (DRO) is removed from the Individual Insolvency Register three months after the end of the order (that is, it is a matter of public record for 15 months) although credit agencies are able to keep a record of a DRO for six years, see Insolvency Act 1986, s 251W; and United Kingdom Government "Search the bankruptcy and insolvency register" GOV.UK <www.gov.uk>.

217 Insolvency Act, s 449(4).

218 Credit Reporting Privacy Code 2020, r 4.

219 Rule 9(2).

include the Assignee acting as gatekeeper, the specified grounds on which a debtor is disqualified from entering the NAP, provision for the Assignee to notify known creditors of a debtor's entry to the NAP and creditors' rights of objection, and the Assignee's power to terminate a NAP.

In the Ministry of Economic Development's 2011 evaluation, creditors reported some anecdotal evidence of potential debtor misconduct in the period immediately prior to their entry to the NAP, such as increases in last-minute spending, although there was some debate as to whether this type of behaviour was fraudulent or merely "gaming the system".[220] On the other hand, some debtors are likely entering NAP as a consequence of lenders making available credit that the debtor cannot afford to repay, that is, some creditors are the authors of their own misfortune. To some degree, numbers of NAP terminations will be linked to numbers of creditor objections, and it may be that creditors lack incentive to do this given the small chance of their debt being repaid even if a NAP is terminated. Nevertheless, the available evidence from the past 10 years is that few debtors are applying, or being admitted, to the NAP in instances when they were disqualified from entry.

In the year ended 30 June 2023, the Assignee received 559 applications to enter the NAP and rejected 29 per cent (162) of these. Some rejected applications were resubmitted, so the ultimate acceptance rate was 85 per cent of all applications made during this period.[221] Similarly high percentage rates of accepted applications have occurred across time alongside correspondingly low numbers of rejections.[222]

The Assignee's most frequently reported reason for rejecting an application over the past 10 years is an incomplete statement of affairs, followed by the debtor having total debts over the statutory limit. There were no reported rejections on disqualification grounds in four out of the past 10 years, with rejections on such grounds reported at less than five per cent of total rejections in other years.[223]

The Insolvency and Trustee Service reports very low termination rates of between one and three per cent per annum across the years ended 30 June 2014–30 June 2023. In all years, the most frequently reported reason for termination is the debtor having total debts over the statutory maximum limit, followed by a change in the debtor's circumstances, and the debtor having the means to repay their debts. Reasons that would disqualify a debtor from entry (such as having incurring debt with knowledge of inability to pay) are reported at rates of 10 per cent or fewer of all terminations.[224]

220 Ministry of Economic Development "Evaluation of the No Asset Procedure", above n 11, at 37.
221 New Zealand Insolvency and Trustee Service (2024), above n 89, at 18.
222 At 18; Insolvency and Trustee Service (2023), above n 89, at 18.
223 The years ended 30 June 2014–2018 and 2021.
224 Insolvency & Trustee Service "Insolvency Statistics", above n 163.

D. Simplicity and Administrative Savings

The NAP's final objective was the provision of a simple procedure which minimises the State's administrative costs. The Ministry of Economic Development's 2011 evaluation reported some efficiencies for the Insolvency and Trustee Service associated with administering the NAP rather than bankruptcies. This is an expected consequence of the fact that some individuals who would previously have been adjudicated bankrupt voluntarily are entering the shorter and less administratively burdensome NAP.[225] However, it was also reported that these efficiencies had to be balanced against the possibility that some debtors entering the NAP would not have otherwise entered a personal insolvency procedure, a concern reported by some creditors.[226] Other costs to the State resulted from an increase in NAP debtors taking out student loans (when they would have been unable to do so if they had been adjudicated bankrupt) and costs incurred by the Ministry of Social Development, both in terms of administration costs and the costs of writing off debt.[227] To the extent this was (or remains) the case, it is unclear whether the NAP has resulted in a net efficiency in terms of administrative costs for the State. On the other hand, the 2011 evaluation did not attempt to measure societal benefits, which would also result in a net cost benefit to the State, such as an increase in the tax take for NAP debtors able to take advantage of the provided fresh start and re-enter employment or improve their employment position.

Costs to creditors were not an initial NAP objective but were reported as an unintended outcome in the 2011 evaluation. Creditors reported that their costs included an increase in debt that was written off, reportedly due to greater numbers of debtors entering the NAP who might otherwise have paid off their debts over time.[228] On the other hand, those entering NAP are assessed by the Assignee as having no available means to repay their debts, and there is no guarantee at this time that their situation will improve in the short term such that they are able to pay their debts over time *and* that it will be cost-effective for creditors to enter and monitor such arrangements. Creditors also reported significant administrative costs,[229] but it is not possible to assess the extent to which these costs would have been incurred in any event, such as if the creditor had taken enforcement action or was required to respond to a debtor's adjudication as a bankrupt or becoming subject to a DRO. It is also worth noting that although the writing off a single debtor's debt may not be significant, this may not be the case where a creditor must write off the debts

225 Ministry of Economic Development "Evaluation of the No Asset Procedure", above n 11, at 46.
226 At 45.
227 At 52.
228 At 52.
229 At 39.

of many. A further unknown is the extent to which the introduction of the NAP has altered creditors' behaviour, potentially to their longer-term advantage in that they do not offer credit where a debtor is unlikely ever to be able to repay.

E. Comment

There are some limitations to the publicly available data presented above, as readers will likely have identified. On the plus side, much of the available quantitative data is from a reliable source, the Insolvency and Trustee Service. Qualitative data (although also provided by the Insolvency and Trustee Service) is largely self-reported by debtors and there appears to be no available and independent check on its veracity. Some key data, for example debtors' self-reported causes of insolvency, is not available for recent periods. As the NAP has now been available for 17 years, "control" data (that is, patterns and trends in the period prior to the enactment of the NAP) is now quite old and may not necessarily be reflective of current societal norms.

Having regard to the above, the available evidence nonetheless suggests the NAP is reaching its target market in that it is largely insolvent consumer debtors who have no means of repaying their debts who are entering the procedure. A helpful tweak to the existing legislative scheme would be alignment of the maximum debt entry levels with that for the DRO, that is, $50,000 of *unsecured* debt. It is likely that debtors entering the NAP experience immediate relief and benefits from the moratorium on creditor enforcement action, but evidence as to the proportion who achieve a fresh start in the longer-term post-discharge is unclear. The practical reality is that not all NAP debtors are likely to turn their lives and financial position around following their exit from the procedure. As there is no comparative data available in the Aotearoa New Zealand context as to debtors' experiences post-discharge from bankruptcy or a DRO, it is not possible to offer any conclusion as to the success of the NAP vis a vis other collective, personal insolvency procedures.

The fresh start available to debtors under the NAP takes the form of a discharge of debt, but the Canadian experience suggests mixed support for mandatory education as a condition of discharge for all debtors. On the other hand, a mechanism to provide educative materials or experiences to those who would most benefit from it (debtors whose cause of insolvency is excessive use of credit facilities) merits further investigation. A further tweak by way of reducing the post-discharge period in which a debtor's NAP is a matter of public record to distinguish NAP debtors from those adjudicated bankrupt also merits consideration as a means of ensuring the provision of earlier fresh start.

The statistical data provided by the Insolvency and Trustee Service on rejection and termination rates suggests infrequent abuse in the form of ineligible/disqualified debtors applying for or entering the NAP. This is likely a consequence of the Assignee's role as gatekeeper, and of the detailed information required of debtors when applying to enter the procedure. The administrative burden (and cost) on the Assignee is likely to be greater when assessing debtors' eligibility to enter the NAP (and when determining whether to make a (DRO)) than when processing a debtor's application for voluntary bankruptcy. The flipside is a reduction in the Assignee's obligations during the period of a debtor's NAP and the cost savings associated with this. There is no available evidence whether debtors perceive the NAP application process to be onerous, but they must provide a similar volume of information if applying to enter the other collective procedures administered by the Assignee. Overall numbers of debtors admitted to the NAP on an annual basis are lowish (476 in the year ended 30 June 2023), and unlikely to capture all insolvent consumer debtors who are eligible to enter the procedure. However, this is also true for all collective insolvency procedures for which data is available, and for numbers of companies entering the collective insolvency procedures available under the Companies Act 1993.[230]

There is no recent evidence available as to the impact of the NAP in terms of minimising the State's administrative costs. To the extent that greater numbers of debtors over time have entered the NAP who would not have applied for voluntary bankruptcy, it may be that there is an overall resulting increase in the Assignee's administrative costs. However, there is no available counterpoint to this in the form of an assessment or estimate of the benefits for debtors admitted to the NAP and/or society.

Perhaps the safest conclusion is that the NAP is largely used by its intended "target market", insolvent consumer debtors, and provides them with an opportunity for a fresh start in the form of a discharge from most of their debts at an earlier time than they would have received if they had been adjudicated bankrupt, and also with fewer restrictions operating during the NAP than would be the case if they had been adjudicated bankrupt. The extent to which NAP debtors take advantage of the fresh start they receive in the long-term likely depends on the debtor's personal circumstances and future income earning ability and/or opportunities.

230 See New Zealand Companies Office Companies Register "Company Statistics" (2025) <https://companies-register.companiesoffice.govt.nz>.

VII. Conclusion

The NAP is the most recent addition to the Aotearoa New Zealand personal insolvency framework contained in the Insolvency Act. It is a legislative response to a proportionate increase in the number of consumer insolvencies over time. It is intended as an alternative to bankruptcy for insolvent consumer debtors who have no assets and no means to repay their debts. Further objectives, reflected in the drafting of the NAP's statutory scheme, include simplicity, low administrative costs for the State (the Assignee), appropriate safeguards to prevent abuse, and provision of a fresh start for targeted debtors (in the form of a discharge from most of their debts on exiting the NAP) at an earlier time than they would have received if they had been adjudicated bankrupt. These objectives are consistent with the wider purposes of the Aotearoa New Zealand insolvency framework and with internationally accepted policy aims for personal insolvency regimes. The NAP is consistently the collective, personal insolvency regime most frequently administered by the Assignee. The available evidence as to whether the NAP has met the objectives it was enacted to achieve indicates that, as intended, it is largely eligible insolvent consumer debtors who have been admitted to the procedure, and that the gatekeeping role performed by the Assignee appears to have prevented abuse of the scheme by ineligible debtors. The statutory scheme provides a fresh start for admitted debtors in the form of a moratorium on the enforcement of most of their debts during the 12-month NAP duration, and a discharge from most of their debts when they exit the procedure. The provided fresh start is simpler and incurs lower, initial costs for the State when compared to a scheme combining debt relief with mandatory State funded budgeting or financial education. It is unlikely that all NAP debtors have been able to achieve a fresh start in the longer term given the international evidence that success is linked to post-discharge adequacy of income. Although there is a lack of evidence on this point, it seems likely that this is also true of the nature of the fresh start debtors receive under the other collective, insolvency procedures set out in Insolvency Act. International evidence as to the efficacy of mandatory budgeting education is mixed, although this may potentially benefit debtors who have become insolvent because of excessive use of credit facilities rather than because of an unexpected life event. The available evidence as to reduction in costs to the State has focused on the Assignee's administrative costs and has not considered the potential wider societal benefits resulting from the operation of the NAP. The current statutory NAP scheme is by no means perfect, and there is scope for "tweaks" in relation to the specified debt entry threshold, the post-discharge period in which a debtor's past NAP is publicly advertised, and in the provision of educative materials to debtors

who would benefit from this. Notwithstanding the gaps in the available evaluative evidence, the NAP appears to be a better option than bankruptcy for the relatively few insolvent consumer debtors who are unable to repay their debts *and* who chose to enter a collective, personal insolvency procedure in Aotearoa New Zealand.

EXPLORING THE AFTER-MAF: THE PAST, PRESENT AND FUTURE OF 'MALE ASSAULTS FEMALE'

Anna Smith*

Abstract

Violence against women is a widespread issue both domestically and across the globe. This paper approaches gendered violence from a legal perspective by interrogating New Zealand's unique criminal provision of "male assaults female" (MAF). Prompted by the Law Commission Report from 2009 that recommended repealing MAF, this paper first investigates the historical background of MAF to establish its original purpose of preventing domestic violence. The interrogation then moves to confirm whether the original purpose of MAF has changed, considering the introduction of new family violence legislation and the use of MAF by the police. It concludes there may be a new purpose for MAF – publicly condemning violence against women. With the original purpose of MAF arguably replaced by new legislation, this paper then explores violence against women in New Zealand and the current relevance of MAF. It asserts MAF remains relevant as a mechanism to publicly condemn gendered violence. The final part of this paper asks whether MAF should be repealed, exploring arguments from the Law Commission, along with criminalisation and punishment theories. The arguments in favour of retaining MAF are shown to outweigh the arguments for repeal.

I. Introduction

Violence against women, specifically by men, is ingrained as inherently "bad" in Western society. The young people in my life aged between 10 and 17 demonstrate this to me with statements such as "I can't hit her, she's a girl" and "I know violence is bad anyway, but him hitting her crossed the line". While it is generally understood that violence against women is unacceptable, it is still a widespread and normalised occurrence.[1] From a sociological perspective, violence against women is normalised

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1 Ministry for Women "Violence against women" <www.women.govt.nz>.

due to the power men have over women within a patriarchal society.[2] New Zealand is no exception to this. In approaching the issue of gendered violence from a legal perspective, this paper aims to investigate the purpose of the criminalisation of violence perpetrated by men against women, specifically s 194(b) of the Crimes Act 1961 (Crimes Act), "Assault by a male on a female", its relevance in light of that purpose, and whether this provision should be repealed. Throughout this paper, s 194(b) and its historical provisions will be referred to as MAF.

Part I of this dissertation outlines the rationale behind researching MAF, and sets out the research questions that will be addressed. This section introduces the Te Aka Matua o te Ture | Law Commission report that recommends repeal of MAF, and provides the rationale for an investigation of MAF's purpose. Part I then outlines the MAF provision as it is today.

The historical underpinning of MAF will be discussed in Part II to ascertain the provision's original purpose. Beginning with the common law principle of coverture to provide background context, this section follows MAF from its earliest form in the United Kingdom in 1853, through to its current form in New Zealand law under the Crimes Act 1961. Part II will establish that the original purpose of MAF was to limit domestic violence.

Part III outlines the new family violence legislation that may bring the relevance of MAF into question. This section then investigates when, and how often, men are prosecuted with MAF specifically, through an assessment of Police and Ministry of Justice data. Case law will also be considered to confirm whether the original purpose of MAF has changed, along with the impact the new family violence legislation has had on prosecutions of MAF. Part III concludes that MAF was used predominantly in the domestic context confirming its original purpose, that this purpose is now being addressed by the new family violence legislation, and suggests MAF may have a potential new purpose of publicly condemning gendered violence.

The relevance of MAF is considered in Part IV. This section outlines New Zealand's international obligations related to addressing violence against women (VAW).[3] It will then discuss VAW in New Zealand, including data on the gender demographics of violent crime and victimisation. It will be argued that as VAW is an issue both globally and domestically, MAF remains relevant and may serve a revised purpose of publicly condemning VAW.

2 Carrie Yodanis "Gender Inequality, Violence Against Women, and Fear: A Cross-National Test of the Feminist Theory of Violence Against Women" 2004 19(6) J Interpers Violence 655 at 657; and Gwen Hunnicutt "Varieties of patriarchy and violence against women: Resurrecting 'Patriarchy' as a theoretical tool" (2009) 15 VAW 553 at 560.

3 As VAW is on a spectrum, discussion will be limited to violence in terms of assault.

Finally, the question of whether MAF should be repealed will be addressed in Part V. Firstly, this section explores arguments based on the Law Commission's report on victim-specific offences.[4] Part V will then investigate arguments based on theories of criminalisation and punishment to establish whether MAF should be repealed. When considering MAF has a revised purpose of condemning VAW, the arguments in favour of retaining MAF will be shown to outweigh the arguments for repeal.

A. Rationale

In 2009, the Te Aka Matua o te Ture | Law Commission published its *Review of Part 8 of the Crimes Act 1961* (the LCR).[5] Though initially requested by the Labour Government in 2007, the review was expedited at the request of the new National Government in 2008.[6] This was because developing an appropriate response to violence against children was a priority under the new Government, and some provisions under pt 8 of the Crimes Act 1961 related to offences against children.[7] This report recommended repealing MAF, along with other sections of the Crimes Act 1961 regarding victim-specific assault offences.[8] This recommendation of repeal was on the condition that the penalty for common assault be increased.[9] The LCR also suggested MAF as it then stood was "not fulfilling a useful function", as the provision was essentially the same as common assault, aside from the genders of the people involved.[10] In response, the then Minister of Justice Simon Power, stated due to the Government's focus on family violence, there were no plans to remove this offence at that time.[11] The report also considered that although MAF may have "been designed, or be operating, as a proxy for an offence of domestic assault", the gendered nature of the offence did not capture all forms of family violence.[12] Other aspects relevant to the recommendation for repeal of MAF were also considered in the report, including the charge as a propensity indicator for family violence offending.[13] These reasons provide a starting point for the investigation of the history of MAF, and in what circumstances men are being prosecuted under the provision.

4 Law Commission *Review of Part 8 of the Crime Act 1961: Crimes Against the Person* (NZLC R111, 2009).
5 Law Commission, above n 4.
6 At iv.
7 At iv.
8 At 35.
9 At 35.
10 At 6.
11 "Law Commission recommends repealing Male Assaults Female offence" (27 January 2011) Violence Information Aotearoa <vine.org.nz>.
12 Law Commission, above n 4, at 35.
13 At 36.

The LCR did not recommend introducing a new offence to deal with domestic violence.[14] However, a specific family violence offence, s 194A "assault on person in family relationship", was inserted into the Crimes Act by the Family Violence Amendments Act 2018, along with other new family violence related offences.[15] With these amendments now in place, the question as to the relevance of MAF in its current form arises.

MAF, in one form or another, has been law in New Zealand for 130 years.[16] The provision as it stands has not been adjusted since 1961.[17] Interrogation and evaluation of the purpose of MAF in both historical and contemporary social contexts will give insight into whether it remains necessary, particularly if its original purpose is being achieved by the new offences introduced in 2018.

Therefore, this dissertation seeks to understand the original purpose of MAF, along with its relevance and necessity in the future, considering there are now specific family violence offences in force. To do this, the following sub-topics will be addressed:

- Investigation of the historical underpinning of MAF to establish its purpose.
- Interrogation of that purpose and whether it has changed.
- Assessment of the provision's relevance in today's society.
- Assessment as to whether MAF should be repealed.

B. The Offence: Crimes Act 1961, s 194(b)

Section 194(b) itself appears straight forward, however it does require application of the interpretation section of the Crimes Act to establish all elements of the offence.[18] Section 194 of the Crimes Act, "Assault on a child, or by a male on a female", states:

> Every one is liable to imprisonment for a term not exceeding 2 years who—
>
> (a) assaults any child under the age of 14 years; or
>
> (b) being a male, assaults any female.

14 At 36.
15 Family Violence (Amendments) Act 2018, pt 3.
16 Indictable Offences Summary Jurisdiction Act 1894, s 16.
17 Crimes Act 1961, s 194(b).
18 Section 2.

The definition of "assault" as set out in the Crimes Act, s 2 states:

> **assault** means the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other to believe on reasonable grounds that he or she has, present ability to effect his or her purpose; and to assault has a corresponding meaning.

Therefore, to prove an offence under s 194(b), it must be shown that the defendant is male, he has intentionally applied force directly, or indirectly, to another person, and that other person is female. The respective genders of the defendant and the complainant must be established by the prosecution, and this is usually undisputed.[19]

Along with the intentional element of assault, it must also be established that the defendant knows the victim is female.[20] This knowledge is typically assumed, unless the issue of knowledge is raised by the defence.[21] In *Chandler v R*, the issue of knowledge was raised on appeal when the appellant intended to hit another man, but his blow accidentally hit the wrong person, who was a female.[22] It was held that it would be "unjust to subject somewhat to the higher penalty when, unknowingly and by accident, the person assaulted turns out to be a woman" and the charge was reduced to a conviction of common assault.[23] This element may become an issue in future, as social understandings of sex and gender, and gender expression, develop. The comments of Greig J in *Chandler v R* suggesting that "disguise, delivery, or dress and demeanour which hides the sex of the person involved" may provide future guidance to the courts.[24] For now, the gendered elements of MAF remain assumed and accepted.

19 *Police v Bannin* [1991] 2 NZLR 237; and Stephanie Bishop and others *Garrow and Turkington's Criminal Law in New Zealand* (looseleaf ed, LexisNexis) at [CRI194.2]. Note, with societal changes in the space of gender identity, this may become problematic in future, as social definitions of sex and gender move away from the binary model.

20 *Police v Bannin*, above n 19, at 245.

21 *Chandler v R* [2010] NZAR 25 (HC); and Simon France (ed) *Adams on Criminal Law: Offences and Defences* (looseleaf ed, Thomson Reuters) at [CA194.01].

22 *Chandler v R*, above n 21, at 25.

23 At 28.

24 At 28. Note, this could become problematic due to the differing social attitudes towards gender and sex that were held in 1993 compared to the attitudes of 2024, however this issue is beyond the scope of this dissertation.

II. Historical Background

This section will outline the historical background of MAF to ascertain its original purpose. As with most older laws in New Zealand, MAF has its roots in English legislation. The provision was codified into New Zealand statute law in the 1860s. It was subsequently re-enacted in one form or another until 1961, when it was included in the Crimes Act. This is where MAF has remained.

A. English Law

According to English history literature from 1883, in early English law, offences against the person were treated as torts, not crimes.[25] Though more serious acts of violence started to be regarded as criminal, minor assaults were likely to be punished with a fine.[26] English law focused on harsher penalties for crimes against property when compared with penalties for acts of personal violence, which have been described as relatively lenient.[27] References to male violence against females can be found in common law and legislation.

1. Common law

The key common law principle that provides contextual background for MAF is the law of coverture. This described the condition of a woman during marriage that involved certain disabilities along with protections or privileges.[28] It meant that once married, a woman no longer had any legal identity of her own, and the legal identity of her husband 'covered' her by merging her legal existence with his.[29] Coverture is an old common law doctrine with roots dating back to the 16th century, with definitions becoming clearer as the concept developed over time.[30] In 1868, lawyer and legal commentator Ransom Tyler asserted it was "necessary for the preservation of peace" that one person in a marriage should possess pre-eminence to deal with disputes.[31] The reason this pre-eminence was reserved for men was "because he is the stronger", and also presumed the man would have more education,

25 James Fitzjames Stephen *A History of the Criminal Law of England* (Routledge/Thoemmes Press, London, 1996) vol 3 at 108.

26 At 109.

27 At 109.

28 Peter Spiller *New Zealand Law Dictionary* (9th ed, LexisNexis, Wellington, 2019) at 78.

29 Tim Stretton and Krista Kesselring *Married Women and the Law: Coverture in England and the Common Law World* (McGill-Queen's University Press, Montreal, 2013) at 7; and Ransom Tyler *Commentaries on the Law of Infancy, including Guardianship and Custody of Infants, and the Law of Coverture, Embracing Dower Marriage and Divorce, and the Statutory Policy of the Several States in Respect to Husband and Wife* (William Gould and Son, Albany, 1868) at 312.

30 Stretton and Kesselring, above n 29, at 7.

31 Tyler, above n 29, at 313.

life experience, and better judgement than the woman.[32] There is an assumption that this entitled men to physically and verbally control their wives.[33] This is often based on the writings of Judge William Blackstone, originally published in 1768, that stated "[t]he husband also (by the old law) might give his wife moderate correction".[34] However, it is argued Blackstone's comments on coverture and chastisement of women have been misinterpreted, and that although Blackstone acknowledges the existence of matrimonial chastisement under common law, under the "politer reign of Charles the second" this power no longer existed.[35] Blackstone was not condoning such actions at all, nor stating it was acceptable under the law.[36] This common law principle sets the scene for legislative movement towards criminalising assaults on women and children.

2. Statute law

Legislation regarding minor crimes against the person began in 1803.[37] The Criminal Procedure Act 1853 (UK) is the first formal legislation in England that makes assault on a female by a male an offence.[38] The purpose of this Act was "for the better prevention and punishment of aggravated assaults upon women and children", as it was stated the current law was insufficient to protect women and children from violent assaults.[39] Where a person was found guilty of an assault on a woman, that was of such an aggravated nature that charge and punishment of common assault or battery would have been insufficient, they could be charged under this Act. The penalty was up to six months imprisonment, or a fine of up to £20, which is significantly higher than the £5 fine for common assault, or up to two months imprisonment should the fine not be paid.[40] This section has been referred to as "the only substantial piece of legislation aimed at tackling domestic violence through criminal prosecution for more than a century".[41] This indicates its purpose was to limit domestic violence.

32 At 313.
33 Centre for Women's Justice "Timeline of Key Legal Developments" <www.centreforwomensjustice.org.uk>.
34 William Blackstone *The Oxford Edition of Blackstone's: Commentaries on the Laws of England: Book I: of the Rights of Persons* (David Lemmings (ed), Oxford University Press, Oxford, 2016) at 286.
35 Wilfrid Prest "Law for Historians: William Blackstone on Wives, Colonies and Slaves" (2007) 11 Legal Hist 105 at 107.
36 At 108.
37 Stephen, above n 25, at 113.
38 Criminal Procedure Act 1853 (UK) 17 Vict c 30.
39 At introduction.
40 Offences against the Person Act 1828 (UK) 9 Geo 4 c 31, s 27.
41 Lucy Williams and Sandra Walklate "Policy Responses to Domestic Violence, the Criminalisation Thesis and 'Learning from History'" 2020 59 Howard J Crime Justice 305 at 309.

In 1861, the Offences against the Person Act (UK) consolidated and amended the "Statute Law of England and Ireland relating to Offences against the Person".[42] The assault provisions were covered in ss 36–47. The wording of s 43, the provision regarding assault on females and boys under the age of 14, was very similar to the 1853 provision. It included the caveat that it was to be used if a charge of common assault would be insufficient, and the penalty remained the same.[43] In looking at legal commentaries from the time, James Fitzjames Stephen stated "every other section of the act of 1861 has a history of its own".[44] However, he proceeded to write that he would "pass over many sections punishing particular acts of violence … in particular the whole series of offences relating to the abduction of women, rape, and other such crimes", indicating the early form of MAF would not be discussed.[45] His reasoning for this omission was the history of these offences was of no "special interest" and did not illustrate England's political or social history. Perhaps these crimes against women were so uncontroversial they did not add to his discussion on the criminal law in England. The lack of commentary on the specific assault of women appears to be a common theme, and becomes apparent throughout this dissertation. The implication of this lack of discussion on MAF is either that its wrongfulness is so obvious it is not necessary to discuss, or that it is being purposefully ignored.

Section 43 of the Offences against the Person Act 1861 (UK) was ultimately repealed and there is no apparent replacement provision.[46] Only minor changes to the wording of s 43 were made while it was in force. The fine for s 43 was increased first in 1967, as part of an overall increase in fines for summary offences, to £100.[47] Then again in 1977, where it was increased to £500 as part of another overall increase in fines.[48] The fine for common assault was increased to £50, then £200 by the same overall increase instruments. This reflects the continued higher penalty for males assaulting females than common assault, indicating men assaulting women was more serious than common assault.

There is no apparent reason for the repeal of s 43. The offence of common assault remains in the United Kingdom, and the sentence has been increased to six months imprisonment with no specified fine.[49] There are now no gendered assault crimes in the United Kingdom. This indicates a move away from victim and gender-specific

42 Offences against the Person Act 1861 (UK) 24 & 25 Vict c 100, Introduction.
43 Section 43.
44 Stephen, above n 25, at 116.
45 At 117.
46 England and Wales see Criminal Justice Act 1988 (UK) 36 Eliz II c 33, sch 16; and Northern Ireland see Justice Act (Northern Ireland) 2011 c 24 (NI), sch 8.
47 Criminal Justice Act 1967 (UK) 15 Eliz II c 45, sch 3.
48 Criminal Law Act 1977 (UK) 25 Eliz II c 45, sch 6.
49 Section 39.

offences in the United Kingdom, which is contrary to the position in New Zealand where MAF has been retained.

B. New Zealand Law

As colonisation of New Zealand was formalised in 1840 with the signing of the Treaty of Waitangi, New Zealand inherited its law from England.[50] The English Laws Act 1858 confirmed the full inheritance of English law, including common law, from 1840.[51] This section will investigate the statutory history of MAF in New Zealand from its adoption from United Kingdom law to its current form.

1. Nineteenth-century provisions

In 1867, New Zealand formally adopted the 1861 English law reforms.[52] Adopting Imperial legislation essentially word for word was common practice at this time, as there was a desire to keep colonial legislation similar to that of England to ensure interpretation by the English Courts could be used consistently in colonies.[53] Section 43 of the Offences against the Person Act 1861 (UK) was copied directly into the New Zealand equivalent of this Act, and MAF became s 40 of the Offences against the Person Act 1867. The wording and penalty for the provision were identical to the United Kingdom version.[54] This is the first instance of MAF in New Zealand legislation. There was also a caveat that allowed for the dismissal of any assault case if the offence was either justified, not proved, or "so trifling as to not merit any punishment".[55] This indicates there may have been some acceptance of violence towards wives in New Zealand at the time, for the purposes of discipline or chastisement. This provision was also in the equivalent United Kingdom legislation.[56] Though this caveat would eventually be repealed, the language and concept of dismissing 'trifling' cases has survived and will be discussed in Part III. As these provisions were identical to the United Kingdom legislation, it can be inferred that the purpose of the New Zealand version of MAF was the same as that of England, to limit domestic violence.

50 Philip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thompson Reuters, Wellington, 2021) at 28.

51 At 28.

52 Jeremy Finn "Codification of the criminal law: the Australasian parliamentary experience" in Barry Godfrey and Graeme Dunstall (eds) *Crime and Empire 1840–1940: Criminal justice in local and global context* (Willan Publishing, Oxford, 2005) 224 at 225.

53 Stephen White "The making of the New Zealand Criminal Act of 1893: A Sketch" (1986) 16 VUWLR 353 at 359.

54 Compare Offences against the Person Act 1867, s 40 and Offences against the Person Act 1861 (UK) 24 & 25 Vict c 100, s 43.

55 Offences against the Person Act 1867, s 41.

56 Offences against the Person Act 1861 (UK) 24 & 25 Vict c 100, s 44.

Work on a new criminal code for New Zealand began in 1879, using resources from similar criminal code reform in England.[57] The Criminal Code 1893 (Criminal Code) did not include MAF, despite pt 19 being dedicated to assaults.[58] Though the Criminal Code repealed many English and New Zealand enactments, s 40 of the Offences against the Person Act 1867 was an exception.[59] Assault was defined in s 187 of the Criminal Code, and this definition remains the same in the current Crimes Act. The penalty for common assault under the Criminal Code was one years' imprisonment, with no option for a fine.[60] At the point of enactment, common assault under the Criminal Code had a harsher penalty than MAF. It is unclear why MAF was not included in the Criminal Code 1893. However, the fact that it was not repealed may indicate it was still necessary to have MAF as an offence at the time.

The Indictable Offences Summary Jurisdiction Act 1894 (IOSJA) completed the repeal of Imperial legislation, including the Offences against the Person Act 1867.[61] The purpose of this Act was to consolidate the remaining criminal legislation from 1867 that had not been repealed by the Criminal Code.[62] It incorporated definitions from the Criminal Code, including that of assault. Section 16 of the IOSJA simplified the wording of MAF, however, the penalty remained at six months imprisonment or a £20 fine. Assaults by men on women still needed to be of such an aggravated nature that a charge of common assault would be insufficient to adequately punish. This indicates there was still some acceptance of violence towards wives at this time. On review of the Hansard records for the IOSJA there was very little discussion on the contents of the Bill, and it passed through the Houses smoothly.[63] The lack of substantial comment on the early iterations of MAF indicates the original purpose of MAF had not changed.

2. Consolidation enactments: 1908–1927

The statute consolidation activity of 1908 saw no change to the MAF or common assault provisions, other than the statutes in which they were located. The IOSJA was consolidated within the Justices of the Peace Act 1908, which placed MAF in s 193 with no changes to the wording, nor penalty, for assaults on women.[64] Further consolidation occurred in 1927. The explanatory note for the Justices of the Peace Bill 1927 stated that other than some minor alterations in language the law had not

57 Finn, above n 52, at 225.
58 Criminal Code 1893, ss 187–190.
59 Schedule 3, Pt 2.
60 Section 190.
61 Indictable Offences Summary Jurisdiction Act 1894, s 75.
62 Indictable Offences Summary Jurisdiction Bill 1894 (9-4) (explanatory note).
63 (20 July 1894) 83 NZPD 610.
64 Justices of the Peace Act 1908, sch 1.

changed.[65] Again, there were no changes made to the provision related to MAF, other than its section number, and the caveat allowing dismissal was also retained.[66] Hansard records are again silent on the matter of assaults on women.[67]

The lack of change, and continued silence, on MAF suggests it remained relevant and potentially so fundamental that discussion of the provision was not necessary. This also indicates no change to the original purpose of limiting domestic violence.

3. Police Offences Amendment Act (No 2) 1952

MAF was re-enacted in 1952. The Police Offences Amendment Act (No 2) 1952 (POAA) was intended to complete the replacement of pt 5 of the Justices of the Peace Act 1927, which is where MAF was located at the time.[68] MAF under s 203 of the Justices of the Peace Act 1927, was replaced by s 5 of the POAA. The POAA refers to the definition of assault in the Crimes Act 1908, and restates the offence of common assault with an increased penalty of up to three months imprisonment or a fine of up to £50.[69] The POAA also restructured the wording of the previous iterations of MAF, dividing the offences of assault by male on a female and assault on a child into separate subsections.[70] Reference to the assault on a female being aggravated was also removed. However, s 5(2) stipulated that the fact a female or child had been assaulted did not preclude a charge of common assault under s 4 of the POAA, or s 210 of the Crimes Act 1908. The maximum penalty for MAF was increased to one year imprisonment, and the option of a fine was removed.[71] This indicates a potential increase in the perceived seriousness of men assaulting women, as assaults no longer had to be aggravated, and fines were no longer a direct sentencing option. It is unlikely the purpose of the provision changed.

In its path to enactment, the Statutes Review Committee made no alterations to the restructuring of MAF.[72] Hansard records also have little discussion on the revised provision. During the Police Offences Amendment Bill's second reading, the Attorney General at the time gave a summary of the Bill's purpose, including specific mention of the new s 5.[73] However, this is purely descriptive of how it replaces s 203 of the Justices of the Peace Act 1927, with no further information provided.[74] The Hon Henry Mason stated the Bill was "notable for its rearrangement of the law rather

65 Justices of the Peace Bill 1927 (23-2) (explanatory note).
66 Justices of the Peace Act 1927, ss 203–204.
67 (15 July 1927) 212 NZPD 664.
68 Police Offences Amendment Bill (No 2) 1952 (78-1) (explanatory note).
69 Police Offences Amendment Act (No 2) 1952, s 4.
70 Sections 5(1)(a)–(b).
71 Section 5(1).
72 Police Offences Amendment Bill (No 2) 1952 (78-2).
73 (2 October 1952) 298 NZPD 1736.
74 (2 October 1952) 298 NZPD 1736.

than for material changes in the law", and despite "small alterations", overall there were no "momentous changes" to the criminal law.[75] The lack of discussion on the provision, particularly the increase in sentence, indicates there were no objections from Parliament. The smooth passing of the Bill also indicates general support for the changes to the wording and penalties for MAF.

4 . Crimes Act 1961

The completion of the consolidated codification of New Zealand's criminal law occurred in 1961.[76] The enactment of the Crimes Act 1961 repealed s 5 of the POAA and confirmed MAFs place in the new criminal code under s 194(b).[77] The newly drafted MAF provision set out the elements of the offence clearly, with a higher sentence than the preceding iterations. This was in line with two of the principle changes the Crimes Act made to criminal law.[78] The Crimes Act also referred to MAF in s 319 as one of the offences for which there is no bail as of right, despite having a sentence of less than three years' imprisonment. This provision was not present in the Criminal Code 1893,[79] nor the Crimes Act 1908.[80] The provision regarding bail has subsequently been moved to the Bail Act 2000, and remains current.[81] This arguably supports the purpose of MAF being to address domestic violence, as limiting bail as of right in cases of MAF prevents offenders from returning to their homes, where the victim likely also resides.

As MAF has remained unchanged since its enactment, looking at the discussion on the Crimes Act from the years leading up to its enactment can provide insight into the purpose of MAF, and whether that purpose had changed since its adoption in 1867. The preliminary draft for the Crimes Act was introduced in the form of the Crimes Bill 1957 by the Hon John Marshall, Minister of Justice and Attorney General.[82] Along with the consolidation of the criminal code, one of the aims of this Bill was to create a "better balance between penalties for offences against the person and the penalties for offences against rights of property".[83] The provisions relating to assault were also rewritten and the new "system of penalties" was intended to be

75 At 1737.
76 Grant Morris *Law Alive: The New Zealand Legal System in Context* (4th ed, Thompson Reuters, Wellington, 2019) at 46.
77 Crimes Act 1961, sch 4.
78 Crimes Bill 1957 (135-1) (explanatory note).
79 Criminal Code 1893, s 368.
80 Crimes Act 1908, s 345.
81 Bail Act 2000, s 7.
82 Crimes Bill 1957 (135-1); and Barry Gustafson "Biography: Marshall, John Ross" in *Te Ara: The Encyclopedia of New Zealand* (eBook ed, Manatū Taonga–Ministry for Culture and Heritage, 2000).
83 Crimes Bill 1957 (135-1) (explanatory note) at (i).

proportional to the gravity of injury, and the offender's intent.[84] This is relevant to MAF, as the penalty was increased from one to two years' imprisonment.[85] Though the 1957 Bill appeared to be a complete overhaul of the criminal law, it was noted that many clauses had been redrafted without actually making any material changes to the existing law, and this included MAF.[86]

Input into the Bill was sought from several sources, such as lawyers and judges, both nationally and internationally. This is recorded in a file on the Crimes Bill I obtained from Archives New Zealand.[87] The New Zealand Department of Justice sent a memorandum to "all stipendiary magistrates" advising the Bill was being held over for at least a year so the "fullest possible opportunity for consideration and criticism" could be provided.[88] Advice was also sought from Crown Solicitors, the Reserve Bank of New Zealand, and even went as far as requesting a copy of the newly enacted 1955 Criminal Code from The Office of the Attorney-General in Wisconsin, United States of America.[89] Numerous responses from magistrates and lawyers are on file, though none of these refer to MAF specifically. One submission from a Crown Solicitor notes the changes to assault with intent to injure and common assault "seem to me desirable", however, this is the only reference to any assault provisions in the file.[90]

In looking into the public reception of the Crimes Bill 1957, the New Zealand Archives file provides further information. A compilation of newspaper articles from 1957 show there was widespread public support for revision of the criminal code across the country.[91] Several of these articles note the revision was overdue, considering the code had not been altered for over 60 years.[92] Another general theme in these articles is that the public recognised the existing code was inadequate to deal with the social changes that had occurred since the previous criminal code and modernisation of the criminal law was needed, and that modern social trends are

84 At (ii).
85 Crimes Act 1961, s 194.
86 Crimes Bill 1957 (135-1) (explanatory note) at (iii).
87 "Original Comments on Crimes Bill (Correspondence and Newspaper Comments)" Archives New Zealand, R16363398.
88 Memorandum from ST Barnett (Secretary for Justice) to All Stipendiary Magistrates Memorandum on Crimes Bill (6 November 1957).
89 Letter from ST Barnett (Secretary for Justice) to the Office of the Attorney-General (Wisconsin U.S.A.) requesting copy of Wisconsin Criminal Code (5 April 1957).
90 Letter from HG Brodie (Crown Socilitor) to New Zealand Solicitor-General respose to circular letters (6 August 1957).
91 "Original Comments on Crimes Bill", above n 87.
92 "Crime and Punishment" *The Marlborough Express* (Blenheim, New Zealand, 29 October 1957); "Legal Evolution" *The Grey River Argus* (Greymouth, 30 October 1957); and "Revised Crime Bill not Complete Answer to Dominion's Problem" *Central Hawkes Bay Press* (Waipukurau, New Zealand, 29 October 1957).

reflected in the Bill.[93] Articles suggested the increase in penalties for crimes against the person reflected the new modern thinking of the time, and would be applauded by the New Zealand community.[94] The Bill was praised as a "bold attempt to recast criminal law in line with present-day needs – not by a series of piecemeal and expedient amendments, but at a single sweeping stroke".[95] This is likely a reference to the way the criminal law had been spread across numerous statutes, until this complete codification exercise was undertaken. It was also suggested that once the Bill became law "New Zealand will have a modern criminal code that should set an example to the Commonwealth".[96] Though there is no mention of MAF specifically, it was reported in a news article that the increase in sentences for both offences against the person, and sexual offences, could be traced to the "clamour for heavier sentences" that women's organisations across the country had been agitating for in the preceding years.[97] According to the author of this article, this "clamour" was justified, due to the constant accounts of sexual offences in court news reports. This shows an increasing awareness of VAW in New Zealand society, which arguably supports the relevance of MAF as a specific crime to protect women. Overall, these articles indicate the Crimes Bill was well received by the public and reflected the general public's desire for people to be prioritised over property, through the commendation of increased penalties for crimes against others.

Due to a change in government in November 1957, the Crimes Bill was then referred to senior puisne judge, Sir George Finlay, in 1958 to provide an in-depth report.[98] Finlay's report discusses the rearrangement of the existing criminal code, along with the altered method of expression used in the Bill.[99] Neither MAF at cl 203 of the Bill, nor bail as of right at cl 330, are discussed in the report.[100] Finlay's silence on MAF is also reflected in the Hansard records concerning the Crimes Act 1961, in the lead-up to its enactment.

The revised Crimes Bill 1959 was discussed in depth in Parliament. The changes to the death penalty and homicide provisions dominated the parliamentary debates

93 "New Criminal Code" *The Waikato Times* (Hamilton, New Zealand, 26 October 1957); "Modernised Law to Fight Modernised Crime" *The Daily Telegraph* (Napier, New Zealand, 25 October 1957); and "Criminal Law Revision" *The Rotorua Post* (Rotorua, New Zealand, 29 October 1957).

94 "Some Good Features of New Crimes Bill" *The Dominion* (Wellington, New Zealand, 29 October 1957); and "Modern Look on Crime" *The Christchurch Star Sun* (Christchurch, New Zealand, 25 October 1957).

95 "Revision of Criminal Law" *The Times* (New Zealand, 26 October 1957) from Archives New Zealand, n 87 above, at file 18.

96 "Changes in Criminal Law" *The Manawatu Evening Standard* (New Zealand, 26 October 1957).

97 "Legal Evolution", above n 92.

98 (13 September 1961) 328 NZPD 2205.

99 George Finlay *Report on the Crimes Bill 1957* (30 September 1959) at 1.

100 At 86 and 110.

at all readings of the Bill.[101] The views expressed in newspapers were also reflected in the parliamentary debates.[102] Mr Riddiford, Member for Wellington Central, pointed out that increased penalties related to certain crimes against women and children reflected "the general feeling of the country about such offences".[103] This suggests that violence towards women and children was socially condemned, and therefore offences of that nature such as MAF, warranted a higher penalty than common assault. This was the only express mention of offences related to women that could include MAF, as other references were related to the changes to sexual offences only.[104] The theme of silence on MAF is again reflected in the parliamentary debates. As minor amendments were made throughout the remaining course of the Bill being in front of the House, the Crimes Act was given Royal Assent on 1st November 1961.

C. Analysis

In considering the historical background of MAF, its original purpose in the United Kingdom was to protect women, and to punish men who perpetrate excessive physical violence in the domestic setting. As the common law principle of coverture was widely accepted in society, it appears the Government needed to intervene and formally legislate against the use of violence in the home. The relative silence on the provision since its original enactment in the United Kingdom, and repeal of the provision from the Offences against the Person Act 1961 (UK), indicates this purpose did not change.

It is possible the purpose of MAF was not considered in the adoption of the Offences against the Person Act in 1967, as there was a tendency to keep New Zealand legislation uniform with that of the United Kingdom.[105] Therefore, the purpose of preventing domestic violence can be assumed to have also been adopted. The silence on the provision since its adoption indicates either general agreement that the provision remained necessary, indifference, or that it was simply not noticed. The latter two options seem unlikely when considering the effort and attention that goes into the drafting and passing of law.[106] In any case, the lack of discussion arguably shows there was no great need to consider the purpose of MAF when legislative changes were being made. The increase in penalty, and language changes, appear to be in line with the general practice being employed by the Government each time

101 (13 September 1961) 328 NZPD 2205; (3 October 1961) 328 NZPD 2678; and (4 October 1961) 328 NZPD 2751.
102 (3 October 1961) 328 NZPD 2678.
103 (4 October 1961) 328 NZPD 2751 at 2774.
104 (13 September 1961) 328 NZPD 2205.
105 White, above n 53, at 359.
106 For example, the background to the Crimes Act 1961 discussed in Part II of this paper.

the provision was moved. MAF in its most recent form shows how the New Zealand Governments of the 1950s and 1960s also focused on modernisation of the law based on social attitudes, which were clearly moving towards prioritising punishment of crimes against the person, rather than property.[107]

Overall, the history of MAF shows that it is a very old law, that has undergone few changes with little to no discussion since its creation. Therefore, from the first instance of MAF in the United Kingdom in 1853 to the enactment of MAF in its current form in New Zealand under the Crimes Act 1961, preventing domestic violence can be taken to be its original purpose.

III. Use of MAF

In taking the original purpose of MAF to be the prevention of domestic violence, this section will provide a brief outline of the new family violence legislation, and how this raises issues for the retention of MAF. As the police have an important function in the detection and prosecution of criminal activity in New Zealand,[108] how the police use an offence provision can provide insight into its purpose. This section will also investigate whether the purpose of MAF has changed, by assessing how it has been used since MAF's enactment in its current form, and with the introduction of "Assault on person in family relationship".[109] This will involve an assessment of the police manual, charging data, and case law. For the purposes of this dissertation, the 'use of MAF' refers to in which contexts and how often men are prosecuted with MAF.

A. New Zealand Family Violence Legislation

The most significant legislative reform concerning domestic violence was the introduction of the Family and Whānau Violence Legislation Bill 2017. At this point, the use of the term 'domestic violence' is essentially archived, as it had been recognised that violence could occur in the wider family context and not just within intimate relationships.[110] The Family and Whānau Violence Legislation Bill 2017 was ultimately divided into two separate Acts, the Family Violence Act 2018, and the Family Violence (Amendments) Act 2018.

107 (3 October 1961) 328 NZPD 2678 at 2678.

108 Geoffrey Palmer "The Legislative Process and the Police" in Neil Cameron and Warren Young (eds) *Policing at the Crossroads* (Allen & Unwin in association with Port Nicholson, Wellington, 1986) 86 at 86.

109 Family Violence (Amendments) Act 2018, s 25; and Crimes Act 1961, s 194A.

110 Bill Atkin "Family Violence and the Civil Law/Criminal Law Interplay: Some Reflections" 2021 52 VUWLR 671 at 671.

The Family Violence (Amendments) Act 2018 focused on amendments to other legislation, which is relevant to this dissertation. New offences were introduced to the Crimes Act, including s 194A, "Assault on person in family relationship" (AFR).[111] AFR was also added to s 7(2) of the Bail Act 2000 along with MAF, which prevents bail as of right for persons charged with the offence. The new offence states it is an offence to assault another person where there is, or has been, a family relationship.[112] The insertion of AFR into the Crimes Act is the first instance of explicit criminalisation of family violence. Though it is arguable the offences under s 194 of the Crimes Act are effectively the first instances of criminalising family violence,[113] AFR is the first offence that specifically refers to family violence in the Crimes Act.

AFR has the same penalty as MAF, indicating it is of the same level of seriousness. It was stated that the introduction of this new offence would ensure "family violence is appropriately addressed as a criminal matter".[114] It was designed to be complementary to MAF, and to provide a way of identifying family violence offending within the justice system.[115] The creation of this new offence addressed the original purpose of MAF by criminalising family violence. The implication of this, is that MAF may no longer be relevant or necessary as a stand-alone offence. An analysis of the use of MAF before and after the introduction of AFR will provide insight into a potential new purpose.

B. Police Manual

As charges of MAF are brought by the Police in the first instance, understanding the policy on when to charge is relevant to the use of MAF. The Police Manual provides guidance and instructions to the Police to ensure consistent policing across New Zealand.[116] The manual chapter relevant to MAF is currently called "Assaults and injuries to the person", though it was simply titled "Assaults" at its inception in 2005.[117] The chapter provides guidance for the numerous offences relating to assault and injuries to the person under the Crimes Act 1961 and the Summary Offences Act 1981.[118]

111 Family Violence (Amendments) Act 2018, ss 24–25, 28.
112 Crimes Act 1961, s 194A.
113 Section 194(a) "assault on child" and s 194(b) "assault by a male on a female".
114 (11 April 2017) 721 NZPD (Family and Whānau Violence Legislation Bill, First Reading, Amy Adams).
115 (11 April 2017) 721 NZPD (Family and Whānau Violence Legislation Bill, First Reading, Amy Adams).
116 New Zealand Police "Police Instructions Policy" (2022) (Obtained under Official Information Act 1982 Request to the New Zealand Police) <https://fyi.org.nz>.
117 New Zealand Police Manual "Assaults and Injuries to the Person" (Obtained under Official Information Act 1982 Request to the New Zealand Police) at 285.
118 At 288.

In reviewing the assault chapters of the Police Manual from 2005 until the current chapter published in 2023, there have been some changes to the wording of the guidance for the use of MAF. Between 2005 and 2016, the manual stated to prosecute MAF "you must prove the identity of the suspect and that he assaulted any female".[119] A change in formatting of the manual chapters in 2017 provided the current guidance for prosecution, which now simply lists the requirements as "Ingredients: male, assaulted, female".[120] This provides clear guidance for the Police on the essential elements of the offence.

On the use of the provision, there has always been a caveat in the Police Manual on MAF that originally stated the charge:[121]

> Should not automatically be used in all situations where a male has assaulted a female. The courts take a dim view of using this section for minor assaults simply on the basis of the gender of those involved. The section should be used when the assault is more than trifling, and should be regarded as only one in the scale of available charges.

The wording of this guidance reflects the wording of the original offence of MAF under the Offences against the Person Act 1867 discussed in Part II. Though the requirement that the assault must not "be so trifling as to not merit any punishment" has been removed from legislation, the Police must still consider whether the assault is serious enough to warrant charging under MAF.[122] The reference to the Courts taking a "dim view" of using MAF for minor assaults was removed from the manual in 2015.[123] However, the reference to the assault being "more than trifling" remains in the current chapter.[124] The retention of language from the original provision indicates there is unlikely to have been a change in the use of MAF since its original enactment. This means it is likely the purpose of the provision has also remained the same.

119 At 232.
120 At 263.
121 At 9.
122 Offences against the Person Act 1867, s 41.
123 New Zealand Police Manual, above n 117, at 181.
124 At 298.

The reference to the "scale of available charges" in the above quote from the Police Manual also links to the charges of common assault under both the Crimes Act and Summary Offences Act 1981.[125] These are the least serious offences related to assault, based on their maximum sentences of one year or six months, respectively. In the section of the Police Manual on common assault, there is a note regarding the different offences available across the two statutes. The note states the deciding factor will be the nature of the assault, and provides examples of assaults and which Act would be the appropriate to charge under.[126] This distinction has also been used by the courts in the context of family violence, as prosecutions under either Act are referred to as "common assault (domestic)" despite there being no reference to family violence in the provisions.[127] This demonstrates the Police have a level of discretion in their response to acts of domestic violence towards women, and the potential for perpetrators of such violence to be charged with less serious offences, despite a gender-specific charge being available.

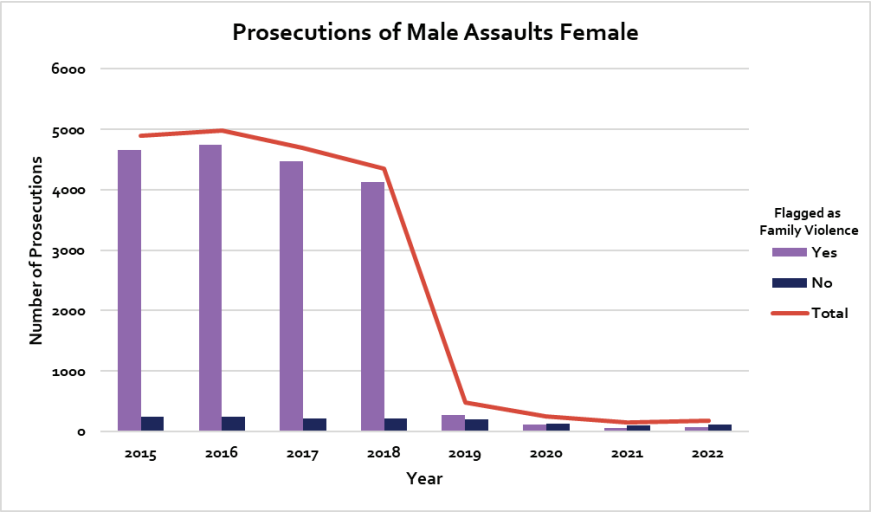
A "see also" reference to the Police Manual chapter on Family Violence was added to the MAF guidance in 2010.[128] This coincides with the introduction of police safety orders under the Domestic Violence Amendment Act 2009.[129] This suggests the Police likely use MAF in the context of family violence, and that police officers should be considering other policies and guidelines to respond appropriately to incidents.

C. Charging Data

Another avenue to establish whether there has been any change to the original purpose of MAF, is to investigate the charging data from both the Police and the Courts. I submitted a request to the New Zealand Police under the Official Information Act 1982 for data on the number of charges under s 194(b) of the Crimes Act, and any contextual information regarding whether charges were laid in the family violence context. The purpose of this request was to establish the use of MAF outside of the family context, as this information is not available in the data published by the Ministry of Justice. Publication of official statistics on proceedings against offenders began in July 2014.[130]

125 Crimes Act 1961, s 196; and Summary Offences Act 1981, s 9.
126 New Zealand Police Manual, above n 117, at 11.
127 New Zealand Family Violence Clearinghouse "District Court defintions" <http://nzfvc.org.nz>.
128 New Zealand Police Manual, above n 117, at 79.
129 Domestic Violence Amendment Act 2009, s 9.
130 New Zealand Police "Request for Information on s 194(b) Crimes Act 1961" (13 October 2023) (obtained under Offical Information Act 1982 Request to the New Zealand Police).

Figure 1. Annual prosecutions of "male assaults female" under s 194(b) Crimes Act 1961 2015–2022.[131]



The response from the Police provided insight into proceedings that resulted in prosecution of MAF, including whether the occurrence was flagged as family violence in the Police records. As demonstrated in Figure 1, there was a significant decrease in the use of MAF after the introduction of the new family violence offences in December 2018. This confirms the primary use of MAF by the Police was in the family violence context.

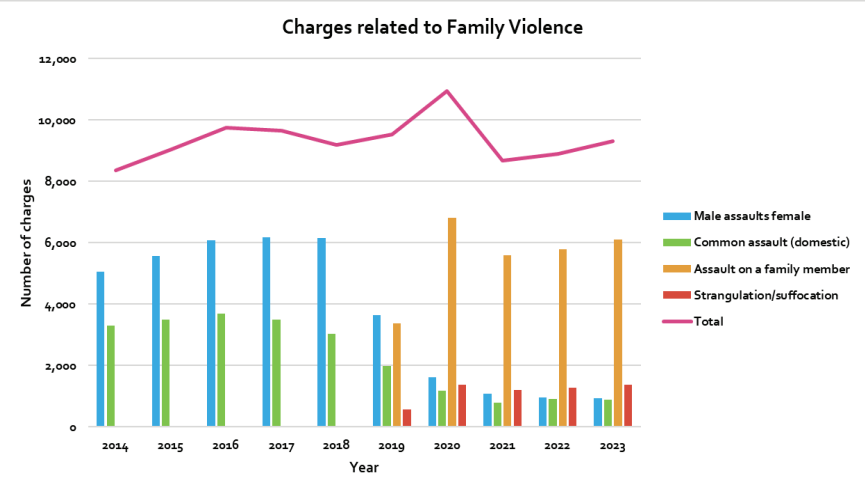
Further to the information provided by the Police, the Ministry of Justice publishes charging data online. These data tables are actively published under a range of headings.[132] MAF data is in the "Offences related to family violence" data table, along with common assault (domestic), AFR, and strangulation/suffocation. This data table notes that MAF "is not used specifically for family violence, however historically most situations did involve people in a family relationship".[133]

131 Adapted from data obtained under Official Information Act 1982 request to New Zealand Police, above n 130.

132 Ministry of Justice "Research & Data – Data tables" (19 March 2024) <justice.govt.nz>.

133 Ministry of Justice "Offences related to family violence" (spreadsheet, 19 March 2024) at Contents sheet.

Figure 2: Annual charges related to family violence 2014–2023.134



Transposition of the data table containing instances of MAF into a graph (Figure 2), provides an obvious indication that MAF was indeed largely used in the family violence context. Additionally, this complements the data in Figure 1 and further shows the use of MAF has drastically reduced since the introduction of AFR. The additional insight Figure 2 provides is that prosecution of family violence did not decrease with the introduction of the new provisions. However, the purpose of accurately identifying family violence instances within the justice system appears to have been achieved, as the data illustrates specific instances of offending related to family violence.

D. Case Law

A brief investigation of case law can further support the data above, and provide insight into the Court's interpretation of MAF. As many instances of MAF are prosecuted through the District Court, there are a limited number of reported cases.

Hall's Sentencing provides a list of sentences issued for MAF. On review, of the 20 cases listed, only three were not instances of family violence.[135] In these three cases, the assaults were not random acts of violence as the victim was not a complete stranger to the accused. Instead, there was some kind of link to the accused through

134 Adapted from Ministry of Justice "Offences related to family violence" Data Table <justice.govt.nz>.

135 Geoff Hall *Hall's Sentencing* (loosleaf ed, LexisNexis) at "Sentencing Levels".

proximity or a family member. For example, in each case the victim was: a neighbour of the accused in *Ballantyne v Police*,[136] a woman who allegedly threatened the partner of the accused in *Smith v Police*,[137] and a woman at a party the accused was also attending, who took issue with the accused's children in *Hawea v Police*.[138] Though this is not family violence per se, there is still a linkage to the offender's personal circumstances or family in the perpetration of the assault, whether it be frustration (*Ballantyne*) or retaliation (*Smith*, *Hawea*). This aligns with most literature on VAW that suggests such violence is mostly perpetrated by someone known to the victim or an acquaintance.[139]

There is limited judicial commentary on MAF itself. In *Chandler v R*, Greig J reflected that the purpose of MAF is "to protect women" and "in order to do that the penalty has been made a maximum of two years' imprisonment in comparison to common assault".[140] The facts of this case were not related to family violence, but an accidental assault. This statement indicates the purpose of MAF outside the family context is the protection of women, which suggests family violence is not the sole purpose of MAF.

Views expressed by Fisher J in *Police v Bannin* somewhat contradict the Police Manual guidance.[141] In assessing the charge of MAF, Fisher J states "it is trite law that the amount of force used is immaterial. To kiss or touch a person against her will is an assault".[142] In this case, the assault was in the form of touch, rather than a more violent act such as a punch.[143] The charge of MAF was still raised in this case, which is not consistent with the Police Manual guidance that the assault should be more than trifling. However, the context of the event could be considered threatening, as the offender had unlawfully entered the victim's home, which supports a charge of MAF. It is also possible MAF was used with a view of the totality of the offending, as the offender was also charged with three instances of unlawfully entering a building with intent to commit a crime.[144] This case provides an example of MAF being used for a minor assault outside of the family context, with the Court confirming that this is still an appropriate use of the provision.

136 *Ballantyne v Police* HC Ham CRI-2010-419-20, 22 April 2010 at [3].
137 *Smith v Police* [2020] NZHC 25 at [5].
138 *Hawea v R* [2018] NZHC 770 at [5].
139 Gill Hague and LynnMarie Sardinha "Violence against Women: Devastating Legacy and Transforming Services" 2010 17 Psychiatry Psychol Law 503 at 508; and Janet Fanslow and others "Prevalence of interpersonal violence against women and men in New Zealand: results of a cross-sectional study" 2022 46 ANZJPH 117 at 124.
140 *Chandler v R*, above n 21, at 28.
141 *Police v Bannin*, above n 19.
142 At 244.
143 At 240.
144 At 237.

E. Analysis

The primary use of MAF by the Police has been as a response to family violence. This can be seen from the guidance in the Police Manual, including the retention of language from the original provision, and the reference to the family violence chapter inserted in 2010. Though the manual provides a level of discretion to the Police in when to charge under MAF, it also attempts to reserve MAF for more serious assaults through the recommendation that a range of charges be considered, rather than charging purely based on the gender of the people involved.

The data obtained from the Police and Ministry of Justice provides an excellent illustration of the use of MAF since data reporting commenced. The data clearly shows the use of MAF before the introduction of the new family violence offences was often in the family violence context, as the dramatic decrease in the use of MAF coincides with the introduction of the new provisions. The data also shows the instances of MAF outside of the family context have remained relatively stable, indicating there may still be a purpose for MAF even though there are specific family violence offences.

The limited judicial commentary also shows the use of MAF has primarily been to prosecute family violence. The cases discussed provide examples of the use of MAF outside of the family context, though there is still a connection to domestic circumstances in each of them. The fact that there are only three cases, out of a list of 20, where MAF was prosecuted outside of the family context, confirms that MAF is primarily used as a response to family violence. The courts have provided little commentary on MAF. The comments in *Bannin* indicate the use of MAF in minor assaults may not be viewed as dimly as the Police Manual once suggested.[145] Additionally, a more general purpose of protecting women was suggested by the Court in *Chandler*.[146] This is in keeping with the original wording of the first iteration of MAF in the UK, as the law at the time was insufficient to protect women from violent assaults.[147]

It is appropriate to conclude that the purpose and use of MAF was in response to family violence. The charging data also supports the conclusion that this purpose is now being achieved through the Family Violence (Amendments) Act 2018 changes. These conclusions set the foundation for an assessment of whether the provision remains relevant.

145 At 245.
146 *Chandler v R*, above n 21, at 28.
147 Criminal Procedure Act 1853 (UK) 17 Vict c 30, title.

IV. Relevance of MAF

It appears the original purpose of MAF is now being addressed through the use of AFR. Though it is clear from the charging data that instances of MAF have significantly reduced since the introduction of AFR, the provision is arguably still relevant as VAW remains a significant issue in New Zealand. This section will explore the relevance of MAF and whether there is a new purpose for it, by considering New Zealand's obligations under international law. As VAW is a global issue, international law may provide guidance on appropriate responses to VAW for nation states, thus assisting to establish MAF's relevance. The gender demographics of violent crime in New Zealand will also be explored in this section, as this may provide insight into whether a gendered assault offence is relevant in New Zealand.

A. International Law

Gender-based violence against women is a global issue. International recognition of discrimination towards women was formalised in 1979, with the United Nations (UN) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[148] Though this treaty does not make specific references to violence against women, such violence is accepted as a manifestation of discrimination against women, and states party to the treaty should be working to eliminate VAW.[149] International commitment to end VAW is further reflected through CEDAW General Recommendation 35, which requires states to "adopt legislation prohibiting all forms of gender based violence against women and girls".[150] New Zealand ratified the CEDAW in 1985, confirming New Zealand's commitment to addressing VAW.[151] Essentially, this commitment requires New Zealand to "act with due diligence to prevent, investigate, or punish" VAW under international law.[152]

MAF, though already enacted when the CEDAW was ratified, is a specific penal sanction that criminalises, punishes, and therefore condemns VAW. The UN Committee on the Elimination of Discrimination against Women acknowledges that VAW is not confined to the family context.[153] MAF supports this, by providing a penal sanction regarding VAW in all contexts, not just family violence.

148 Convention on the Elimination of All Forms of Discrimination against Women 1249 UNTS 13 (opened for signature 1 March 1980, entered into force 18 December 1981) [CEDAW].

149 Jorge Contesse and Jeanmarie Fenrich "It's Not OK: New Zealand's Efforts to Eliminate Violence Against Women" 2008 32 Fordham Intl LJ 1770 at 1776.

150 *General Recommendation No 35 on gender based violence against women, updating general recommendation No 19* UN Doc CEDAW/C/GC/35 (26 July 2017) at 10.

151 Ministry for Women "Preventing violence against women" <www.women.govt.nz>.

152 Contesse and Fenrich, above n 149, at 1779.

153 *General Recommendation No 35*, above n 150, at 3.

International recognition of the issue of VAW, along with New Zealand's commitment to the international instruments designed to address VAW, suggests a specific gendered response to VAW remains relevant and important in New Zealand. This supports the assertion that MAF remains relevant.

B. Violence Against Women in New Zealand

Though it is clear from the data presented in Part IV of this paper that VAW is commonly associated with family violence, VAW still occurs outside of this context. This has been recognised by responses to the Family and Whānau Violence Legislation Bill 2017 during parliamentary readings and the Select Committee stage. There was no indication from the Government, or public submissions on the Bill, that MAF should be repealed in light of the new offence.[154] The complementary nature of AFR to MAF was recognised in the Bill's second reading, as it acknowledges "other forms of family violence, while continuing to recognise the gendered violence within and outside of family relationships".[155] A cabinet paper released by the then Minister of Justice noted MAF is "often considered a proxy for family violence" and while the new offence would widen the scope of coverage for prosecution in the domestic setting, retention of MAF would "ensure the law continues to acknowledge the seriousness of gendered violence even outside the context of family violence".[156] These responses indicate the new offences were not intended to replace MAF. This suggests MAF remains relevant, despite the introduction of new family violence offences. This can be further supported by data on the gender demographics of violent crime in New Zealand.

C. Gender Demographics of Violent Crime

Data on offenders and victims of crime in New Zealand is available from the New Zealand Police. This data provides insight into which of the binary genders are the predominant perpetrators of crime, and which is more likely to be victimised. This will assist in assessing the relevance of MAF by illustrating a potential need for extra protection of women through retention of MAF.

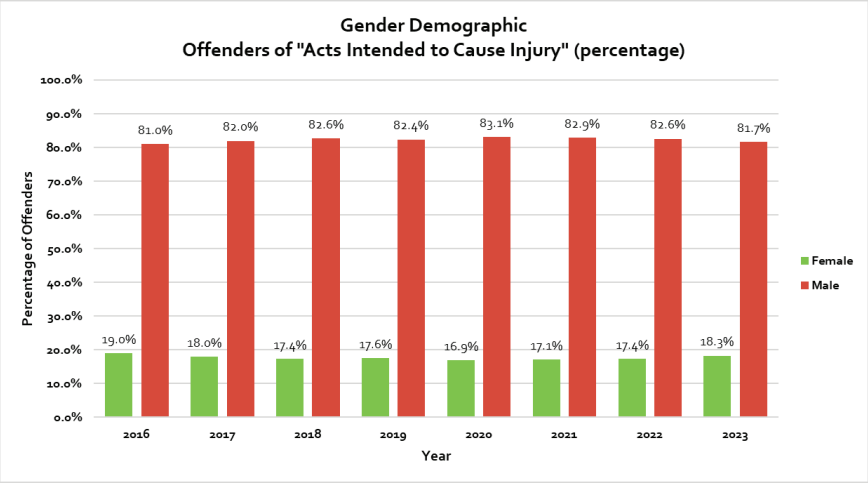
1. Perpetrators of violent crime

Discussions in the media related to VAW have been ongoing. An article released in 2018 using Police data suggested men are more likely to be offenders of violent

154 New Zealand Parliament "Family and Whānau Violence Legislation Bill" <www.parliament.nz>.
155 (11 September 2018) 732 NZPD (Family and Whānau Violence Legislation Bill, Second Reading, Jan Logie).
156 Office of the Minister of Justice "Cabinet paper on prosecuting family violence" (2015).

crime.[157] A review of the same data reported on in this article shows that this remains the case. This is illustrated in Figure 3 below.

Figure 3: Gender demographic of offenders of "Acts intended to cause injury" where court action has taken place.[158]



"Acts intended to cause injury" are assault-based crimes, as classified by the Australian and New Zealand Standard Offence Classification.[159] Crimes included are common assault, assault on an officer, and other serious assaults including strangulation.[160] The information in Figure 3 demonstrates that males have consistently been the predominant perpetrators of assault-related crimes. Therefore, an assault offence that targets instances where the offender is male, such as MAF, is arguably still relevant considering males are the main perpetrators of violence.

2. Victims of violent crime

To support the proposition that MAF remains relevant due to males being the main perpetrators of violence, the victim demographic must also be assessed. While females are predominantly the victims in family violence situations,[161] for MAF to

157 Andy Fyers "Most victims of violent crime in New Zealand are women" (11 December 2018) <www.stuff.co.nz>.

158 Graph adapted from New Zealand Police "policedata.nz" (Unique Offenders (demographics)) <www.police.govt.nz>.

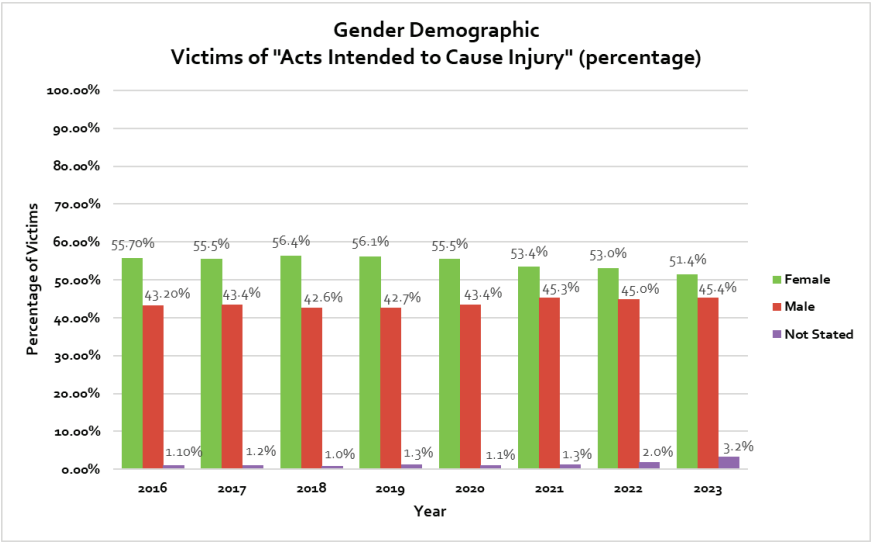
159 New Zealand Police "policedata.nz" (tableau tables, 30 April 2024) <www.police.govt.nz>.

160 Australian Bureau of Statistics "Australian and New Zealand Standard Offence Classification (ANZSOC)" (30 November 2023) <www.abs.gov.au>.

161 Ministry for Women, above n 1.

remain relevant, females should also be the predominant victims of violent crime outside of the family context. If females can be shown to be the predominant victim group in general, a gender specific offence would arguably be relevant as this group can be shown to need additional protections under the law.

Figure 4: Gender demographic of victims of "acts intended to cause injury" where court action has taken place.[162]



The data in Figure 4 shows that females are consistently the predominant victims of assault-related crimes. This satisfies the requirement for the proposition above. As females are still being victimised, an offence such as MAF that specifically criminalises VAW arguably remains relevant.

D. Analysis

Violence against women is an ongoing issue that has been recognised both internationally and domestically. The UN's commitment to addressing VAW through the creation of international instruments and declarations, demonstrates the importance and relevance of legislation that focuses on the protection of women.[163] New Zealand is also committed to addressing VAW, as evidenced by the ratification of the UN conventions, and ongoing reporting on how New Zealand is performing

162 Graph adapted from New Zealand Police "policedata.nz" Unique Victims (demographics) <www.police.govt.nz>.

163 CEDAW, above n 148; and General Recommendation No. 35, above n 150.

on the matter.[164] MAF supports both the international and domestic obligations to address VAW, as it specifically focuses on female victims of assault. This supports the assertion that MAF remains relevant, due to its gender-specific function that is protective of women.

Additionally, the responses from Members of Parliament and public submissions regarding the Family and Whānau Violence Legislation Bill 2017, indicate MAF would remain relevant alongside the new offences. This also recognises that MAF has a function outside of the family context, adding to its continued relevance.

More support for MAFs relevance can be found in the data on offenders and victims of assault-related crimes. As the majority of offenders are male, and the majority of victims are female, having a gender-specific crime that focuses on women as the predominant victims appears logical. MAF can act as a protective mechanism for women by targeting men who engage in assault on a female. This is clearly required, as women are being impacted by violence more than men, based on the data available.

Therefore, considering the need to address VAW internationally and domestically, responses to the new family violence provisions, and gender demographic data on violent offences, MAF remains relevant despite the introduction of the new family violence offences. This continued relevance justifies a revised purpose for MAF, to publicly condemn violence against women.

V. The After-MAF: Arguments on Repeal

With the continued relevance of MAF established, despite the original purpose being addressed by new legislation, the final question to address is whether MAF should be retained or repealed based on an amended purpose of publicly condemning VAW. In this final section, after addressing the specific concerns raised by the Law Commission regarding victim-specific offences, MAF will be assessed against theories of criminalisation and punishment, to establish whether MAF should be repealed. The selected theories are: legal moralism, harm prevention, deterrence and censure. These theories are relevant as they are closely linked to crimes against the person, such as MAF.

164 New Zealand Government *United Nations Convention on the Elimination of All Forms of Discrimination against Women Ninth Periodic Report by the Government of Aotearoa New Zealand* (July 2023).

A. Law Commission Report on Victim-Specific Offences

MAF is one of the few victim-specific assault offences in New Zealand. Other victim-specific offences are: assault on a child, assault on police, prison, or traffic officer, and assaults on others in performance of their duties.[165] The LCR recommended repealing both MAF and assault on a child, in favour of increasing the penalty for common assault to two years, with the victim and severity of the incident being considered at sentencing.[166] The LCR also recommended assaults on others in performance of their duties should be repealed, and that the only justified victim-specific offence is assault on a police officer.[167] The LCR provides several arguments in favour of repealing MAF based on it being a victim-specific offence that will now be assessed.

1. Domestic violence context

When addressing MAF specifically, the LCR focuses on the use of MAF as a proxy for domestic assault.[168] The report notes that "[i]f a domestic assault offence is the end that is sought, section 194(b) is not doing a good job", as domestic assault is not only committed by men, and same-sex relationships are not covered by MAF.[169] There is also discussion of MAF being a propensity indicator for domestic violence as it is separated from common assault on a person's criminal record.[170] The LCR suggests this would be a misleading propensity indicator, as MAF is typically used for minor assaults, and more serious crimes would be charged under different provisions where there would be no indication of the context of the assault.[171] Finally, the LCR suggests there would be "significant problems" with creating a specific domestic assault offence, as defining a domestic relationship would prove difficult, and expressly does not recommend introducing a specific domestic assault offence.[172] These points are the basis for an argument in favour of repealing MAF.

As this dissertation has established, the original purpose and primary application of MAF was in the domestic context, therefore the suggestion that MAF was a proxy for domestic assault was accurate. However, the introduction of AFR has proven a specific assault offence for family violence was indeed possible, which rebuts the

165 Crimes Act 1961, ss 194(a), 192(2); Summary Offences Act 1981, s 10; and Law Commission, above n 4, at 38.
166 Law Commission, above n 4, at 36.
167 At 41.
168 At 35.
169 At 35.
170 At 36.
171 At 36.
172 At 36.

suggestion that drafting such an offence would be too difficult.[173] MAF could still be used as a propensity indicator of gendered violence. It was suggested AFR would act as a propensity indicator for family violence during the Parliamentary debates on the Family Violence (Amendments) Act 2018.[174] With instances of family violence being specifically shown on criminal records rather than assumed based on an MAF conviction, MAF would arguably be a more accurate means of identifying an offender's propensity for gendered violence. This would support a revised purpose of addressing VAW, through condemnation of such violence being displayed on criminal records.

2. Inconsistent Charging

The LCR also asserts victim-specific assaults create risk of inconsistent charging.[175] This is due to the Police discretion involved in deciding which offence to charge under.

It is arguable that the suggested risk of inconsistent charging is mitigated by the guidance provided in the Police Manual discussed in Part IV of this paper. The purpose of the Police Manual is to ensure consistent charging practice. The Manual is therefore a mechanism to ensure the risk proposed in the LCR is mitigated. There is also evidence of police officers being concerned with accountability, therefore in the exercise of discretion police officers are more likely to ensure paperwork is completed.[176] This can arguably act as a further check to ensure police discretion is applied appropriately, as decisions to charge must be formally justified. These mitigation measures can arguably prevent inconsistent charging of MAF.

3. Reactive Legislation

The risk of reactive legislation is an unrealistic concern. The LCR suggests there is a risk of a "slippery slope effect" that could result in a "patchwork of offences without any logical or coherent structure".[177] The argument is essentially, if victim-specific offences are created in one context, there is a higher chance further offences will be added based on political or public opinion.

New Zealand operates under the principle of parliamentary sovereignty, which holds "Parliament can make and unmake any law it wishes".[178] This gives "extensive

173 Crimes Act 1961, s 194A.

174 (11 April 2017) 721 NZPD (Family and Whānau Violence Legislation Bill, First Reading, Amy Adams).

175 Law Commission, above n 4, at 30.

176 Stephanie Grant and Michael Rowe "Running the risk: Police officer discretion and family violence in New Zealand" (2011) 21 Polic Soc 49 at 63.

177 Law Commission, above n 4, at 31.

178 Spiller, above n 28, at 220.

power to" whichever political party, or parties, hold the majority in Parliament.[179] This means the New Zealand Government can legislate however they see fit. As New Zealand operates under this principle, the "slippery slope effect" arguably applies to any subject matter in New Zealand. The risk is mitigated through the lawmaking process, that requires parliamentary debate, and submissions through the Select Committee process which ideally identifies potential issues with new laws before the law is passed. Assuming the Government does not act under urgency, the lawmaking process would arguably catch any reactive legislation before it is inserted into the statute books.

Repealing MAF based on it being a victim-specific offence that risks future ad hoc offences being added would not prevent this risk, as it is an inherent part of New Zealand's governing system. Additionally, as MAF has been in New Zealand legislation for such a long time, if there was going to be a "slippery slope effect" it likely would have happened by now, and it has not. Therefore, the suggestion that there is a risk of reactive legislation is not a realistic concern.

4. Singling out of Aggravating Factors

The LCR suggested that singling out aggravating factors, such as the gender or age of the victim, or use of a weapon, should not be elements of offences.[180] Instead, these factors should be considered at sentencing.[181] This is consistent with other recommendations in the report that would repeal offences with specific aggravating factors, such as assault with a weapon, and instead create more generic offences such as "causing serious injury with intent".[182] Including gender as an aggravating factor at sentencing is an acceptable alternative to MAF. However, it is arguable that only having generic offences such as this would "suppress the fact that, within each field of harmful wrongdoing, each of our existing offences may involve a different wrong, a different harm, or both".[183] It is important to be able to distinguish different wrongs through specific offences, to ensure these wrongs are clearly communicated to the public.

In the context of MAF, the specific 'wrong' being addressed is a male assaulting a female. This is distinguished from common assault by the gender of the parties. Though the harm caused may be similar, the 'wrongness' of violence against women by men is arguably singled out to signify the difference between male on male, and

179 Andrew Geddis "Parliamentary government in New Zealand: Lines of continuity and moments of change" 2016 14 IJCL 99 at 102.
180 Law Commission, above n 4, at 31.
181 At 31.
182 At 17.
183 Andrew Simester, Warren Brookbanks and Neil Boister *Principles of Criminal Law* (5th ed, Thompson Reuters, Wellington, 2019) at 1026.

male on female assault. This also supports a revised purpose of condemning VAW by distinguishing it as a separate offence, thus communicating to the public that it is wrong. The different level of 'wrongness' is based on the morality and symbolism of criminalising gendered violence.

B. Theories of Criminalisation and Punishment

In taking a principled approach to the evaluation of MAF, the underlying theories on criminalisation and punishment of specific actions must be considered. Legal philosopher Hyman Gross states the presence of crime is a "social reality in every community [that] gives rise first to anger and fear, then to urgent concern about how crime ought to be dealt with".[184] This describes the importance of criminalisation theories in the criminalisation of actions, as crime is a reality that must be addressed. This section will provide a general outline of the function of criminal law. It will then explore theories of criminalisation and punishment and consider these theories in relation to whether MAF should be repealed.

1. Function of criminal law

Criminal law is a functional way for the state to participate in ordering the lives of its citizens.[185] It is a blunt instrument to respond to public wrongs. Criminal law differs from civil law in that while forms of civil law, such as tort law, provide a course of action for those who have been wronged, criminal law has a communicative function within society.[186] Criminal law has elements of morality, behavioural control, and harm minimisation, in its function of prohibiting actions for which there is an assumed political or societal interest in regulating and communicating to the public.[187] Criminal law and its processes are therefore separate and distinct from civil law.[188]

2. Legal moralism

The theory of legal moralism suggests there is a level of moral judgement involved in the criminalisation of certain actions. Legal moralism, originally coined by HLA Hart, suggests that an act being immoral is sufficient reason for it to be criminalised, even if it does not cause harm to others.[189] The right to live

184 Hyman Gross *A Theory of Criminal Justice* (Oxford University Press, New York, 1979) at 3.
185 Simester, Brookbanks and Boister, above n 183, at 1.
186 Andrew Simester and Andreas von Hirsch *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing, Oxford, 2011) at 4.
187 At 4; and Carleton Allen *Legal Duties and Other Essays in Jurisprudence* (Scientia Verlag Aalen, Oxford, 1977) at 233.
188 Allen, above n 187, at 227.
189 Thomas Petersen "What is Legal Moralism?" 2011 12 SATS 80 at 80.

free from harm is inherent in global society and is based in morality, not legality.[190] Violation of this right through acts of violence is therefore morally wrong. Offences involving violence, which are central to the majority of criminal codes, are also therefore both morally and legally wrong.[191] However, not all crimes are based in moral justifications. For example, breaching the speed limit by a small amount is not inherently morally wrong, despite being an offence.[192] Morality certainly has a role in the criminalisation of some actions, but it is not the primary reason acts are criminalised. As MAF may have a moral element to it due to the gendered nature of the offence, moral legalism is a relevant theory to be considered in the assessment of whether MAF should be repealed.

The inherent right to live free from harm, and the moral wrongness of breaching this right, is a fundamental element of society.[193] Therefore, there is often a link to the moral wrongness of an action in the reason for its criminalisation. The LCR acknowledges the primary argument for retention of victim-specific offences, such as MAF, is the moral symbolism such offences have.[194] This stems from the notion that crimes against particular groups of people are "so substantially different in character and culpability", that distinguishing such acts from "generic conduct" is warranted.[195] This reflects a level of moral judgement in the criminalisation of actions related to specific victims.

As MAF specifically focuses on violence perpetrated by men towards women, the implied symbolism is that this form of gendered violence is worse than common assault, where the gender of the parties is not stipulated. This reflects the revised purpose of condemning VAW in general, and that addressing domestic violence is not the only purpose of criminalising men assaulting women. International recognition of the issue of VAW, along with New Zealand's commitment to the international instruments designed to address VAW discussed in Part IV, indicates VAW is considered worse than non-gendered violence. Therefore, there is a level of symbolism in MAF that warrants a separate offence for men assaulting women. Repeal of MAF arguably undermines the recommendations from the CEDAW, as it would remove the specific gendered response to VAW New Zealand already has. An argument to retain MAF based on its symbolism can also be supported by the moral condemnation of VAW from a societal perspective.

The moral condemnation of VAW from a societal perspective adds to the symbolism of the offence. This moral condemnation is based on the societal norm

190 Gross, above n 184, at 13.
191 At 13.
192 Simester, Brookbanks and Boister, above n 183, at 3.
193 Gross, above n 187, at 13.
194 Law Commission, above n 4, at 30.
195 At 30.

of 'chivalry'.[196] Chivalry dates back to the Middle Ages, and requires men to protect women from harm.[197] It is likely based on the perceived vulnerability of women in society.[198] This norm "emphasises the forbidding of male violence against women".[199] When a man uses violence towards a woman, it is perceived as being worse than violence between men.[200] Reviews of research have shown that violent behaviour towards women, by men, is more likely to be condemned.[201] Specific research into the moral condemnation of VAW, found respondents were "much more likely to condemn men's assaults on women than violence involving other gender combinations", and concluded that VAW occurs "in spite of, not because of social norms".[202]

Evidence of the chivalry norm in early New Zealand legislation can be found in the Criminal Code 1893, where flogging or whipping was not permitted to be inflicted on women.[203] This indicates lawmakers viewed physical punishment of women as inappropriate. Though flogging is no longer an acceptable punishment for any person, the continued existence of MAF reflects the chivalry norm in the legislative context, as it expressly prohibits and punishes men for assaulting women.

MAF reflects this moral condemnation of VAW, through the specific criminalisation of men assaulting women. The silence on the provision throughout its history could also indicate there is an inherent wrongfulness in assaulting women. It is arguable that if there were a moral basis for not having an offence that targets gendered assaults, it would have been considered during changes to the criminal law in New Zealand discussed in Part II. However, the only discussion on MAF was that it would not be repealed.[204] The silence about MAF is indicative of the societal view that VAW is worse than male-on-male assault. The consequences of repealing MAF could send a damaging message to society. On one hand, it could be seen as a move towards equality, which would be praised in online forums, where it is claimed MAF is discriminatory against men.[205] On the other hand, it could be seen

196 Richard Felson and Scott Feld "When a Man Hits a Woman: Moral Evaluations and Reporting Violence to the Police" 2009 35 Aggress Behav 477 at 478.

197 Richard Felson *Violence and Gender Reexamined* (PsycBOOKS (EBSCO), Washington DC, 2002) at 68.

198 At 70.

199 At 68.

200 At 67.

201 Andrew Krajewski, Richard Felson and Mark Berg "Are Men Reluctant to Assault Women Even When Intoxicated?" 2023 41 JQ 243 at 244.

202 Felson and Feld, above n 196, at 485.

203 Criminal Code 1893, s 14(4).

204 See Part IV, B.

205 For examples of such claims see: griii2 (r/SystemicSexism) "In New Zealand assault by a male on a female carries double the penalty of identical assault by a female on a male" <www.reddit.com>; and Roger Calkin "Is the Charge of Male assaults Female discriminatory under the Human Rights Act" FYI.org.nz (5 July 2021) <www.fyi.org.nz>.

as a rejection of the chivalry norm and, by proxy, an acceptance of VAW in society. The latter is simply unacceptable.

3. Harm prevention

The principle of preventing harm is also an important facet of criminalisation. It is asserted that it is justifiable for the state to regulate activities when an activity will cause, or risk, harm to other people.[206] The harm principle provides guidance for law-makers, and acts as a positive reason to prohibit harmful actions.[207] Legal philosopher Joel Feinberg describes the harm principle as follows:[208]

> It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) *and* there is probably no other means that is equally effective at no greater cost to other values.

This principle provides grounds for criminalisation when it is obvious that the prohibition of an activity is done in the interest of preventing serious harm including, but not limited to, physical harm. Based on this, the necessity of preventing harm to others is "always an appropriate reason for legal coercion".[209]

The harm principle should also be considered in relation to legal liberalism. As criminal law essentially acts to restrict individual autonomy or liberty, it should only be done when it is absolutely necessary, and with explicit social justification.[210] To show criminalisation of an action is needed, there must be a case in favour of state regulation which shows the action is serious enough to warrant state intervention and intrusion on individual liberty.[211] There must also be evidence that criminalisation is the best way to achieve regulation, and the desired outcome of prohibiting the activity.[212] In relation to violence, the harm principle satisfies these criteria. Acts of violence including assault, rape and murder, commonly known as "crimes against the person", obviously cause harm, and therefore can be justifiably prohibited by the state.[213] As Feinberg aptly states "no reasonable person could advocate" for the decriminalisation of violent offences.[214] The harm principle is

206 Simester and von Hirsch, above n 186, at 35.
207 At 35.
208 Joel Feinberg *Harm to Others* (Oxford University Press, New York, 1984) at 26.
209 At 11.
210 At 7.
211 Simester, Brookbanks and Boister, above n 183, at 1004.
212 At 1004.
213 Feinberg, above n 208, at 11.
214 At 10.

relevant to the assessment of MAF as it relates to physical violence, which typically causes harm to the victim.

How harmful certain conduct is should be a key consideration in whether to criminalise said conduct.[215] The harm MAF appears to focus on is acts of assault, specifically against females, where the perpetrator is a male. For a successful argument to retain MAF, the harm principle should be satisfied. In summary, MAF should be an effective way to eliminate or reduce harm to women, and there should be no other effective means of doing this.

The harmfulness of assault is debatable, as there are varying degrees of assault. The focus of this dissertation has been based on the understanding of assault as an act of physical violence. However, assault is not necessarily a crime of violence, despite violence being present in the majority of cases.[216] The key aspect of assault is the "invasion by one person of another's body space".[217] Therefore, it is arguable that the harm MAF is designed to prevent is not as serious as other crimes that have acts of violence expressly stated.[218] This is reflected in both legislation and the Police Manual. Before 1961, assaults on women needed to be worse than what would be ordinarily considered common assault.[219] Though this requirement was removed from legislation with the enactment of MAF in its current form, the Police Manual still states that MAF should not be automatically used based on the gender of the parties.[220] This means other avenues can be taken to prevent the harm to women that MAF targets. The other assault offences available could cover all instances of a man assaulting a woman. These other offences are arguably an effective means of preventing harm, without specifying the gender of the parties. Therefore, MAF may not satisfy the harm principle.

4. Deterrence

The theory that criminalisation and punishment act as a deterrent for certain behaviour can also be a reason certain conduct is criminalised. As crimes are punished by means including imprisonment or fine, criminal law is purportedly designed to "correct inclinations to crime before a crime is committed".[221] This is because criminalisation and punishment creates a threat of consequences that

215 Andrew von Hirsch and Nils Jareborg "Gauging Criminal Harm: A Living-Standard Analysis" (1991) 11 Oxford Journal of Legal Studies 1 at 3.

216 John Gardner *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press, Oxford, 2007) at 39.

217 At 39.

218 For example: Crimes Act 1961, s 188 "Wounding with intent".

219 Indictable Offences Summary Jurisdiction Act 1894, s 16.

220 New Zealand Police Manual, above n 117, at 298.

221 Gross, above n 184, at 35.

could impact one's personal freedom.[222] Generally, punishment should provide a reason not to do the prohibited act. This is not simply a suggestion by the state not to break the law, but an outright threat that if a crime is proved to have been committed, punishment will follow.[223] The theory that the threat of punishment will act as a deterrent relies on the would-be criminal considering whether the risk of punishment is worth the potential gain from committing the crime.[224] Modern interpretations of deterrence theory also include a rational actor/choice model.[225] This suggests the decision to engage in criminal behaviour based on the potential consequence would be rational.[226] Alternatively, rational thinking could be completely irrelevant in cases where the offender may be acting based on emotion, rather than logic.[227] This suggests the rational actor model is not always appropriate when considering the application of deterrence theory. Whether or not the criminal law successfully functions as a deterrent is debatable.[228] It is arguable that the introduction of MAF may have been to deter assault by males on females, therefore deterrence should be considered in the assessment of MAF.

The punishment of MAF specifically was likely based on deterrence theory. Originally, MAF may have been intended to act as a deterrent for family violence. When considering the roots of MAF discussed in Part II, VAW was likely common enough to warrant specific deterrence by the state. Evidence of deterrence theory can also be seen in the higher penalty for MAF when compared to common assault.

For deterrence to be a valid argument for retention of MAF, it should be shown that the provision deters men from assaulting women. The data on charges related to family violence, along with the data on gender demographics on acts intended to cause injury, indicate that rates of VAW are not reducing, and confirm females are the predominant victims. This arguably demonstrates that the threat of conviction under MAF does not operate as a deterrent.

For deterrence theory to achieve the desired outcome, the offender must: know about the penalty, believe they will be caught, and have been able to rationally decide whether the risk of penalty is lower than the benefit of committing the crime.[229] As MAF has been in New Zealand legislation for such a long time, it can be assumed the majority of the population is aware of its existence. Additionally,

222 At 35.
223 Simester and von Hirsch, above n 186, at 6.
224 Kevin Kennedy "A Critical Appraisal of Criminal Deterrence Theory" (1983) 88 Dick L Rev 1 at 2.
225 At 3.
226 Robert Apel "Sanctions, Perceptions, and Crime: Implications for Criminal Deterrence" (2013) 29 J Quant Criminol 67 at 69.
227 Kennedy, above n 224 at 3; and Apel, above n 226, at 70.
228 Kennedy, above n 224, at 7.
229 Joseph Dole "Disinfecting the Criminal Legal System of Punitive Deterrence" 2023 17 DePaul J for Soc Just 1 at 7.

it is likely common knowledge that assaulting someone is a crime. The belief of being caught will be subjective in each case. Evidence suggests victims are more likely to report violence to the Police in cases where the gender of the parties is different.[230] Of course, this literature would not be readily available to potential offenders, however, men may arguably be aware that assaulting women is more likely to result in a police report, based on the norm that VAW is condemned by society. The ability to rationally consider the effect of committing an assault on a woman is likely not applicable in MAF cases. It is arguable a person experiencing an emotional response is "not likely to be deterred from committing it, regardless of the sanctions imposed".[231] Victims in MAF cases that were not related to family violence were still known to the offender, and it appears the assaults were based on an emotional reaction.[232] This means the ability to make a rational decision whether or not to assault a woman was not relevant in the decision to carry out the assault. Based on the three elements for the successful application of deterrence theory, it can be concluded that MAF as a deterrent for VAW is not likely to achieve the desired outcome. Repeal of MAF would arguably not have an impact on deterring men from assaulting women based on deterrence theory, as it appears MAF currently has little effect on deterring VAW.

5. Censure

The state criminalises actions that are considered wrongful enough to warrant state intervention. The purpose of this is to communicate to the public that actions are unacceptable and worthy of punishment. This reflects the principle of censure, the "expression of strong disapproval or harsh criticism".[233] Censure differs from ordinary disapproval or criticism, as it usually comes from an authoritative body, in this context, the state via the criminal law.[234] As representatives of a nation's citizens, law set by the state as to what is considered wrong, and ultimately criminal, is one of the highest forms of censure.[235] This censure is expressed to the offender in the form of criminal conviction, if found guilty, which serves as a public label that the person has broken the law and is, therefore, a criminal.[236] Being officially labelled as someone who has done wrong can have implications on how a person is treated in society due to the stigma attached to criminal convictions. These implications

230 Keith Hullenaar and R. Barry Ruback "Gender Interaction Effects on Reporting Assaults to the Police" 2021 36(23–24) J Interpers Violence 12997 at 13018.
231 Kennedy, above n 224, at 7.
232 See Part III, D.
233 Simester and von Hirsch, above n 186, at 13; and Spiller, above n 28, at 44.
234 Simester and von Hirsch, above n 186, at 13.
235 At 13.
236 Uma Narayan "Appropriate Responses and Preventive Benefits: Justifying Censure and Hard Treatment in Legal Punishment." 1993 13 OJLS 166 at 172.

are often negative, and include reducing employment prospects and rejection from the community.[237] The censure of VAW through the MAF provision has been suggested as a reason for keeping the offence, as it provides public condemnation of the behaviour.[238] Censure should therefore also be considered when assessing whether MAF should be repealed.

The New Zealand Government appears to support censure of offences against women through other gendered offences. There are a limited number of offences that specifically refer to gender in the Crimes Act. Section 204A, "Female genital mutilation", and s 204B, "Further offences relating to female genital mutilation", concern the gender of the victim and is also another example of VAW that has been specifically criminalised. "Dealing in slaves" is also an offence, under s 98 of the Crimes Act. This makes it an offence to give in marriage or transfer a woman to another person without her consent for the purpose of "gain or reward".[239] Under the same provision, anyone who "is a party to the inheritance by any person of a woman on the death of her husband" is also liable for this offence.[240] Though these offences differ from MAF, as the gender of the perpetrator is not specified, they could only be prosecuted if a woman was impacted. While MAF is the only specifically gendered provision in the Crimes Act, it is not the only instance of censure of actions that can harm women. This indicates the Government is not opposed to gender-specific offences that censure VAW.

Arguably, the purpose of criminalising assaults on women was based on the principle of censure. To support this proposition, it can be noted the penalty for common assault, while located in the same act as MAF, has typically been lower than the penalty for MAF.[241] This indicates the Government considers the seriousness of assault on a woman, is greater than that of non-gendered common assault. As the differences in maximum sentences between MAF and common assault have not changed since the introduction of the offences, it can be inferred that men assaulting women remains wrongful enough to be censured through a specific offence.

It is arguable the principle of censure could be upheld even if MAF was repealed. As the Law Commission suggested, the gender of the victim could be considered as an aggravating factor at sentencing.[242] However, an aspect of censure is the labelling of the wrongdoing that comes with the criminal conviction. Specific offences are

237 Simester and von Hirsch, above n 186, at 14.
238 Law Commission, above n 4, at 30.
239 Section 98(1)(g).
240 Section 98(1)(h).
241 Compare Indictable Offences Summary Jurisdiction Act 1894, ss 15–16 with Crimes Act 1961, ss 194(b)–196.
242 Law Commission, above n 4, at 31.

necessary to ensure citizens are fairly warned about prohibited conduct, and fairly labelled if convicted.[243] Fair labelling ensures criminal records reflect the essential elements of the offence.[244] As criminal records are used by the courts, and other entities such as social services and employers, to make decisions on an offender's future, the information contained in such records must be accurate.[245] In the case of MAF, the label is that the offender has assaulted a female. This label would reflect the censure of VAW by the state. It would also reflect the revised purpose of MAF through condemnation of VAW.

C. Analysis

The Law Commission's assertion that MAF was being used as a proxy for family violence was accurate. The suggestion that a specific family violence offence would be difficult to create has been proven wrong, as AFR has now been enacted by Parliament. MAF being used as a propensity indicator for family violence is no longer necessary, with the introduction of AFR. However, retaining MAF for use as a propensity indicator for gendered violence still has merit, particularly as family violence is now distinguished on criminal records.

In considering the concerns about victim-specific offences suggested in the LCR, there is potential for these risks to be mitigated. The risk of inconsistent charging can be mitigated by the guidance provided in the Police Manual, along with police officers being held accountable for their decisions to charge. The risk of reactive legislation is inherent in New Zealand's governing system. As MAF has been in force for such a long period of time with no apparent reactive legislation as a result, this concern is arguably redundant. Removing gender from the offence to avoid singling out of gender as the most important aggravating factor, removes the ability to address different wrongs that produce similar harm. Adding the gender of the parties to the aggravating factors at sentencing would be a viable alternative to ensure gender is still considered. However, the ability to address different wrongs through specific offences is an important facet of lawmaking, and arguably outweighs the risk of gender being considered more important than other factors.

MAF is symbolic of the moral view that VAW is wrong, and men assaulting women is worse than non-gendered violence. This is the primary argument against the repeal of MAF. Retention of MAF also supports New Zealand's obligations under international law to prevent VAW through penal sanctions. Repealing MAF would undermine New Zealand's commitment to the international instruments designed

243 Simester, Brookbanks and Boister, above n 183, at 1027.

244 James Chalmers and Fiona Leverick "Fair Labelling in Criminal Law" (2008) 71 Mod L Rev 217 at 231.

245 At 231.

to prevent VAW. There is also evidence that VAW has always been viewed as morally wrong, which can be seen in historic legislation and through the chivalry norm. The silence on MAF throughout its history also indicates VAW has been accepted as morally wrong, and there has been no cause for further discussion on the matter. VAW is largely viewed as morally wrong by society. As such, repeal of MAF could send a conflicting message to citizens, in that it could communicate that women no longer need specific acknowledgement, or protection in criminal law, in relation to assaults. This contradicts the social norm that VAW is wrong.

MAF is arguably not preventing the harm that it is designed to prevent, as demonstrated by the data discussed. For the harm principle to be satisfied, MAF should act as an effective way to reduce harm to women, and there should be no alternative. MAF is arguably only addressing minor crimes that are covered elsewhere in legislation. There appear to be alternative avenues for conviction and punishment for gendered violence that support an argument in favour of repeal.

Though MAF was likely introduced with the intention of deterrence, unfortunately, it does not seem to have been successful. Based on the data analysed, the existence of MAF does not appear to be having an impact on instances of VAW, as women are consistently victimised more than men. The elements required for deterrence theory to work are arguably not met in the case of MAF. This means that repeal of MAF would likely not affect reducing VAW, though no harm appears to be coming from having it either. Deterrence theory is therefore a neutral argument on whether to repeal MAF.

The retention of MAF, for the purpose of censure, would continue to communicate to the public that a male assaulting a female, regardless of context, is more serious than common assault. Censure is achieved through the higher penalty MAF prescribes than the penalty for common assault. The consistency of the difference in penalty indicates the action has always been wrongful enough to be censured by the state. There is further evidence of government support for the censure of offences that impact women, through the other offences where only a woman could be the victim. Fair labelling of offences is also consistent with censure, as criminal records are part of the public denunciation of wrongful actions.

Overall, these arguments need to be weighed against each other to form a conclusion on whether MAF should be repealed. Concerns regarding victim-specific offences can be mitigated in the case of MAF, which means such arguments do not hold as much weight as the LCR suggests, despite some being valid concerns. Arguments based on the ineffectiveness of deterrence and harm prevention indicate MAF could be repealed. The arguments in favour of retaining MAF based on morality, symbolism, and censure are more compelling. VAW is considered morally wrong,

and widely condemned by society. MAF is symbolic of this view as it denounces and censures men assaulting women. Repealing MAF could communicate to the public that this moral view has changed, and that VAW is somehow acceptable. This is not the case in society, as demonstrated by the social norm that men should protect, and not harm, women. A revised purpose of MAF to condemn VAW supports its retention based on morality, symbolism, and censure. As VAW is still a widespread issue, and condemned as such, it warrants specific labelling in the criminal justice system. Though removing gender from the criminal law is technically more equal, the prevalence of VAW is still too high to consider repeal as a positive move for the interests of women and their personal safety. On this basis, MAF should be retained.

VI. Conclusion

It is necessary to understand the purpose of a provision to establish whether it is worthwhile.[246] With this in mind, and against the backdrop of the Law Commission recommending MAF be repealed, along with new family violence legislation, the purpose of MAF came into question. This dissertation sought to understand MAF's purpose, establish whether MAF remained relevant, and assess whether MAF should be repealed.

An investigation into the historic underpinning of MAF established the provision's original purpose was to address domestic violence. The common law principle of coverture, which at the time was seen to approve matrimonial violence, provided the initial context for why a provision criminalising domestic violence was necessary. The first instance of MAF from the United Kingdom was adopted into New Zealand legislation, where it was then adapted into its current form. There was a common theme of silence on MAF, despite the numerous statutes MAF moved through across a century. This indicates there was no change in the provision's original purpose, and it can be confidently concluded the purpose was to address domestic violence.

The use of MAF was also considered, to confirm whether the original purpose had changed, particularly with the introduction of AFR. Instructions to police, provided by the Police Manual, supported the conclusion that the original purpose had not changed, particularly through the reference to the wording of the original New Zealand statute from 1867. Data collected from the Police and the Ministry of Justice confirmed that MAF was primarily used in the domestic context.

246 Gross, above n 184, at 4.

A review of case law provided examples of MAF that were not related to family violence. This confirmed MAF could still be used outside of the family context, despite its original purpose. However, as this section concluded the primary use of MAF was related to family violence, the relevance of MAF became questionable, considering AFR is now addressing the original purpose.

MAF arguably remains relevant when considering the widespread issue of VAW. This is supported by New Zealand's obligations to address VAW under international law. MAF is a direct reflection of New Zealand's obligations under the CEDAW. It also supports the UN declaration that condemns VAW, as MAF is a penal sanction that specifically punishes men who are violent towards women. As the new family violence legislation was introduced, there was no suggestion of repealing MAF. On the contrary, MAF was intended to be complementary to the new provisions, as it continued to recognise VAW outside of the domestic setting. This adds to the continued relevance of MAF, as its retention was supported by the Government. A review of the gender demographics of violent crime and victimisation in New Zealand also supports the relevance of MAF. Males are the predominant perpetrators of VAW, and females are the predominant victims of violent crime. A gender-specific crime such as MAF is therefore relevant, as women are more often the victims. With MAF's relevance established, this dissertation suggests a revised purpose for MAF is to act as a tool to publicly condemn VAW.

In light of the original purpose of MAF being to address family violence, its relevance confirmed, and a revised purpose proposed, the final question this paper sought to address was whether MAF should be retained. The Law Commission raised arguments for the repeal of victim-specific offences, all of which can arguably be mitigated. The theories of deterrence and harm prevention did not appear to support the retention of MAF, as the elements required for successful application of these theories were not met. MAF does not appear to deter men from assaulting women, nor does MAF appear to prevent harm. However, arguments based on morality, symbolism and censure provide compelling reasons to retain MAF. VAW is considered to be inherently morally wrong. MAF is symbolic of this societal view. The censure of VAW achieved through MAF communicates to the citizens of New Zealand that VAW will not be tolerated, and that it is more serious than non-gendered violence.

The communicative function of criminal law should not always be discounted in favour of other theories on criminalisation. The symbolism and censure achieved by MAF are too important to ignore. The message repealing MAF sends to the New Zealand community contradicts the moral and legal obligations that exist to prevent VAW. Public condemnation of VAW is necessary to help female victims of

violence as it keeps the issue in the public eye. Without continued exposure and condemnation, VAW may remain normalised in society despite its wrongfulness being acknowledged. For the young people in my life to experience a future where women are free from violence, provisions such as MAF that specifically and publicly condemn VAW, should be retained.

PLURALISM IN ACTION: THE ROLE AND FUTURE OF PŪKENGA IN AOTEAROA NEW ZEALAND

Asta Hinton*

Abstract

Tikanga Māori is becoming increasingly integrated into Aotearoa New Zealand's common law. Pūkenga, experts in tikanga Māori, are essential in maintaining the integrity of Māori law while this integration develops. Yet, the role of pūkenga exposes the paradox of operating within a mono-legal system not designed for Māori law. Within the courtroom, pūkenga assist judges in recognising tikanga as a living, developing legal framework. Beyond this sphere, they contribute to legal education, ensuring a deeper comprehension of tikanga and advancing Māori rights under the rule of law. However, a series of tensions persist for pūkenga. The expert evidence framework treats tikanga as a discipline rather than a legal system, limiting recognition of pūkenga as legal authorities. Additionally, the principle of probative value is challenging to apply as the judiciary deepens its understanding of tikanga Māori, since what is relevant in tikanga terms could be excluded or overlooked entirely where its significance is not understood. Moreover, the adversarial emphasis on impartiality conflicts with whakapapa-based obligations central to tikanga expertise. Despite these challenges, pūkenga should continue to develop their role within the court system to 'strengthen' legal pluralism in Aotearoa New Zealand and help accelerate the momentum necessary for future constitutional refinement.

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I. Introduction

For close to 200 years, Aotearoa New Zealand has been a legally plural nation. As stated by Joseph Williams J, tikanga Māori and English common law coexist as legal systems in Aotearoa, as her first and second laws.[1] However, with a history of cultural and legal assimilation, the recognition of tikanga Māori as part of our legally plural reality has been a topic of significant legal debate.[2]

Despite these challenges, a third law is emerging in Aotearoa, shaped by both tikanga Māori and English common law.[3] This demonstrates a pivotal point concerning the role of tikanga in the legal system.[4] As this evolving third law is indicative of legal pluralism, this prompts the broader question: how should legal pluralism continue to develop in Aotearoa?

Legal pluralism can take many forms based on societal circumstances.[5] The specific plural relationship this dissertation explores is the intersection of pūkenga and the expert evidence framework in Aotearoa. In analysing this plural relationship, this dissertation seeks to firstly explore what the role of pūkenga demonstrates for legal pluralism in Aotearoa. The analysis will then evaluate what the future of pūkenga in our litigation system may look like through a pluralist lens, and, how the role of pūkenga can best increase the understanding and usage of tikanga in our wider legal system.

Part II of this dissertation describes in detail the concepts of legal pluralism, realism, and relationality, and how they are present in Aotearoa. This section also outlines the adoption of he awa whiria – the integrated, bicultural research methodology designed to provide inclusive research outcomes by fusing Māori and Western research processes. Part III then builds on existing legal pluralism scholarship through analysing the intersection of pūkenga and expert evidence laws. In doing so, the section first outlines the historical background on the role of pūkenga and how this correlates to their role in the courts. The section then describes the expert evidence framework within which pūkenga operate, and analyses specific examples of how pūkenga bring tikanga before the court. Following this analysis, the overarching essence of this section is explored, which argues that the intersection of pūkenga and expert evidence law is indicative of a weak plural relationship.

1 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 at 2 and 5.
2 At 10.
3 At 11.
4 Jacinta Ruru "First Laws: Tikanga Māori in/and the Law" (2018) 49 VUWLR 211 at 211.
5 Jennifer Corrin "Exploring the Deep: Looking for Deep Legal Pluralism in the South Pacific" (2017) 48 VUWLR 305 at 309.

In light of this weak plural relationship between tikanga and state law in the courts, Part IV highlights the advantages and pitfalls of the adversarial system in both recognising pūkenga as experts in law, and the wider acceptance of the principles and practices of tikanga Māori. As tikanga incrementally forms part of the common law of Aotearoa, the role of pūkenga as experts in tikanga Māori is crucial in developing the law in a way that maintains the integrity of tikanga.[6] However, this article argues that the operation of pūkenga within an adversarial, predominantly mono-legal court system highlights the reality that tikanga continues to operate subservient to state dominance.[7] This article concludes by arguing that pūkenga currently operate as a legal paradox. This is because pūkenga currently work within a system not designed for Māori law, yet they are necessary for the continued development of Māori law within the system.

Part V argues that looking to the future, pūkenga should continue as a developing role within litigation in Aotearoa. In doing so, it is likely that pūkenga will continue to operate as a paradox within an adversarial framework. However, this will give pūkenga the opportunity to continue to develop tikanga understanding inside the legal framework, and to prepare for possible constitutional change leading to a stronger legal pluralism.

Overall, this dissertation argues that pūkenga should continue to have a role within the litigation system, despite the challenges they face when acting in an adversarial court system. When looking to the future, the importance of 'strengthening' our legal pluralism becomes clear. To get there, however, this dissertation concludes active engagement between state law and tikanga Māori under the current, if not slightly modified constitutional arrangements, will help accelerate the momentum necessary for future constitutional refinement.

II. Theory and Methodology

In the multi-faceted and evolving legal landscape in Aotearoa (New Zealand), legal theory provides an important framework for understanding how laws are applied, interpreted, and enforced within society.[8] This section delves into key theoretical underpinnings that inform legal interpretation in Aotearoa, specifically

6 Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" (2015) 1 NZLR 1 at 58.

7 David Williams "The Waitangi Tribunal and Legal Pluralism: A Reassessment" (1994) 10 AJLS 195 at 196.

8 Erik Björling and Eva-Maria Svensson "The Role of Legal Theory in Legal Education: A Reflection on Professional and Scholarly Ideals in Nordic Legal Education" (2021) 4 Nordic Journal on Law and Society 1 at 2.

focusing on legal pluralism, realism, relationality, and the distinction between weak and strong plural relationships.

This section begins by exploring the importance of legal realism in recognising tikanga Māori as law, which then supports its place as a legal system within the legally plural Aotearoa. Building on legal pluralism, legal relationality explores the dynamic interactions within this wider plural context and looks to how multiple legal systems may navigate recognition in a plural society. As legal pluralism often creates complex legal relationships, weak and strong legal pluralism will be distinguished to help explain the diverse relationships that arise between multiple legal orders within a singular social field. These foundations will inform the analysis in subsequent sections, where these theories will be applied to the specific legal context surrounding the operation of pūkenga in the courts of Aotearoa, illustrating their relevance and implications for the future.

This section then outlines the research methodology adopted in this dissertation, which uses the he awa whiria (braided rivers) approach. This framework facilitates the merging of Māori and Western research perspectives, in adopting both kaupapa Māori and doctrinal research. This section details the application of this approach in the research and analysis, emphasising the value of integrating Māori and Western ways of knowing to produce insights that are both robust and culturally inclusive.

Overall, this section emphasises the importance of both legal and methodological pluralism to provide a comprehensive and inclusive framework in analysing the nature of legal relationships in Aotearoa.

A. Legal Pluralism, Realism and Relationality

Central to this paper is the presence of legal pluralism in Aotearoa.[9] As expressed by Williams J, tikanga Māori and English common law are the first and second laws of Aotearoa. Presently, a third law is emerging where the first and second laws are being interweaved, which recognises a legally plural relationship.[10] Legal pluralism can manifest in various forms,[11] one of which being the concept of pūkenga. For the purpose of this dissertation, pūkenga are broadly conceptualised as experts in tikanga.[12] The role of pūkenga is inherently pluralistic, operating within both tikanga Māori and orthodox common law. However, legal realism is important to address first as it recognises tikanga Māori as law, which therefore establishes its place as a legal system within legally plural Aotearoa.

9 See generally, Nicole Roughan "Honing 'our jurisprudence' to respond to interacting legalities in Aotearoa New Zealand" (2022) 3 NZLR 299.
10 Williams, above n 1, at 11.
11 Geoffrey Swenson "Legal Pluralism in Theory and Practice" (2018) 20 Rev Intl Stud 438.
12 See part III for an in-depth discussion of the role of pūkenga.

Legal realism recognises that societies simply do not exist without law, and law therefore links inextricably with the definition of society.[13] Particularly relevant in the context of Indigenous peoples, legal realism posits that law exists in society regardless of who created it and how it was created.[14] Under this approach, law can be understood as a set of norms required for the operation of society.[15] These norms can be described through prominent legal realist Llewellyn's "law jobs", which recognise law where it can resolve disputes, create rules, be directed, and those functions can be allocated.[16]

Although tikanga is more expansive than solely a legal system, legal realism recognises its purpose to guide the functioning of Māori society.[17] As stated by Professor Sir Hirini Moko Mead, tikanga comprises "beliefs and practices associated with procedures to be followed in conducting the affairs of a group or individual".[18] Tikanga originates from the word tika, meaning correct and just, which seeks to uphold justice and correct behaviour as understood in te ao Māori. The value-based nature of tikanga makes the system inherently adaptable, featuring fundamental interconnected values such as whanaungatanga (kinship), mana (authority), and tapu (sacredness).[19] Although these values interconnect holistically, their relationship provides directives to reach resolution,[20] outline behavioural expectations and overall guidelines for the operation of Māori society.[21] The implementation of these values are also solidified by precedent over time, and are further established over the span of multiple generations.[22] Therefore, under a realist lens, the ability of tikanga to guide behaviour makes it law.

Legal realism is additionally crucial in ensuring that the functions and outcomes of law improve its ability to uphold the rights of Indigenous peoples.[23] Realism notes

13 KL Llewellyn "The Normative, the Legal and the Law Jobs: The Problem of Juristic Method" (1940) 49 Yale LJ 1355; and Emile Durkheim *On The Division of Labour in Society* (George Simpson (translator), Collier Macmillan, New York, 1963).

14 W John Hopkins "Missing the Point? Law, Functionalism and Legal Education in New Zealand" (2011) 28 Wai L Rev 188

15 At 190.

16 Llewellyn, above n 13.

17 Carwyn Jones "Lost from Sight: Developing Recognition of Māori Law in Aotearoa New Zealand" (2021) 1(2) Legalities 162 at 166.

18 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 [72].

19 Williams, above n 1.

20 At 3.

21 Wiremu Doherty, Hirini Moko Mead and Pou Temara "Tikanga" (2024) Appendix to Law Commission *The Study Paper He Poutama* (NZLC SP24, 2023) at 39.

22 Mead, above n 18, at [74].

23 Hilaire McCoubrey and Nigel D White *Textbook on Jurisprudence* (2nd ed, Blackstone Press Limited, London, 1996) at 192.

the importance of monitoring the effects of law on people,[24] ensuring law actually produces better outcomes for the needs of society.[25] To do this, legal realism emphasises the importance of incorporating knowledge and understanding from a variety of fields to address the wide-reaching consequences of legal decisions.[26] Recognising that tikanga Māori is part of the legal reality in Aotearoa through both pluralist and realist lenses highlight the need to better engage with mātauranga Māori (Māori knowledge) regarding legal and social outcomes in a way that ensures law produces outcomes that respect and maintain the integrity of te ao Māori.[27]

In recognising tikanga as a system of law, it therefore forms part of legal pluralism in Aotearoa. This is because legal pluralism, in its simplest form, recognises the existence of multiple laws and legal systems in a state.[28] Legal pluralistic thinking became notably predominant in the 1970s, when scholars had proceeded to intersect law with anthropology and social theory.[29] Legal pluralism today acknowledges multiple forms of law that can coexist within a state, including indigenous law, religious law, specific laws of cultural communities and international law.[30] Tikanga Māori, as a legal system, can therefore form part of legal pluralism in Aotearoa as being one of the multiple legal systems that operate within the state. Because pluralism allows acknowledgement of diverse legal systems, the legal principles that feature throughout a plural legal order often vary in similarity, coordination and operation.[31] Hence, legal pluralism is often complex, and the intersection of pūkenga and expert evidence law will demonstrate this.[32]

Importantly, legal pluralism strives to reject orthodox legal positivism, as positivist thinking in a pluralist state has limited applicability.[33] Legal positivist HLA Hart illustrates legal systems as monist systems, recognising law as solely created

24 Warwick Tie "Legal Pluralism: Toward a multicultural conception of law" (PhD Thesis, Massey University, 1997) at 10.

25 Brian Leiter "American Legal Realism" (research paper conducted for the University of Texas School of Law, October 2002) at 3.

26 Michael Coyle "E Pluribus Plures: Legal Pluralism and the Recognition of Indigenous Legal Orders" in Paul Schiff Berman (ed) *The Oxford Global Handbook of Legal Pluralism* (Oxford University Press, New York, 2020) at 807.

27 Val Napoleon "Legal Pluralism and Reconciliation" (2019) November Māori LR 2.

28 Margaret Davies "Legal Pluralism" in Peter Cane and Herbert M Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, Oxford, 2012) 805 at 807.

29 Keebet von Benda-Beckmann and Bertram Turner "Legal pluralism, social theory, and the state" (2018) 50 The Journal of Legal Pluralism and Unofficial Law 255.

30 Brian Tamanaha "Ubiquity of Legal Pluralism and its Consequences" (2023) 54 VUWLR 895 at 918.

31 Brian Tamanaha *Legal pluralism explained: history, theory, consequences* (Oxford University Press, New York, 2021).

32 Tamanaha, above n 31.

33 Robert Hughes "Legal pluralism and the problem of identity" in Anita Jowitt and Tess Newton Cain (eds) *Passage of Change* (Australian University Press, Canberra, 2003) 332 at 337.

by the state sovereign,[34] and comprised of primary and secondary rules.[35] Primary rules of a legal system are rules that grant rights and duties upon individuals,[36] and secondary rules determine the operation and enforcement of primary rules.[37] However, applying this narrow conception of law in Aotearoa disregards other legal systems that operate alongside state-made law, namely tikanga Māori but also international law.[38]

Although Hart's definition of a legal system comprised of primary and secondary rules can apply to tikanga Māori, the essence of Hart's theory is based upon a notion by which Indigenous law is deemed "primitive" and not law.[39] Tikanga can fit into this conception of law when framed in a light beyond orthodox thinking, This is because tikanga precedent and legitimacy is sourced in a manner that does not align with the orthodox positivist criteria for legal validity.[40] Rather than originating from orthodox norms, tikanga is sourced from wānanga (institutions of learning), whaikōrero (oratory), whakatauākī (proverbial sayings) and pūrākau (stories).[41] Tikanga is passed down through generations, however tikanga that is considered tapu (sacred) will remain with those considered experts.[42] Legal positivism's emphasis on orthodox source and recognition of law means positivism continues to limit recognition of tikanga Māori.[43] Because of the underlying notion of legal positivism that Indigenous law is not law, generalisations regarding non-Western legal systems are counterproductive in upholding the integrity of tikanga Māori alongside common law. Adhering to this restrictive approach therefore does not reflect the pluralist realities in Aotearoa.[44] This is seen where statute law,[45] regulatory bodies and common law are incrementally incorporating tikanga,[46] which demonstrates the reality of an established and developing pluralism in Aotearoa.

34 McCoubrey and White, above n 23.
35 HLA Hart *The Concept of Law* (Clarendon Press, Oxford, 1961).
36 William C Starr "Law and Morality in HLA Hart's Legal Philosophy" (1984) 67 Marq L Rev 673 at 676.
37 Massimo La Torre "The Hierarchical Model and HLA Hart's Concept of Law" (2013) 21 Journal for Constitutional Theory and Philosophy of Law 141 at 148.
38 Stephen Hall "The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism" (2001) 12 EJIL 269 at 270.
39 Mārami Stephens "Māori Law and Hart: A Brief Analysis" (2001) 32 VUWLR 844 at 855.
40 Law Commission *The Study Paper He Poutama* (NZLC SP24, 2023).
41 *Re Ellis v R* SC 49/2019, 30 January 2020 (Statement of Tikanga) at 35.
42 At 36.
43 Coates, above n 6, at 26.
44 Stephens, above n 39, at 855.
45 Such as s 7 of the Resource Management Act 1993, s 4 of the Te Ture Whenua Māori Act 1993, and treaty settlements generally, despite challenges to their overall effectiveness in recognising tikanga Māori.
46 Such as the Waitangi Tribunal and the Māori Land Court.

Today, Aotearoa as a state interacts with multiple key legal systems: common law, equity, tikanga Māori and international laws and regulations.[47] A legally pluralist environment featuring common law and tikanga Māori has existed in Aotearoa since the arrival of settlers. Legal pluralism was however first officially recognised upon the signing of the Māori Declaration of Independence | He Whakaputanga in 1835, which acknowledged Māori autonomy over their territories.[48] This recognition was further established upon the signing of Treaty of Waitangi | Te Tiriti o Waitangi 1840,[49] where the presence of both English common law and tikanga Māori were acknowledged.[50] Article 2 of the Māori text outlined the retention of "tino rangatiratanga", referring to "absolute chieftainship".[51] This autonomy includes the continuation of tikanga Māori as the legal system over their lands.[52] Notably, this guarantee demonstrates historic recognition of the existence of tikanga Māori as a legal system within Aotearoa. Importantly, although tikanga Māori was suppressed by colonisation, its presence as a legal system was sustained on marae and te ao Māori spaces. Legal pluralism and realism both recognise tikanga as law and as an autonomous, functioning legal system in Aotearoa, regardless of whether the Crown consistently recognised it as such.[53]

As discussed, legal pluralism recognises that Aotearoa features multiple legal frameworks. However importantly, where there is legal pluralism in a society, relationships between legal systems are often formed.[54] These, often complex, relationships between legal systems can be conceptualised through legal relationality theories. Legal relationality understands the coexistence of multiple legal systems within an overall plural framework and how legal systems can interact.[55] Legal relationality also emphasises the importance of studying the relationships within legal contexts, observing how power dynamics, social identities, and cultural values

47 Brian Tamanaha "Understanding Legal Pluralism: Past to Present, Local to Global" (2007) 29 Syd LR 37.

48 Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 498.

49 Williams, above n 1, at 7.

50 Caren Fox "Legal pluralism in Aotearoa/New Zealand" (2024) 30 Canta LR 35 at 33.

51 The Treaty of Waitangi | Te Tiriti o Waitangi 1840; and Justine Munro "The Treaty of Waitangi and the Sealord Deal" (1994) 24 VUWLR 389 at 392.

52 Fox, above n 50, at 33.

53 David V Williams "Indigenous Customary Rights and The Constitution of Aotearoa New Zealand" (2006) 14 Wai Law Rev 120 at 126.

54 Nicole Roughan "The Association of State and Indigenous Law: A Case Study in 'Legal Association'" (2009) 59 UTLJ 135 at 136.

55 Swenson, above n 11, at 446.

influence legal outcomes.[56] This is particularly crucial when examining a state that has a colonial history.[57]

Legally plural relationships often have various forms due to pluralism's fluid nature.[58] One way to conceptualise these relationships between legal systems is through Griffiths' theory of weak and strong legal pluralism.[59] As posited by Griffiths, weak legal pluralism, on one hand, is understood as societal pluralism that operates under unitary law.[60] Conversely, strong legal pluralism is where pluralism operates where multiple legal systems coexist in their own right, but interact in harmony, or sometimes in conflict with each other.[61]

Notably, where Indigenous law and state law operate in a weak pluralist paradigm, a subservient-dominant relationship can often arise, where one legal system is recognised solely through another legal system.[62] On the other hand, strong legal pluralism better allows Indigenous law to operate at an equal level to state law.[63] In light of this, this dissertation looks to explore the extent of the plural relationship between pūkenga and expert evidence law. This raises the question as to whether recognition of tikanga can be adequately addressed in a weak pluralist regime, or whether strong pluralism is required in the future. The analysis of this will begin in Part III.

B. A Braided River: Bicultural Application of Kaupapa Māori and Doctrinal Legal Methodology

Because this research focuses heavily on a pluralist lens encompassing both tikanga Māori and common law as law, a 'he awa whiria' or a 'braided river' approach will be adopted. This is to ensure that both kaupapa Māori and the doctrinal research method are used to strengthen each other and ultimately create conclusions that acknowledge and benefit both Māori and Pākehā contexts.

To provide context, a good starting point is the Treaty | Te Tiriti. Te Tiriti is founded upon the concept of partnership.[64] Within this lies a commitment to mutual

56 Hajar Yazdiha "The relationality of law and culture: Dominant approaches and new directions for cultural sociologists" (2017) 11 Sociology Compass 12545 at 12551.
57 Michael Murphy "Relational Legal Pluralism: Ethical Agency, Reflexive Communities, A-legality, and the Revitalization of Democratic Institutions" (March 2024) at 1.
58 Swenson, above n 11, at 441 and 458.
59 John Griffiths "What is Legal Pluralism?" (1986) 24 J Legal Plur 1 at 8.
60 At 8.
61 Ralf Michaels "Global Legal Pluralism" (2009) 5 Annual Review of Law & Social Science 1 at 5.
62 Margaret Davies "Pluralism and Legal Philosophy" (2006) 57 NILQ 577 at 588.
63 Napoleon, above n 27, at [38].
64 Mohi Rua et al. "A Kaupapa Māori conceptualisation and efforts to address the needs of the growing precariat in Aotearoa New Zealand: A situated focus on Māori" (2022) 62 British Journal of Social Psychology 39 at 48.

respect between Māori and Pākehā of each other's culture.[65] Research, if conducted in a certain manner, can be a mechanism for colonisation.[66] Because of colonial history and the assimilation of Māori culture and mātauranga (knowledge), research that relates to tangata whenua must be relevant and meaningful to their cultural practices and needs in order to produce sound outcomes.[67] Decolonisation through research does not mean a complete rejection of Western theoretical and research paradigms, however.[68] Where we currently stand in this process is looking to how tikanga Māori and common law legal systems can operate in a way that supplements the other, and ensure maintained autonomy of tikanga and mātauranga Māori.[69]

A number of scholars argue mixed method research methodologies are an appropriate way to conduct research that involves Indigenous peoples.[70] Mixed method approaches help provide overall sound solutions where the strengths of multiple ways of knowing are combined.[71] The mixed method approach 'he awa whiria' has accordingly been developed in the Aotearoa context.[72] The methodology is particularly effective, as it weaves kaupapa Māori and Western doctrinal methodologies to create equally beneficial research outcomes for Māori and Pākehā, while ensuring maintained sovereignty of mātauranga Māori.[73] Macfarlane bases the methodology on a metaphor of streams to a river. Although the streams' connectedness may ebb and flow, the convergence of the water sources to form one river represent the creation of a learning space that does not assimilate the other method.[74] As the flow of the river is strengthened by the equal contribution of both kaupapa Māori and doctrinal methodology, this creates the opportunity for new knowledge that can help to create better outcomes for all.[75] Overall, he awa whiria is

65 Rhiannon Martel, Matthew Shepherd and Felicity Goodyear-Smith "He awa whiria: A 'Braided River' – An Indigenous Māori Approach to Mixed Methods Research" (2022) 16(1) Journal of Mixed Methods Research 17 at 19.

66 Doherty, Mead and Temara, above n 21, at 7.

67 Denise Wilson, Alayne Mikaere-Hall and Juanita Sherwood "Using indigenous kaupapa Māori research methodology with constructivist grounded theory: generating a theoretical explanation of indigenous womens' realities" (2022) 25 International Journal of Social Research Methodology 375 at 379.

68 Wilson, Mikaere-Hall and Sherwood, above n 67, at 380.

69 Law Commission, above n 40, at 16.

70 Alexandra Drawson, Elaine Toombs and Christopher Mushquash "Indigenous research methods: A systematic review" (2017) 8(2) International Indigenous Policy Journal 1.

71 L Botha "Mixing methods as a process towards indigenous methodologies" (2011) 14(4) International Journal of Social Research Methodology 313 at 320.

72 Cristy Trewartha "He awa whiria, braiding the rivers of kaupapa Māori and Western evidence on community mobilisation" (2020) 12 Haratua 16 at 18.

73 S Macfarlane, A Macfarlane and G Gillon "Sharing the food baskets of knowledge" in A Macfarlane, S Macfarlane and M Weber (eds) *Sociocultural realities: exploring new horizons* (Canterbury University Press, Christchurch, 2015) at 73.

74 Trewartha, above n 72, at 16

75 Macfarlane, Macfarlane and Gillon, above n 73, at 74.

appropriate in the context of legal pluralism research, acknowledging the complex and dynamic relationship between te ao Māori and te ao Pākehā, and assisting in outcomes that legitimately recognise legal pluralism in Aotearoa.[76]

The first stream within this methodology is kaupapa Māori. Kaupapa Māori is a research methodology created by Māori, for Māori, embedded with Māori principles and values.[77] Unlike Western research methodologies, kaupapa Māori ensures that the undertaking and outcomes of academic research align with Māori values and advance Māori outcomes,[78] which otherwise are often lacking in non-Māori approaches to research.[79] Kaupapa Māori is crucial in freeing Māori knowledge from Pākehā domination,[80] and challenging Pākehā hegemony in the legal system.[81] The use of kaupapa Māori for this paper focuses on providing appropriate, informed outcomes regarding pūkenga in Aotearoa's legal system. This is important in maintaining the overall integrity of tikanga in the future.[82]

Notably, there is discussion surrounding Pākehā eligibility to appropriately conduct kaupapa Māori research.[83] Although being Māori is a key criterion for using kaupapa Māori methodology, those who are Pākehā are not prohibited from conducting research with a kaupapa Māori focus either.[84] This concern stems from rightful criticism regarding Pākehā conducting research on Māori, failing to consider Māori culture, interests and needs.[85] However, Māori academics such as Ani Mikaere caution against restricting kaupapa Māori research in order to stray from Pākehā exclusionary practices when it comes to Western research.[86] Although there is contention, the literature does acknowledge there is space for Pākehā to conduct kaupapa Māori method, provided they appropriately adopt kaupapa Māori

76 Trewartha, above n 72, at 16

77 Linda Tuhiwai Smith *Decolonising Methodologies: Research and Indigenous Peoples* (Otago University Press, Dunedin, 1999).

78 Rhianna Morar "Tikanga Māori in Aotearoa New Zealand law: *He Poutama* explored in detail – Part three: future engagement" (2024) April Māori LR 1 at [10].

79 Steven Kent "The Connected Space of Māori Governance: Towards an Indigenous Conceptual Understanding" (PhD Thesis, University of Lincoln, 2011).

80 Doherty, Mead and Temara, above n 21, at 7.

81 Leonie Pihama, Fiona Cram and Sheila Walker "Creating Methodological Space: A Literature Review of Kaupapa Māori Research" (2002) 26(1) Canadian Journal of Native Education 30 at 33.

82 Morar, above n 78 at [10].

83 This author acknowledges that because they are tangata Tiriti with whakapapa (genealogy) from England and Scotland, they cannot speak about tikanga from a personal perspective; Marama McDonald, "Manaaki Tāngata The Secret to Happiness: Narratives from Older Māori in the Bay of Plenty" (PhD Thesis, University of Auckland, 2016) at 13.

84 Carla Wilson "Ministry of Social Development: Book Review on *Decolonising Methodologies: Research and Indigenous Peoples* by Linda Tuhiwai Smith, 1999, Zed Books, London" (2001) 17 Social Policy Journal of New Zealand 214 at 216.

85 McDonald, above n 83, at 13.

86 At 14.

values, and advocate for positive outcomes for Māori.[87] What is therefore essential in this case is ensuring the aims, intentions and values that underpin this research sufficiently align with kaupapa Māori.[88]

To protect Māori concepts from misappropriation, the author has acknowledged a vast array of primary and secondary sources which stem from the perspectives of tangata whenua throughout the research. This author has also been guided in their writing by a Māori supervisor, supplementing overall understanding. As well as this, this research has been guided by a series of mātāpono (guiding principles), adopted in line with kaupapa Māori.[89] Dr Linda Tuhiwai Smith states a number of key guiding principles of kaupapa Māori involve physically connecting with others.[90] These include kanohi kitea (presenting yourself to people in person), titiro, whakarongo and korero (looking, listening and speaking when conducting an inquiry), and manaaki i te tangata (hosting people).[91] However, as the allocated timeframe to complete this dissertation was short, the author decided to utilise elements of doctrinal research. This meant that they were limited in conducting interpersonal research. This, however, did not inhibit the ability to reflect other key mātāpono (guiding principles) throughout this work, maintaining a 'braided' research approach. Particularly in relation to sources, arguments and conclusions, these mātāpono include respect for others (aroha ki te tangata), being cautious (kia tūpato), respecting people's mana (kaua e takahi i te mana o te tangata), ensuring the research provides benefits for Māori (mā te Māori), and conducting this research with commitment, integrity and an open mind (kia manawanui, kia mākohakoha, kia ngakau pono).[92] These mātāpono reflect the overarching importance of this author as tangata Tiriti to nurture a partnership informed by both Māori and Pākehā ways of knowing.

The second stream that forms part of the overall braided river is doctrinal legal research. Doctrinal research is often considered the most common form of Western legal research methodology.[93] The approach predominantly focuses on law

87 Alex Barnes "What can Pākehā learn from engaging in kaupapa Māori educational research?" (paper presented to New Zealand Council for Educational Research, October 2013) at 28.

88 McDonald, above n 83, at 15.

89 Courtney Bennett and others "Mana whenua engagement in Crown and Local Authority initiated environmental planning processes: A critique based on the perspectives of Ngai Tahu environmental kaitiaki" (2021) 2021 New Zealand Geographer 1 at 4.

90 Tuhiwai Smith, above n 77.

91 Te Mana Arotake | Office of the Auditor General "Māori Perspectives on Public Accountability" (July 2022) at 5.

92 At 5.

93 Nasir Majeed, Amjad Hilal and Arshad Nawaz Khan "Doctrinal Research in Law: Meaning, Scope and Methodology" (2023) 12(4) Bulletin of Business and Economics 559 at 561.

produced by the judiciary and the legislature, and analyses its operation.[94] Doctrinal research seeks to explain the law, find new facts regarding the law by examining it, and predict or suggest future development of the law.[95] Although doctrinal research will enable useful comparisons on how law operates to provide potential improvements, scholars argue doctrinal methodology is not appropriate on its own when dealing with Indigenous law.[96] Ali, Yusoff and Ayub, for example, argue that doctrinal research alone can often fail to consider law beyond a normative lens when conducting an analysis and reaching conclusions, as it can be used to only involve an orthodox conception of what law is, and what legal outcomes are.[97] Therefore, doctrinal research will be strengthened when coupled with kaupapa Māori under a braided river methodology.

C. Conclusion

To conclude, this section emphasises the need to embrace legal and methodological pluralism in analysing the role of pūkenga in Aotearoa. Through recognising and integrating diverse legal systems and research methodologies, the reality of societal contexts can be respected and help to create inclusive research outcomes that are reflective of the future direction of law in Aotearoa.

III. Legal Pluralism in Action: The Intersection of Pūkenga and Expert Evidence Laws

In modern legal discourse, the concept of legal pluralism has gained significant traction.[98] This highlights the coexistence and developing interactions between multiple legal systems within a wider state.[99] As outlined in Part II, tikanga and common law are both prevalent legal systems in Aotearoa's wider plural society.[100] Over the past number of decades, tikanga Māori and common law have had a growing intersection, where the judiciary have increasingly engaged with tikanga in a series of legal fields.[101]

94 Terry Hutchinson and Nigel Duncan "Defining and describing what we do: doctrinal legal research" (2013) 21(3) Legal Education Digest 32 at 35.
95 Majeed, Hilal and Khan, above n 93, at 560.
96 Salim Ibrahim Ali, Zuryati Mohamed Yusoff and Zainal Amin Ayub "Legal research of doctrinal and non- doctrinal" (2017) 4 International Journal of Trend in Research and Development 493 at 494.
97 At 494.
98 Kelty McKerracher "Relational legal pluralism and Indigenous legal orders in Canada" (2023) 12(1) Global Constitutionalism 133 at 135.
99 Napoleon, above n 27.
100 Williams, above n 1, at 11.
101 At 17–32.

As this section will explore, tikanga Māori and state law intersect with each other in evidence law.[102] This is demonstrated through the operation of pūkenga within the formal expert evidence framework.[103] This section first explains the pūkenga role and how expertise is understood in te ao Māori. Then, the discussion moves to outline the expert evidence framework pūkenga operate within. Finally, this section analyses how pūkenga and expert evidence law intersect, and concludes that this overarching relationship illustrates weak legal pluralism.

A. Who are Pūkenga and What is the Definition of their Role?

In te ao Māori, knowledge and recognition of expertise is different to the Western world. Mātauranga Māori is often expressed in English as either Māori knowledge or ways of knowing.[104] Such knowledge refers to collective wisdom derived from past, present and future experiences.[105] Mātauranga is rooted in the underlying values and principles at the core of te ao Māori, and is deeply connected to te taiao (the environment). The environment encompasses physical elements such as whenua (land) and wai (water), but also includes koiora (life).[106] Tikanga is deeply ingrained within Māori knowledge, where tikanga is the practical implementation of mātauranga Māori.[107] Therefore, people, knowledge and the natural world are perceived as interconnected.[108]

Similar to the concept of mātauranga, expertise in te ao Māori also has a holistic nature. Instead of being assessed through formal qualification, Māori expertise is embedded within cultural, historical, and spiritual contexts.[109] In te ao Māori, tohu (expertise) is stored within the ngākau, often understood as the heart or where feelings are stored in the body.[110] Within the ngākau, whakaaro (thought) occurs,

102 Roughan, above n 54, at 135.
103 *Ellis v R* [2022] NZSC 114 at [125].
104 Dan Hikuroa "Mātauranga Māori: the ūkaipō of knowledge in New Zealand" (2017) 47 Journal of the Royal Society of New Zealand 5 at 6.
105 Helen Moewaka Barnes "Arguing for the spirit in the language of the mind: a Māori practitioner's view of science and research." (PhD Thesis, Massey University, 2008).
106 Kenneth Taiapa, Helen Moewaka Barnes and Summer Wright "Climate change and mātauranga Māori: making sense of a western environmental construct" (2024) 2024 Kōtuitui: New Zealand Journal of Sciences Online 1 at 3.
107 Hirini Moko Mead Tikanga Māori: Living by Māori Values (Huia, Wellington, 2016).
108 Taiapa, Barnes and Wright, above n 106, at 3.
109 Angus H Macfarlane and others "Indigenous epistemology in a national curriculum framework?" (2008) 8 Ethnicities 102 at 107.
110 Takirirangi Smith "Indigenous knowledge in the Pacific: Knowing and the ngākau" (2008) 17 Indigenous Ways of Knowing, Democracy and Education 13 at 19.

and once thought becomes embedded within the ngākau it becomes knowledge.[111] This is different to the Western conception of expertise as knowledge being stored in the brain and derives from typically written source.[112]

Both the terms tohunga and pūkenga have connotations to holding expertise in te ao Māori. As outlined in the *Te Aka Māori Dictionary*, a tohunga is considered a "skilled person". Similarly, a pūkenga is also considered someone who is skilled, a specialist or an expert.[113] Traditionally, the terms pūkenga and tohunga refer to a specialist in a variety of different disciplines, ranging from weaving, carving, healing and spiritual knowledge.[114] These specialisations also include the ability to make legal decisions. Tohunga, in particular, historically had a role in making legal decisions where law at iwi or hapū stemmed from their wisdom.[115] For example, breaches of tapu were often resolved by tohunga to restore the welfare of the wider community.[116] Although both tohunga and pūkenga are understood as experts in a certain field, some argue that what distinguishes the two is that pūkenga have a more vocational role as someone who teaches and trains tohunga to become qualified experts.[117] Nonetheless, in the development of tikanga in the courts, the judiciary have adopted the word pūkenga to describe those who are experts in tikanga Māori and can provide expert tikanga evidence in court.[118]

B. The Law of Expert Evidence in Aotearoa New Zealand

Pūkenga, as experts in tikanga Māori, currently operate within a senior court setting by bringing their knowledge of the tikanga legal system into the common law system through expert evidence laws.[119] To conceptualise this intersection, the Aotearoa expert evidence framework will first be explained.

In a court proceeding, a judge or jury are required to determine factual issues to finalise a decision. Both facts and the law can be determined in this context

111 Takirirangi Smith "Tohu and Māori knowing" in JS Te Rito and SM Healy (eds) *Te Tatau Pounamu: The Greenstone Door; Traditional Knowledge and Gateways to Balanced Relationships* (Ngā Pae o te Māramatanga, Auckland, 2008) 265 at 267.

112 Smith, above n 110, at 19.

113 *Te Aka Māori Dictiona*ry (online ed, Te Murumāra Foundation, 2024) <www.maoridictionary.co.nz>.

114 Law Commission *Māori Custom and Values in New Zealand* (NZLC SP9, 2001) at [188].

115 Sir Apirana Ngata (July 19 1907) 139 NZPD 518.

116 M Durie in David Williams "He Aha te Tikanga Māori?" (unpublished revised draft of Joseph Williams paper of the same name prepared for the New Zealand Law Commission, 1988) *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 37.

117 Kelly Frances Mitchell "Distinguishing Expertise in Te Reo Māori: Tohunga, Pū and Rehe" (2021) 130 Journal of the Polynesian Society 137 at 139.

118 Note, however, that the Māori Land Court in 2004 stated the term 'pūkenga' to describe this role was not correct, and instead suggested the term 'pu-wānanga'.

119 Law Commission *Third Review of the Evidence Act 2006* (NZLC R148, 2024) at 37.

through witness evidence.[120] Litigation law frequently interacts with various disciplines that require clarity to ensure an informed outcome. Therefore, to gain clarity, the evidence of experts has often been turned to.[121] The use of expert evidence to provide technical insight necessary to reach a decision has been adopted over several centuries. As stated in the 1554 case, *Buckley v Rice Thomas*, legal matters which relate to other disciplines will require explanation by an expert in a field foreign to the court.[122] Since then, it is now well-established in many jurisdictions that the independent opinion of an expert may be called upon to perhaps strengthen a party's argument or assist a fact finder in making a decision.[123]

The Aotearoa expert evidence framework is outlined in the Evidence Act 2006. In general, this framework establishes how expert opinion can be admitted in civil and criminal courts. Expert evidence in Aotearoa may consist of fact, opinion, or a combination of the two.[124] An "opinion" for evidentiary purposes is understood as "a statement of opinion that tends to prove or disprove a fact".[125] These statements are treated as an exception to the general rules of admissibility, where it would otherwise be inadmissible.[126] Expert opinion evidence will be deemed admissible provided it meets the following general requirements outlined in both the Evidence Act and the High Court Rules 2016:

a. it must be relevant under s 7 of the Evidence Act;

b. it must not be either inadmissible or excluded under another section of the Evidence Act;

c. it must not be excluded under s 8 of the Evidence Act; and

d. the expert who provides the evidence must adhere to the Code of Conduct outlined in Sch 4 of the High Court Rules 2016.[127]

120 United Kingdom Law Commission *Expert Evidence in Criminal Proceedings in England and Wales* (online ed) (Law Com No 325, 2011).

121 Douglas V Wick "Interdisciplinarity and the Discipline of Law" (2004) 31 Brit JL & Socy 163 at 180.

122 Steven Rares "Using the 'hot tub': how concurrent expert evidence aids understanding issues" (2013) 95 Intellectual Property Forum: Journal of the Intellectual and Industrial Property Society of Australia and New Zealand 28 at 30.

123 Julian D M Lew "The need for expert evidence?" (2023) 39 Arbitration International 246 at 249.

124 Law Commission *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18, 1991) at 55.

125 Evidence Act 2006, s 4.

126 See generally, Evidence Act 2006.

127 Elisabeth McDonald and Scott Optican *Mahoney on Evidence: Act and Analysis* (3rd ed, Thomson Reuters New Zealand Ltd, Wellington, 2018) at 52.

For expert evidence to be admissible, it must first be relevant pursuant to s 7 of the Evidence Act.[128] Determining the relevance of evidence to a proceeding falls on if the evidence has both materiality and probative value.[129] Generally speaking, this involves determining what the issue in the proceeding actually is, and in turn, what the purpose of the evidence should be.[130] Once the purpose of the evidence is ascertained, its probative value is determined by analysing whether the evidence is capable of reaching that overarching purpose.[131]

In this circumstance, once materiality and probative value have been considered under s 7, expert opinion evidence is assessed under s 25.[132] To be an expert qualified to provide opinion evidence for the purposes of s 25, s 4(1) defines an expert to be "a person who has specialised knowledge or skill based on training, study or experience". With an understanding of the te reo and te ao Māori origins of the pūkenga role, expertise held by pūkenga can fit into the Evidence Act definition of an individual fit to provide an expert opinion. Additionally, the courts also recognise expertise flexibly, not necessarily through having a formal qualification or formal study.[133] As expertise in te ao Māori is holistic,[134] this flexibility of the court further enables pūkenga to operate within this statutory definition.

Expert opinion evidence must also be substantially helpful to be admissible.[135] The test of substantial helpfulness warrants a higher threshold than mere probative value under s 7, assessing overall relevance and reliability of the evidence.[136] Each case will often be determinative on the facts, and the helpfulness of expert evidence will depend on its nature and intended purpose.[137]

The general exclusion under s 8 must also be considered. Section 8(1) states the judge must exclude evidence from a proceeding if its probative value is outweighed by the risk that the evidence will be too unfairly prejudicial or will needlessly prolong the proceeding.[138] This exclusion is specifically concerned with whether the connection between the evidence and proof is "worth the price to be paid by admitting it",[139] requiring a balancing act. Section 8 emphasises a defendant's right

128 *Keil v Police* [2017] NZCA 430 at [16].
129 Evidence Act 2006, s 7(3).
130 McDonald and Optican, above n 127, at 54.
131 At 55.
132 Evidence Act 2006.
133 *Ministry of Agriculture and Fisheries v Hakaria* [1989] DCR 289 (DC) at 294.
134 Macfarlane and others, above n 109, at 108.
135 Evidence Act 2006, s 25.
136 *Platt v R* [2010] NZCA 43 at [39].
137 John Katz E*xpert Evidence in Civil Proceedings* (Thomson Reuters New Zealand Ltd, Wellington, 2018) at 58.
138 Evidence Act 2006.
139 *R v Bain* [2009] NZSC 16, [2010] 1 NZLR 1.

to a fair trial, as outlined in s 25 New Zealand Bill of Rights Act 1990, and is at the core of the Evidence Act's purpose.[140]

Expert witnesses who are part of a court proceeding have an obligation to conduct themselves within the rules of the court. This applies both when preparing for a hearing and when giving expert evidence in the courtroom.[141] This obligation is governed under r 9.43 and the Code of Conduct outlined in sch 4 of the High Court Rules 2016. The Code of Conduct closely resembles a series of principles developed in a series of common law cases which have since been accepted in Aotearoa law.[142] The overarching role of these guidelines is to ensure the expert behaves in a way that prioritises assisting the court, regardless of whom they received representation instructions from.[143]

The Code firstly outlines that expert witnesses must expressly comply with their overriding duty to assist the court in an impartial manner.[144] The expert must acknowledge and comply with the code, declare their qualifications and clarify the issues within their expertise.[145] They should additionally disclose the facts and assumptions that support their opinions, explain the reasoning behind such opinions and outline any supporting materials relied upon, including the qualifications of those who produced those materials.[146] Furthermore, if an expert witness believes their evidence may be incomplete or inaccurate without qualification, or if their opinion is not conclusive due to insufficient research or data, they must outwardly state these qualifications or reservations in their evidence.[147]

Additionally, expert witnesses also have a duty to confer with each other as directed by the court.[148] This duty includes attempting to reach agreement on matters within their expertise, preparing a joint witness statement detailing areas of agreement and disagreement, and providing reasons for any disagreements.[149] Importantly, expert witnesses must maintain independent and professional judgement during these discussions and are prohibited from acting under the influence of others to withhold or avoid agreement.[150]

140 *R v Kingi* [2017] NZCA 449.
141 *Green & Hunt on Arbitration Law and Practice* (online looseleaf ed, Thomson Reuters) at [DA6.14].
142 Katz, above n 137, at 98.
143 Fred Seymour and others "Counterintuitive Expert Psychological Evidence in Child Sexual Abuse Trials in New Zealand" (2014) 21 PPL 511 at 513.
144 *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZCA 67.
145 High Court Rules 2016, sch 4, cl 3.
146 Schedule 4, cl 3.
147 Schedule 4, cls 4 and 5.
148 Schedule 4, cl 6.
149 Schedule 4, cl 6.
150 Schedule 4, cl 7.

C. Operation of the Pūkenga Role within an Expert Evidence Context

As the senior courts are becoming increasingly amenable to tikanga Māori, pūkenga are being used through this wider expert evidence framework to provide tikanga expertise.[151] This is occurring in a number of forms.[152] Firstly, pūkenga can be appointed to give expert opinion evidence through the standard framework under the Evidence Act and the High Court Rules. As well as this, pūkenga can provide tikanga expertise through appointment to the bench of the Māori Appellate Court under the Te Ture Whenua Māori Act 1993 and Foreshore and Seabed (Takutai Moana) Act 2011. Another active mechanism is where pūkenga can be appointed by the court to act as either counsel or expert as non-party interveners. And finally, pūkenga can provide a court with tikanga expertise through formulating a statement of tikanga.

The appointment of pūkenga in these ways has helped guide decisions relating to a number of new legal intersections between tikanga and state law. To name a few, pūkenga have advised on issues regarding recognition of customary title,[153] granting leave for a posthumous appeal,[154] resolving a dispute between beneficiaries of an iwi trust,[155] determining whether trustee of an ahu whenua trust (a Māori land trust) have duties under tikanga,[156] granting resource consents,[157] judicial review,[158] and declarations of ahi kā (continuous fires of occupation) and mana whenua (management rights) over land.[159] These examples illustrate the increasing regularity with which pūkenga are being used to assist the courts. The range of expert evidence pathways utilised by pūkenga to assist the court will be further explored below.

Firstly, pūkenga can be called upon through the orthodox, adversarial framework as expert witnesses. As outlined earlier, this is primarily governed by the Evidence Act and the High Court Rules where parties can call upon experts to strengthen their case.[160] Under r 9.36 specifically, the court may decide either on its own or following application of a party, to appoint an independent expert to provide

151 Claire Charters "Recognition of Tikanga Māori and the Constitutional Myth of Monoculturalism: Reinterpreting Case Law" in R Benton and R Joseph (eds) *Waking the Taniwha: Māori Governance in the 21st Century* (Thomson Reuters, Wellington, 2021) 611 at 612.

152 Morar, above n 78.

153 *Re Tipene* [2015] NZHC 2923, [2016] NZHC 3199; *Re Edwards* (No 2) [2021] NZHC 1025; *Re Ngati Pahauwera* [2021] NZHC 3599; *Ngāi Tūmapūhia-a-Rangi Hapū Inc v Taylor* [2024] NZHC 309; and *Re Clarkson* [2021] NZHC 1968.

154 *Ellis v R*, above n 103.

155 *Ngawaka v Ngāti Rehua-Ngātiwai Ki Aotea Trust Board (No 2)* [2021] NZHC 291.

156 *Pokere v Bodger* Ōuri 1A3 (2022), 459 Aotea MB 210 (459 AOT 210) (2022), 459 Aotea MB 210 (459 AOT 210).

157 *Wills v Bay of Plenty Regional Council* [2010] NZEnvC 98.

158 *Te Pou Matakana Ltd v Attorney-General* [2021] NZHC 3319.

159 *Ngāti Whātua* Ōrākei *Trust v Attorney-General (No 4)* [2022] NZHC 843.

160 See generally, Evidence Act 2006; and High Court Rules 2016.

insight on a fact or opinion.[161] This pathway can be used in the context of foreshore and seabed,[162] however is additionally used in other contexts to admit expert tikanga evidence.

For example, pūkenga in *Biddle v Pooley* gave expert evidence to provide insight on the correct tikanga processes following the death of a family member in te ao Māori.[163] One of the core issues within this case concerned the inheritance of taonga. Under Aotearoa common estate law, the property of a deceased individual typically transfers to their surviving partner if not otherwise specified in a will or other arrangement.[164] However, as evidenced by the pūkenga, taonga is treasure and distinct from material property in a Western sense.[165] In tikanga, taonga have guardians rather than owners. These treasures, embedded with mauri (spirit, life force), require protection from their guardians.[166] The pūkenga advised that because the relevant taonga had been in the deceased's parents' home since they were created, the parents held guardianship over the items. Because of this, it was held that the parents should be the ones to approve any transfer of taonga, as sudden removal could harm their future generations.[167] The judge ultimately held that although there was no formal arrangement, the deceased made a conscious decision throughout his six-year relationship to leave the taonga in the care of his parents.[168] The evidence brought by pūkenga in this case ultimately helped guide the court in ensuring that the taonga were dealt with in accordance with te ao Māori.[169]

Secondly, pūkenga can be appointed to the bench of the Māori Appellate Court to assist determining an issue of tikanga. Under the Te Ture Whenua Māori Act 1993, the High Court can refer a question of fact to the Māori Appellate Court which relates to Māori rights to land, personal property, or any other question of tikanga.[170] Where the High Court has called for the opinion of the Māori Appellate Court on a question of tikanga, its opinion will be binding.[171] When hearing a case about any question of tikanga beyond land or personal property, the Māori Appellate Court bench will be comprised of three Māori Land Court judges, and one or two pūkenga. These pūkenga need not be judges; rather, they must have expert knowledge of tikanga.[172]

161 High Court Rules 2016, r 9.36(1).
162 Marine and Coastal Area (Takutai Moana) Act 2011, s 99.
163 *Biddle v Pooley* [2017] NZHC 338.
164 See generally, Property (Relationships) Act 1976.
165 *Biddle v Pooley,* above n 163, at [136].
166 At [137].
167 At [136].
168 At [151].
169 Law Commission *Review of succession law: rights to a person's property on death* (NZLC R145, 2021) at 91.
170 Te Ture Whenua Māori Act 1993, s 61(1).
171 Section 61(4).
172 Section 62(1)–(2).

A similar pathway operates under the Foreshore and Seabed (Takutai Moana) Act 2011. Section 99 of the Act operates within a recognition order context, stating if an order raises a question of tikanga, the High Court has the ability to seek the opinion of the Māori Appellate Court in accordance with s 61 of the Te Ture Whenua Māori Act 1993, or can obtain the advice of a pūkenga in accordance with the High Court Rules. Typically, questions of tikanga in this context relate to determining which iwi and hapū hold land in accordance to tikanga. For example, the court in *Re Edwards (No 2)* employed pūkenga under s 99 to provide advice on four questions relating to which applicants hold an area of the takutai moana (foreshore and seabed) in accordance with tikanga.[173] The admission of pūkenga in this context helped provide insight on whakapapa and ahi kā for the claimant iwi, where the court may not otherwise have had that historic knowledge.

Thirdly, pūkenga can be appointed by the court to provide evidence as either counsel or an expert. This is primarily to help guide discussion concerning issues where tikanga and common law principles intersect.[174] An example where pūkenga have been appointed in this way is through court engagement with the Māori Law Society as non-party interveners. Non-party interveners can be called upon by either the High Court or Court of Appeal to assist in proceedings,[175] often providing expertise on a legal issue that has high public interest.[176] The Māori Law Society acted in this capacity in *Ellis v R*,[177] and *Smith v Fonterra Co-operative Group Ltd*.[178]

In *Smith v Fonterra*, for example, the Māori Law Society commented on the potential relevance of tikanga in negligence and nuisance, and its potential in the development of future novel torts related to the environment.[179] The Māori Law Society stated that tikanga could be relevant to establishing public nuisance or whether a duty of care was owed to a party. However, they noted that there may be issues in determining causation, risk and liability.[180] The Māori Law Society then commented tikanga *should* guide the development of new torts, especially those that concern environmental damage caused by climate change. They believed that tikanga could help in conceptualising the wrongs committed and identifying who may be responsible where there may be many at fault.[181] In this instance, the use of

173 *Re Edwards (No 2)* [2021] NZHC 1025 at [309].
174 Law Commission, above n 40, at 242.
175 See Court of Appeal (Civil) Rules 1997, r 19; and High Court Rules 2016, r 438(3).
176 Edward Clark "The Needs of the Many and the Needs of the Few: A New System of Public Interest Intervention for New Zealand" (2005) 36 VUWLR 71.
177 *Ellis v R,* above n 103, at [38].
178 *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5 at [12].
179 *Smith v Fonterra* SC 149/2021, 22 June 2022 (Submissions for Te Hunga Rōia Māori o Aotearoa | The Māori Law Society) at [17].
180 At [29].
181 At [30].

the Māori Law Society as pūkenga here was crucial in providing expertise to guide the future development of tikanga in a newly-emerging intersection of laws. Cases that involve a new intersection of tikanga and state law are particularly legally significant, and therefore require pūkenga to guide precise application of tikanga.[182]

Finally, pūkenga can provide tikanga expertise through creating a statement of tikanga admitted by agreement of all parties.[183] Section 9 of the Evidence Act enables evidence to be admitted by a judge if the evidence is provided in any form agreed by the parties.[184] In *Ellis*, counsel agreed to conduct a wānanga with the appointed tikanga experts and representatives from the Māori Law Society to discuss the issues. Notably, the procedural decision to hold a wānanga to formulate a statement of tikanga was amicably decided on by the parties, not the Court.[185] Following the wānanga, an agreed statement of facts pursuant to s 9 of the Evidence Act 2006 was filed, with a statement of tikanga written by the appointed pūkenga. The statement of tikanga, as part of the submitted evidence, covered specific application to the facts, as well as a general overview of tikanga and its current place in the judiciary.[186]

Similarly, in *Ngāti Whātua* Ōrākei *Trust v Attorney-General (No 4)*, experts were adduced by numerous iwi who held overlapping interests to prove ahi kā (continuous occupation) and mana whenua (management rights) over the land in question.[187] As the claim involved multiple iwi, the pūkenga from both parties were instructed by the judge to produce a joint witness statement that outlined the tikanga matters they agreed and disagreed on, creating a fulsome statement of tikanga informed by the expert evidence from both sides.[188] The evidence provided by Ngāti Whātua Ōrākei, for example, outlined several key historical events surrounding the raupatu (land confiscation) over the land in question, and the maintenance of ahi kā (continuous occupation) throughout the Ngāpuhi invasions.[189] Pūkenga were especially crucial in outlining both sides of the claim so that the court could grasp its full scope.

As evidenced throughout this subpart, pūkenga can work within the expert evidence framework in a number of ways. Through outlining the variety of legal contexts that pūkenga have provided evidence in, this demonstrates the benefit of pūkenga bringing expertise on complex or unchartered tikanga to help guide decision-making in the senior courts.

182 Williams, above n 1, at 26.
183 Section 9.
184 Evidence Act 2006, s 9(1)(b).
185 *Ellis v R,* above n 103, at [35].
186 At [37].
187 *Ngāti Whātua* Ōrākei *Trust*, above n 159.
188 At [47], [290] and [291].
189 Sarah Down "*Ngāti Whātua Ōrākei (No 4)*: insights into the complexities of recognising tikanga as part of New Zealand Law" (2022) May Māori LR 1 at 17.

D. What Do Pūkenga, as Providers of Expert Evidence, Demonstrate Regarding Our Legal Pluralism?

Thus far, this section has highlighted the role of pūkenga as experts in tikanga Māori and their operation within the framework of expert evidence laws. Expert evidence laws are rooted in Western, adversarial principles.[190] However, pūkenga have navigated and integrated the use of tikanga through this legal framework, exemplifying an intersection of common law and tikanga Māori.

When analysing this current intersection of pūkenga and expert evidence laws, their relationship reveals an underlying weak pluralist relationship. As proposed by Griffiths, legal pluralism and the relationships between legal systems can be conceptualised as strong or weak.[191] Strong legal pluralism, on one hand, is where legal systems exist autonomously and have little to no interaction with other system. Conversely, weak legal pluralism occurs where there is societal pluralism under unitary law.[192] In light of the theory, weak pluralism best describes the current relationship between pūkenga and expert evidence laws. This is because, while there is recognition and incorporation of tikanga through pūkenga within this framework, the integration of tikanga remains subject to the rules of state law.[193]

However, where weak legal pluralism operates within a state that has a colonial history, often the Indigenous law is treated as subservient within that framework, even though their legal system exists within wider society.[194] Although tikanga Māori and common law have both existed in Aotearoa for at least 200 years,[195] colonial history and positivist thinking have meant the legal system has developed in a way that does not recognise tikanga in its own right.[196] This means that although tikanga and common law have an increased intersection, tikanga continues to operate as a secondary system within the confines of dominant state law.[197]

Overall, in establishing the intersection of pūkenga and expert evidence laws as weak legal pluralism, the question then turns on the impact that this legal relationship has on the recognition of tikanga Māori as a legal system.

190 Rewa Kendall "How might tikanga concepts inform the use of Māori knowledge as expert evidence?" (2021) 8 Te Tai Haruru | J Māori LW 166 at 167.

191 Anne Griffiths "Customary Law in a Transnational World: Legal Pluralism Revisited" (paper presented to Conference on Customary Law in Polynesia, 12 October 2004) at 13.

192 At 14.

193 Rhianna Eve Morar "Kia Whakatōmuri Te Haere Whakamua: Implementing Tikanga Māori as The Jurisdictional Framework for Overlapping Claims Disputes" (2021) 52 VUWLR 197 at 218.

194 Brian Tamanaha, Caroline Sage and Michael Woolcock *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press, New York, 2012) at 70.

195 Coates, above n 6, at 32.

196 Swenson, above n 11, at 440.

197 Roughan, above n 54, at 145.

IV. What is the Impact of Weak Legal Pluralism for Tikanga Māori Through Pūkenga and Expert Evidence Law?

In identifying the weak plural relationship between pūkenga and expert evidence laws, various benefits and pitfalls of this intersection arise. The overarching advantage of pūkenga within weak pluralism is their ability to provide insight and knowledge on complex principles before a court. Despite the judicial recognition of tikanga as part of common law in Aotearoa, how this occurs in a manner that maintains the integrity of tikanga Māori is still developing.[198] Therefore, engaging with both tikanga and common law in an appropriate way is crucial for the law to better reflect the values and principles of Aotearoa.[199] Additionally, pūkenga have

an equally important role in providing the backbone for developing legal education beyond the courtroom, supporting the consideration of greater tikanga recognition. As well as this, pūkenga are vital in developing the rule of law, particularly concerning Indigenous rights.

However, while the paradigm of weak pluralism persists, tikanga remains subordinate to the dominant common law system.[200] The difficulty for the expert evidence framework to adequately recognise pūkenga as legal experts and treat tikanga as a unique legal system exemplifies this imbalance. As will be explored in this section, this imbalance becomes particularly evident regarding the intersection of tikanga with probative value, admissibility, conflict of interest and cross examination. This ultimately raises the question as to how adequate weak legal pluralism is in recognising tikanga as an autonomous system of law, and what this demonstrates for the pūkenga role.

A. Benefits of the Role of Pūkenga

1. Within the courtroom

As evidenced throughout Part III, the expertise of pūkenga is crucial in assisting the judiciary in approaching decisions that concern tikanga. Pūkenga are also crucial in helping maintain the integrity of tikanga and explore the use of tikanga

198 *Ellis v R*, above n 103.

199 Natalie Coates "How can we protect the integrity of tikanga in the lex Aotearoa endeavour? Inaugural Downie Stewart Law and Society Lecture 2022" (2022) 17 Otago LR 223 at 237.

200 Natalie Coates "Should Māori Customary Law Be Incorporated into Legislation?" (LLB(Hons) Dissertation, University of Otago, 2009) at 17.

in new areas of the common law.[201] However, in a weak plural legal system, there will often be an intersection between tikanga and common law principles. Given this, the role of pūkenga is crucial in maintaining integrity of tikanga, and ensuring the law does not develop in an undesirable direction.[202]

For example, in *Sweeney v Prison Manager of Spring Hill Corrections Facility*, the plaintiff sought monetary damages for impact on his mana.[203] Although the judge held that one could not rely on mana as a tort under the common law,[204] a decision to allow the quantification of mana through monetary damages would have been harmful precedent.[205] Where tikanga undoubtedly begins to develop in other legal areas, such as is happening with employment law and potential climate torts,[206] the role of pūkenga is of great significance to help mitigate potentially detrimental decisions when difficult questions of tikanga come before the senior courts.

2. Outside the courtroom

Pūkenga additionally have an important role in legal education beyond the courtroom. The judiciary have acknowledged that there is currently a gap of knowledge regarding tikanga and te ao Māori among lawyers and judges.[207] Relatedly, as tikanga has long been overshadowed by state law, it has not been until recently that tikanga is forming part of the national legal education curriculum in Aotearoa.[208] Consequently, a number of legal education institutions have established programmes to upskill the wider judiciary in its capacity to appropriately apply tikanga Māori. For example, the Institute of Judicial Studies | Te Kura Kaiwhakawā is providing education from tikanga experts for judges to help increase their knowledge and proficiency of tikanga.[209] Alongside this, the Council of Legal Education have recently incorporated tikanga teachings as a compulsory component of the Aotearoa law degree from 2025 onwards.[210] This is to consist of teaching general tikanga principles within the scope of the core LLB subjects, and a compulsory

201 Darcy Lindberg "UNDRIP and the Renewed Application of Indigenous Laws in the Common Law" (2022) 55 UBCL Rev 51 at 70.

202 At 55.

203 *Sweeney v Prison Manager of Spring Hill Corrections Facility* [2024] NZHC 1361.

204 At [86].

205 Rachael Evans "Can the courts measure mana? How Māori tikanga is challenging the justice system" (24 June 2024) The Conversation <https://theconversation.com>.

206 *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101; and *Smith v Fonterra*, above n 178.

207 Coates, above n 6, at 50.

208 Law Commission, above n 40, at 232.

209 Te Kura Kaiwhakawā | Institute of Judicial Studies "Ā Mātou Mahi | Our Work" (2024) <https://tkk.justice.govt.nz>.

210 Lydia Te Rā Joseph "Lost in transition: tikanga in Aotearoa New Zealand's common law" (LLB(Hons) Dissertation, University of Otago, 2023).

separate tikanga paper.[211] This will also require appointment of lecturers who have tikanga expertise, or utilising experts from Māori studies faculties, local iwi and hapū, and wānanga nationwide.[212] Pūkenga therefore play an important role in the teaching Māori perspectives to assist understanding of tikanga when brought into a court.[213] Without fulsome understanding of tikanga, implementing it in a way that fails to uphold its integrity risks the continued disadvantaging of Māori in the legal system.[214]

3. Pūkenga and the rule of law

Pūkenga are also essential in the maintenance of the rule of law – a fundamental aspect of Aotearoa's constitutional framework.[215] It has been internationally affirmed that the rule of law is inextricably intertwined with human rights.[216] In light of this, the opportunity for pūkenga to guide increased recognition of tikanga as part of the wider common law helps to action the right of Māori to their legal system.

As stated by Glazebrook J, the recognition of human rights, access to justice and reconciliation for historical wrongs is essential to the rule of law.[217] In light of those aspects, the rule of law is a developing concept in Aotearoa. This is based upon the reality that the legality of tikanga Māori is not yet fully recognised.[218]

The rights of Indigenous peoples to practice their legal systems, have them recognised, and access justice through them is fundamental to achieving an inclusive legal framework.[219] This right is underlined throughout both The Treaty of Waitangi | Te Tiriti o Waitangi 1840 and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[220] Both documents acknowledge the inherent right of Māori to their laws and legal processes, recognising the historical undermining of te ao Māori by the prioritisation of Crown sovereignty. Article 2 of Te Tiriti emphasises rangatiratanga (self-determination), affirming Māori rights to their ways and legal systems, which aligns with the minimum human rights standards set by

211 Coates, above n 199, at 233.
212 At 233.
213 Carwyn Jones "Indigenous Legal Issues, Indigenous Perspectives and Indigenous Law in the New Zealand LLB Curriculum" (2009) 19(2) Legal Educ Rev 257.
214 Lindberg, above n 201, at 57.
215 Ministry of Justice "Constitutional" (2024) <www.justice.govt.nz>.
216 Robert Joseph "Indigenous Peoples' Good Governance, Human Rights and Self-Determination in the Second Decade of the New Millennium: A Māori Perspective" (2014) December Māori LR 1.
217 Susan Glazebrook "The Rule of Law" Guiding Principle or Catchphrase? (2021) Wai L Rev 2 at 23.
218 Nicole Roughan "Interlegality, interdependence and independence: Framing relations of tikanga and state law in Aotearoa New Zealand" (2024) Appendix to Law Commission *The Study Paper He Poutama* (NZLC SP24, 2023).
219 Julie Rowland "The New Legal Context of Indigenous Peoples' Rights: The United Nations Declaration on the Rights of Indigenous Peoples" (2013) 37(4) American Indian Culture and Research Journal 141 at 144.
220 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007).

the UNDRIP.[221] Despite political fluctuation in support for the UNDRIP, it remains a critical human rights document that guides the recognition and protection of Indigenous rights, irrespective of its non-binding nature.[222]

With regards to access to justice, where all are bound by the law, all require access to it.[223] This is fundamental to evidence law, as statutorily outlined in the Evidence Act.[224] Such access to law includes access to justice systems that feature processes and outcomes which align with human rights,[225] inclusive of the Indigenous right to self-determination.[226] As will be explored in the next subsection, our current common law-based system often imposes Western legal principles onto Māori that is inconsistent with te ao Māori and tikanga. This often causes Māori to feel disconnected from the Aotearoa justice system, creating a barrier to justice.[227] In that regard, the implementation of tikanga through pūkenga expertise plays a key role in improving Māori accessibility to justice by helping to increase cultural awareness in legal proceedings, and with that, the rule of law.[228]

Overall, the rule of law underscores basic human rights outlined in both the UNDRIP and Te Tiriti. Both affirmed documents specifically acknowledge the right of tangata whenua to their law and legal process. Pūkenga, through advancing the legal status of tikanga, therefore play a fundamental role in building Aotearoa's commitment to the right of Māori to their legal system as per these obligations.

B. The Tensions That Arise Where Pūkenga Operate in an Adversarial System

Despite the benefits that pūkenga provide in helping to better establish tikanga and wider Indigenous rights, where pūkenga operate within an adversarial system under weak legal pluralism, a series of tensions arise. Ultimately, this is because pūkenga operate within a system not designed to recognise Māori law.

221 Articles 3, 4, 20 and 34.

222 Susan Glazebrook "The Declaration on the Rights of Indigenous Peoples and the Courts" (2020) 7 Te Tai Haruru | J Māori LW 50 at 66.

223 Helen Winkelmann J, Chief High Court Judge "Access to Justice: Who Needs Lawyers?" (New Zealand Law Foundation, Ethel Benjamin Address, 7 November 2014).

224 Evidence Act 2006, s 6.

225 Pacific Justice Sector Programme "Access to Justice Strategy" (October 2022) at 5.

226 Valmaine Toki "Seeking Access to Justice for Indigenous Peoples" (2017) 15 YBNZ Juris 25 at 27.

227 Chief Judge Heemi Taumaunu "mai te pō ki te ao mārama … the transition from night to the enlightened world: Calls for transformative change and the District Court response" (Norris Ward McKinnon Annual Lecture, Waikato University, 11 November 2020) at 4.

228 Law Commission *Justice: The Experiences of Māori Women, Te Tikanga o te Ture: Te Mātauranga o ngā Wāhine* Māori e pa ana ki *tēnei* (NZLC R53, 1999) at [29].

1. Pūkenga differ from the orthodox expert witness

The first point of contention in this weak plural arrangement is that pūkenga are different to the expert witness. Although the provisions of the Evidence Act are often engaged to admit tikanga evidence from experts, pūkenga differ from an orthodox conception of an expert witness.[229] Pūkenga are experts in law and custom from te ao Māori, and in that regard provide insight on the applicability and operation of tikanga in the common law.[230] However, the foundations of the expert evidence framework treat tikanga as a discipline, not a legal system. Therefore, the adversarial system fails to sufficiently acknowledge pūkenga as legal experts or entirely recognise tikanga as its own legal system.[231]

In the expert witness Code of Conduct, for example, it becomes evident that a number of principles have Western connotations.[232] For instance, the Code states that an expert witness will give evidence in a technical capacity, and that expertise is derived from literature and empirical testing.[233] As discussed in Part III, in traditional common law systems, experts are generally appointed to the court to provide insight on a non-legal discipline unfamiliar to the court. Typically, expert evidence concerns disciplines such as accounting, science or engineering, sourced from those who have traditionally recognised qualifications.[234] The laws of expert evidence ultimately assist the court in understanding those otherwise misunderstood concepts.[235] However, this foundation provides challenges in recognising the substance of tikanga in the courts.

As stated in Part III, Māori knowledge and expertise differs from the Western conception. For example, pūkenga need not have acquired expertise status through formal education and qualifications.[236] According to Tāmati Kruger, most pūkenga have acquired authentic tikanga proficiency through lived experience rather than solely through written texts or academia.[237] Kaumātua, for instance, have been deemed tikanga experts in the courts irrespective of having a formal qualification.[238] In *Ministry of Agriculture and Fisheries v Hakaria*, for example, it was sufficient

229 Law Commission, above n 119, at 37.
230 As outlined in Part III.
231 Morar, above n 193, at 205.
232 High Court Rules 2016, sch 4.
233 Law Commission, above n 119, at 46.
234 Ezekiel Elton Mike Micah, Paulina Oluchukwu Adinnu and Taiwo Ibitomi "Forensic Accounting and Litigation Support: The Role of Expert Witnesses in Legal Proceedings" (2023) 11 European Journal of Accounting, Auditing and Finance Research 15 at 16.
235 Chief Justice Allsop "Expert Evidence Practice Note" (October 2016) <www.fedcourt.gov.au> at [2.2].
236 Mai Chen "The Increasing Need for Cultural Experts in New Zealand Courts" (2023) 4 Amicus Curiae 583 at 590.
237 *Ngāti Whātua* Ōrākei *Trust*, above n 159, at [316].
238 *Ministry of Agriculture and Fisheries v Hakaria*, above n 133, at 294.

that the kaumātua was "steeped in the lore of his people".[239] It therefore becomes clear that the adversarial norm for evidence to be written and technical is based upon orthodox conceptions of legal expertise, and creates one of multiple tensions between pūkenga and the common law.

2. Probative value, reliability, and overall admissibility challenges with pūkenga evidence

Another tension that arises when pūkenga operate within expert evidence law surrounds the need for probative evidence. As discussed in Part III, probative value and reliability of evidence is crucial for evidence to be admissible, according to adversarial rules.[240] Probative value concerns how likely a piece of evidence is going to prove or disprove the allegation in the proceeding. It therefore must be relevant to the case.[241] Although well-established in common law, this principle can pose difficulty where the judiciary is developing their understanding of the complexities of tikanga. What may be understood as relevant in a common law legal system, which has been the dominant system in Aotearoa, may well differ from what is relevant in terms of tikanga Māori or could be overlooked entirely where otherwise applicable.[242]

A first issue arises where tikanga is tested under s 7 of the Evidence Act. This test has a low threshold, which means there will either be a logical connection between the evidence and the claim in the judge's mind, or not.[243] Because of this, when s 7 concerns admitting Māori evidence to a court, the relevance of evidence is influenced by the court's understanding of the issues at hand.[244] The possible drawback here is that it is not always obvious as to when or what tikanga is relevant. For example, in *Te Runanga o Muriwhenua v Te Runanganui o Te Upoko o Te Ika Association Inc,* the definition of "iwi" concerning pre-settlement was interpreted under a general, dictionary definition of the word as opposed to a definition rooted in the interests of the particular iwi at hand.[245] The Privy Council later criticised this approach, stating that omitting evidence which looked at the specific meaning of iwi in the context of the settlement party was unjust, and did have probative value.[246]

Another example of this is demonstrated in the recent *Re Taueki* judgment.[247] In this case, it was noted by one of the applicants that tikanga was relevant to the

239 At 290.
240 Evidence Act 2006.
241 Section 8.
242 Fraser Harland "Taking the "Aboriginal Perspective" Seriously the (Mis)use of Indigenous Law in *Tsilhqot'in Nation v British Columbia*" (2018) 21 Indigenous LJ 22 at 28.
243 *R v Bain*, above n 139.
244 Kendall, above n 190, at 175–176.w
245 *Te Runanga o Muriwhenua v Te Runanganui o Te Upoko o Te Ika Association Inc* [1993] 2 NZLR 301.
246 *Treaty Tribes Coalition v Urban Māori Authorities* [1997] 1 NZLR 513 (PC) at 514.
247 *Re Taueki* [2024] NZHC 536.

customary marine title proceeding and consequently the case would benefit from the advice of a pūkenga.[248] However, at that stage of the application, the Court had failed to consider the use of a pūkenga.[249] It was therefore not obvious to the Court where pūkenga could provide assistance. Both of these cases demonstrate that although pūkenga are highly useful in providing tikanga expertise, their potential value in certain circumstances can sometimes be an afterthought.

A second issues that arises under this head concerns substantive helpfulness. The substantive helpfulness test under the Evidence Act creates tension between tikanga and common law where pūkenga evidence is tested under it.[250] Substantive helpfulness is assessed following general s 7 admissibility, determining the relevance and reliability of expert opinion evidence in particular.[251] In orthodox adversarial systems, law and fact is typically based on written precedent.[252] As well as this, determining the reliability of evidence is often subject to testing.[253] However, tensions can arise due to the oratory nature of tikanga. Because tikanga is often learned or practiced through oratory mechanisms such as waiata (song), karakia (prayer), haka (performance) and hui (meeting), it is difficult to 'test'.[254] Therefore, it is possible that the court may hold an unconscious bias that the oratory nature of tikanga and mātauranga is unreliable.[255]

An example of this occurred in the *Delgamuukw* decision in Canada.[256] Here, oral evidence that was provided by Gitxsan and Wet'suwet'en peoples (who are pūkenga equivalents) was believed to be unreliable and therefore given no legal weight unless it was supported by other evidence.[257] Therefore, even if tikanga evidence provided is admissible, it is still subject to the judge's determination and potential unconscious bias.[258] Consequently, determining the relevance of tikanga evidence under s 7 and s 25 risks tikanga being misinterpreted or missed entirely. This difficulty underscores the possible challenges faced by Indigenous groups in admitting evidence to the

248 *Re Taueki*, above n 247.
249 At [46].
250 Evidence Act 2006, s 25.
251 Section 25.
252 Aimée Craft "Reading Beyond the Lines: Oral Understandings and Aboriginal Litigation" (presented at the Canadian Administration of Justice Conference: How Do We Know What We Think We Know: Facts in the Legal System, 11 October 2013) at 8.
253 McDonald and Optican, above n 127, at 146.
254 *Re Ellis v R* SC 49/2019, 30 January 2020 (Statement of Tikanga); and *Ngāti Whātua* Ōrākei Trust, above n 159, at [316].
255 Kendall, above n 190, at 177.
256 *Delgamuukw v British Columbia* [1997] 3 SCR 1010.
257 *Delgamuukw v British Columbia,* above n 256.
258 Harland, above n 242, at 28.

court,[259] and by extension, how this may affect pūkenga in incorporating tikanga within the courts through this system.

3. Conflict of interest and whakapapa

Another tension that arises between adversarial legal systems and tikanga Māori concerns conflict of interest and the risk of bias. This tension becomes particularly evident regarding expertise rooted in whakapapa.[260] In the Aotearoa courts, expert witnesses have an overarching duty of impartiality, as outlined under sch 4 of the High Court Rules.[261] Under this rule, where there is disagreement among the parties as to who can be an expert, the court can appoint someone from a list of suitable people named by both parties. This is to ensure independence of the appointed expert to the court.[262] However, this principle is incompatible with the interconnectedness of tikanga and whakapapa (genealogy). Such lived experience and genealogical connection, central to tikanga expertise, clashes with the adversarial principle of impartiality and independence to the court.[263] This may therefore undermine the need for specific tikanga to be brought to light in a common law proceeding.

The issues surrounding independence and whakapapa when appointing pūkenga have been discussed in a series of court judgments. *Re Tīpene*, for example, concerned an application for an order under the Marine and Coastal Area (Takutai Moana) Act 2011 for customary marine title regarding a series of islands off the coast of Rakiura | Stewart Island.[264] Earlier in the proceeding, it was agreed by the parties that a pūkenga would be appointed to provide evidence on Rakiura Māori ownership of the islands under tikanga.[265] Ms Davis, the appointed pūkenga, was appointed on grounds as being Rakiura Māori, alongside her strong iwi involvement as a previous member of the Ngāi Tahu Māori Trust Board, director on the trust's Holdings Corporation and her QSM award for service to Māori.[266]

However, questions were later raised as to the appropriateness of appointing Ms Davis as a pūkenga due to her ownership over one of the islands. The Crown believed that independence meant that the person appointed as the pūkenga must not have any "past or present associations or interests with the participants that would materially influence their decisions".[267] However, the court held that in the

259 Jérémie Gilbert "Litigation Indigenous Peoples' Rights in Africa: Potentials, Challenges, and Limitations" (2017) 66 ICLQ 657 at 678.
260 Lindberg, above n 201, at 73.
261 Law Commission *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18) at 110.
262 Morar, above n 78 at [83]; High Court Rules 2016, r 9.36.
263 Lindberg, above n 201, at 73.
264 Marine and Coastal Area (Takutai Moana) Act 2011, s 99; and *Re Tīpene* [2015] NZHC 2923.
265 *Re Tīpene*, above n 264, at [6].
266 At [8].
267 At [18].

context of s 99(1)(b),[268] the provision solely refers to pūkenga as a "court expert" with no outward independence requirement. This clarified that in a context under that particular section of the Takutai Moana Act, impartiality to the court is an exception. This was developed further in *Ngāti Whātua* Ōrakei *Trust*, albeit in a slightly different context.[269] In dealing with a court declaration of ahi kā and mana whenua over land, the judge chose not to appoint independent pūkenga to assist the Court.[270] Pūkenga were only sought for the many parties subject to the case. Converse to orthodox principle, it was held appointing independent pūkenga did not make sense as they would be unable to accurately comment on the application of the area-specific tikanga required to resolve the issue.[271]

Re Tīpene and *Ngāti Whātua* Ōrakei highlight the possible tensions regarding independence between differing adversarial and tikanga legal perspectives.[272] In tikanga contexts, it will be legally appropriate and necessary to have appointed a pūkenga who is related to the iwi in question because they will have the requisite knowledge of the specific tikanga applicable.[273] However, *Re Tīpene* still leaves open as to how whakapapa evidence can be admissible when operating under the High Court Rules. The court noted that the expert qualification procedure under r 9.36(1) requires independence.[274] Therefore, the use of whakapapa evidence still has potential to be hindered under this principle due to underlying concerns of conflict and bias. Because of the nature of Aotearoa's developing legal pluralism, the judiciary must take due considerations as to when it may be necessary for tikanga expertise to come from someone outside iwi and hapū, and when it may not be.[275]

4. Cross examination of pūkenga

The potential to cross examine pūkenga in the current framework also highlights tensions between adversarial legal systems and tikanga Māori. Cross examination is codified in Aotearoa evidence law under s 84(1)(b) of the Evidence Act. Therefore, where pūkenga operate within an expert evidence framework, they can be cross examined. However, the cross examination of one law by another, in this instance, undermines the legitimacy of tikanga as a legal system.[276]

268 Marine and Coastal Area (Takutai Moana) Act 2011.
269 *Ngāti Whātua* Ōrākei *Trust*, above n 159.
270 *Ngāti Whātua* Ōrākei *Trust*, above n 159.
271 At [39].
272 *Re Tīpene*, above n 265; and *Ngāti Whātua* Ōrākei *Trust*, above n 159.
273 Alister Hughes "Rebalancing Wrongs: Towards a New Law of Remedies for Aotearoa New Zealand" (2022) 53 VUWLR 303 at 307.
274 *Re Tīpene*, above n 264, at [21] and [22].
275 Roughan, above n 218.
276 Naiomi Metallic "Six Examples Applying the Meta-Principle Linguistic Method: Lessons for Indigenous Law Implementation" (2022) 73 UNBLJ 133 at 161.

The adversarial trial process aims to uncover truth by assessing credibility, particularly through cross examination,[277] which challenges opposing arguments and exposes weaknesses in testimony.[278] This pressure-inducing method helps judges or juries evaluate the consistency of witness statements.[279] While common law systems restrict inappropriate questioning,[280] cross examination's adversarial nature is unsuitable in contexts where experts present evidence of a legal system, particularly Indigenous legal systems. This is especially as opposing lawyers often emphasise the limitations of expert evidence in the cross examination process.[281] As evidenced through a realist lens, tikanga is a legal system.[282] Tikanga has operated as a system of law in Aotearoa longer than state law, and has long existed independent from it.[283] Although some scholars argue that the legitimisation of Indigenous law is protected by the ethical and professional standards expected of lawyers in cross examination, it remains inappropriate to treat tikanga as a discipline where its legitimacy has to be tested.[284] The Aotearoa judiciary have already commented that treating tikanga as a question of fact is inappropriate, especially as this is typically how foreign law is treated in a court.[285] However, the continued requirement for cross examination and emphasis of adversarial principle in the current court system will continue to clash with tikanga.[286]

Another issue that arises under cross examination is how the process conflicts with tapu. Tapu is an intangible, sacred force that stems from the atua (gods, deities) who created te ao Māori.[287] As stated by Kendall, "all things and people that have come from that creation signify the presence of tapu in the human world".[288] In the Māori world, tapu forms a key role in jural relations in particular, operating as a guideline for social conduct in specific contexts. Where certain people, places, and knowledge are considered tapu, behavioural guidelines require individuals to act

277 Law Commission *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996).
278 Australian Law Reform Commission "Cross-examination." (November 2010) <www.alrc.gov.au>.
279 Law Commission, above n 279.
280 Australian Law Reform Commission, above n 278.
281 Bruce Granville Miller *Oral History on Trial: Recognising Aboriginal Narratives in the* Courts (UBC Press, Vancouver, 2011) at 7.
282 Jones, above n 17, at 166.
283 Lindberg, above n 201, at 58.
284 Miller, above n 281, at 7.
285 *Ellis v R,* above n 103, at [123].
286 Miller, above n 281, at 8.
287 Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, Auckland, 1991) at 128.
288 Kendall, above n 190, at 169.

in a certain manner that maintains its respect,[289] and prevents harm to its tapu.[290] However, because cross examination is often a strategic, sometimes hostile exercise to try prove or disprove a statement, it operates at odds with respecting the tapu nature of tikanga evidence.[291]

The Waitangi Tribunal provides an exemplary model as to how tapu can and should be respected during evidence presentation.[292] The Tribunal aim to alter their approach to show respect for certain witnesses and the nature of certain evidence.[293] For instance, instead of conducting standard cross examination, the Tribunal often utilise pōwhiri or wānanga. This enables speakers to ask questions and clarify points in a collaborative manner. This differs from the scenario of cross examination, where witnesses face individual scrutiny.[294] Additionally, the Tribunal can hear issues on marae grounds, and in those instances will adopt the specific marae protocol. In particular, enabling this can prevent counsel from questioning kaumatua where it is deemed inappropriate.[295] However, this does not mean that mātauranga Māori can never be contested. Where the Tribunal sees it fit, they can request that a certain expert witness can be called for cross examination after it has been established this is appropriate in light of the circumstances.[296]

Overall, emphasising the need for flexibility to implement an informed decision-making forum helps the Tribunal to maintain respect for the knowledge and its experts.[297] When contrasting the adversarial system with the Waitangi Tribunal, it is evident that cross examination is not fit to fulsomely respect the tapu nature of tikanga evidence.

289 Justice Christian Whata "Tikanga and the Law: A Model of Recognition" (2023) 4 Amicus Curiae 610 at 616.

290 Mason Durie "The Application of Tapu and Noa to Risk, Safety, and Health" (Presentation to Challenges, Choices and Strategies, Mental Health Conference 2000, Wellington, 16 November 2000) at 4.

291 Emily Henderson "Bigger fish to fry: should the reform of cross-examination be expanded beyond vulnerable witnesses?" (2015) 19 The International Journal of Evidence & Proof 83 at 90.

292 Law Commission *Second Review of the Evidence Act 2006* (NZLC R142, 2019) at 37.

293 *Te Runanga o Ngai Tahu v Waitangi Tribunal* [2001] 3 NZLR 87 (HC) at [111].

294 Kendall, above n 190, at 181.

295 Waitangi Tribunal Practice Note "Guide to the Practice and Procedure of the Waitangi Tribunal" (August 2023) at 6.30.

296 At 6.31.

297 Kendall, above n 190, at 181.

C. Does Our Weak Pluralism Enable Pūkenga to Support the Development of Tikanga in Aotearoa New Zealand?

Through analysing the benefits and pitfalls of the current operation of pūkenga in our weak legal pluralist system, the pūkenga role can be described as a legal paradox.[298] This is because pūkenga work within a system not designed for tikanga, yet are necessary for the system's improvement in being the conduit by which tikanga is embedded into the common law. This outlines the drawbacks of weak legal pluralism, where it maintains the dominance of state law over the pūkenga role and does not recognise tikanga as an equal system of law in Aotearoa.[299]

The flaws of the orthodox, adversarial principles outlined in this section highlight the need for procedural modifications of the current system in a weak plural context. However, resolving the tensions present will likely be a multifaceted task. The courts and Law Commission have already noted the need for a series of legislative changes regarding procedure and principle of current evidence law. They have either adopted different approaches to better reflect the nature of tikanga, or have proposed them.[300]

For example, the issues surrounding cross examination of tikanga Māori were counterbalanced through the procedure adopted in *Ellis*. As noted earlier, the Statement of Tikanga was produced by formally appointed pūkenga, alongside a series of other tikanga experts and counsel through a wānanga process.[301] This use of expert conferencing provided an environment where all experts could discuss the issues, rather than being subjected to separate cross examination.[302] Such an approach importantly better recognised the tapu nature of the tikanga relevant to the posthumous context.[303] This adoption has contributed to the normalisation of such an approach that maintains the integrity and mana of pūkenga, and recognises alternative methods to dispute resolution that may be more appropriate in certain tikanga circumstances.

As well as this, the Law Commission have indicated the need for the statutory normalisation of admitting oral evidence.[304] Firstly, the Commission has suggested

298 Moana Jackson "A Colonial Contradiction or a Rangatiratanga Reality" in McElrea (ed) *Re-Thinking Criminal Justice Vol 11: Justice in the Community* (Institute of Criminology Victoria University, Wellington, 1995) at 34–35.

299 Morar, above n 193, at 218.

300 Law Commission, above n 119; Law Commission, above n 40.

301 *Ellis v R,* above n 103.

302 At [124].

303 Vance Hughston SC and Tina Jowett "In the native title 'hot tub': expert conferences and concurrent expert evident in native title" (2014) 6 Australian Institute of Aboriginal and Torres Strait Islander Studies 1 at 9.

304 Law Commission *Third Review of the Evidence Act 2006* (NZLC IP50, 2023).

that the Rules Committee consider modifying the expert witness Code of Conduct to more effectively acknowledge and incorporate tikanga and mātauranga as distinct types of expert evidence. As has been discussed, this would be an important change where the code is based upon adversarial principle and Western ways of knowing.[305] Secondly, the Commission has recommended creating an exception to the hearsay rule applicable to tikanga and mātauranga Māori. This is believed to assist in normalising the admission of tikanga in the courts, in light of its oratory substance.[306] The Commission have outlined that the Evidence Act will continue to create issues for pūkenga if the admission of oral evidence is not normalised under the Act.[307]

Overall, these decisions demonstrate a willingness to facilitate the legitimisation of tikanga by incrementally altering the foundations of the adversarial court, but also recognises the multifaceted challenge of this endeavour.[308] However, this dissertation focuses on the specific role that pūkenga will play in this venture. Importantly, the implications that arise from how pūkenga currently operate in our litigation system demonstrate where Aotearoa should go in the future development of its legal pluralism. As highlighted throughout this section, maintaining weak pluralism will not adequately facilitate the recognition and application of tikanga as a legal system.[309] Part V therefore argues that a stronger legal pluralism is necessary for better recognition of tikanga. While improvement will continue inside the paradoxical framework of our weak pluralism meaningful change will only be achieved with some constitutional reform to support a move to strong legal pluralism.[310]

D. The need for stronger legal pluralism in Aotearoa New Zealand.

Despite the progress made under the current framework of weak legal pluralism, there remains a significant journey ahead to fully integrate tikanga with the Aotearoa legal system. The weak plural status quo, while a starting point, is insufficient to address the deeper recognition and application of tikanga as an autonomous legal system. As evidenced in Part IV, the adversarial court system does not reflect the role of pūkenga as legal experts, nor does it fully reflect the substance of tikanga.

305 Law Commission, above n 119, at 45.
306 At 43.
307 Law Commission, above n 304, at 22 and 23.
308 Kirsten Manley-Casimir "Creating Space for Indigenous Storytelling in the Courts" (2012) 27 Can JL & Socy 231 at 236.
309 Coates, above n 200, at 45.
310 Rachel Sieder "The Challenge of Indigenous Legal Systems: Beyond Paradigms of Recognition" (2012) 18 The Brown Journal of World Affairs 103 at 104.

However, as will be explored, it is equally evident pūkenga are vital in the future to bridge the gap between tikanga and common law.

Where weak legal pluralism does not serve pūkenga nor tikanga, we should look to implement a stronger form of legal pluralism.[311] The call to change the operation of legal pluralism in Aotearoa is gaining momentum, as there is an increasing understanding of the current plural relationship between tikanga Māori and common law.[312] Given this context, this section will argue that a more effective future system will require a move to strong legal pluralism, which will likely have constitutional implications.

Pluralism is inherently flexible and can develop and change within a society.[313] As has been discussed, legal pluralism within a state with a colonial history often means that the Indigenous legal system will be treated as subservient to state law. As evidenced, the current arrangements within the courts are designed to recognise a single legal system and legal process.[314] A series of discussions have recently considered how legal pluralism in Aotearoa could develop in a number of ways.[315] For example, there are two aspirational frameworks that have been discussed regarding the future relationship between tikanga and common law, both with elements of stronger legal pluralism.

A first future plural proposal is the relational sphere framework outlined in the Matike Mai report. Matike Mai was designed to spark conversation on the possibility of Māori constitutional reform in Aotearoa.[316] The 2010 report emphasises the potential future development of the relationship between Māori and Pākehā.[317] In doing so, the report suggests a number of frameworks to assist in the interweaving of Māori and Pākehā ways of knowing while recognising the equal standing of each.[318] One of the ways that Matike Mai believes the future relationship between the Crown and Māori could develop is through the tricameral model.[319] This relationship is conceptualised as where the Crown maintains kāwanatanga (governorship, dominion), and Māori retain rangatiratanga (broadly, the exercise of authority

311 At 104.
312 Charters, above n 153, at 620.
313 Swenson, above n 11.
314 John Dawson "The Resistance of the New Zealand Legal System to Recognition of Māori Customary Law" (2008) 12 Journal of Pacific Law 56 at 59.
315 Michael and Suzanne Borrin Foundation "Inspiring National Indigenous Legal Education for Aotearoa New Zealand's Bachelor of Laws Degree: Phase One: Strengthening the Ability for Māori Law to Become a Firm Foundational Component of a Legal Education in Aotearoa New Zealand" (2020).
316 "The Report of Matike Mai Aotearoa: The Independent Working Group on Constitutional Transformation" (Iwi Chairs' Forum, February 2016) at 5.
317 "Matike Mai Aotearoa", above n 320, at 7.
318 Jessica Fenton "Relational Sovereignty Under a New Constitution: International Examples of the Models of Matike Mai" (2018) 6 Te Tai Haruru | J Māori L 59 at 63.
319 At 64.

and self-determination)[320], but the joint relational sphere where the two intersect grows.[321] Although the kāwanatanga and rangatiratanga spheres are predominantly separate, they have a partial intersection which forms the relational sphere for joint decision-making.[322] This framework reflects a stronger legal pluralism, where tikanga Māori and common law would operate as distinct legal systems except where joint deliberation is necessary.

The second framework is based upon Roughan's concept of interlegality, and an independent and interdependent relationship between tikanga and common law.[323] Roughan conceptualises this form of pluralism as concentric circles where tikanga independence is at the core, but is surrounded by an interdependent state law and tikanga relationship.[324] Interlegality puts a focus on the intertwining of elements from the selection of legal systems present to create a new, interconnected system of law.[325] In 2023, the Law Commission described such interdependence through the metaphor of weaving tukutuku panels.[326] This represents a process of incrementally developing a unified approach between tikanga and state law, instead of continuing the process by which tikanga is incorporated into the common law, adversarial model.[327] Such an approach is argued to help recognise the authority of both tikanga and common law as legal systems that interact regarding their legality, rather than through force or politics.[328] In the future, a legal relationship such as this is argued to be beneficial to enable the two legal systems to exist alongside each other yet inform and enrich one another.[329]

The discussion surrounding those possible frameworks illustrates the need for stronger legal pluralism in the future. Creating a framework that supports tikanga as an autonomous legal system, while simultaneously having interconnectedness with state law, is difficult to achieve under weak legal pluralism.[330] Therefore, these

320 *Te Aka Māori Dictionary*, above n 113. The definitions of rangatiratanga and kāwanatanga relate to the wider discussion of the interpretation of English and te reo Māori versions of the Treaty of Waitangi, and how the context of the Treaty has impacted the understanding of these concepts. There is ongoing debate and developing understanding around the meaning of these terms, and how they contribute to the Māori and Pākehā relationship in Aotearoa. The author has used the *Te Aka Māori Dictionary* definitions for the purposes of this dissertation, but acknowledges the dynamic discussion surrounding the understanding of these terms.

321 Matike Mai Aotearoa, above n 318, at 10.

322 Matike Mai Aotearoa, above n 318, at 9.

323 Roughan, above n 220, at 4.

324 At 31.

325 Marc Simon Thomas "Legal pluralism and interlegality in Ecuador: The La Cocha murder case" (2009) 24 Centre for Latin American Studies and Documentation 41 at 46.

326 Law Commission, above n 40, at 16.

327 At 17.

328 Roughan, above n 220, at 4.

329 Waitangi Tribunal *Waitangi Capital Establishment Report* (Wai 718, 1999).

330 McKerracher above n 98, at 141.

discussions demonstrate the need for a level of constitutional reform which better recognises the independence of tikanga and moves us to strong legal pluralism.

In light of our current constitutional arrangements, such as parliamentary sovereignty, incremental progressions toward stronger legal pluralism will be the most palatable.[331] Although such progressions within the current system will only get us so far, it will be a necessary path to build momentum for the acceptance of future constitutional change.[332] Such momentum is already underway, an example of this being the Te Awa Tupua governance framework.[333] The framework integrates Māori concepts of environmental law, kaitiakitanga (guardianship), and connectivity through the creation of legal personhood for the Whanganui River.[334] The human representative body, Te Pou Tupua, comprises two individuals who act on behalf of the river – one nominated by the iwi with interests in the river, and one by the Crown.[335] This arrangement not only demonstrates the ability for us to respectfully incorporate a Māori worldview within a state law mechanism,[336] but also our willingness to embody tikanga principles into our common law.

Evidently, it is becoming increasingly recognised that weak legal pluralism does not recognise the integrity and independence of tikanga sufficiently. Therefore, momentum is gaining to implement stronger forms of legal pluralism in Aotearoa to allow tikanga to be recognised as an autonomous legal system. The remainder of this section will discuss how pūkenga may assist in developing a stronger legal pluralism.

E. The Future of Pūkenga in Developing Legal Pluralism

The future of pūkenga in developing legal pluralism in Aotearoa holds significant promise in the Lex Aotearoa endeavour.[337] Although the adversarial court system does

331 Claire Charters "Legitimising the State: Constitutional Reform to Recognise Rangatiratanga and Tikanga Māori" (presentation, New Zealand Law Commission 30th Anniversary Symposium, 3 November 2016) at 9.

332 Mila Urlich "Whakaritea Te Pārekereke: Engaging with Legal Pluralism in Aotearoa/New Zealand Legislation to Facilitate Future Constitutional Transformation" (LLB(Hons) Dissertation, University of Otago, 2023) at 13.

333 Miriama Cribb, Elizabeth Macpherson and Axel Borchgrevink "Beyond legal personhood for the Whanganui River: collaboration and pluralism in implementing the Te Awa Tupua Act" (2024) 2024 International Journal of Human Rights 1.

334 Elizabeth Macpherson "Can Western water law become more 'relational'? A survey of comparative laws a□ecting water across Australasia and the Americas" (2023) 53 Journal of the Royal Society of New Zealand 395 at 398.

335 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 18(2).

336 Toni Collins and Shea Esterling "Fluid Personality: Indigenous Rights and the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 in Aotearoa New Zealand" (2019) 20(1) MJIL 197 at 205.

337 Williams, above n 1, at 34.

not fully reflect the role of pūkenga as legal experts nor the substance of tikanga, it is evident pūkenga are vital in the future to bridge the gap between tikanga and common law.

The call to change the operation of legal pluralism in Aotearoa is gaining momentum, where there is an increasing understanding of the current plural relationship between tikanga Māori and common law.[338] Given this context, as weak legal pluralism does not serve pūkenga nor tikanga, a more effective legal system requires a move to strong legal pluralism. This, however, will have constitutional implications that conflict with the underlying principles of positivism and parliamentary sovereignty in the current system.[339] This likely means that steps toward constitutional reform will be incremental.

In analysing the recent recommendations of the Law Commission which concern pūkenga, this demonstrates there is no immediate call for formal recognition of tikanga as an independent legal system. Therefore, pūkenga are likely to continue to work within weak pluralist arrangements, still operating as a legal paradox. However, by continuing to develop an intersection between state law and tikanga through pūkenga, this may well help prepare the soil to plant the seeds of the constitutional change needed to support stronger legal pluralism.

The Law Commission have noted that our current court procedure is often incompatible with tikanga brought by pūkenga.[340] In *He Poutama*, the Commission recognised the continued need for pūkenga and made three recommendations to increase the importance of pūkenga within the litigation system.[341] The first recommendation is to utilise pūkenga through a specialist tikanga panel that operates within the High Court. Their second suggestion involves enabling pūkenga to assist High Court judges as lay commissioners where necessary. The third future proposal regards the possible increased jurisdiction of the Māori Land Court and Māori Appellate Court as specialist tikanga courts.[342]

The first recommendation provided by the Law Commission proposes pūkenga to be used within a specialist tikanga panel which operates in the High Court.[343] Specialist panels currently operate in Aotearoa New Zealand where a series of expert judges can help guide the court in making technical decisions in a commercial

338 Charters, above n 153, at 620.
339 Emma Gattey "Do New Zealand Courts Regard Tikanga Māori as a Source of Law Independent of Statutory Incorporation? Or is Anglo-inspired Common Law still "the sole arbiter" of Justice in New Zealand?" (LLB(Hons) Dissertation, University of Otago, 2013) at 55.
340 Law Commission, above n 306, at 50.
341 Law Commission, above n 40.
342 At 240.
343 At 246.

context.[344] The Senior Courts Act 2016 grants the Chief High Court Judge, following consultation with the Attorney-General and Chief Justice, the ability to create a new panel of High Court judges.[345] If implemented in a tikanga context, potential future parties would be able to nominate their case to be heard by a tikanga panel judge, and the Chief High Court Judge would have the ability to decide whether or not a case should be allocated to the panel.[346]

The second recommendation is that pūkenga could assist High Court judges as commissioners where deemed necessary.[347] Commissioners are considered 'lay members' of the High Court, selected from a pool of experts to be a member of the court for the duration of those proceedings.[348] Although current legislation does not allow for pūkenga to be commissioners in this way, a framework could be sourced from where lay commissioners are appointed to the Environment Court or under the Commerce Act.[349] Through this framework, the experts within that group would have the jurisdiction to be appointed by the court in specific scenarios that would need to be statutorily outlined.[350]

The third suggestion of the Law Commission is the possibility of the future increased jurisdiction of the Māori Land Court and Māori Appellate Court.[351] In 2004, the Law Commission had recommended expanding the jurisdiction of the Māori Land Court and the Māori Appellate Court. Such new jurisdiction had been proposed to go beyond land and succession,[352] and include all potential legal issues regarding communal Māori assets.[353] Twenty years later, the Commission expanded this proposal further by suggesting jurisdiction of the Māori Land Court should broadly include all claims involving tikanga as either custom or law.[354] This would mean that where both tikanga and common law principles were at play, both the Māori Land Court and the High Court would have jurisdiction to make findings on certain aspects of the dispute.[355] As well as this, with advancing the Māori Land Court as the specialist tikanga court, the right of appeal to the Māori Appellate

344 New Zealand Bar Association "Commencement and operation of the Commercial Panel of the High Court" (August 2017) <www.nzbar.org.nz>.
345 Senior Courts Act 2016, ss 19(3) and 19(4).
346 Law Commission, above n 40, at 246.
347 At 247.
348 Ngā Kōti o Aotearoa | The Courts of New Zealand "How cases are heard" (2024) <www.courtsofnz.govt.nz>.
349 Law Commission, above n 40, at 248.
350 Law Commission, above n 40.
351 Morar, above n 78.
352 Chief Judge Joe Williams "The Māori Land Court – A Separate Legal System?" (paper presented to the Faculty of Law and the New Zealand Centre for Public Law, Victoria University of Wellington, 10 July 2001) at 7.
353 Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004).
354 Law Commission, above n 40, at [8.141] and [8.142].
355 At 248.

Court could be developed to consider questions of tikanga.[356] Looking beyond this, Roughan suggests that the potential future jurisdiction of the two courts could be developed to where we create a new system that could handle disputes about tikanga and ensure shared decisions at all levels, not just in the High Court.[357]

In making these suggestions, the Law Commission supports the increasing influence of pūkenga to assist the weaving of tikanga and common law. Regarding the first and second recommendations, these would enable pūkenga to continue to provide expertise on tikanga. Lay commissioners have a key role in ensuring that expert evidence regarding complex issues is understood and assessed properly by the court.[358] Similarly, the commercial expert panel was implemented to gain expertise on complex matters of commercial law.[359] In developing the pūkenga role to operate within these frameworks, pūkenga could continue to provide necessary tikanga expertise. As well as this, implementing pūkenga through these frameworks would better reflect their role as holders of legal knowledge rather than a discipline. The catch is, however, is that these suggestions remain a form of weak pluralism. Where pūkenga become solidified in a context alike an expert panel or as a lay commissioner, pūkenga will continue to operate within an adversarial system.

The recommendation to increase the jurisdiction of the Māori Land Court, however, provides a pathway to better reflect tikanga as a legal system in Aotearoa through stronger legal pluralism.[360] As outlined in Part IV, the key issues that affect pūkenga when working in an adversarial system concern its inability to fully recognise tikanga principles and process. Although the Māori Land Court and the Māori Appellate Court currently operate in land title contexts, both bodies have sound expertise in tikanga.[361] The procedures embedded within both courts are inherently flexible, and emphasise the use of mediation,[362] marae kawa (marae protocols) and te reo Māori where considered appropriate.[363] From a pūkenga perspective, such recognition under this framework would better reflect tikanga as an autonomous legal system, and better reconcile the challenges where presenting tikanga before an adversarial court.

However, in light of our legal and political context, such a change is unlikely to occur imminently. As stated by David Williams, Pākeha in power are generally reluctant to address or embrace tangata whenua aspirations if they believe it could result in a divided national sovereign, separatism within the state or the creation of

356 At 249.
357 Roughan, above n 220.
358 Ngā Kōti o Aotearoa | The Courts of New Zealand, above n 351.
359 Senior Courts (High Court Commercial Panel) Order 2017, cl 5.
360 Law Commission, above n 40.
361 Law Commission, above n 40, at 244.
362 At 86.
363 At 233.

separate justice systems.[364] Because increasing the jurisdiction of the Māori courts is constitutionally significant, the decision to implement this is ultimately in the hands of parliamentary sovereignty.[365] To get to this point will therefore require a committed effort for such constitutional alteration to become possible.

With the above in mind, the role of pūkenga as legal experts will play an important part in bringing the realities of the current legal framework to light. While the first and second suggestions of the Law Commission may not fully enable the strong pluralism that is required for tikanga to be recognised as an independent legal system, those recommendations would be significant progress for tikanga. This is because although those recommendations maintain the centrality of the adversarial system, they would additionally contribute to greater recognition of tikanga. As theorised by Natalie Coates, those recommendations are strong forms of weak pluralism, which although are not completely strong, can nonetheless assist in the progression to strong legal pluralism.[366] Therefore in the future, it is beneficial for the pūkenga role to be incrementally developed within the common law system, continuing as a legal paradox yet simultaneously increasing the potential for constitutional change.

In continuing to develop pluralism in Aotearoa, some argue that fostering this relationship between tikanga and common law in this way is another form of cultural assimilation.[367] The risk of tikanga becoming part of the common law only where it aligns with already established common law principles is a rightful concern, especially where it could easily undermine the integrity of tikanga as a legal system.[368] A further risk lies where the court could distort either tikanga or the common law by making uninformed parallels.[369] These tensions are prevalent in the paradoxical framework in which pūkenga operate, where tikanga as law is recognised in an adversarial context. As has been discussed, where pūkenga assist in ensuring tikanga is dealt with accurately and with integrity, the adversarial system can still question its legitimacy and relevance.[370] Where pūkenga continue to operate within weak legal pluralism, issues of how to place tikanga and mātauranga within a non-Māori legal structure will remain.[371]

364 David Williams "Unique Treaty-Based Relationships Remain Elusive" in Michael Belgrave, Merata Kawharu and David Williams (eds) Waitangi Revisited: Perspectives on the Treaty of Waitangi (2nd ed, Oxford University Press, Australia, 2005) 369 at 370.

365 Margaret Mutu and others "Dreaming Together for Constitutional Transformation" (2021) 12 Counterfutures 35 at 39–41.

366 Coates, above n 200, at 18.

367 Moana Jackson "Changing realities: unchanging truths" (1994) 10 AJLS 115 at 116.

368 At 116.

369 Glazebrook, above n 217, at 18.

370 Law Commission, above n 40, at 243.

371 Law Commission, above n 119.

Although there are clearly limitations in developing strong forms of weak pluralism, such change is an essential initial step toward reconciliation in the form of legal recognition.[372] Tikanga has withstood colonisation and has remained a legal system in Aotearoa despite the weak plural realities.[373] As it is clear that tikanga and common law will continue to coexist, the focus must remain on how to continue to engage with tikanga, and how it can be developed and rebuilt.[374] This highlights the importance of creating collaborative solutions that are rooted in the expertise from both legal systems to maintain their integrity as autonomous law.[375]

On a further note, the role of pūkenga outside the courtroom should be expanded to continue to enable better understanding and application principles of tikanga. As of 2025, pūkenga will be crucial in the implementation of compulsory tikanga teachings throughout law schools.[376] This has the potential to be developed further, exemplified by the emerging concept of a conjoint Indigenous and common law degree. The University of Victoria in Canada are the pioneers for this initiative, employing a trans-systemic method based on Indigenous multi- juralism to promote better understanding of legal relations between state and Indigenous law.[377]

Discussions are underway in Aotearoa about how our legal education could continue to similarly expand. Off-site legal education in marae and Māori communities is being slowly implemented, demonstrating an incremental yet necessary shift in improving the teaching of tikanga.[378] In the future, there is also potential for more collaboration between universities and other institutions, such as Te Wānanga o Aotearoa, iwi and hapū, or other bicultural entities.[379] In the progression towards broader tikanga education, pūkenga will be instrumental in facilitating understanding of the complex relationship between tikanga and common law.[380] Furthermore, developments in education will contribute to the normalisation of tikanga as a valid legal system in Aotearoa, with the potential to continue to boost its recognition.

Overall, weak legal pluralism does not sufficiently recognise tikanga Māori as a legal system.[381] Looking to the future, a stronger legal pluralism will better address the issues that the adversarial system creates in acknowledging and

372 Urlich, above n 333, at 14.
373 Val Napoleon "Did I Break It? Recording Indigenous (Customary) Law" (2019) 22 PER/PELJ 2.
374 Napoleon, above n 27.
375 Murphy, above n 57, at 2; and Horatia Muir Watt "Conflicts of laws unbounded: the case for a legal-pluralist revival" (2016) 7(3) TLT 313 at 317.
376 As discussed throughout Part IV.
377 McKerracher, above n 98, at 134.
378 For example, see "Special Topic: Comparative and International Indigenous Rights Research Project" (LLB Paper LEGAL441, Waikato University, 2020) <waikato.ac.nz>.
379 Borrin Foundation, above n 315, at 41.
380 Roughan, above n 54.
381 Urlich, above n 333, at 12.

applying tikanga. This path to constitutional reform will not be straightforward, nor imminent. Such change will require a series of incremental developments that slowly but surely move toward an easier and more widely-accepted transition to strong legal pluralism.[382]

The continued development of the pūkenga role within and beyond the courtroom will help to incrementally strengthen weak pluralism in Aotearoa. In light of the Law Commission's recommendations, continuing to develop the relationship between state law and tikanga under the current weak plural arrangements has the potential to make future constitutional change more realistically achievable. Where state law continues to actively engage with tikanga, regardless of the constitutional makeup, this could make it easier to achieve constitutional change in the future.[383] In adopting this pathway, the role of pūkenga will continue to operate as a paradox. However, through this paradox, pūkenga provide an opportunity to continue incrementally developing the current arrangements in a respectful and culturally informed manner, laying the foundation for future constitutional change.[384]

V. Conclusion

In Aotearoa New Zealand, where tikanga Māori and common law coexist, legal pluralism has been recognised as part of our legal reality. However, this has not always been the case. The past dominance of legal positivism had relegated our first law as subservient to our second law. Over time, this positivist theory has been challenged by the movements of legal realism and the development of the concept of legal pluralism. In the endeavour to create a 'third law', informed by both tikanga and common law, pūkenga have become an increasingly important part of the relationship between the two systems.

This dissertation has sought to firstly analyse the role of pūkenga in particular, and what their relationship with expert evidence law demonstrates for legal pluralism in Aotearoa. In highlighting what the intersection of these legal systems illustrates, this dissertation then explored what the future of pūkenga in Aotearoa litigation may look like in light of pluralism, and how pūkenga can increase the understanding and engagement of tikanga Māori in our wider legal system.

In analysing the intersection of pūkenga and expert evidence laws, the relationship between tikanga and common law is indicative of weak legal pluralism. This weak plural paradigm, however, creates a paradox for pūkenga. Pūkenga, as

382 *Ellis v R,* above n 103.
383 Urlich, above n 333, at 17.
384 Charters, above n 151, at 612.

experts in tikanga, are particularly beneficial for the evolution of tikanga as part of the common law. But as stated, they function within an adversarial framework unable to sufficiently recognise Māori law. Although legal pluralism recognises the presence of more than one legal system, where a state has colonial history, weak legal pluralism can result in an arrangement where the Indigenous legal system is treated as subservient to state law framework. Therefore, challenges arise where pūkenga operate within the adversarial system, especially where tikanga is subject to rules of probative value, admissibility, bias and cross examination.

It is evident that weak legal pluralism falls short of acknowledging the integrity and independence of tikanga as a legal system. Consequently, there is a growing movement in Aotearoa toward adopting stronger forms of legal pluralism with the aim to better recognise the autonomy of tikanga. In creating a more robust legal pluralism, this dissertation argues that pūkenga should continue to guide development of the law through providing tikanga expertise.

In continuing to guide this development, pūkenga will continue to function as a paradox. However, the continuation of the pūkenga role will assist in strengthening weak legal pluralism to ready us for potential constitutional development. By continuing to intersect the adversarial system and tikanga, irrespective of the current constitutional circumstance, pūkenga provide an opportunity to progressively develop, restore, and plurally strengthen the existing system in a manner that is both respectful and culturally informed. In doing so, pūkenga can continue to build the momentum required to pave the way for future constitutional change. This change will recognise tikanga and tackle the lingering issues we face as we untangle our colonial heritage, striving to bring our founding partnership to a point of legal consensus.