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4. The author should also supply an abstract of the submission of no more than 200 words.
5. The article should be fully anonymised. The author should submit a separate document with the author's full name, present position, qualifications and contact details, including e-mail address.
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The *Canterbury Law Review* has adopted the *New Zealand Law Style Guide.*

EDITORIAL
CANTERBURY LAW REVIEW
2023

It is with great pleasure that we present the 2023 edition of the Canterbury Law Review. This edition has special significance, being published in the year that Te Whare Wānanga o Waitaha | University of Canterbury celebrates 150 years since its founding in 1873 as Canterbury College, the first constituent college of the University of New Zealand and only the second institution in Aotearoa to provide tertiary-level education. In 1961, Canterbury College morphed into the University of Canterbury and became an independent university in its own right.

In celebration of this significant milestone, this edition contains lectures given by invited guests during the year, including the Chief Justice of the Supreme Court, Helen Winkelmann, Justice Christian Whata and Chief Judge of the Māori Land Court, Dr Caren Fox, alongside the Review's traditional high quality general articles. In total, this 2023 edition contains 10 publications and a book review.

The first is a public lecture given by Chief Justice Helen Winkelmann as part of the programme of events celebrating the 150th anniversary, given on 13 July 2023 at Te Pae Christchurch Convention Centre. Her lecture reflects on the challenge of educating a legal profession fit for the next 150 years. In doing so, she argues that we need to look at *who* we are teaching and the need to educate a more diverse cohort of students than we currently are but also consider *what* we are teaching, to ensure the teaching of law and legal skills meets legal need (for example, through the use of legal clinics) and enables access to justice.

The second is the keynote speech given by Justice Christian Whata on 7 July 2023 at the Australasian Law Academics Association (ALAA) conference held at the Te Whare Wānanga o Waitaha | University of Canterbury. Justice Whata (a Justice of the High Court and Law Commissioner) discussed the concept of "Tikanga" providing an account of tikanga and state law and an explanation of the framework of tikanga as a normative and legal system.

Justice Whata's contribution is followed by a speech, on a related topic, delivered by Dr Caren Fox, now the Chief Judge of the Māori Land Court (at the time of her speech she was Acting Chief Judge) on 8 July 2023, also at the ALAA conference. Entitled "Legal Pluralism in Aotearoa | New Zealand", her paper examines Māori law as a set of principles and values that may be relevant considerations in decision making, may be required to be weighed in decision making or may even be legally enforceable.

These articles by current judicial leaders, dealing with the current challenges of future proofing legal education in the context of an emerging bi-cultural legal system, can be contrasted with the transcript provided by Emeritus Professor Jeremy Finn of a lecture given by Dr Charles James Foster in Christchurch on 13 February 1873. This was the first formal recorded lecture on a legal subject in an educational institution in Canterbury. This provides a window into the world of legal education 150 years ago and makes for interesting reading, reflecting both the somewhat narrow view of law (which failed to engage with the existing Māori legal traditions) but also a perhaps surprisingly progressive view of the nature of law in practice. Given that Dr Foster was a somewhat colourful character (as Professor Finn notes), it is difficult to know if his views were held by many or reflected an idiosyncratic viewpoint. We will leave that judgement to readers and future research.

The focus on past and present approaches to challenges facing legal systems is highlighted in the next two articles. Richard Boast, in "State Formation and Law in the Pre-European Pacific", says there is evidence of a long history of state formation in the Pacific. He argues in response to the claim by some legal theorists that "law" is a product of "states" that whether or not places in the Pacific were or are "states", it is still meaningful to speak of Māori, Polynesian or Trobriand Island law. Bridget Fa'amatuainu's article examines challenges to Samoa's legal system from a Pacific viewpoint. Her article "Samoa Law Reform and Legal Pluralism: Critical Challenges to achieving legal recognition of fa'atama and SOGIEC" examines the possibility of recognising the status of fa'atama and diverse sexual orientation, gender identity expression and sex characteristics (SOGIEC) representation in Samoa, where modern concepts of justice create tension with traditional political and legal values.

Returning to the education theme introduced by the Chief Justice in the opening article, the next article explores the question: "Is the Aotearoa | New Zealand Law Student and Law Graduate Experience a Gendered Experience?" This paper by a team from Te Whare Wānanga o Waitaha | The University of Canterbury (Lynne Taylor, Natalie Baird, Ursula Cheer, Valerie Sotardi and Erik Brogt) examines results from a longitudinal study of law students and graduates from Law Schools around the country and considers "what lessons the identified gender differences offer for law teachers, the legal profession and employers of law graduates".

Our final two substantive articles discuss issues of relevance to very different areas of substantive law in Aotearoa New Zealand. The first by Peter Kelly, entitled "Reforming Family Law without compromising the integrity of trust law: recognising wealth held in trust when reallocating family property on separation", examines the different approaches taken to trusts in a commercial context and a social policy context. These approaches are used to critique how trusts are considered in the

context of relationship property under the current Property (Relationships) Act and in the Law Commission's proposed reforms.

The second of these concluding substantive articles, "Crossing the Alps: The Application of the Criminal Proceeds (Recovery) Act 2009 to Regulatory Offending", by Angus Graham, investigates how the Commissioner of Police has sought to expand the application of the Criminal Proceeds (Recovery) Act to regulatory offending and argues that such an expansion is inappropriate.

The last article in the volume is the winner of the *Canterbury Law Review's* annual essay competition by Georgina Lyes, an honours student at Te Kaupeka Ture | The Faculty of Law at Te Whare Wānanga o Waitaha | The University of Canterbury. In her prize-winning essay, Georgina examined the role of the courts in the most pressing issue of our generation, climate change. The high standard of this article has meant a shorter version has already been accepted for publication in the *New Zealand Journal of Environmental Law.*

To conclude this outstanding collection, Scott Optican provides a book review of Elisabeth McDonald's *Prosecuting Intimate Partner Rape: The impact of misconceptions on complainant experience and trial process* (Canterbury University Press, 2023).

All articles were subjected to a blind peer-review process and we wish to thank the reviewers for their evaluations and the useful comments which have assisted the authors.

Last, but not least, a huge thank you to all our contributors and our faithful subscribers without whom the *Canterbury Law Review* would not be possible.

We hope you enjoy this excellent 2023 edition.

Toni Collins, Editor, Canterbury Law Review
W John Hopkins, Chair of the Board of Canterbury Law Review Trust

KEEP RUNNING UP THAT HILL: THE CHALLENGE OF EDUCATING A LEGAL PROFESSION FIT FOR THE NEXT 150 YEARS

Helen Winkelmann *

E ngā mate o te wā,
E ngā hunga ora,
E huihui mai nei
I raro i te korowai o Ngāi Tahu,
Ki te whakanui i tēnei whare wānanga,
I tēnei kete mātauranga tuatinitini,
Ko ngā kaiwhakawā, ko ngā rōia, ko ngā ahorangi, ko ngā tauira
O ngā rā o mua, o tēnei rā, o ngā rā kei te heke mai hoki
Tēnā koutou, tēnā koutou, tēna tātou katoa

I. Introduction

It is an honour to give this lecture as part of the programme of events celebrating the 150th anniversary of this great University. I acknowledge the Chancellor, the Hon Amy Adams, and Vice Chancellor, Professor Cheryl de la Rey. I also acknowledge staff and students of this Law School – past and present.

It is right we also mark this very special occasion for the Law School. Canterbury Law School has produced many of the giants of our profession. Amongst its roll of teaching staff past and present are several legal legends – Professors John Burrows, Jeremy Finn, Philip Joseph, Ursula Cheer, Gerry Orchard and Stephen Todd, to name but a few. And its alumni have made important contributions to the law. I cannot do justice to the extent of that contribution today – time does not allow. But some indication can be gained by noting that the 6th Chief Justice of New Zealand, Sir Michael Myers, graduated from this Law School in 1897, and that Presidents of the Court of Appeal who were educated here include Sir Kenneth Gresson, Sir Alfred

* Chief Justice of New Zealand. *Public Lecture to Celebrate 150 Years of Legal Education at Canterbury* Te Pae Convention Centre, Christchurch, 13 July 2023. I wish to thank my clerk, Bronwyn Wilde, as someone who was recently a law student, for her help in preparing this speech.

North, Sir Ivor Richardson, and Sir Willie Young. Many more alumni have served on the courts, in the profession and through government. The first Māori to be admitted as a barrister and solicitor, Tā Āpirana Ngata, was educated at Canterbury College, although, as many did at the time, he completed his degree extramurally – today we would refer to it as remote learning.[1]

Christchurch was early in offering legal education at tertiary level. Although it was not the first city to do so (that honour falls to Otago University in Dunedin), Canterbury can boast of being the place where law has been taught continuously in New Zealand for the longest time.[2]

This University, and the Law School has been through its own hard times. The 2011 earthquakes caused difficulty and disruption to this institution. But Canterbury students were able to continue with their studies throughout, thanks to the commitment and manaakitanga of the academic and administrative staff, and of course to the resilience of the students. This experience has stood the Law School in good stead for the challenges of the pandemic.

Given the pedigree and accomplishment associated with this institution, the responsibility to honour it on its 150th birthday is heavy. I confess, and I feel it is a confession in this setting, that I am not a Canterbury alumnus, and I have not taught at this institution. But I reassure myself that as a judge, and more recently as Chief Justice, I am in a sense a scrutiniser and reviewer of the quality of the product of this and other law schools – that perhaps gives me standing.

Judges see the fruits of that legal education. When we place confidence in a lawyer's conduct of a trial or hearing we are in part placing confidence in the education they have received at Law School. In the cases we hear, we also see the fingerprints of lawyers who work outside of the courts – in the "policy shops" and legal departments of government departments, in Parliamentary Counsel's office, in the office of Cabinet, and the clerk of the house, lawyers who work as part of the inhouse legal team of local authorities or large corporate entities. We see the work of the many lawyers in suburban practices, handling transactions and legal documentation for families – the sale and purchase of family homes, and small businesses, the documentation of testamentary dispositions and living wills. We benefit from the assistance provided by lawyers through Community Law and Citizens Advice.

In each of these roles, lawyers perform the constitutionally significant task of enabling people to comply with the law and enabling them to access its protection.

1 Jeremy Finn *Educating for the Profession: Law at Canterbury 1873–1973* (Canterbury University Press, Christchurch, 2010) at 33.

2 The teaching of law at Otago was interrupted twice before WWI.

In all these roles, lawyers are relied upon to know the law, to know the systems through which the law is applied, and how to access or use those systems.

Judges therefore have a good understanding of the contribution that this Law School, along with others, has made to the legal profession, the administration of justice, and indeed to the rule of law.[3]

But it is not all one way. Because judges and lawyers have always played a significant role in the life of this University and of this School of Law. Indeed, prominent lawyers played a key role in establishing both. As Jeremy Finn recounts in his book, *Educating the Profession*, the first body offering tertiary level courses in Christchurch was the Collegiate Union, a predecessor body to the University.[4] It was established in 1871 by a group of leading Christchurch citizens, broadening its courses to include law in 1873. Those leading citizens included Supreme Court judge, Henry Barnes Gresson, and local lawyer, William Wynn Williams, surnames that would carry on down through the law for the next century and beyond.

For the first half of its 150-year history, all the teaching in law at Canterbury University College (as it was called then) was undertaken by practitioners. Classes were taught outside work hours – 8 am to 9 am and 5 pm to 8 pm. Students typically worked as undergraduate law clerks in law firms – part of the then business model for law firms. The first fulltime professor of law was not appointed until 1957. The teaching staff were practitioners from downtown Christchurch who had to balance the demands of their students with those of their clients.

Kenneth Gresson, the same Kenneth Gresson who would go on to be President of the Court of Appeal, taught at Canterbury in the 1930s. He once had to cancel two weeks of lectures because of work pressure, personally reimbursing his students for their lost time – paying them 1 shilling 6 pence (the equivalent of $160 in today's money) per student, per hour. He wished them luck in their exams, noting "much hard work before November will, no doubt, be necessary".[5] I am sure the money was welcome, but not perhaps the message.

From the 1930s through to the 1960s, the teaching staff included one Mr Eric Wills, who taught property law and, for a short time, contract. He was also Dean of the Law School for a few years in the 1950s. Through all of this he ran a busy practice, the "business" of which is attested to by his former clerk young John Burrows. John recounts that, lacking any administrative support as Dean, Mr Wills wrote to the University in these terms: "The efficiency of the Law Department would be helped if

3 I note as well that judges have a long history of involvement in legal education in New Zealand. For the first 30 years or so, the only regulation of the legal market was provided by judges. Today that involvement continues, although in a different form, with judges serving on the Council of Legal Education, the statutory body charged with aspects of regulation of legal education.

4 Jeremy Finn, above n 1.

5 R O McGechan "The Profession and the Teaching of the Law" (1947) 23 NZLJ 110.

parttime clerical assistance or a tape recorder could be provided." As John tells the story, the University's response to this extravagant request is not known.

These practitioners, the Gressons, the Wills, were busy people. They did this work because they believed in the importance of the legal profession, and the importance of how lawyers were educated.

Throughout its 150-year history, Canterbury Law School has maintained a commitment to employing practitioners to teach the law. Today that continues – when he is not conducting a busy practice as a KC, James Rapley teaches courses in advocacy. Professor Philip Joseph has himself been known to appear before select committees to explain the finer points of constitutional law, and to make the occasional appearance before the Supreme Court. To my mind, this connection between the practice and teaching of the law should be nurtured and, if anything, strengthened, as it feeds into teaching and scholarship, knowledge about how the law works in society and in practice.

I have taken my inspiration for today's lecture from remarks I heard Professor John Burrows make at the ceremonial sitting of the Christchurch High Court to mark the New Zealand Law Society's 150th anniversary about the role that the profession had played in legal education. Professor Burrows said of the teaching of law:[6]

> The right balance between theory and practice has always been a contentious subject … . But we must remember that while it is essential that students acquire a deep critical knowledge of law and its underlying premises, and that while law is rightly an academic subject, law is also an intensely practical subject. It has to be – it regulates society. And, after all, the common law was made by busy judges, after hearing argument from busy practitioners.

Wherever you read discussion of the history of legal education in New Zealand you will read of the debate to which Professor Burrows refers – a debate about the respective virtues and vices of practical versus academic teaching.[7] I believe that to be a false dichotomy – too simplistic a debate on which to base the design of a curriculum. What I think Professor Burrows captured in that short statement is

6 John Burrows, Emeritus Professor of the University of Canterbury "The Legal Profession and Legal Education" (New Zealand Law Society 150-Year Anniversary, Christchurch High Court, 5 September 2019).

7 See, for example: Peter Spiller "The History of New Zealand Legal Education: A Study in Ambivalence" (1993) 4 Legal Education Review 223; and Margaret Wilson and ATH Smith "Fifty Years of Legal Education in New Zealand 1926-2013: Where to From Here?" (2013) 25 NZULR 801.

the need for the discipline of law as taught in our law schools to stay tethered to the practice of law. As Professor Burrows said, it has to, because it is law that regulates society. I would add something else – it has to, because law is a social, historical, and economic artefact of society. Untethered from society, it will become unable to respond to the justice needs of that society. Untethered from society, it will lose its purpose and relevance.

This takes me to the title of this lecture and to its content. Some of you may think that the title I chose for this lecture, "Keep Running Up that Hill" is a reference to the Kate Bush song, recently made famous (again) in the Netflix programme, "Stranger Things". It is not.

The title connects to two themes of this lecture. First, the historical connection between the profession and this Law School that I have already spoken about.

It draws on my own memories of 5 pm lectures at Auckland Law School in the 1980s. Even then, like in Mr Wills' time, 8 am and 5 pm were the time slots for the classes taught by practitioners. Although the share of teaching workload was, by the 1980s, carried largely by full-time staff, practitioners still taught some core courses. At the end of the day, busy practitioners, inevitably late leaving the office, would have to run up the hill through Albert Park and then on to the Law School – arriving out of breath.

In 1985 and 1986 (about the time the Kate Bush song came out for the first time), I myself made this frenzied ascent many times as a junior lawyer tutoring at the Law School. Arriving to take a tutorial with my glasses fogging up, I had to spend the next 10 minutes of the tutorial effectively sightless. The only difficulty with this title inspiration is that of course there is no hill here in Christchurch that practitioners such as Mr Wills had to climb.

The second theme I had in mind is the challenge that lies ahead for law schools in educating the lawyers of the future, equipped to meet Aotearoa New Zealand's justice needs, and to thrive in whatever career they pursue. This Law School has been running up that particular hill for the last 150 years. I suggest that the climb ahead is no less steep.

To frame those challenges, I begin with the features of society, and of our legal system, that tell us something about what it is we will need from the lawyers of the future and what skills and knowledge they will need to thrive in their careers.

First, ours is a diverse society. It is to the justice needs of this diverse society that the legal profession and judiciary must respond. To respond we require, at least as a collective group, an ability to understand the different lives, values, and needs of these diverse communities. The first responsibility of a legal system is to strive to uphold the ideal of the rule of law so that all are equal before, and equally entitled

to the benefit of, the law.[8] Ignorant of those we represent or see before us, we risk failing to meet this ideal.

Secondly, I point out a particular feature of the legal biosphere. The provision of legal services skews to the well-off, yet legal need is just as pressing, if not more pressing, amongst the poor to middle income members of society. Most people cannot afford a lawyer. Professor Bridgette Toy-Cronin, who has written and researched widely in the area of access to justice, observes that the increase in the cost of legal services has far outstripped the increase in median weekly income.[9] While Legal Aid is meant to fill the gap, the current income threshold for eligibility is still set well below the full-time minimum wage.[10]

Thirdly, I point to a fact of life for all lawyers. We work in a system, indeed in systems within systems. Lawyers operate within a large system – the justice system. They must also engage with numerous other systems in the course of their work. Their clients and employers expect them, indeed need them, to understand these systems.

There are systems in our society that bear upon almost every facet of life. There are the meta systems that lawyers should understand – for court lawyers, how courts function, the legislative framework, how the common law is made, and how the administrative state functions. For those in the policy shops of government, there is a need to understand how it is that an idea for positive change can make its way into law, and of course, a need to know about how Parliament operates. Then there are the micro systems with which lawyers need to engage. Criminal lawyers are familiar with this – they know the importance of their working relationship with the prosecutor, the police, the judge, the registry staff, of understanding how to get access to a client in prison. Resource management lawyers are also used to working within the labyrinthine systems of planning and consenting.

It is a feature of most societies that over time, societal and governmental systems grow ever more complex – that is as true in New Zealand as it is anywhere. It is also worth mentioning in this context, that in New Zealand a reconceptualisation of some of the law related systems is going on. For example, engagement with the criminal justice system is increasingly being used as an opportunity to enable government agencies, iwi and community groups to come together to address the causes of offending. This approach lies at the heart of Te Ao Mārama courts. Lawyers of the future will need to play their part in seizing this opportunity for their clients.

8 It is one of the fundamental obligations of lawyers, recorded in s 4 of the Lawyers and Conveyancers Act 2006, to uphold the rule of law.

9 Bridgette Toy-Cronin "Explaining and Changing the Price of Litigation Services" (2019) NZLJ 310.

10 Notwithstanding a 15 per cent increase to this threshold in January 2023.

Other fundamental changes are afoot. The incorporation of tikanga concepts into statute law is already well advanced, and the place of tikanga in the common law is once again being recognised.[11]

In addition, and not unique to New Zealand, digital and remote technology is changing how lawyers are working, how research is undertaken and even how hearings are conducted. The working environment of lawyers, judges, courts, police, is now already being shaped by technology, a trend that will only accelerate.

The final aspect of this environmental scan I mentioned is its constitutional culture. The judiciary is a branch of government and an important part of our constitutional settlement. Our court system is a vital part of the social infrastructure of our society. But the role of the courts, and of the judiciary is little understood beyond the walls of law schools and court buildings. As multiple commentators have noted, while New Zealand as a society greatly values representative government and compliance with the law, we are notoriously indifferent as to what it is that secures the rule of law.[12]

What flows from this sketch for our law schools? I am very relieved that I have the luxury of simply raising questions and ideas for discussion while leaving for the experts, the faculty, and academic leadership, what the answers are. I acknowledge how hard the task of legal education is. It is hard to prepare aspiring lawyers in this social and legal landscape. No less daunting to be an aspiring lawyer.

Rather than answers then, I have framed this speech around two questions. First, who are we teaching? Secondly, what are we teaching? Having said that, I have not been able to resist a few tentative ideas that may assist with answering these questions as we look to the future of legal education. I suggest that our law schools should be educating lawyers who are able to meet the justice needs of our society – lawyers who will have sufficient knowledge of their community, sufficient understanding of the systems within which they will operate and sufficient skills to fulfil that most fundamental obligation of lawyers – upholding the rule of law. Finally tonight, I conclude with an acknowledgment of the important role of the Law Faculty's academic staff and of the vital role they will play in this task of educating our future lawyers.

11 *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239

12 See, for example: Sian Elias "Transition, Stability and the New Zealand Legal System" (2004) 10 Otago LR 475 at 475; Geoffrey Palmer "The Bill of Rights fifteen years on" (paper presented to the Ministry of Justice Symposium, Wellington, 10 February 2006) at [39]; and John Priestley "Chipping Away the Judicial Arm?" (2009) 17 Waikato L Rev 1 at 23.

II. Who Are We Teaching? The Need to Achieve a Diverse Student Group

I propose that we need to educate a more diverse cohort of students than we currently are.

The need for diversity in our judiciary and in our profession is often, and correctly, remarked upon as a pressing issue. The most recent "snapshot of the profession" provides us with some information about the makeup of our profession – 7 per cent of practising lawyers are Māori, although Māori make up 16.5 per cent of the general population. Only 3.35 per cent of practising lawyers are Pasifika, as against 8.1 per cent of the population. No attempt is made to gather socio-economic data or data on disability.[13]

Diversity in the profession depends upon diversity in our law schools. Our society needs a law student cohort drawn from a variety of backgrounds – varied ethnically, socio-economically and in terms of life experience. That diversity will enrich all students' learning experience, and ultimately, it will go on to enrich the law. Although some research has been done on diversity within law schools themselves, including by academics at this University,[14] there is no research that is sufficiently recent, accessible, or broad in scope. Without regular, reported research, both quantitative and qualitative, it is impossible to know if law school initiatives targeting diversity are in fact working.

We do have some information, however. Through a series of Official Information Act requests in 2018, the New Zealand Herald discovered that only 6 per cent of students accepted into law schools around the country were from decile 1–3 schools, and only 1 per cent from decile 1. By contrast, 60 per cent of entrants came from decile 8–10 schools.[15] The Herald also reported that the financial assistance offered through scholarships went largely to the students who least need it – high decile schools receive four times as many entry-level scholarships as low-decile schools.[16]

There are obvious limitations to this information, but it does suggest a student cohort which overwhelmingly reflects the comfortable to well-off part of our

13 Louise Brooks and Marianne Burt "Snapshot of the Profession 2022" (2022) 952 LawTalk 6.

14 Lynne Taylor and others *The making of lawyers: Expectations and experiences of first year New Zealand law students* (Ako Aotearoa, University of Canterbury, Christchurch, 2015); Lynne Taylor and others "Ethnicity and engagement in first year New Zealand Law programmes" (2017) 36 Higher Education Research & Development 1047. See also Mele Tupou-Vaitohi & Wiliame Gucake *Fofola na ibe – Improving Pasifika Legal Education in Aotearoa Report on Talanoa Research Findings and Recommendations* (The Borrin Foundation and Victoria University of Wellington, Wellington, December 2022).

15 Kirsty Johnston "Want to be a doctor, lawyer or engineer? Don't grow up poor" *New Zealand Herald* (online ed, Auckland, 15 September 2018).

16 Kirsty Johnston "Half of university scholarships go to wealthiest students while the poorest struggle" *New Zealand Herald* (online ed, Auckland, 6 October 2018).

society. It is they who will go on to be our lawyers, and to be our future judges. Missing are the children who grow up in poor families. Missing is the knowledge they could bring to the law. Knowledge of the vulnerability and disempowerment that are features of life for the poor. Yet no-one would suggest that only the children of the well-off have the intellect and ability to be lawyers.

British theorist Stafford Beer coined the famous phrase: "The purpose of a system is what it does. There is after all no point in claiming that the purpose of a system is to do what it consistently fails to do."[17] We should be interested to know whether we have indeed designed a legal education system that has a tendency to exclude those from lower socioeconomic groupings.

There are projects in the profession aimed at addressing this deficiency – directed to encouraging students from low decile schools to aspire to law, and supporting them into and through law school, through a mix of mentoring, support, and financial aid.

III. What Can the Law Schools Do?

My first suggestion is to regularly collect information on the ethnic makeup of our law schools, and on socio-economic background and disability. If we do not measure this, then it will forever be an issue we talk about but do little to address.

As to addressing the barriers to entry, scholarships and admissions policies will provide some of the answers. But a broader strategy is needed directed at enabling young people, coming from very unequal starting points, to have a fair opportunity to succeed. When I was a student, the fact that courses were a year long, and that there was a plussage system (a system which enables course marks to count only if they help your final exam mark), provided an opportunity for some levelling up. It allowed for the reality that students from comfortable homes start at a very different point than those from poor homes. It allowed for the reality that disadvantage can persist beyond admission to law school, as work and family obligations still have to be juggled with study, meaning course work may suffer. This reality persists today, yet today we have 4-month semesters, and most Universities are abolishing or have abolished plussage.

Those limited opportunities for addressing these disadvantages are disappearing.

The use of technology offers new opportunities for addressing these disadvantages, but also, if care is not taken, to worsen them. Debates around remote

17 Stafford Beer *Diagnosing the System for Organizations* (Wiley, Chichester, United Kingdom, 1985) at 99.

learning are ongoing in law schools throughout the country, and the issues are complex. I only wish to weigh in to suggest that equity should be at the centre of any decision-making – and perhaps to remind you that Tā Āpirana Ngata was a remote learner.

I acknowledge that the issue of the makeup of the student body has not passed law schools by. I expect that all law schools have support networks for Māori and Pasifika students, although I understand these are largely student led. There are also targeted admissions schemes for Māori, Pasifika, disabled and low socio-economic students. These are important initiatives, but I suggest a more systemic approach is needed. I am going to be controversial and argue for the retention or reintroduction of plussage. I also suggest that, at least for the entry subjects into law school, course content could be designed to provide a ramp to understanding, rather than presenting the law as a disaggregated and complex puzzle which only good lawyers will be able to solve.

Just how to design a system which allows young people from disadvantaged backgrounds a fair chance to succeed is of course also a conversation for the wider university – but the law faculty, with the combined powers of reason and persuasion of its members, must surely be well placed to lead it.

IV. What Are We Teaching?

There are many issues to be addressed under this heading – I highlight just a few.

A. Teaching Law and Skills That Will Meet Legal Need

First, I suggest we should be teaching law that will meet the legal needs of our community.

I mentioned as one feature of the legal landscape that the provision of legal services skews to the well-off, and that the needs of the poor are not met. That holds largely true even for middle-income sections of society.[18] I do not know for sure, but I suspect that, when designing courses and course content, law schools in New Zealand do not have regard to the legal needs people have. To be fair, they would be hard pressed to do so because there is very little information collected about that.

18 With the notable exception of the sale and purchase of the family home, and the completion of a will.

Legal need is a dramatically under researched area in New Zealand.[19] Legal academics do not traditionally have much appetite, or skill, for empirical research – tending to favour doctrinal or theoretical scholarship. And, as Professor Michael Taggart noted, with the introduction of Performance Based Research Funding in the 2000s encouraging publication in international journals, there is less scholarship on issues of concern to the local legal community and society.[20] But understanding legal need, and the obstacles to that need being met, are important to the functioning of the system.

Overseas research suggests that most people with legal need do not seek assistance – either because they do not conceptualise their problem as a legal problem, or because they have no expectation that there is a solution available to them.[21] From speaking to community service providers, I know that pressing legal need exists in the areas of rented housing, employment, care and protection, welfare entitlements, immigration and pay day lending. Research undertaken on expressed legal needs by Otago University academics, in association with the Citizens Advice Bureau, adds to this list consumer rights, estates, family law and neighbour disputes.[22]

Some of these, such as rented housing, welfare entitlements, immigration and pay day lending are largely invisible areas of law. Even when they do make their way to a lawyer, resolution of the problem is unlikely to be reported. These are cases more likely to be decided in a tribunal than a court. But law that is taught in law schools overwhelmingly focuses upon the output of Senior Courts.[23]

What law schools can do is ensure that, in the core subjects, students acquire some familiarity with the sources of law in these areas, and ideally, with the core concepts. Law schools can also expose students to the nature of these legal issues and to the value of working in these areas. In other jurisdictions, legal clinics are a popular aspect of legal education. For example, the University of Toronto offers

19 The last Ministry of Justice national survey on unmet legal needs was in 2006 (plans are underway to run a new survey in 2023 in conjunction with the Ministry of Business, Innovation and Employment). Community Law Centres and Citizens Advice Bureaus record some of this information themselves, but the recent research project by University of Otago Professors on expressed legal needs has been the first attempt to bring these findings into the world of academia: Bridget Toy-Cronin and Kayla Stewart *Expressed Legal Need in Aotearoa: From Problems to Solutions* (Civil Justice Centre, University of Otago, Dunedin, 2022).

20 Michael Taggart "Some Impacts of PBRF on Legal Education" in Claudia Geiringer and Dean R Knight (eds) *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University, Wellington, 2008) 250 at 259.

21 Deborah Rhode "Access to Justice: An Agenda for Legal Education and Research" (2013) 62 Journal of Online Legal Education 531.

22 Toy-Cronin and Stewart, above n 19.

23 Although I note that Victoria Law School has in the last few years twice taught a course on Welfare Law, and in 2017 this Law School taught a course on Landlord and Tenant Law. University of Auckland has taught courses in Social Welfare Law, Policy and Action, and also Housing Law and Policy.

more than 20 clinal legal education papers per semester, with content ranging from housing and income security to advocating for injured workers.

Legal clinics are an idea that has come and gone at our law schools over the years. I see them as an important aspect of legal education, and moreover as supportive of a good student experience at law school. They have the benefit of creating the connection between law as taught and as practised, and of exposing students to the nature of legal need in communities and the human faces of that need.

I am pleased to see that students at Canterbury are given the opportunity to work at Community Law Canterbury and at the free law clinic at the Canterbury Migrants Centre. I also understand that after the 2011 earthquakes, Canterbury students volunteered to assist the local community with their legal issues such as insurance policies and employment rights.[24]

Initiatives such as this are important because they make visible areas of legal need, and of law that would otherwise be invisible to law students. But I make one observation. It is important that "legal clinic" engagements such as these take place with teaching structure and resource around them. That seems obvious if this is to be part of the education experience. Certainly, it is necessary since I know that lawyers who work in Community Law Centres are typically pressed for time and little able to take on that additional teaching role.

B. Encouraging Systems Thinking

The next area I suggest is worthy of focus is the systems operating within or touching upon our legal system. Law students are not taught about systems, nor to think systemically. I have already mentioned the system that produces our law students. Many of the issues I have talked about in relation to legal need are also systemic. The obstacles that lie in the way of access to justice are systemic – the form our statutes take, the dispute resolution pathways they create, the information that is available to help people access their rights, the processes and costs of courts and tribunals, the availability of legal advice and representation. These issues and their interplay are worthy focus of systemic research and study.

Nevertheless, with some truly notable exceptions, this is an area that is little studied in our law schools, and little researched in our country.[25] But educating law students about systemic issues bearing upon access to justice in this broad sense

24 Kurt Bayer "Students volunteering with post-quake law cases" *New Zealand Herald* (online ed, Auckland, 24 October 2012).

25 Notable exceptions include Acclaim Otago (Inc) *Understanding the Problem: An analysis of ACC appeals processes to identify barriers to access to justice for injured New Zealanders* (July 2015); and Bridgette Toy-Cronin and Kayla Stewart, above n 19.

would be a significant contribution to an effective legal profession – effective in undertaking its core role of upholding the rule of law.

Perhaps it would also enhance the degree experience for students, making explicit the social good that law is. As to this, I note the initial findings of a longitudinal study of law students in 2015 by lecturers from this University – Professors Lynne Taylor, Natalie Baird, John Caldwell, Debra Wilson, and Dean Ursula Cheer – published as a project for Ako Aotearoa under the title "The Making of Lawyers: Expectations and Experiences of First Year New Zealand Law Students".[26] This research included information about students' backgrounds, and aspirations. One question students were asked was why they wanted to complete a law degree. There were 673 total responses.

The three highest preferences selected were, in descending order: "I am passionate about justice and law", "I want to make a difference" and "I want to help people".

Constructing courses in access to justice is not untrodden territory. A short review of overseas universities reveals that many offer courses in access to justice.[27] These courses typically examine the fundamentals of access to justice from a theoretical and practical perspective including consideration of self-represented litigants, pro bono work and the increasingly prominent issue of "cause lawyering".

Perhaps the most interesting are two courses being run by the University of New South Wales. In one, "Designing technology solutions for access to justice", students are taught how to design and build applications to facilitate access to justice, and are given an opportunity to use those skills by building a project to support a not-for-profit organisation. The other, "Legal Aid and global justice lawyering" undertakes a comparative analysis of strategic legal responses to communities' legal needs.

In her article "What the Access to Justice Crisis Means for Legal Education", Kathryne Young describes the challenge for legal education in this way:[28]

> … we need to teach law students as much as we can about the ecosystem of justiciable problems, where lawyers fit into this ecosystem, when lawyers are and are not useful to everyday people, and how to partner with other actors in the ecosystem as opposed to training them to focus solely on the narrow legal problem in front of them.

26 Lynne Taylor and others "The Making of Lawyers: Expectations and Experiences of First Year New Zealand Law Students" (2015) 23 Wai Rev 112.

27 For example, the Universities of Stanford, Berkley, New South Wales and the University College of London.

28 Kathryne Young "What the Access to Justice Crisis Means for Legal Education" (2021) 11 UC Irvine L Rev 811 at 831.

This is a good framing of the systems issue. Lawyers have always needed to work with others in the system to be effective. Yet that is not something we teach. Because of the trends in our legal system, referred to earlier, that challenge will be considerably greater for future lawyers than it is today. There is a contribution practising lawyers can make here. They understand those systems. They see how the law does its work in practice.

Systems thinking will also be necessary as the profession finds its critical role in a society where many will have ready access to legal information and even to some form of advice and documentation generated by digital systems. We have already had a glimpse of this future, with the recent proliferation of large language models such as ChatGPT. It will also be necessary as we reconceptualise a legal system which increasingly will not be conducted on a face-to-face basis, but rather through AVL and computer screens. We need as a profession, an academy and a judiciary, to be actively thinking about what all this means for our model of justice, and what change we should be advocating for – and that which we should be resisting.

Technology has enormous potential to increase that percentage of our population with access to legal advice, to legal representation and to the courts and tribunals. It has the potential to generate new business models for lawyers. But it also has potential to be undermining of critical aspects of the legal system.

In the judiciary we are working hard to think through the implications of digital evolution for the administration of justice. Recently we published a Digital Strategy for the Courts.[29] Technological developments will also change the way that law is taught – perhaps consideration should be given to a digital strategy for legal education.

Perhaps also, much of what I have said to date points in the direction of a cross-disciplinary approach to the study of law. I have highlighted gaps in research into legal need, but also gaps in our knowledge about the makeup of our profession, and our law schools. But the gaps do not end there. We do not know what a good law is, because we do not teach lawyers how to measure things like that. Sociology students are taught more about how the law operates in society than our law students are. Political science students can learn more about the democratic theory that underpins judicial review than can our law students. Sir Geoffrey Palmer observes that New Zealand has been slow to refine our legal institutions using evidence, because of the absence of that evidence.[30]

29 Chief Justice of New Zealand | Te Tumu Whakawā o Aotearoa *Digital Strategy for Courts and Tribunals* (Te Tari Toko i te Tumu Whakawā | The Office of the Chief Justice, Wellington, March 2023).

30 Geoffrey Palmer "Some Thoughts on Legal Education" (2017) 48 VUWLR 209.

He suggests a need for subjects such as statistical and survey-based research to become subjects in the curriculum. Perhaps our law students would benefit from courses taught not just by lawyers but also by statisticians, economists, political scientists and software engineers. None of this would be a world first – just such a cross-disciplinary approach is taken in other jurisdictions.

V. Leadership and Engaged Legal Scholarship

The final part of this lecture tonight is addressed to the teaching staff and academics of this institution.

First, I would like to acknowledge the role that the legal academy plays in speaking up on critical issues when it is necessary to do so. This contribution you make is to be seen against the background of a funding model which seems to provide no incentive (and perhaps to act as a disincentive) for the study of New Zealand based topics.

And against the background of the heavy teaching and administrative load carried by legal academics.

The importance of the legal academy was apparent during the pandemic. Public law academics did valuable work subjecting government action to scrutiny and giving shape and substance to the constitutional and public law issues in play in that response. We also saw the value of this contribution in relation to the recent Three Waters entrenchment debate, when academics from several universities took the unusual step of issuing an open letter raising concerns about the inclusion of an entrenchment provision in ordinary legislation.[31] This is a model of engaged legal scholarship which ensures the law is brought to bear upon issues in society where the law should have something to say.

One of the characteristics of universities, enshrined in legislation, is that "they accept a role as critic and conscience of society".[32] In New Zealand, with its culture of "notorious indifference" to our constitutional arrangements, this is a vital service that this Law School and the others around New Zealand provide. We are a small nation, tucked away at the bottom of the world, and anchored in the Pacific. Without the scholarship of our own academy, the forum of public debate on matters of societal and constitutional moment may fall silent.

31 Michael Neilson "Three Waters: Lawyers' constitutional concerns over entrenched privatisation provision: 'dangerous precedent'" *New Zealand Herald* (online ed, Auckland, 28 November 2022).

32 Education and Training Act 2020, s 268(2)(d)(E).

Secondly, and to conclude, I acknowledge that the issues I have raised in this lecture and the ideas I have tentatively proposed suggest new areas of teaching, and at least some recalibration of existing teaching. I acknowledge there are resource constraints and that parts of the current curriculum are required teaching. Nevertheless, there are challenges to the present model that must be met. There is work to be done, hard choices to be made. But then, the task of legal education has always been difficult. Compromises will have to be made and perfection is not possible. But the stakes are high, and so I say, keep running up that hill.

TIKANGA
HE KOROWAI TĀWHARAU‡

Christian Whata *

Justice Whata is from Te Arawa, with primary affiliation to Ngāti Pikiao, Ngāti Tamateatūtahi – Kawiti and Ngāti Whakaue. He obtained an LLB (Hons) from Auckland University in 1994 and an LLM (First Class) from Cambridge University in 1996. He then practised law, specialising in environmental, Māori and public law litigation. He was appointed in 2011 as a High Court judge in Christchurch, residing there from 2012, before returning to Auckland in 2015. Justice Whata is also a member of the faculty of Te Kura Kaiwhakawā | Institute of Judicial Studies responsible for the Tikanga Programme. In 2021 Justice Whata was appointed to Te Aka Matua o te Ture : the Law Commission. While there he helped complete the Study Paper 24, He Poutama: Tikanga. He returned full time to the High Court in September 2023.

I. Introduction

> The Māori philosophy of law, te maramatanga o ngā tikanga, was sourced in the beginning. From the kete of Tane it was handed down through precedent and practice of ancestors. Like an intricate taniko pattern, it was interwoven with the reality of kinship relations and the ideal of balance for those within such relationships. It provided sanctions against the commission of hara or wrongs which upset that balance, and it established rules for negotiation and agreement between whanau, hapu and iwi. It formulated a clear set of rights which … individuals could exercise in the context of their responsibility to

‡ A sheltering cloak.

* High Court Judge. This paper is inspired by the speech I gave this year at the ALAA conference. In that speech, I spoke at length about the writing of a Law Commission paper on which there are many diverse and divergent views. The process undergone gave me an insight into the rigours of academic study and the brutality of academic peer review. I retreat to the relative safety of my judicial bunker secure in the knowledge that our legal academic community are rigorously maintaining the integrity of legal discourse and patrolling the boundaries of the law.

> the collective. It also laid down clear procedures for the mediation of disputes and for adaption for new and different circumstances.
>
> Moana Jackson[1]

I commence with this kōrero to acknowledge first, the passing last year of one of our great tikanga jurists, and second to make clear that what I say here draws heavily on the writings of others, especially the doctoral work of the late Associate Professor Nin Tomas.[2]

Moreover, I make no claim to being an academic or that this paper has any pretensions to academic credibility. Rather, the thoughts written here, while drawing heavily on my work both as a Judge and Law Commissioner, are simply the personal reflections tentatively voiced at the 2023 annual ALAA conference. They predate the release of *He Poutama*, study paper from Te Aka Matua of Te Ture | Law Commission, a must read for those seeking an insight into tikanga as a system of norms.[3]

II. Preface

Tikanga refers, most simply, to the right or correct way of doing things.[4] It comprises, however, a multi-layered and multi-dimensional system of ethics and law. By law, I simply mean a body of shared norms, principles, values, processes

1 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 Australia & New Zealand, Auckland, 1992).

2 In this regard, I also wish to acknowledge the work of the late Dr Nin Tomas, whose 2006 doctoral thesis, "Key concepts of Tikanga Māori (Māori Custom Law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present" (PhD thesis, University of Auckland, 2006), provides a detailed account of tikanga in jural terms. Similarly, I have been greatly assisted by Judge Caren Fox and her analysis in "Ko te mana te utu: Narratives of sovereignty, law, and tribal citizenship in the Pōtikirua ki te Toka-a-Taiau District" (PhD thesis, Te Whare Wānanga o Awanuiārangi, 2023).

3 In this regard, I must also acknowledge the assistance and work of Wiremu Doherty, Tā Hirini Moko Mead and Tā Pou Temara of Te Whare Wananga o Awanuiārangi, who provided in depth explanation of the tikanga concepts explored in this paper and in Te Aka Matua o te Tur | Law Commission *He Poutama* (NZLC SP24, 2023) [*He Poutama*]. Their paper, "Tikanga" presented to the Law Commission, Te Whare Wananga o Awanuiārangi 2023, is attached as Appendix 1 to *He Poutama*.

4 Bishop Manuhuia Bennett "Te Pu Wananga Transcript No.2" (seminar with Bishop Manuhuia Bennett, Bishop Whakahuihui Vercoe and Te Ariki Morehu, 23 March 2000, Te Matahauariki Research Institute, University of Waikato). See also Richard Benton, Alex Frame and Paul Meredith *Te Mātāpuenga: A compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 431.

and rules that govern relationships.[5] In this paper, I offer an account of tikanga as a system of norms and law. It is necessarily idealised and involves an attempt at explaining core tikanga in neutral terms. However, this analysis must be treated with caution as any attempt to explain mātauranga Māori (Māori knowledge) by reference to the language of general knowledge involves reconstruction in non-Māori terms.[6]

By way of overview, I begin with some context, including my parameters for the analysis and a brief account of tikanga engagement with State law. The object here is twofold: first to explain why I have embarked on a theoretical account of tikanga in the way I have, and second to underscore that at this time in our legal history, a clear grasp of what tikanga is key to its maintenance and integrity. This then serves as an introduction to a major part of this speech, the objective of which is to provide an explanation of the framework of tikanga as a normative and legal system.

Overall, I posit that tikanga as a system of norms and law includes four main parts: structural, prescriptive and relational tikanga and methods (including processes). The structural and prescriptive tikanga set the normative frame for tikanga as lived. The relational tikanga are the primary means by which relationships are organised. These are the norms or values that generate an expected societal response if engaged or breached. The methods refer to the core tikanga processes and techniques used to avoid, mediate, and resolve disputes. As it is with legal systems generally, the interaction between these parts is fluid, complex and context specific. For this reason, this account provides a theoretical framework only for engagement with tikanga. Any comprehensive understanding of tikanga must involve close examination of tikanga as lived.

5 As Nicole Roughan explains in Nicole Roughan "Honing 'Our Jurisprudence' to Respond to Interacting Legalities in Aotearoa New Zealand" (2022) NZL Rev 3, 299–330:
Despite their differences, both Hart's and Fuller's accounts operate versions of a widely held view that treats law as offering a particular means or mode of organising persons and power in societies through rules that are applied and imposed collectively and institutionally in a community, rather than through mere force and violence between persons in their private capacities. Law, as an order of rules, institutions, and officials, thus differs from both the demands made by the gunman to his victim (as Hart explains), and the ineffective and idiosyncratic dictates of Fuller's King Rex, who tries but fails to make law. Law is neither rule by iniquitous nor well-meaning unconstrained power.

6 For an account of the relationship between generic knowledge and mātauranga Māori see *He Poutamai*, above n 4, at 7ff, Appendix 1. See also Arnu Turvey "Te Ao Māori in a 'Sympathetic' Legal Regime: The Use of Māori Concepts in Legislation" (2009) 40(2) VUWLR 531; and Catherine Ions Magallanes "The Use of Tangata Whenua and Mana Whenua in New Zealand Legislation: Attempts at Cultural Recognition" (2011) 42(2) VUWLR 299.

III. PART I

A. Parameters

I now lay down some of the parameters for this account of tikanga. As my first parameter, I settle on a list of core principles as providing the basic frame for tikanga, namely whakapapa, whanaungatanga, utu, ea, mana, tapu and noa, together with a range of associated obligations, processes and methods.

It is important to note that this "tikanga" list is not fixed. In its 2001 Study paper, Te Aka Matua o te Ture | The Law Commission (the Commission) adopted the five core values identified by Joe Williams (now Tā Justice Joseph Williams) and Professor David Williams in their paper, *He aha te tikanga Māori,* namely: whanaungatanga, tapu, kaitiakitanga, mana and utu.[7] Tā Eddie Durie also identified aroha, mana tupuna, wairua, and manaakitanga as additional conceptual regulators of Māori law.[8] Dame Joan Metge identified six main groups of core values, aroha – whanaungatanga, taha wairua and taha tinana, tapu and noa, ora and aituā, tika and mana – with whakapapa, mana tupuna, mana atua, mana tangata, mana whenua, mana tāne and mana wahine, nga mahi-a-ngakau, obligations arising from aroha and or mana, and utu or reciprocity.[9] In recent reports, the Law Commission has also referred to a broader set of core tikanga values and concepts, including hara, aroha and manaakitanga.[10]

Other major research projects refer to most of these values, as well as concepts of muru, mana moana and ahi kā.[11] Doherty, Mead and Temara, in their paper for the Law Commission, also refer to kotahitanga.[12] Finally, a major review of tikanga evidence in legal proceedings undertaken by Natalie Coates and Horiana Irwin-Easthope identified a comparable list of core tikanga values.[13]

7 Joseph Williams *He aha te tikanga Māori?* (unpublished draft paper for Law Commission, 1998) <lawcom.govt.nz>; and David Williams *He aha te tikanga Māori* (unpublished revised draft as at 10 November 1998 of Joseph Williams' paper of the same name for the Law Commission, 1998, with minor updates) <lawcom.govt.nz>.

8 Ta Edward Taihakurei Durie *Custom Law* (unpublished draft paper for Law Commission, Treaty Research Series Treaty of Waitangi Research Unit, 1994).

9 See Joan Metge *Commentary on Judge Durie's "Custom Law"* (unpublished paper for the Law Commission, 1996) <lawcom.govt.nz> at 3.2.

10 Law Commission *Review of Succession Law* (NZLC R145, 2021).

11 *He Hinatore ki te Ao Māori: A glimpse into the Māori world* (Ministry of Justice, Wellington, 2001); Tomas above n 2; and, see Fox, above n 2.

12 *He Poutama*, above n 4, at 59, Appendix 1.

13 Natalie Coates and Horiana Irwin-Easthope "Kei raro i ngā tarutaru, ko ngā tuhinga o ngā tupuna | Beneath the herbs and plants are the writings of the ancestors: tikanga as expressed in evidence in legal proceedings" in *He Poutama*, above n 4, at Appendix 2.

With the benefit of this voluminous kōrero and writing about core tikanga,[14] I consider the tikanga concepts and methods described in this section are sufficiently representative of core tikanga Māori. But for a deeper understanding of tikanga, close study of the tikanga as it is applied at an iwi and hapū level must be undertaken. This is an entry-level guide only.

My second parameter is to adopt a conceptual approach based on the abovementioned research rather than a social anthropological or linguistic approach. My simple reason is that, first, I am only legally trained and, moreover, these alternative approaches are well trodden.

My third parameter is to focus on tikanga as law and, in this sense, in terms of jural relations. I acknowledge the risks of such an approach, the most obvious being the mischaracterisation of tikanga using jural language. But, like Dr Nin Tomas, I consider that it is vital to maintenance of the integrity of tikanga that we fully grasp its jural coherency.

Finally, I have endeavoured to adopt an approach that drives from within te Ao Māori. This inevitably requires that I start my analysis referring to the narratives that underpin the Māori world view. For those of us trained into thinking, like me, that the law is essentially secular, positivist and morally neutral, this is confronting. It tests our legal "sensibilities". But that learned preference reflects systemic bias that is not only itself based on an ideology, including the ideal of rule of law, but seeks to deny the existence of an alternative normative frameworks that does not reflect our complex society.

B. Tikanga and State Law today

Before I commence my account of tikanga as a framework of norms and law, it is also important to understand that tikanga can now be found woven into State law in multiple locations. This is addressed in detail in the *He Poutama* paper so I will not dwell on it here. But expressions of tikanga can be found engaged in, among other areas, trust, public, environmental, civil, family, and criminal law. Our apex Court also unanimously expressed the view that tikanga has been and will continue to be recognised in the development of the common law of Aotearoa New Zealand in cases where it is relevant,[15] and forms part of New Zealand law as a result of being incorporated into statutes and regulation.[16] A majority in the same case described

14 Including Benton, Frame and Meredith, above n 4, at 431.

15 *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [108]–[l 10] per Glazebrook J; at [171]–[174] per Winkelmann CJ; at [257]–[259] per Williams J; and at [279] per O'Regan and Arnold JJ.

16 At [98]–[102] per Glazebrook J; at [175]–[l 76] per Winkelmann CJ; at [257] per Williams J; and at [280] per O'Regan and Arnold JJ.

tikanga as the first law of New Zealand,[17] and cautioned that the courts must take care not to impair the operation of tikanga as a system of law and custom in its own right.[18]

Against this background, I turn to provide an account of tikanga as a system of norms and law.

IV. PART II

A. Fundamental tikanga

Tikanga as a system of norms and law commences at its apex with a combination of structural and substantive norms shared across iwi and hapū and by some non-iwi-based Māori rōpu. They provide the frame for a body of shared tikanga principles, values, processes and rules as lived. However, the way these tikanga are expressed, debated, resolved and practiced vary between iwi and hapū. As I have said, it is at this "lived" level that the detailed features of tikanga as law are located. I return to this important fact at the conclusion of this paper.

I consider, like all law, tikanga generally mirrors the core beliefs, norms and values of the society to which it relates.[19] In te ao Māori (the Māori world), core or fundamental tikanga values find expression in shared creation and post narratives that describe the origin of all things.[20] There is not time to narrate them here, but they are precedent writ large. They speak of the beginning of life as we know it, and of the great upheaval and reformation associated with it. Within these narratives we find a conception of existence that originates with our creators or atua, and is premised on multiple layers of consciousness, both physical and metaphysical. Within this conception, all things are connected to the creators and to each other through wairua and through wairua the essence of life or mauri is received and through mauri that connection to atua is reinforced.

This significance of mauri is explained by Makereti Papakura:[21]

17 At [22]

18 At [180] per Winkelmann CJ.

19 For a comprehensive account of the relationship between law and values, see Brian Z Tamanaha *A General Jurisprudence of Law and Society* (Oxford University Press, Oxford, 2001) at 5. I acknowledge that Tamanaha does not agree with this "mirror" proposition, preferring instead an explanation of law as simply reflecting the dominant social and cultural norms.

20 Often referred to as myth, but this descriptor belies both the depth, breadth, number and complexity of these narratives and also their function as repositories of knowledge, including tikanga.

21 Makereti Papakura *The Old Time Māori* (Victor Gollancz, London, 1938) at 181; and see Tomas , above n 2, at 86.

> Māori believed that nothing in this earth existed without its mauri and that if this were violated in any way, its physical foundation was open to peril or exposed to great risk. If the mauri of the forest were violated, the trees and plants would not be able to produce in abundance, but fruits would be scarce, and there would be few birds. With the mauri ora of man, if this is violated in any way, the thought is that with the loss of spiritual mauri, he is left without protection.

This connection is mapped by whakapapa, sometimes described as a web that joins and locates all things, including knowledge, both in time and space. This connection is sustained by whanaungatanga, often referred to as kinship, but best captured as the glue that binds. Through that whakapapa and whanaungatanga connection, all things have mana or power and associated fundamental responsibility to protect mauri, and means that all things are inherently tapu, that is they possess inherent worth, sometimes referred to as sacrality. In this way, tapu signifies restriction in relation to that entity or thing. Thus, mana and tapu are major regulators of relationships in te ao Māori. I will develop these ideas below.

Two further tikanga concepts are reflected in the creation and post-creation narratives, and the upheaval referred to in those narratives, namely the concepts of **utu** (reciprocity) and **ea** (balance). These concepts make the demand that every action that upsets the balance between relationships must be remedied through reciprocal action so as to restore balance.

Finally, to complete this account of tikanga concepts, I refer to the concept of noa. This concept is intertwined with the concept of tapu – where tapu refers to the inherent sacrality of a thing, and associated restriction, **noa** refers to the absence of restriction. It is represented in the creation narratives by the actions of Tūmatauenga, who, in claiming utu for the failure of his siblings to discharge their obligations, removed the tapu of their offspring, and in so doing made them noa, and available for consumption by humankind.

This is not a complete list, and other concepts may be used to explain or clarify these tikanga.[22] But mauri, mana, tapu, noa, whakapapa, whanaungatanga, utu, and ea appear to be universally accepted as tikanga concepts that frame all relationships within te ao Māori.[23]

22 For example, wairuatanga is sometimes referred to in terms of ira atua (see Fox, above n 2) and the concept hau is allied to, but not the same as mauri. See Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (2nd ed, Huia Publishers, Wellington, 2016) at 62.

23 Coates and Irwin-Easthope, above n 13, at 2.4

B. Relational tikanga

I now turn to focus on what I consider to be the relational tikanga; that is the tikanga that govern relationships. Before doing so, I place them in their wider normative context. Whakapapa and whanaungatanga are primarily structural norms, in that the entirety of te ao Māori is structured by reference to interrelatedness of all things through whakapapa and whanaungatanga. Mauri, utu and ea are prescriptive tikanga, in that they make prescriptive demands for their maintenance. Mana, tapu and noa are within this wider matrix, relational tikanga, in that relationships are largely organised by reference to them.

1. Jural relations

I have found it useful for the purpose of assisting comprehension, to frame mana, tapu and noa may in terms of jural concepts or what Hohfeld called powers, rights, duties, privileges, liabilities and immunities – and corresponding jural relationships.[24] While not voiced in these terms by pūkenga, life in te ao Māori could be said to be ordered by reference to a rich and complex matrix of jural relationships. However, as mentioned, the form and substantive content of these relationships is shaped by the operation of the tikanga of whakapapa, whanaungatanga, mauri, utu and ea. Taken together, these norms speak to kotahitanga (collectivity and connectedness).[25] Therefore, assumptions about the norms governing relationships between individuals (including corporates) within a broader rubric premised on individualised notions of alienable rights are largely foreign to te ao Māori. When speaking then of core tikanga relationship regulators and jural relations that fundamental difference must be considered.

Moreover, while use of jural concepts assists comprehension, I wish to emphasise that there can be no exact equivalence between tikanga and common law legal concepts,[26] and orthodox Western relational analysis can be inapposite when dealing with multi-dimensional and multi-layered whakapapa and

24 Wesley Hohfeld "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913–1914) 23 Yale LJ 16. They also refer to relations that generate an expected response from societal agents (for example, the Courts, the Police and so on). See Arthur Corbin "Jural relations and their classification" 30 Yale LJ 226 at 227.

25 *He Poutama*, above n 4, at 59, Appendix 1.

26 Turvey, above n 6. See also Magallanes, above n 6. See also Mihiata Pirini and Anna High "Dignity and Mana in the 'Third Law' of Aotearoa New Zealand" (28 September 2021) New Zealand Universities Law Review <https//papers.ssrn.com>.

whanaungatanga-based relations.[27] In addition, as legal history shows, the failure to correctly explain relational tikanga runs the risk of distortion, as tikanga are wrongly categorised and assimilated to fit essentially non-Māori sub-classification.[28] The conversion of the tikanga-based relationship to land into territorial rights is the classic illustration of such mis-classification and assimilation.

With that important kōrero in mind, I consider that mana, tapu, and noa are the main basic regulators of relationships in tikanga Māori and provide a useful starting point when framing engagement with tikanga. In this context, I am referring to these concepts in terms of their jural classificatory sense rather than their full substantive meaning. Classification is important to mitigate the risk of mis-categorisation and assimilation mentioned above. However, as with all law, aggregates of jural relationships may be engaged simultaneously in a particular fact situation. Therefore, these concepts should be viewed as a starting point rather than an end point for engagement.

2. Mana

I start with mana. Mana in its generic meaning broadly aligns with its jural meaning, which is power and authority.[29] More specifically, mana here refers to the power or authority to affect status and existing relationships. Forms of mana may also be described as a "right" to do something, correlating to a duty to give effect to that right.[30] But mana, as power or right, cannot be understood without reference to the source of that power or right and the responsibilities intrinsically attached to it. This important point is aptly made by Tamati Kruger when referring to the allied concept of take (*ta-ke*), which refers to a cause giving rise to responsibility. As Kruger explains in relation to mana whenua:[31]

27 While Hohfeld's classic statement of relational regulators or fundamental jural relations as correlatives (rights-duties, privilege-no privilege, power-liability, immunity-no liability) and concept of multital rights (which refer to rights of and individual or group that correlate to duties of an indefinite class of persons) may be applicable in a formulaic sense, it has doubtful descriptive or normative usefulness in terms the multi-dimensional, multi-layered nature of the jural relationships in te ao Māori. Wesley Hohfeld "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913–1914) 23 Yale LJ 16.

28 By sub-classification, I mean into sub-classes of rights and interest, including proprietary rights and interests. For examples of proprietary rights' sub-classification, see *King v Morison* [1950] NZLR 247 (SC); and *In re the Bed of the Wanganui River* [1955] NZLR 419 (CA).

29 Benton, Frame and Meredith, above n 4, at 154.

30 As noted above, the concept "right" is problematic in te ao Māori and care should be taken when using it to describe a relationship between people or between people and the environment. As Tamati Kruger also explains, the concept of right does not translate well into Māori culture, Vivian Tamati Kruger Statement of Evidence-in-chief, 2 June 2020 at [102], as cited in Natalie Coates and Horiana Irwin-Easthope "Kei raro i ngā tarutaru, ko ngā tuhinga o ngā tupuna / Beneath the herbs and plants are the writings of the ancestors: tikanga as expressed in evidence in legal proceedings (paper prepared for Te Aka Matua o te Ture / Law Commission, 2023) – Appendix 2 at [4.200].

31 At [97]–[98].

> While the connection between Māori and the land at a spiritual level is enduring, the reality is there are different ways in which the relationship with particular areas come about. These are referred to as take, which means "the basis of". There are five different take which allow for a closer analysis of the justification of a particular group's responsibilities vis-vis the land:
>
> These are:
>
> *Take kitea:* responsibilities on the basis of discovering of the land.
>
> *Take tipuna:* responsibilities on the basis of heritage or whakapapa.
>
> *Take raupatu:* responsibilities on the basis of conquest or war.
>
> *Take tuku iho:* responsibilities on the basis of gift, including through marriage.
>
> *Take hoko:* responsibilities arising from an exchange, though not apurchase in a Pakeha sense.

The nature of the responsibilities will vary according to the nature of the mana. Common examples of these responsibilities include obligations of aroha, manaakitanga and kaitiakitanga, which speak to obligations to care and guardianship. Thus, mana in its jural meaning is best expressed as a conditional power or right, having regard to its source or take and the inherent responsibilities that attach to it. I have not attempted to deconstruct this notion of responsibility in terms of rights and duties. While theoretically available,[32] expressing these responsibilities as duties with corresponding rights is too simplistic or at least not sufficiently nuanced to reflect the multi-dimensional character of mana.[33] Rather, these responsibilities or obligations are best described simply as associated relational norms.

3. Noa

Noa in its common meaning also closely aligns with its jural meaning, which is free of restrictions. This concept is relatively undernourished in kōrero and

32 Hohfeld's multital right might stretch to include, say, a right of manuhiri to manaakitanga correlating to a duty on the mana whenua to manaaki them, but that would be an odd way to describe the relationship in te ao Māori.

33 Trusteeship may capture the essence of say the multidimensional character of mana wheua, but that trusteeship would have to involve at times conflicting obligations to the whenua, tipuna, present and future generations, as well as to manuhiri or another iwi.

academic writing. But freedom from restriction plays a vital role in Māori social order. As Leonie Pihama references:[34]

> The influence and power of noa is very significant to the physical wellbeing of people by freeing them from any quality or condition that make them subject to spiritual and/ or ceremonial restriction and influences. The concept of noa is usually associated with warm, benevolent, life-giving, constructive influences including ceremonial purification.

The significance of noa in classificatory terms is shown by the attainment of noa by manuhiri or visitors to a marae. Manuhiri are only free to engage with tangata whenua after having achieved noa status via the pōwhiri process.[35] Also, within hapū and iwi, certain actions could be only undertaken if a state of noa pertains.

4. Tapu

As I have already noted, tapu generally refers to the status of a person or object and associated restriction on engagement with that person or object unless the appropriate processes had been followed. Tā Hirini Moko Mead states:[36]

> Tapu is pervasive and touches all attributes. It is like a personal force field that can be felt and sensed by others. It is the sacred life force which supports the mauri (spark of life), another important attribute of a person. It reflects the state of the whole person. In fact, life can be viewed as protecting one's personal tapu and in so doing one is looking after one's physical, social, psychological and spiritual wellbeing.

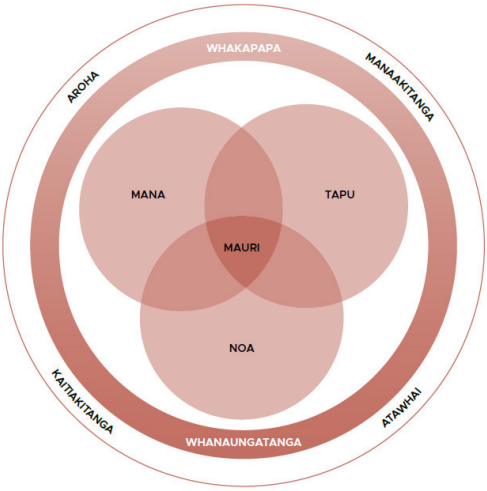
In the present context, tapu has an expanded meaning to refer, not only to that which is inherently worthy, but also to something that is inherently dangerous. As the authors of *He Hinatore ki te ao Māori* also observe:[37]

> Tapu acted as a protective mechanism for both people and natural resources. Making something or someone tapu could either protect the environment against interference from people or protect people from possible dangers they may encounter.

34 Leonie Pihama brief-of-evidence for Waitangi Tribunal *Mana Wahine Kaupapa Inquiry* (Wai 2700, 2021) A19, citing Rangimarie Rose Pere.
35 Mead, above n 22, at 127.
36 At 51.
37 *He Hinatore ki te Ao Māori*, above n 11, at 65.

A corollary of this, in basic relational terms, tapu (very broadly) corresponds a right to protection from harm, an immunity from interference and well as to restriction to protect others from harm.

The following diagram endeavours to illustrate the relationship between the key tikanga norms in play:



Each of the circles denotes the latent potential mana, tapu and noa of all things, all encased within whakapapa and whanaungatanga and the associated obligations to others.

C. Tikanga methods and processes

I turn now from my account of what I have called relational tikanga, to what I consider to be key tikanga methods and processes associated either with avoidance of disputes or dispute resolution.

To my mind, any functioning legal system relies on methods and processes to give effect to legal principles. Tikanga, like law, places a premium on methods, including methods for identifying rights and obligations and, in many ways, places greater focus on process than State law. It is not possible to address in any publication of moderate length a full account of tikanga methods and processes. The discussion here examines only some common methods for the management of relationships, including in times of dispute.

I have already referred to the concept of whakapapa as a structural tikanga concept, as referring to layers of connection. It is a concept that also underpins reasoning, and the rudimentary but important idea that the logical sequence of events must be understood in order to identify the source of rights and obligations.

I have already referred to the notion take (ta-ke) or source. Identifying the take of mana, tapu or noa is a key step in resolving competing claims in tikanga Māori. The proper take of say a power, right or duty for example, will define the content of an associated claim and corresponding remedy. Drawing on Tamati Kruger's use of take (ta-ke), a claim based on take hoko to occupy land is treated differently from the same claim based on take tupuna. Take tipuna identifies both a superior claim and weightier responsibilities in respect of the associated whenua. Take is also commonly used as a reference to the cause of a claim.[38] My use of the concept take includes this characterisation.

Kawa is also a very important tikanga process for managing relationships. Indeed, as Tā Hirini Mead and Tā Pou Temara describe it, kawa is tikanga wrapped in tapu.[39] In this context, it refers to the processes for maintaining or restoring mana and tapu or, where necessary, attaining noa for a particular purpose. These kawa vary according to context, so for example, different karakia may be required to lift tapu depending on the nature of the tapu or action to be performed.[40] It may also involve detailed and carefully orchestrated steps to be taken to achieve noa, as exemplified by pōwhiri processes.

As noted, utu is a prescriptive principle corresponding to an obligation by a wrongdoer to make good the harm done so as to restore mana, both for the wrongdoer and the victim. One of the techniques to achieve utu and thus ea was muru. Muru has been described as a form of restorative justice. It had a set protocol, including a kōrero process from which a judgment would be made. This process involved ventilation of an accusation and investigation. It involved compensation for both intentional and unintentional harm.[41] It also involved denunciation and was most effective when acknowledged by the associated communities. However, it was mana-enhancing for both transgressor and victim – it restored the mana of both.[42]

In an earlier version of this paper, I had included a step-by-step guide for engagement of these basic tikanga and relational concepts, as well as the tikanga methods and processes. However, a far better guide has now been published in *He Poutama*.

38 Mead, above n 22.
39 Hui of 30 June 2022. Kawa is not a term of universal usage. But the concept of tikanga processes to mediate between mana, tapu and noa is universal.
40 See, for example, Mead, above n 22, at 77.
41 At 166–176.
42 *He Hinatore ki te Ao Māori*, above n 11, at 77. See also Mead, above n 22, at 161.

D. Tikanga as Lived

Before I conclude, I want to return a point I made in opening. Tikanga is lived, it is practiced, it evolves according to circumstance. While, in my view, an action that does not accord with the basic tikanga principles noted above is not likely to be tika, tikanga, as lived, reflects the many and finer details and demands of life in te ao Māori, including the basic demands of survival. The tikanga must then span the big public tikanga and the small mundane tikanga.[43] Tikanga must therefore be real and not abstract and must be sufficiently elastic to evolve over time in their application to accommodate changing circumstances.

The potential breadth, depth and detailed form of tikanga is aptly illustrated by the account given by Rapata Wahawaha of the 28 forms of take whenua, or land rights.[44] Tikanga is also naturally organic, and like the common law, evolves over time in light of changing local circumstances while maintaining adherence to basic norms or "legal roots".[45] As Professor Wiremu Doherty explains, while core shared tikanga values may be readily identified, any detailed account of tikanga as lived must occur at the iwi or hapū level, which is beyond the scope of this paper.[46]

V. Conclusion

Whatever the precise account given of tikanga, it is undoubtedly a coherent integrated system of values and norms. While there are many uncertainties ahead in terms of engagement with tikanga by the Courts, the capacity of tikanga, when properly understood, to provide clear normative guidance is not one of those uncertainties. It is as it has always been, he korowai tāwharau, a sheltering cloak.

43 Mead, above n 22.

44 See Fox, above n 6.

45 This refers to the maxim of the common law that recognition of customary law requires consistency with the common law's "legal roots". See *Takamore v Clarke* [2011] NZCA587, [2012] 1 NZLR 573 at [127], referring to *Johnson v Clark* [1908] 1 Ch 303 at 311. See also *Halsbury 's Laws of England* (online ed) 12 Custom and Usage.

46 *He Poutama*, above n 4, at Appendix 1.

LEGAL PLURALISM IN AOTEAROA/NEW ZEALAND

Dr Caren Fox*

I. He Tīmatanga – Introduction

Legal pluralism exists in the New Zealand nation state. It was cemented in place when Britain negotiated and signed Te Tiriti o Waitangi | Treaty of Waitangi with the rangatira, hapū and iwi of this land. The Māori text of the Treaty, which most Māori signed, guaranteed that Māori would retain their "tino rangatiratanga" (chiefly authority) which by implication includes the continuation of their own forms of governance, laws and citizenship. This guarantee was a declaration of what existed in the country when colonisation began, namely that Māori governed themselves by their own laws or tikanga. This Māori legal system continued, even though largely made unenforceable as colonisation proceeded and as many colonial politicians and some judges tried to suppress it. However, it remained viable in Māori enclaves capable of being reinvigorated or modified as circumstances changed; and modify they did.

Traditional governance models (namely rūnanga) morphed into councils and then trust boards until the enactment of the old Māori Trust Boards Act 1955. Now the favoured models for Māori governance are post-settlement governance entities. There are also numerous decisions of the superior courts which hold that tikanga Māori is the first law of New Zealand. Therefore, the nation is now alert to the importance of Māori law as a set of principles and values that may be relevant considerations in decision making, that may need to be weighed in decision making or that may be directly legally enforceable.

Sir Joe Williams has described how tikanga Māori has permeated New Zealand law.[1] He notes that tikanga emerged as the first law of Aotearoa from the time of the Hawaikians to the classical Māori period of the 18th and early 19th centuries.[2] The second law (namely English law), was introduced into New Zealand after May 1840.[3]

* Acting Chief Judge, Māori Land Court. Presentation to the Australasian Law Academics Association Conference, University of Canterbury, Christchurch, 8 July 2023.

1 J Williams "Lex Aotearoa: Mapping the Māori dimension in modern New Zealand Law" in Robert Joseph and Richard Benton (eds) *Waking the Taniwha: Māori governance in the 21st century* (Thomson Reuters, Wellington, 2021) at 543–544.

2 At 542.

3 At 542–548.

The third law, existing from the 1970s to the present, is a blending of these legal systems as tikanga Māori is being integrated and mainstreamed.[4]

There are four points that can be made based upon his analysis relevant to the topic of legal pluralism.

II. Te Take Tuatahi – The First Point

Law is defined by reference to rules or processes capable of enforcement and situated within a political system, society or community.[5] Under this approach, English customary law was incorporated into the common law. Customary law was "law generated by social practice and acceptance".[6] It was "made by the community" and "established by long standing practice and precedent".[7] The *Case of Tanistry* (1608) from Ireland recognised that custom may be a source of law and that it was important for such custom to be: (a) of antiquity, (b) of uninterrupted usage or continuance, (c) certain, and (d) reasonable. Such customs were void against the Crown.[8] In this case the custom of tanistry was found to be unreasonable, uncertain, contrary to the common law, was prejudicial to the prerogative and therefore void.[9] This is also one of the authorities for the proposition that custom can survive the importation of English law, so long as it is not repugnant to the rules of the common law.[10]

Logically, it follows that Māori law should have been recognised by the common law in the same manner as the customary law of Ireland, although ascertaining its nature may require a different analysis to establish its nature and extent.

Sir Edward Taihakurei Durie on this point noted that:[11]

> … a mono-legal regime had not been contemplated during the execution of the Treaty of Waitangi. On the contrary, Māori were specifically concerned that their own laws would be respected. There was no lack of clarity in their position that

4 At 548–549, 582.

5 R Benton, A Frame and P Meredith (eds) *Te Mātāpunenga: A compendium of references to the concepts and institutions of Māori customary law* (Victoria University Press, Wellington, 2013) at 14.

6 Joe Williams "He aha te tikanga Māori" (unpublished draft, 1998) at 1 <www.bit.ly/3rumn4d>.

7 At 1.

8 *Case of Tanistry* (1608) Davis 28 78–115 (KB) at 88–100; see also *Campbell v Hall* (1774) 1 Cowp 204 (KB) at [208]–[209].

9 *Case of Tanistry*, above n 8, at 92–100.

10 *Case of Tanistry* above n 8, at 101–108; Williams, above n 1, at 547.

11 E Durie "Will the settlers settle? Cultural conciliation and law" (1996) 8(4) *Otago Law Review* 449, at 460–461. See also Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999) at 264.

> they were not about to give away the laws of their forebears. At Waitangi the debate became mixed with a dispute amongst the representatives of the missionary churches. There the governor's response, as translated to English, was read out for him as follows:
>
> The Government says the several faiths [beliefs] of England, of the Wesleyans, of Rome, and also the Māori custom, shall be alike protected by him.
>
> This is sometimes called the fourth article. The government had adjourned to consider the matter and had delivered a written response.
>
> By the time the Treaty reached Kaitaia however, the debate, and the Māori insistence on respect for their own law, had crystallised. Correctly in my view, Māori identified the issue as one not just of law but authority. Nōpera Panakareao, the leading rangatira of Muriwhenua, put it this way in the Treaty debate at Kaitaia that, "the shadow of the land goes to the Queen but the substance remains with us."
>
> Due to poor health the governor could not attend at Kaitaia but there Willoughby Shortland conveyed the Governor's explicit message:
>
> The Queen will not interfere with your native laws or customs.

Professor Alan Ward referred to the assurances given to other Māori throughout the country that their law would be respected when he notes:[12]

> In order to avert suspicion of the Treaty, Hobson…issued a circular letter repudiating suggestions that the Māori would be degraded by the advent of British authority and telling the chiefs that "the Government will ever strive to assure unto you the customs and all the possessions belonging to the Māori." Finally missionary George Clark was appointed Chief Protector of Aborigines and instructed to assure the Māori:

12 A Ward *A show of justice: racial amalgamation in nineteenth century New Zealand* (Reprinted with corrections) (Auckland University Press, Auckland, 1995) at 45.

> "that their native customs would not be infringed, except in cases that are opposed to the principles of humanity and morals."

The New Zealand Law Commission underscored the initial approach of the colonials to Māori law:[13]

> Pragmatism prevailed with official British policy initially recognising Māori custom. James Stephen, principal advisor to successive ministries around the time of the signing of the Treaty of Waitangi, considered that British authority in New Zealand should be exercised through "native laws and customs." In 1840, the British Minister instructed Governor Hobson that:
>
> [The Māori people] have established by their own customs a division and appropriation of the soil . . . with usages having the character and authority of law . . . it will of course be the duty of the protectors to make themselves conversant with these native customs . . .
>
> Following this pattern, the Secretary of State for the Colonies, Lord Stanley, advocated a justice system that was inclusive of Māori custom. In 1842, he advanced the suggestion that certain Māori institutions such as tapu be incorporated into the English system. He further suggested that legislation be framed in some measure to meet Māori "prejudices" including punishment for desecration of wāhi tapu (sacred places).
>
> Tentative legislative recognition was accorded Māori custom law by way of, in particular, the Native Exemption Ordinance 1844, the Resident Magistrates Courts Ordinance 1846 and Resident Magistrates Act 1867 which used Māori assessors, and section 71 of the Constitution Act 1852.

This willingness to accommodate Māori law is also readily apparent in the royal instruments and legislation enacted between 1840–1851. It was a period where accommodation was necessary due to the numerical superiority of Māori. In some

13 New Zealand Law Commission *Māori Custom and Values in New Zealand Law* (Study Paper 9, Wellington, 2001) at 18–19.

districts, this period lasted longer because of geographical remoteness, as for example the Rohe Pōtae and Tairāwhiti districts.

III. Te Take Tuarua – The Second Point

After 1851, many policy advisors, colonial politicians and judges rejected the notion that Māori society had the capacity to make law.[14] The New Zealand Law Commission has written:[15]

> A number of factors combined to ensure that the systems of introduced laws and settler policies were geared towards the eclipse of Māori custom law. These included:
> a) the belief that English institutions and culture were innately superior, and it was in the best interests of Māori to assimilate;
> b) the desire to create an ideal English society in New Zealand;
> c) the introduction of English laws and internalising colonial values; and
> d) the settlers' desire for land resulting in land alienation from Māori.
>
> A process of denial, suppression, assimilation and co-option put Māori customs, values and practices under great stress. Aspects of this process continue today. Dr Michael Belgrave argues persuasively that the acquisition of the resource base by the Crown was effected through a sustained attack on Māori custom law by the monocultural colonial and post-colonial systems. In addition, he observes that any recognition of Māori custom law has been quickly followed by extinguishment, and that Māori people have every right to be cautious about attempts to recognise custom law…

A classic example of the extreme views held on the topic is to be found in the decision of *Wī Parata v The Bishop of Wellington* (1877) where the Court stated:[16]

14 Benton, Frame and Meredith, above n 5, at 14.
15 New Zealand Law Commission, above n 13, at 22–23.
16 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC) at 77–78 per Prendergast CJ.

> On the foundation of this colony, the aborigines were found without any kind of civil government, or any settled system of law. … The Māori tribes were incapable of performing the duties, and therefore of assuming the rights, of a civilised community.

Mr A Mackay in 1890, in a letter to the Native Minister also opined that there was no fixed law that existed in Māori society. He based his views on his own experience, and on papers he collected from Pākehā politicians, Native Land Court judges, missionaries, and officials. Those papers expressed varying opinions on the nature of Māori land tenure, but Mackay wrote: "That no fixed law existed in regard to Native tenure except the law of might, and those various customs [that] existed in different localities."[17]

This is a good example of the era and the outright rejection of law and custom. Prendergast CJ, as a further example, in the case of *Riria Peti v Ngāraihi Te Paku,* rejected the notion that marriage in accordance with Māori custom had any legal validity.[18]

There was some acknowledgement by the Privy Council of Māori custom as the determinant of native title cases in the early part of the 20th century.[19] What the native title cases do not do is throw light on the obvious; namely that native title must be underpinned by the pre-existing sovereignty and law of Māori, a point acknowledged by Professor Mark Hickford who has written:[20]

> Native title presupposes indigenous normative orders and a sense of an anterior political community – a community that sorts out to whom such rights might be allocated and on what terms, together with the content or incidents of such entitlements. These sorts of questions lurk in the shadows, to this day; but they suggest, importantly, the governmental and jurisdictional dimensions of native title even though such

17 A Mackay "Opinions of various authorities on native tenure" *The Appendix to the Journal of the House of Representatives* (1890, G-1).

18 *Riria Peti v Ngāraihi Te Paku* [1889] 7 NZLR 235 at 238–240.

19 See for example *Nireaha Tamaki v Baker* [1840–1935] (1901) NZPCC 371, [1901] AC 561 at 578–580 (PC); *Wallis v Solicitor- General for New Zealand* [1840–1935] (1903) NZPCC 371; *Tamihana Korokai v Solicitor-General* [1913] 32 NZLR 321 (CA); *Manu Kapua v Para Haimona* [1913] AC 761 at 765; compare *Waipapakura v Hempton* [1914] 33 NZLR 1065 at 1071–1072.

20 M Hickford "Looking Back in Anxiety: Reflecting on colonial New Zealand's historical political constitution and laws' histories in the mid-nineteenth century" (2014) 48 *New Zealand Journal of History* 8–9.

> characteristics or features might seem to be concealed or neglected.

While avoiding referencing Māori law, there are several early 20th-century cases where Māori customs were recognised in law. These include the *Public Trustee v Loasby* (1908), where the Supreme Court in New Zealand accepted that if no English law prohibited it, Māori customs could continue.[21] The test applied was consistent with the English Laws Act 1858. This case was followed a decade later by the decision of the Privy Council in *Hineita Rirerire Arani v Public Trustee* (1919), where that court considered that Māori retained some internal power of self-government, enabling a tribe by common consent to modify its customs.[22] I note that this right to self-government was impacted by land loss, assimilation policies, and urbanisation. However, mana Māori or rangatiratanga, governance and tikanga survived in the institutions of tribal rūnanga and tribal governance structures constituted through statute and on marae.[23]

IV. Te Take Tuatoru – The Third Point

There was a surge in recognition following the rise of a new generation of Māori leaders and the creation of the Waitangi Tribunal in 1975.[24] During this third law phase, judges of the mainstream courts and members of Parliament "rediscovered" the Treaty of Waitangi.[25] This was also the phase when the first treaty settlements for Tainui and Ngāi Tahu were completed. This was the era when dozens of Crown statutes referencing the Treaty were enacted.[26]

Some of these statutes also referenced tikanga Māori as meaning "customary values and practices". For example, Te Ture Whenua Māori Act 1993, the Resource Management Act 1991, the Marine and Coastal (Takutai Moana) Act 2011, and the Ngāti Porou Claims Settlement Act 2012. The Supreme Court has stated that this definition of tikanga is not to be read as excluding tikanga as law or that tikanga is not law.[27] Rather tikanga is "a body of Māori customs and practices, part of which is properly described as custom law". Thus, tikanga as law is a subset of the customary

21 *Public Trustee v Loasby* [1908] 27 NZLR 801 (SC) at 806, 808–809.
22 *Hineita Rirerire Arani v Public Trustee* [1840–1932] (1919) NZPCC 1 at 5–6.
23 Māori Community Development Act 1962, s 18(1)(c)(iv).
24 J Williams "Lex Aotearoa: An heroic attempt to map the Māori dimension in modern New Zealand Law" (2013) 21 Waikato Law Review 11.
25 At 1, 11.
26 See for example the State-Owned Enterprises Act 1986, s 9; Conservation Act 1987, s 4; and Resource Management Act 1991, s8.
27 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [169] [*TTR case*].

values and practices".[28] The Māori Land Court, the Environment Court and the High Court have all analysed tikanga associated with ahi kā,[29] whāngai,[30] kaitiakitanga,[31] and the nature of different interests in the foreshore and seabed.[32]

During the development of the third law, previous attitudes attributing "primitivity" to Māori law and "sophistication" to English law have been dropped.[33] Rather the assessment of custom turns on the facts of each case and the legislative environment.[34]

V. Te Take Tuawhā – The Fourth Point

Undeniably, great progress has been made during the development of the third law. However, by 2004, the superior Courts had not considered the issue of whether Māori custom could be recognised in the law without statutory support. In that year, the Court of Appeal decided *Attorney-General v Ngāti Apa* (2003), concerning the foreshore and seabed. That Court accepted that the common law presumption relating to Crown ownership of tidal lands could be rebutted by the existence of native title governed by tikanga.[35] That decision was followed by *Paki* (2012) and *Paki No 2* (2014), where the Supreme Court rejected the application of the common law presumption of Crown ownership to certain river-beds upon the same grounds.[36] However, as these were native title cases, it remained uncertain whether the common law could recognise tikanga in its own right.[37]

Then in 2012, the Supreme Court considered a Tūhoe burial custom to ascertain whether it could be recognised as law. This case went on appeal from the Court of Appeal to the Supreme Court and is known as the *Takamore* case.[38] Citing the *Public Trustee v Loasby* decision of 1908,[39] Elias CJ accepted that the common law imports Māori custom or tikanga as a value and as a matter to be weighed in decision making concerning the burial of a deceased person with Elias CJ stating:[40]

28 At [169].
29 *Bell v Churton – Mataimoana* [2019] 410 Aotea MB 244 (410 AOT 244) (MLC).
30 *Re Estate of Tangi Biddle or Tangi Hohua* [2001] 10 Rotorua MB 43 (10 APRO 43) (MAC).
31 *Ngāi te Hapū Inc v Bay of Plenty Regional Council* [2017] NZEnC 73.
32 *Re Edwards (No 2)* [2021] NZHC 1025, note the test is whether an applicant iwi or hapū have held the land in accordance with tikanga from 1840 until today without substantial interruption.
33 Benton, Frame and Meredith, above n 5, at 16–17.
34 Williams, above n 1, at 552–580.
35 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643.
36 *Paki v Attorney-General* [2012] 3 NZLR 277 at [18] per Elias CJ; *Paki v Attorney-General* [2014] NZSC 118 at [67] per Elias CJ.
37 Williams, above n 1, at 551–552.
38 *Takamore v Clarke* [2012] NZSC 116 [*Takamore*].
39 *Public Trustee v Loasby* [1908] 27 NZLR 801. (SC).
40 *Takamore*, above n 38, at [94].

> [94] Values and cultural precepts important in New Zealand society must be weighed in the common law method used by the Court in exercising its inherent jurisdiction, according to their materiality in the particular case. This accords with the basis on which the common law was introduced into New Zealand only "so far as applicable to the circumstances of the … colony." It is the approach adopted in *Public Trustee v Loasby* and in *Manktelow v Public Trustee*. Māori custom according to tikanga is therefore part of the values of the New Zealand common law.

The majority concluded ultimately that the matter of determining what should happen to the body of a deceased vests in the executor of the deceased's estate with McGrath J stating that:[41]

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

In 2013, Sir Joe Williams predicted that the third law would be "predicated on perpetuating" tikanga Māori and in doing so, tikanga would change the nature and culture of what was once colonial law.[42] In other words, during the third law phase, tikanga as the first law of Aotearoa, will be integrated into the existing law of the state. This is occurring and the remaining issue is whether the courts will recognise the pre-existing sovereign nature of the iwi and hapū from which base tikanga Māori is derived.

41 *Takamore*, above n 38, at [164].
42 Williams, above n 24, at 12.

A. Tikanga i roto i ngā Kooti – Tikanga in the Courts?

In *Ngāti Whātua Ōrākei Trust v Attorney-General* (2018), the Supreme Court recognised that Ngāti Whātua should be able to pursue claims based on tikanga, with Elias CJ directly stating that:[43]

> Rights and interests according to tikanga may be legal rights recognised by the common law and, in addition, establish questions of status which have consequences under contemporary legislation.

In *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board,* the Supreme Court in 2021 explicitly recognised that tikanga Māori was the first law of New Zealand.[44] In this case Winkelmann CJ, Glazebrook J and Williams J concurred with the following statement:[45]

Williams J & France J

> For the purposes of the EEZ Act, tikanga Māori has the same meaning as in s 2(1) of the RMA, that is, "Māori customary values and practices." That definition is not to be read as excluding tikanga as law, still less as suggesting that tikanga is not law. Rather, tikanga is a body of Māori customs and practices, part of which is properly described as custom law. Thus, tikanga as law is a subset of the customary values and practices referred to in the Act.

Williams J added:[46]

> As the Court of Appeal rightly pointed out, the interests of iwi with mana moana in the consent area are the longest-standing human-related interests in that place. As with all interests, they reflect the relevant values of the interest-holder. Those values—mana, whanaungatanga and kaitiakitanga—are relational. They are also principles of law that predate the arrival of the common law in 1840. And

43 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84 at [77]. The issue in that case arose in the context of a strike-out application, but the approach indicates the way in which the law in New Zealand has been developing.

44 *TTR case*, above n 27.

45 At [169].

46 At [297].

> they manifest in practical ways, as William Young and Ellen France JJ note.

As identified previously, the superior Courts have considered the decision in *Public Trustee v Loasby* of 1908, thereby indicating it remains good law. In that case, the Court applied the following tests to identify customs that the common law may recognise:[47]

> 1. Whether such custom exists as a general custom of the inhabitants … who constitute the Māori race;
>
> 2. Is the custom contrary to any statute law …?;
>
> 3. Is it reasonable, taking the whole of the circumstances into consideration.?

More recently, in the *Takamore* case, the Court of Appeal also took direction from *Halsbury's Laws of England* to determine whether a Tūhoe burial custom of taking a body for burial in a person's tribal district could be recognised as law.[48] The majority then applied the English customary law test to Māori custom and they resolved that:[49]

> a) it must have existed since time immemorial;
>
> b) it must have continued as of right and without interruption since its origin;
>
> c) it must be reasonable;
>
> d) it must be certain in its terms, and in respect of locality to which it obtains and the person it binds; and
>
> e) it must not have been extinguished by statute.

The majority found that the Tūhoe burial custom was not reasonable given the length of time the deceased had lived away from the tribe and the lifestyle he had adopted. Therefore, it could not be recognised. This decision was overturned on appeal to the Supreme Court.

47 *Public Trustee v Loasby* [1908] 27 NZLR 801 (SC) at 806.
48 *Halsbury's Laws of England* (5th ed, 2013, online ed) vol 12 Custom and Usage.
49 *Takamore v Clark* [2011] NZCA 587, [2011] 1 NZLR 573 at [109].

During that appeal, Elias CJ recognised that Māori custom or tikanga were a part of the values of New Zealand's common law.[50] On what Māori customs are and how they should be identified, however, she stated:[51]

> [95] What constitutes Māori custom or tikanga in the particular case is a question of fact for expert evidence or for reference to the Māori Appellate Court in an appropriate case. A court asked to identify the content of custom by evidence is not engaged in the same process of interpretation or law-creation, as is its responsibility in stating the common law. As in all cases where custom or values are invoked, the law cannot give effect to custom or values which are contrary to statute or to fundamental principles and policies of the law. But it is necessary for the Court to take care in identifying the custom or values truly relevant to its determination. …
>
> [97] The role of the Court is not to judge the validity of traditions or values within their own terms. It is concerned with the application of established traditions and values in fulfilling the Court's own function of resolving disputes which need its intervention. The determination of the Court says nothing about what is right according to the value systems themselves. Indeed, the determination of the Court can only settle the immediate legal claim. The family and tikanga processes may well continue.

Arguably, she was indicating that it is not appropriate for judges to apply to tikanga Māori, the common law tests used to assess English customs.[52] The majority of judges in the Supreme Court considered the executor of an estate's duty to deal with the body of primary importance in the common law, but that an executor had to take into account Māori customary values, along with other important cultural, spiritual and religious values.[53] However, the majority did not make it clear whether it adopted the tests set out in *Loasby* or the Court of Appeal when identifying whether any particular Māori custom could be recognised.[54]

50 *Takamore v Clarke* [2012] NZSC 116 at [94].
51 At [94]–[97].
52 At [95]–[97] per Elias CJ.
53 At [164].
54 See discussion by N Coates "The recognition of tikanga in the common law of New Zealand" (2017) 5 Te Tai Haruru Journal of Māori and Indigenous Issues 25 at 36.

The result of this decision, therefore, left the law in a confused state, as Natalie Coates points out.[55] She contends that the decision did not "explicitly address the possibility of customary law being recognised as law based on the doctrine of continuity and the additional tests in *Loasby* and the Court of Appeal *Takamore* decision".[56]

The judges are starting to attempt definitions of tikanga Māori as well. In *Ngāti Whātua Ōrākei Trust v Attorney-General*, the High Court defined tikanga Māori as shared values, principles, standards and norms.[57] Tikanga-a-iwi, on the other hand, is described as systems of law based on the lived experience of each iwi.[58] The High Court put it this way: "It follows that tikanga is quintessentially developed by each iwi or hapū, in the exercise of their rangatiratanga."[59] It also emphasised that: "Tikanga and its practice can change over time. … It was accepted that tikanga have continued to evolve and are not static."[60]

The decision in *Ellis v The Queen* clarifies further how tikanga may be recognised in the common law.[61] In this case, the Supreme Court allowed a posthumous appeal following arguments on the application of Māori law to a non-Māori. The Supreme Court was unanimous in its view that tikanga was relevant to the development of the common law of Aotearoa/New Zealand. It also forms part of New Zealand law due to being incorporated into statutes and regulations and it may be a relevant consideration in the exercise of discretions. The majority found that the previous tests for the incorporation of tikanga into the common law should no longer be applied. The court concluded that the addition of the tikanga considerations supported the conclusion that the appeal should be allowed.

Other decisions indicate that tikanga Māori may apply to all people, including non-Māori in certain circumstances.[62]

B. He aha te tikanga i ai ki te Māori? – What is tikanga according to Māori?

The New Zealand Law Commission in its 2001 *Māori Custom and Values in New Zealand Law Report* relied upon several publications and background papers to assist inform its views on this topic. These were recently published on its website in 2021. Noteworthy is the fact that most of these authors were Māori or recognised

55 At 35–36.
56 At 36.
57 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843 at [305]–[312].
58 At [322].
59 At [310], [322].
60 At [312].
61 *Ellis v The Queen* [2022] NZSC 114 (7 October 2022).
62 See for example *Ngāwaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board* [2021] NZHC 291 at [43]–[44], 47.

scholars in the field of Māori studies. Each provided commentary on the draft paper prepared by Sir Edward Durie written in 1994. He defined Māori customary law as "[the] values, standards, principles or norms to which the Māori community generally subscribed for the determination of appropriate conduct".[63]

In his view, tikanga Māori are the rules that maintain law and order in Māori society.[64] Tikanga, according to Durie, describes Māori law. The term is derived from the word "tika", or that which is right or just. Translated into English, tikanga can be rendered to mean "rule".[65] The suffix *ngā* renders it a noun and extends its meaning to include "a system, value or principle which is correct, just or proper".[66] Durie noted that Māori operated by reference to tikanga underpinned by philosophical and religious principles, norms and values. All combined to regulate the conduct of individuals, whānau, hapū, and iwi and in this way social control was maintained by doctrines, such as the doctrine of tapu.[67] His definition looks beyond rules to the values and principles that underpin them. Consistent with this approach, Sir Hirini Mead argued that tikanga depends on mātauranga Māori and is a means of social control as it:[68]

> ... controls inter-personal relationships, provides ways for groups to meet and interact, and even determines how individuals identify themselves. It is difficult to imagine any social situation where tikanga Māori has no place. ... The word Tika means "to be right" and thus tikanga Māori focuses on the correct way of doing something. This involves moral judgments about appropriate ways of behaving and acting in everyday life. From this standpoint it is but a short step to seeing tikanga Māori generally as a normative system.

Sir Joe Williams noted in 1998 that there is no "Māori word or phrase which accurately conveys either law or custom law".[69] He agreed with Durie that the closest equivalent was the word "tikanga".[70] Williams J noted the difference between Pākehā law and tikanga Māori is that Pākehā law is prescriptive and values certainty. Tikanga Māori, he opined, is pragmatic and subject to reinterpretation, while focused upon the principles and values underlying conduct required in the

63 E Durie "Custom law: Address to the New Zealand Society for Legal & Social Philosophy" (1994) 24 VUWLR 325.
64 E Durie (1994 unpublished) at 2–4.
65 At 2–4.
66 Williams, above n 1.
67 Durie, above n 63, at 325.
68 Hirini M Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) at 5–6.
69 Williams, above n 1, at 1.
70 At 1

particular circumstances.[71] Williams J also suggested that tikanga Māori was law for "relatively small, homogeneous communities bound by whakapapa links and it relies for its efficacy directly upon the active support of members of whānau, hapū, and iwi".[72] Due to the numbers of people who inhabited some rural districts before urbanisation in the 1960s, it would not be correct to define those tribal legal systems as small and homogeneous. Rather it is possible to argue that they were cohesive and worked to regulate conduct. But the point that principles and norms or standards of tikanga Māori provided the basis for the Māori jural order is correct.[73] However:[74]

> - the ambit of tikanga is wider than that;
> - the focus of tikanga is in the values or fundamental precepts of Māori systems of control not the prescriptive rules or laws with which western trained lawyers are familiar;
> - Tikanga Māori makes no distinction between civil and criminal jurisdiction or between the spiritual and the profane;
> - Tikanga Māori is both law and religion.
>
> ...
>
> Tikanga includes principles, approaches or ways of doing things which might be considered to be morally appropriate, courteous or advisable but which are not rules the breaking of which carries punitive sanctions.

Therefore, not all tikanga is law. As noted above, this view has been accepted by the Supreme Court, who have stated that:[75]

> ... tikanga is a body of Māori customs and practices, part of which is properly described as custom law. Thus, tikanga as law is a subset of the customary values and practices referred

71 At 2.
72 D Williams and J Williams *He aha te tikangā Māori* (unpublished revised paper for the New Zealand Law Commission, 1998) at 9. Retrieved on 13 September 2021 <https://bit.ly/3saBakW>.
73 At 8.
74 At 8.
75 *TTR case*, above n 27, at [169].

> to in the Act. It follows that any aspect of this subset of tikanga will be "applicable law."

In 2019, academics associated with the Māori and Indigenous Governance Centre of the Faculty of Law, Waikato University took an even more extensive approach by suggesting that:[76]

> Tikanga Māori … , reflects a metaphysical cosmology, which is pervasive in determining how Māori relate to landforms and all forms of life including how they relate to each other and outsiders. Their conception of the origin of all things on earth determines their ritenga (ritual), tikanga (law or customary values) and their perceptions of what is tika (right) or hē (wrong). Their law is aspirational, setting standards of best conduct based on ancestral exploits, with prescription mainly reserved for ritenga (custom) including the propitiation of hara (spiritual offences).
>
> Compliance was largely self-enforced, driven by whakamā (shame), mataku (fear of spiritual retribution) or community acceptance, ostracism or even capital punishment for serious hara (offences). Muru (community stripping of the goods of a whānau) was also practised, as utu (redress or restoration of balance) for some aitua (misfortune) like the careless loss of life or property or some breach of social laws. Muru was usually undertaken with the full acquiescence of the whānau kua hē (the family or community in the wrong). Furthermore, each iwi (tribe) and hapū (sub-tribe) had its own variation of the values and customs listed – some will have slightly different ideas as to the values that inform tikanga.
>
> Tikanga Māori is moreover, values based and aspirational, setting desirable standards to be achieved. Thus, where state law sets bottom lines, or Pākehā aspire to minimum standards of conduct below which a penalty may be imposed, tikanga Māori sets top-lines, describing outstanding performance where virtue is its own reward.

76 R Joseph and others *The Treaty, Tikanga Māori, ecosystem-based management, mainstream law and power sharing for environmental integrity in Aotearoa New Zealand: Possible ways forward* (Te Mata Hautū Taketake | The Māori and Indigenous Governance Centre, Te Piringa-Faculty of Law, University of Waikato, 2019) at 16.

> Fundamental to tikanga Māori is a conception of how Māori should relate to the Gods, land, water, all lifeforms and each other. It is a conception based on:
>
> - Whakapapa or the physical descent of everything; and
> - Wairuatanga or the spiritual connection of everything.

While these academics stress the principles and values of whakapapa and wairuatanga, others have longer lists that they considered important to a Māori juridical order.

Conversely, Sir Joseph Williams J and David Williams identified only five fundamental principles, described as conceptual regulators, that inform the totality of tikanga Māori. Their list covered whanaungatanga, mana, utu, kaitiakitanga, and tapu.[77] Sir Tahakurei Edward Durie listed a total of seven conceptual regulators, namely whanaungatanga, mana, manaakitanga, aroha, mana tīpuna, wairua, and utu. Dr Patariki Hohepa listed tapu, mana, pono, whanaungatanga, aroha, and utu. Manuka Hēnare, in 1988, identified whanaungatanga, wairuatanga, mana Māori (including mana, tapu and noa, tika, utu, rangatiratanga, waiora, mauriora, hauora, and kotahitanga), and Cleve Barlow gave "mauri" prominence.[78]

The point is that these principles, just like the principles of other areas of law such as equity, are the foundation stones of tikanga Māori and associated legal systems and at the core was the principle of whanaungatanga, as Sir Joe Williams opined:[79]

> Of these, whanaungatanga is the glue that held, and still holds, the system together, the idea that makes the whole system make sense – including legal sense. Thus the rights in cultivable land and resource complexes such as rivers, fisheries, forests, swamps and so on are allocated by descent from the original title holder (take tupuna – literally ancestral right or source). There is a form of legal interest created by conquest (raupatu – literally the harvest of the war club) and even, though more rarely, transfer (tuku -literally to give up). But these variants are better understood as the foundation of a right rather than as rights in themselves. They were, in practice, fragile until consummated (literally) by creating a connection to, and then spring-boarding off, the

77 Williams, above n 6, at 11.
78 At 11–12.
79 Williams, above n 24, at 4.

> line of original ancestral right holder. So a "conquest" always involved formal making of peace through inter-marriage and assimilation of the old descent line into the new legal order to remove later contestation about whether the newcomer held the primary right (history taught the makers of custom law that conquered hapū rebuilt and reasserted their rights unless properly accommodated in the new order of the conqueror). Tuku was never a one-off transaction in the way a contract is, but rather a means of incorporating the transferee into the community of the original title holder.

VI. Kei Whea Mai i Kōnei – Where to from Here??

The first question that this progress with respect to tikanga raises is: are the judges qualified to pronounce on what the first law is without proper training? This training for judges is being undertaken by Te Kura Kaiwhakawā | the New Zealand Institute of Judicial Studies. In terms of the training for the profession, conferences are being held to teach lawyers how to identify tikanga issues. Soon such training will be unnecessary, as the New Zealand Council for Legal Education (the NZCLE) established under Part 8 of the Lawyers and Conveyancers Act 2006 (LCA) have successfully advocated to the Minister of Justice to amend the Professional Examinations in Law Regulations 2008. These regulations provide for the prescription, quality control and provision of legal training and education for those persons (both New Zealand and overseas degree holders) who wish to apply to be admitted as barristers and solicitors of the High Court of New Zealand. The amendments requires that all Law Schools are to teach tikanga Māori to their law students in each of their core law subjects, as a standalone core subject, and as part of legal ethics course needed for eligibility to be admitted as a barrister and solicitor. This requirement takes effect from 1 January 2025.

The second question concerns the legal enforceability of tikanga. While the superior Courts have now accepted tikanga Māori as the first law of New Zealand, the basis upon which tikanga Māori has been accepted is limited to where statute law does not apply, where this is no extinguishment of that law or where it is not necessary (due to the circumstances of the territory) to apply New Zealand law.

Furthermore, while the superior court judges have recognised tikanga Māori as the first law of New Zealand, they have not grappled with identifying where this law comes from. The only answer must be the pre-existing sovereign authority of Māori

affirmed in art 2 of the Treaty of Waitangi. This is a point well made by Professor Claire Charters as follows:[80]

> Any form of accommodation of tikanga Māori constitutes implicit recognition that it is an independent authoritative source of law applicable in New Zealand in addition to state law. For example, statutory recognition of a particular tikanga Māori norm is recognition that there is an independent tikanga Māori legal system that generated that norm and that the tikanga Māori legal system has ongoing authority. The norm may be given legal force under statute (state law), but also retains its legal character derived from the independent authority of tikanga Māori. The same is true of judicial accommodation of tikanga norms.

The contrary position is that accommodation does not imply recognition of tikanga as an independent source of law derived from any Māori authority.[81] Charters points out this position is flawed.[82] First, because tikanga is applied in fact and law everyday by Māori, and second, because of the "false and assumed" conflict between the primacy of state law and tikanga as an independent source of law when in fact they can be reconciled.[83] They may be reconciled by using the Treaty as evidence of the fact that this independent source of law was to continue or through the common law as outlined so far by the Courts.

80 C Charters "Recognition of Tikanga Māori and the Constitutional Myth of Monolingualism, Reinterpreting Case Law" in R Joseph and R Benton (eds) Waking the Taniwha: Māori governance in the 21st century (Thomson Reuters, Wellington, 2021) at 618.

81 At 618.

82 At 618–619.

83 At 618–619.

FOSTER'S FIRST LECTURE

Transcribed by, and with notes by, Jeremy Finn*

I. The Lecturer

The first formal recorded lecture on a legal subject in an educational institution in Canterbury was given by Dr Charles James Foster on 13 February 1873,[1] to inaugurate the Jurisprudence course offered by the Canterbury Collegiate Union.[2] Foster was an English barrister who had a stellar academic career as a student but was less successful in practice. He was for some years the (part-time) Professor of Jurisprudence at University College London, during which time he wrote his major work, *Elements of Jurisprudence*.[3] He emigrated with his family to New Zealand in 1864, presumably in the hope of greater professional success. A period of initial success was followed by a number of reverses, including bankruptcy in 1869, but his standing in the legal community made him an obvious candidate to lecture in Jurisprudence at the newly-established Collegiate Union and thence to be the first Lecturer in Law at Canterbury University College.[4]

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1 There is likely to have been earlier structured teaching of tikanga by Māori tohunga and rangatira in whare wananga prior to the arrival of colonists in the 1840s, but there is no known record of this.

2 For the Collegiate Union see Jeremy Finn *Educating for the Profession: A Hundred Years of Law at Canterbury* (Canterbury University Press, Christchurch, 2010) at ch 1.

3 Charles James Foster *Elements of Jurisprudence* (Walton and Maberly, London, 1853).

4 For a fuller biographical treatment and a discussion of Foster's views on jurisprudential issues see J H Farrar "Dr Charles James Foster: Canterbury's First Law Teacher" (1980) 1 Canterbury LR 5–14. More recent writing indicates Farrar did not appreciate the low impact of bankruptcy on the social and professional lives of New Zealand lawyers at that time, see Jeremy Finn "Protecting Clients' Money: The Road to the Solvency and Experience Requirements of the Law Practitioners Act 1955" (2021) 28 Canterbury LR 27–49, at 34–35.

II. The Lecture

Dr Foster gave his inaugural lecture on 13 February 1873. It was reported, apparently in full, in *The Press* newspaper the following day.[5] The report reads:

I believe, gentlemen, we may all feel grateful to the Council of the Collegiate Union for having afforded an opportunity of hearing Law Lectures in Christchurch. We are all interested in whatever concerns the efficient training of the legal profession; and if it has been found necessary at home to supplement the student's ordinary opportunities by the institution of lectures, and even to render attendance at them in a measure compulsory, most certainly is such an advantage desirable. At home no member of the profession undertakes more than half its responsibilities,[6] and the mere exigencies of business necessitate a practical redivision of labor according to various departments of practice. The Barrister there confines himself to the Common Law or to Chancery – to the Criminal or the Matrimonial Court: or, abstaining altogether from court practice, devotes himself to arbitration or to giving opinions in his own chambers. While he thus has, it may be thought, less to learn he has had fuller opportunities of learning it. The student for the Bar spends three or even four years with a barrister in full practice, either in London or in Dublin,[7] and it is his own fault entirely if during the whole of that time he has a day disengaged from the personal study of matters of deep law. If he has never heard a lecture or read Blackstone once through,[8] he steps into the arena having seen more law than ten years' practice at Christchurch can show to any of us. If he intends to practise as a solicitor, it is not essential certainly that he should carry on his studies in the great centres of commercial activity, but he must choose his locality badly if he is not in constant professional communication with them, and it is usual for the concluding

5 This text is as published in under the headings "Collegiate Union" and "Jurisprudence" in *The Press* (Christchurch, 14 February 1873) at 3. The spelling and punctuation is as in the original, as is the use of italics either for emphasis or for a Latin phrase. It is not clear whether the report is based on notes taken by a reporter. It is possible that (as was apparently common at the time) Foster provided the newspaper with the full text of his address. However, the misspelling of some names and some possible errors may indicate the article is based on a reporter's record. The newspaper report does not always make the paragraph divisions clear and those in this version largely reflect the views of the transcriber. In some cases, 19th-century newspapers adopted American rather than English spellings, such as "labor" instead of "labour". These have not been altered.

6 In both England and Ireland there was marked division between lawyers who were admitted as, and practised as, barristers and those who are admitted as and practised as solicitors. New Zealand has allowed lawyers to combine the roles since 1841.

7 Would-be barristers had to spend years at the Inns of Court established in those cities. Foster does not refer to lawyers trained in Scotland – perhaps because in 1873 only two Scots-trained lawyers, Thomas Smith Duncan and Andrew Jameson, were in practice in Canterbury.

8 Sir William Blackstone *Commentaries on the Laws of England* (Oxford University Press, Oxford, 1765–70).

year of his articles in London.[9] I believe that the bulk of the English solicitors will be found to have received their training, if not actually in London or Dublin,[10] at all events at such places as Bristol or Birmingham, and these undoubtedly vie with the bar for their skill and professional aptitude. As far as the mere country practitioners go, in my humble judgment, our Christchurch men would beat them out of the field. But our difficulty is this. We always have had – and I hope we always shall – a goodly number among our body of men who have seen and practised good hard law either at home or in an Australian metropolis. But there will also always be among us young men whose opportunities are limited to what Christchurch has to show them, and this is not enough. It is possible to be in good business here for several years and scarcely to see some kinds of practice. So much, too, of what we do see is so merely matter of routine at the most considerable portion of our experience goes for little else. The amount of systematic reading, too, which is required for our examination is necessarily exceedingly small,[11] and by no means of a character to ensure that familiar perceptions of legal analogies which is essential to the safe conduct of the practising lawyer. Instead of being an everyday matter, it is but occasionally that any student consults any report;[12] and most certainly until he has his reports well under command, he may be told he has all his law to learn. There and there only he will find the law on any point deliberately worked out from first principles. The precise facts of a particular case, as they have been actually proved before a jury, are there set out with all their complicating points. The legal bearings of those facts and complications are presented to him in the reported argument of counsel on both sides, which are supported from beginning to end by Acts of Parliament and decisions of the Courts already reported on analogous cases. The whole is wound up by of the judgement of the Court, stated *in extenso*, and not unfrequently copied from a written paper and supplied by the Bench to the legal gentlemen who undertake that important branch of practice. It is only when the student has carefully compared two or three of these "cases" (as we call them), and weighed their united bearing upon the question submitted to him, that he is entitled to consider that he really knows

9 It is not clear whether this was as common as Foster suggests; applications for admission in New Zealand seen by this editor include many where the full term of articles was served outside London or Dublin.

10 Presumably Foster intended English or Irish solicitors working in London or Dublin respectively; it is unlikely many English solicitors worked in Dublin.

11 The "examination" referred to was a (compulsory) examination on law, including the differences between English and New Zealand law, set and assessed by the Supreme Court judges. For the formal requirements for admission to the legal profession see Finn, above n 2, at 15.

12 The development of law reporting in England mentioned see JH Baker *An Introduction to English Legal History* (5th ed, Oxford University Press, Oxford, 2019) at ch 11. For early law reporting in New Zealand, see Peter Spiller, Jeremy Finn and Richard Boast *A New Zealand Legal History* (2nd ed, Thomson Reuters, Wellington, 2001) at 49–52.

the law upon that question, and here it is only occasionally that he has opportunities of knowing the law.

It is not the object of lectures in themselves to supplement this deficiency, and indeed if were they would be of very little use. It is not what a man *is told* that teaches him, it is what he thinks for himself. No doubt something can be done, even in the way of direct instruction. The Inns of Court at London have now provided for five courses of lectures, averaging, I believe, some thirty lectures each, and covering between them an extensive space of ground. Here we can give but one course, and a preliminary course must be almost unavoidably a short one. But the truth is, that, with their lectures as with ours, all that can be done is to present as accurate and systematic a view as possible of the whole ground in a sort of sketch plan as it were, and to give some examples in detail of the way in which the student must learn to fill up this sketch plan for himself. If the student gets a grasp of the plan and follows *ex animo* the working out of the illustrations offered,[13] the rest, as far as he is concerned, may safely be left to him.

We are so far fortunate that it may fairly be assumed of any student that he knows something about law before he begins to study it systematically. No one is entirely ignorant of law. Our knowledge is probably sufficiently superficial, and is no doubt far enough removed from that practical familiarity with its actual working which would enable us to trust ourselves to our own guidance in our own matters. But even here we see something of it every day. The Resident Magistrate's Court is the most popular entertainment there is.[14] The Criminal Sittings,[15] I think, come next; and perhaps after that, a good bankruptcy. The ladies, l am sorry to say, show a bad taste, of which the beauty and fashion of the counties at home afford them no example, in abstaining altogether from witnessing our gladiatorial contests at the civil sittings. That in which any lawyer most prides himself, – the ability to argue sheer law before his Honor on a demurrer – is,[16] I lament to say, except in most rare instances, altogether uncheered by sympathy of any kind. "Remote, unfriended, melancholy, slow" we pour out our points, in presence of a hostile counsel, and before an arbiter whose duty it is to be impassive. But with this last exception, the public of Christchurch really do hear and see a great deal of good hard law. And if I were to run off a number of our technical terms, and request

13 Latin phrase meaning "from the heart".

14 The Resident Magistrate's Court, then principally governed by the Resident Magistrates Courts Act 1858, was the workhorse of the New Zealand court system, where Resident Magistrates, many without any legal training, heard low-level civil and criminal cases.

15 That is, a periodic sitting (usually then four times a year) of the Supreme Court to hold trials for serious criminal matters.

16 A demurrer was a response to a civil legal claim which admitted the facts alleged but argued the law did not impose liability on the defendant on those admitted facts. See WC Cochran *The Law Student's Lexicon* (FB Rothman, Chicago, 1888) at 89.

on the nail to be obliged with your definitions of them, I have no doubt the result would furnish a most amusing variety of expression, but the ideas presented would be rather incomplete than erroneous. Take for instance such terms as crime and punishment; a debt; damages; a man's will; a conveyance; a contract; a gas share;[17] homicide; theft; embezzlement; an action; a demurrer, and a thousand others, you all recognise a personal familiarity with the ideas intended to be conveyed, and your definitions would, I am afraid, in some cases be better than those which some of our best reputed text books afford the student.

Considering again what law *does*, you would be readily prepared for the observation that the subject of civil injuries (which need redress only) is one of far greater extent and complexity than crimes, which require also to be dealt with by punishment. We would afford redress in all cases: we should never punish if we could help it. The system of procedure has of necessity varied along with the objects to be accomplished by it; and in the old country, it has led, and, as we can easily conceive, unavoidably led, to as many courts as systems.[18] In the case of an alleged crime little more is necessary than such simple arrangements as will bring together the witnesses to testify to the facts in the presence of the accused, before the proper authority, and at a proper time and place. In case of a dispute between two parties something more is requisite: Such preliminary steps must be taken as to ensure that both parties and the Court, which is to decide between them, shall have it clearly before them what the exact points are which are in dispute, and shall have reasonable opportunity of eliciting all the facts bearing upon them. When all this is ascertained, the dry law of the case will also, in all probability, have to be pronounced *pro re nata*.[19] Simple as these cases are, it can be said that at home it was possible until recently (and it is still partially true) to find three systems of procedure,[20] scarcely having a feature in common, and all applicable to cases such as I have been describing. But take a more complicated illustration. Suppose a man dies leaving no will, or what is more common, a will which nobody can understand. He leaves probably behind him every kind of property, freehold and leasehold land, some in his own occupation,

17 A gas share in English law is a fee payable to the landlord of a multiple occupant building, in addition to rent, for the supply of gas for cooking, heating and light where the supply is to the premises as a single unit. The amount is usually based on the tenant's proportion of the total floor area of the leased premises.

18 Foster here refers to the English system as it stood before the Judicature Acts 1873–1875. He would not have known the final shape of the reforms proposed for the first of these. For the post-Judicature Act histories of the relevant courts see Baker, above n 12, at ch 3 and ch 6–8. For a very readable account of the making of the Judicature Acts, see Patrick Polden "Mingling the Waters: Personalities, Politics and the Making of the Supreme Court of Judicature" (2002) 61(3) *Cambridge LJ* 575–611.

19 *Pro re nata* means "for the present matter", that is, effectively the legal issue was decided on the particular facts rather than as a general proposition.

20 Presumably those in the respective common law, equity and ecclesiastical courts.

some let to other people under every variety of arrangements. He has gas shares, fire and life policies, colonial stock,[21] municipal debentures, a house in London which he holds for somebody's life (that is, unless the somebody died before him). He was an assenting creditor to one deed of arrangement and a dissentient ditto to another.[22] He had proved in three bankruptcies, in one of which the debtor was known to have concealed large assets but had fled the country; in another he had got his order of discharge but after acquired property had turned up; and in a third the Provisional Trustee had made a muddle of the accounts.[23]

All this property has to be got in and divided: among some fifty or sixty creditors, the majority of whom are at Melbourne or Sydney, or somewhere in England, and these being duly satisfied, then come in the claims of the family. Who are they? Where are they? What are they? Are *some* of them *sui juris*?[24] How many of them are not: married daughters with infant families? Are not some of *their* daughters married and at least in happy anticipation of the delightful results? Are some of the sons bankrupt? Have any died abroad, or not been heard of? Are all the names rightly set forth in the will? Is there no John Thomas cut out of $1,000 by being unhappily called Thomas John?

These are – you will almost laugh when I say so – these are but a sample of the questions which have to be decided any day in the Court of Probate at Westminster in adjudicating between probably 100 claimants on the property bequeathed by a single will. At home, as I have said, the exigencies of a procedure varying with the requirements of all these cases have led to the establishment of many different Courts of Justice. There are three Courts of Common Law[25] and six of Chancery[26] not

21 Colonial stock was the term for government bonds issued by a colonial government or bank and forming part of the public debt of that colony. It appears there was no formal legal regime in New Zealand for such stock until the passage of the New Zealand Consolidated Stock Act 1877. New Zealand investors may also have invested in colonial stock issued by one of the Australian colonies.

22 A deed of arrangement was an agreement between a debtor and her or his creditors whereby the assets of the debtor were transferred to a nominated person for pro-rata distribution (first to secured creditors and the any surplus between the unsecured creditors). The process avoided the delay and costs of bankruptcy and protected the debtor from imprisonment for debt. The deed could be declared binding on all creditors, whether or not parties to the deed, if a sufficient proportion of creditors agreed, see Debtors and Creditors Act 1862, s 20.

23 A Provisional Trustee, apparently normally a court official, would be appointed after a debtor or creditor filed in bankruptcy and was required to gather in and keep secure the assets of the bankrupt until a meeting of creditors appointed a trustee, see Bankruptcy Act 1867, s 151.

24 That is, with individual legal capacity, rather than needing a parent or guardian to make legally binding decisions for them

25 The three Common Law courts were Queen's Bench, Common Pleas and Exchequer. For these and the other courts mentioned see Baker, above n 12, chs 3, 6–8.

26 While it is usual to refer to "the" Court of Chancery, in 1873 it was customary to count separately the four Courts of equity in London (presided over respectively by the Lord Chancellor, the Master of the Rolls and two Vice-Chancellors; to which Foster has apparently added the separate Courts of Chancery of the County Palatine of Lancaster and of the County Palatine of Durham and Sadberge). There was also a Court of Appeal in Chancery.

counting in the Assize or Criminal Courts, of which I do not know how many there are. Then, besides the Admiralty Court, the Probate Court, and the Matrimonial Causes Court,[27] there is the Privy Council and the House of Lords, and this is not all. Here our judges have succeeded, with marvellous skill and success, in fusing the bulk of their jurisdictions into one. We have no Ecclesiastical Court;[28] and our Court of Appeal is the Privy Council but,[29] omitting that and not applying ourselves to the inferior jurisdictions, our Supreme Court transacts all the business of the Courts of Chancery and Common Law,[30] arid the Bankruptcy, Matrimonial, and Admiralty Courts. The basis of its procedure is that of the English Courts of Common Law, with some departures, which I venture to think are not improvements, and with happy adaptations in Equity cases from the practice of the Courts of Chancery.[31] The most material deviation from its ordinary system appears in our matrimonial procedure, in which, while the enviable simplicity of some parts of the practice at Home is made the most of, the fatal facility of copying has also loaded us with some puerile absurdities of a past era and, I think, some expensive forms.[32] Some of these, I believe, are now undergoing reconsideration; and for my part I confess to a belief that if our provinces would only give up their separate judicatures,[33] and allow their Bench and their bar to do their work at Wellington, as at home is done at Westminster, we should get our law done for us not more expensively than now, and in a manner which would-not need to fear comparison with that of any other colonial jurisdiction.

27 These three courts, one administering a mixture of international custom and domestic statutes governing shipping at events at sea, the other two areas of ecclesiastical law and statutes sat outside the main court structure until the Judicature Act 1873 merged them into the Probate, Divorce and Admiralty division of the High Court.

28 Jurisdiction over probate, which in England was dealt with in an ecclesiastical court had been conferred on the New Zealand Supreme Court from 1843; divorce was added by statute in 1867.

29 This reference is inaccurate in that New Zealand then did have a Court of Appeal, consisting of a sitting of two or more judges of the Supreme Court, see Court of Appeal Act 1862. Foster may have been referring to the possibility, sometimes used, of litigants bypassing the Court of Appeal and going direct from the Supreme Court to the Privy Council. Alternatively, Foster have intended to refer to a "final" court of appeal but that word was somehow omitted. England did not, at that time, have a court of appeal for common law civil cases, although one was created later in 1873.

30 This refers to the court retitled in 1980 as the High Court; not to confused with the present Supreme Court.

31 The genesis and development of the procedural rules is superbly described by Shaunnagh Dorsett "The First Procedural Code in the British Empire: New Zealand 1856" (2017) 27 NZULR 690–714.

32 Foster, probably unknowingly, does the legislature an injustice here. Colonial legislatures had been advised that legislation affecting divorce had to very closely follow the model set by the UK Matrimonial Causes Act of 1857, see Spiller, Finn and Boast, above n 12, at 95.

33 Foster's use of "judicatures" may have been intended to refer to not only the Supreme Court judges sitting in different centres but also to the provincial system then in place, with each province making its own laws on some issues.

In the case of the will, I have given an instance of what the law has to do, as well in its substantial arrangements as by its procedure to carry them out. It is the same in all the relations of life. If a man marries, and no arrangement is made as to the joint property, not-the-less necessary is it that the management and enjoyment should be in the power of one or other during the marriage, and that its devolution upon their deaths should be provided for.[34] What the actual arrangement shall be the law leaves them largely at liberty to decide. What the *principle* of it shall be the law decides always; and in case they leave it to the law, it has machinery for working out its principle in its minutest detail for the behoof of every party interested.

What a number of provisions again are necessary in order to settle all our rights as we walk down Colombo Street. The roadway and pathway are severed, but less by the curb than by the law. The side on which I am to walk is marked out for me, nor am I left at liberty to do my entire pleasure even within that narrow strip. A street is not merely a place of passage; it is bounded by shops. Shops have windows, and windows which (contrary to the general understanding) the people inside are desirous that the passers-by should look into. There must be a right of stoppage as well as a right of passage. Shops have cellars, and cellars must be capable of entry. The very flagging on which we are accustomed to walk may be opened,[35] not certainly beneath our tread, for we are entitled to warning; but still, so as to preclude, even to our personal inconvenience, the use of the four feet square which comprise the doorway to the underground world.[36] For the common convenience again of shops, passengers, and purchasers, the street must contain the necessary apparatus for light, water, and drainage; and authorities to whom these are entrusted must needs have power, as occasion arises, to stop all passage while their works are in progress. I am presumably in health, and I walk, it may be taken for granted, with an ordinary degree of care for my own safety; but the fact that I am infirm, intoxicated, or negligent, does not authorise other passengers to disregard the increased humanities due to my unfortunate condition – the which, if any do, the law will not leave me remediless.[37]

34 While at that time property owned by a married couple was usually treated as belonging solely to the husband, the Married Women's Property Acts of 1860 and 1870 had modified the rule in limited respects.

35 "Flagging" here refers to paving stones, sometimes called "flagstones".

36 This refers to the practice, probably much more common in Britain than in New Zealand, of providing for delivery of bulk materials from the pavement into the cellars of buildings via passageways which had removable covers over the necessary gap in the pavement) – the "four feet square" mentioned.

37 Foster here is referring to the ability of persons injured through the negligence of others to sue in tort; a right removed by the Accident Compensation Act 1972, s 5 and replaced by statutory rights to compensation.

We might go on with these illustrations in infinitum. But the next point I wish you to consider is, that while we have in fact taken them from the laws of our own country, we might as easily have taken them (allowing no doubt for differences of detail) from the law of any other country. In every community there must be fathers and sons, husbands and wives, employers and employed, debtors and creditors, subjects and rulers, citizens and foreigners. The relative duties of all these to each other are everywhere substantially the same, and must have substantially the same provisions made for their enforcement however varied the detail. The fact that probably all judicial systems worthy of note are traceable more or less directly to the Roman Law – although not to the same era of Roman Law – really adds force to this consideration, for we can hardly conceive of any other assumption which will account for one system of law pervading the whole civilised world.

We may say then, at the outset of our enquiries, that both by actual observation and by almost intuitive inference we habitually conceive of law as a system of accredited regulation of the affairs of human life generally – not in one particular state, but in any. The object of our enquiry, to use Hobbs'[sic] often quoted phrase – is "not, what is law here or there, but what is law?"[38] Being composed, as we inevitably perceive it to be, of a body of principles applied to a body of facts, we cannot but attribute to it the scientific quality; and we are anxious, if only for the sake of what is due to our own character, to treat it in a scientific manner, we first wish, if we can, to settle its fundamental basis, and then to arrange all the facts connected with it according to the simplest plan of development.

But here we are met with the question, How far can we go? I once ventured to commit myself in print to the position that "if law be really a science ,there can be no question but that all its ideas may be presented as clearly, and that all its conclusions are as capable of as rigorous statement as appears in any of the problems of Euclid". This unlucky sentence, which occurred somewhere about the middle of the book; procured me a contemptuous dismissal, at the hands of a reviewer of well-known reputation, as proving me to be on the face of it entirely ignorant of the nature of my subject. I submitted to my castigation, I hope, with due humility; but what chiefly, comforted mc was that in point of fact the assertion was not mine at all; but I had

38 There may be some error here in composition or recording. Thomas Hobbes does not appear to have posed this question in exactly those words. Certainly, the question is a venerable one, having been ascribed to Socrates, see Huntington Cairns "What Is Law?" (1970) 2 Washington and Lee LR 193 at 211. Hobbes is generally seen as the first proponent of a positivist view of the law as genuine laws are enforceable commands issued by a sovereign government that exercises a monopoly of power over a given territory" David Ingram *Law: Key Concepts in Philosophy* (Bloomsbury Publishing, London, 2007) at 10. Richard Austin was the leading 19th-century advocate of this approach.

borrowed it from a passage in Leibnitz,[39] so well known I had thought as to make a reference to it savour of the pedantic, in which he praises the Roman law because I said all law ought to do. No doubt a merely English lawyer would have every right to be startled at such an assertion. Not that English law is not highly scientific. It is not too much to say that some of the decisions of Lord Stowell are models of every excellence in style and thought,[40] while our reports are *full* of judgments combining a marvellous precision of expression, with a rigorous reduction from first principles. Their individual excellence indeed compelled the admiration of Jeremy Bentham as highly as their want of arrangement when collected excited his wrath. And as practical lawyers, by common consent, none of any country stand higher than our own. But as scientific jurists our institutional writers are simply abominable. As to legal definitions, I really doubt whether all our libraries contain such a thing. Blackstone and Stephens both try to define a debt. Blackstone says it is a "contract", which it is not; and Stephens calls is a predicament, which it is. *Coke upon Littleton* is a work of that reputation,[41] that, if you, want to quote a position as one of undoubted law, you have nothing to do but to refer to it as being written there. But, for arrangement, the only similitude you can think of is a ball of tow. A learned friend of mine once told me he had read it three times straight through; and I believed him, for he had evidently never got over it. Lord St. Leonards' *Vendors and Purchasers* is another work nearly every line of which is unquestioned law,[42] but it is almost as badly arranged as Coke, and much worse indexed.

These are probably the worst specimens, and there are brilliant examples on the other side. Harrison's *Digest* is but a string of propositions,[43] but it might take its stand by any work in any science. *Gale on Easements* and *Cole on Ejectment* are perhaps nearly perfect.[44] But we must sympathise with the complaint of our English Attorney General, Sir John Coleridge that our law has been the work of too many hands; and has sprung from too diverse impulses to be thoroughly capable of scientific reduction, and it is no doubt the case that it has impressed its own character upon

39 Gottfried Wilhelm Leibniz (1646–1716), a German polymath, philosopher and proponent of natural law.

40 Sir William Scott, later Lord Stowell, was Judge of the Admiralty Court 1798–1828 and was regarded as *the* authority on maritime law. For his career, see Henry J Bourguignon *Sir William Scott: Lord Stowell* (Cambridge University Press, Cambridge, 2004).

41 Edward Coke *The First Part of the Institutes of the Laws of England: Or, a Commentary Upon Littleton* (1633). Coke was the leading English lawyer of the 17th century.

42 EB Sugden (later ennobled as Lord St Leonards) *A Practical Treatise of the Law of Purchasers and Vendors*, first published in 1805, when the author was 24.

43 *Harrison's Analytical Digest of All the Reported Cases Determined in the House of Lords, the Several Courts of Common Law, in Banc and at Nisi Prius, and the Court of Bankruptcy: From Michaelmas Term, 1756, to Easter Term, 1843* (RH Small, London, 1846).

44 CJ Gale and TD Whatley *A Treatise on the Law of Easements* (S Sweet, London, 1839); and WR Cole *The Law and Practice In Ejectment Under The Common Law Procedure Acts Of 1852 & 1854* (H Sweet, London, 1857).

its followers, and that it is only now that we are beginning to look generally among our writers for scientific treatment of their subjects. But while we may concede that the peculiar manner in which our English law has grown up amongst us must render it difficult to subject it to a perfectly scientific treatment, without burdening it somewhat disproportionately with the historical element, it is not of English law as such that we have to treat in our present course. Our illustrations will largely, and in this preliminary course, perhaps almost entirely be taken from it; but we shall be able not less readily to shake ourselves loose from whatever mere technicalities may tend to impede our progress. In so doing we shall but follow in the path already pioneered for us by jurists of both the modern schools of ethical enquiry. On the one hand we have Paley, Bentham, and Austin (following in the wake of Puffendorf[sic])[45] basing their conception of law upon the principles of the Modern Epicureans.[46] On the other we have Buller, Mackintosh, and Whewell (under the leadership of Grotius, and I think I may add, of Leibnitz[sic]),[47] giving us at least the means of stating the results of the Stoic philosophy. The subjects of their enquiries extend over so much wider a range than that within which we must confine ourselves that I think a student in the present course is entitled to choose for himself to which of these two-schools he will declare himself an adherent. While, therefore, I suppose it will be tolerably evident that I personally prefer the latter,[48] I shall adopt a suggestion made to me by a high authority amongst us,[49] and give you as concise a summary as I can of the views of both. I shall begin, then, with a resume of the lectures comprised in the first edition of Mr Austin's *Elements of Jurisprudence*.[50] The scarcity of the book renders this the more necessary; and indeed, without a thorough acquaintance with

45 William Paley (1743–1805), an English theologian and philosopher; Jeremy Bentham (1747–1832); John Austin (1790–1859); Samuel Pufendorf, later ennobled as Samuel Freiherr von Pufendorf (1632–1694), a German philosopher and author of *De iure naturae et gentium* (1672) (translation: *On the laws of nature and nations*).

46 For an overview of natural theories see John Finnis "Natural Law: the Classical Tradition", in Jules L Coleman and Scott Shapiro (eds) T*he Oxford Handbook of jurisprudence and Philosophy of Law* (Oxford University Press, Oxford, 2002) at 5–6.

47 The Buller referred to is probably Sir Francis Buller (1746–1800), an English judge and author of *An introduction to the law relative to trials at nisi prius* (London, 1793). The others can be identified as Sir James Mackintosh (1765–1832) a Scottish judge and writer; William Whewell (1794–1866), an English polymath and early exponent of certain universal rights belonging to all persons; and Hugo Grotius (1583–1645) the great Dutch jurist, author of *De jure belli ac pacis* (translation: *On the Law of War and Peace)* and exponent of a universal natural law binding all persons. The groupings set out are interesting in that modern writers would class Pufendorf as influenced by and building on, Grotius, rather than as adhering to different school of thought. There is the possibility that if the material was recorded by a reporter an error crept in; the variants in the spellings of Pufendorf and Liebniz may have been similarly reporting errors. Foster's linking of Grotius with the Stoics was apparently well ahead of contemporary thinking.

48 Foster had long been critical of Austin's views; see Farrar, above n 4, at 11.

49 Probably a coded reference to Henry Barnes Gresson, the local Supreme Court Judge and one of the founders of the Collegiate Union.

50 Published in 1832. It is not clear why Foster refers to the first edition rather than the more recent, though posthumous, edition of 1861.

the subjects discussed in the work, I do not know how the students can be expected to understand the full bearing of even some practical questions. I shall follow this resume by calling your attention to some particulars in which the scheme of law as propounded by Mr Austin has been thought to be defective by men of the other school, and the manner in which they propose to supply such defects. The discussion will open up some wide and interesting divergencies between the juridical results of the two schools. Having thus ascertained the proper scope of our subject, I shall ask you to follow me into an enquiry into the *sources* of law which I shall propose to illustrate from the three English heads of statute, custom, and judicial decision. In another course I hope we may be able to avail ourselves of the labours of the German jurists. For the present we shall have enough to do if we can consider the enactment and repeal of statutes, with the important principles regulating their construction and effect: the formation and growth of common law; the reason why custom finds it so hard to take root on a colonial soil;[51] the conditions under which judicial decision is binding, and the characteristic differences between statutory and judicial legislation.[52] We shall hardly, I fear, have done scant justice to these topics before we are hurried into the *subjects* of law, to be treated of in their primary division of things and persons. Whatever are the subjects of rights in the first place, and the endless variety of rights and obligations connected with them, with the mode of their acquisition, transfer, and devolution, will form the matter of one subdivision of this part of the course. Another will consist of some explanation (necessarily too short) of the law of *status*, or the manner in which rights are modified by the special position of the person to whom they belong. The law of lunacy, marriage, and infancy, of citizenship or alienage; and if the latter, whether neutral, friend, or enemy, with the effect in all three cases of domicil[sic], must here be referred to. A third branch of our subject will naturally be occupied with the subjects of judicial procedure and evidence, to some of the difficulties of which we have already alluded.

I shall endeavour, if possible, to comprise each of the above divisions—sources of law, subjects of law, and legal procedure, within one of the College terms.[53] At the close

51 Early New Zealand judges appear to have recognised local customs as having hardened into law in only a very small number of cases, *Baldick v Jackson* (1910) 30 NZLR 343 being the leading example. However, custom played a larger role in the way many businessmen and farmers regulated their affairs. For a very wide-ranging study of settler custom as a source of law in colonial environments, see Peter Karsten B*etween Law and Custom: High and Low Legal Cultures in the Lands of the British Diaspora the United States, Canada, Australia and New Zealand, 1600–1900* (Cambridge University Press, Cambridge, 2002).

52 Foster is probably meaning to contrast the development of the law by statute and by the process of judicial decision-making, see Ezra R Thayer "Judicial Legislation: Its Legitimate Function in the Development of the Common Law" *Harvard Law Review* 5(4) (1891) 172–201 at 172.

53 The Collegiate Union used the same schedule of terms as the University of Canterbury, but the number of lectures varied between subjects – in the Lent Term (the first in 1873), Foster only gave four lectures, "Canterbury Collegiate Union" *Christchurch Star* (Christchurch, 24 September 1873) at 3.

of the whole, I hope with the permission of the authorities, to hold an examination of the entire course, from which the successful competitor will be able to carry away some slight memento. I would warn the students that they must not expect to carry away much with them, if they are hearers only, however attentive. They must come here, note-book in hand, and must write down all they can, and they will do wisely to re-write as soon as possible afterwards from the notes they can make. I will do my best to assist them by due slowness of delivery, and by referring them for their own investigation afterwards to the sources of my own information. Those sources will usually be found in the Supreme Court library, and I hope no gentlemen will expect much chance at the examination if he has not qualified himself by sedulous attendance there to do somewhat more than verify what he has been told here. But not for this reason only do I urge it upon you. A lawyer's books are like the soldier's arms. The familiar use of them is more than half the battle, when we come in presence of the enemy; and the true use of them is not passive reception but active investigation. When you know by a sort of instinct, out of several hundred volumes, which one it is you ought to want, and where in its 1,000 pages you ought to find what you want in it, though the point is one which perhaps you never had occasion to consider before, you will then be something like the soldier.

I feel however, and I am sure you will agree with me, that this course will hardly have a right to be thought successful, if its effect be limited to making of the student only a handier workman of the law. If we should succeed in satisfying him that law is really a Science – and by a necessary inference what a noble science – the course ought to have a high moral value in implicitly dictating the spirit in which the profession of the law ought to be pursued. In every community, whether, professional or otherwise, there must of necessity be members whose notions of the right and the true will fall beneath the proper standard; and we have occasionally had here our discussions, in which the public has not failed to participate, respecting the professional propriety of the conduct pursued by one or other of our body. It is always injurious that causes for such discussions should be believed to exist, and if after the discussions are over, the alleged: causes should still be believed to be true, it is a great calamity. It may be permitted to one who has certainly had his share of responsibility for these discussions – having been personally engaged in them all– to express the regret which he feels,[54] in the interest of the clients who retained him, that the public could not be admitted, from first to last, behind the

54 Foster here is probably referring to an finding of unprofessional conduct on his part by the Canterbury District Law Society in 1871 (see Farrar, above n 4, at 9) and probably to two other occasions in which Foster was involved in some degree in discussions of the requirements of professional etiquette, see "Supreme Court Practice" *Lyttelton Times* (Lyttelton, 17 February 1871) at 3; and "In Re A Solicitor" *The Press* (Christchurch, 13 May 1872) at 3.

scenes. In face of the public he would earnestly express his conviction – leaving each case willingly to stand on its own merits – that the heart of the profession has always been thoroughly sound. But excepting only the influences of our sublime faith, I know of no higher guarantee to the young practitioner against being led away through too facile stages into unworthy practice than that of being taught early to think highly of the law. If he has from the first understood that the law which he administers is not an accidental, system, but is, in truth, a living example of the. highest department of moral science – inasmuch as it teaches not merely that which it is right to do, but that which is so absolutely right that if not done, it may rightfully be compelled – he will himself surely with so much of circumspection as that his life will be above the suspicion of practices which, in the solicitor, disgraceful, and in the advocate, the lowest depth of degradation.

III. Concluding Comments

Foster's lecture inevitably prompts a desire to make comparisons between legal education in that era and that in the present. Some points are obvious; others perhaps less so. First and most tellingly, Foster was addressing a group of students on "jurisprudence" or the theories underlying law; he was not attempting to teach substantive rules. Modern law teaching focusses on substantive law. Most students will complete a degree without ever having taken a course in Jurisprudence. (The subject ceased to be compulsory some decades ago).

Secondly, and very strikingly, Foster's words were directed at young men (and only men at that time – though women now dominate law student cohorts) who were working in law offices on what was essentially an apprenticeship process. Entry to the profession was very largely through serving "articles" for seven years (less for those University graduates), then passing an examination set by the Supreme (now High) Court judges. Law students now come from a wider range of backgrounds; few are primarily employed in law firms while studying. Practical skills are not learnt "on the job" but imparted in a specialist post-graduate course.

There are two less obvious points. Foster's text clearly anticipates that law students would know sufficient Latin to study Roman law. Impliedly, law was a "learned profession"; in practice it was only open to those who could afford a full secondary education or, rarely, win a scholarship. Foster, and very probably his audience, regarded the law they should learn as being the law of England – colonial developments were essentially ignored. While deference to English case law is evident in law course content until at least the 1960s, modern law teaching concentrates, as it should, on local doctrines and statutes.

STATE FORMATION AND LAW IN THE PRE-EUROPEAN PACIFIC

RP Boast*

Abstract

One of the most interesting and exciting developments in the study of Pacific archaeology and Pacific history is the growing literature on state formation in the prehistoric Pacific. The principal polities discussed to date are pre-European Tonga and Hawai'i, both of which were arguably "archaic" states before European arrival in the Pacific, but there may be other examples of early state formation in Oceania, perhaps in Micronesia. Some legal theorists have claimed, inaccurately, that "law" is a product of "states". Whether that is, or is not the case, where does this argument now lie once it is accepted that there actually were states in the ancient Pacific in any case? What remains of the "state"/"law" nexus given the growing scholarly acceptance that there were pre-European states in Oceania? This article seeks in part, but only in part, to connect the new literature regarding state formation to wider debates in jurisprudence and anthropology relating to law. As Teemu Ruskola in his book Legal Orientalism (2013) has observed, "[i]t is exceedingly difficult, if not impossible, for us to think of politics outside the framework of states, and of states outside of law".[1] It will be argued below, however, there is no necessary connection: it is quite possible to speak meaningfully of Māori, Polynesian, or Trobriand Island law – irrespective of whether any of these places ever were, or are, "states".

I. Introduction

There has been a resurgence of interest in state formation in antiquity in recent scholarship. No one doubts that very potent entities such as the Roman Republic and the Roman Empire were states by anyone's definition, and the same goes for classical Greek cities such as Athens, Sparta, Corinth, or Syracuse, although many prefer to

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1. Teemu Ruskola *Legal Orientalism: China, the United States and Modern Law* (Harvard University Press, Cambridge (Mass), 2013) 1.

use the Greek word *polis* in this context; there is likewise no doubt that ancient Egypt, whether Old, Middle, or New Kingdom, and Ptolemaic Egypt, was a "state", as were Assyria or Achaemenian, Parthian and Sassanid Persia; nor, switching to eastern Asia, certainly Han and T'ang China were states,[2,3] and so were all the later Chinese imperial entities. The issue gets more difficult the further back in antiquity the inquiry is pursued. Where were the first states? What is it that makes, say, the city-states of Sumer, states and their predecessors not? At what point did Rome, or Athens, become a state? These questions, after a long period in which the question does not seem to have been perceived as very interesting, are being debated afresh.

Here are I am concerned with "the Pacific", before the first arrivals of European navigators in the 16th–18th centuries. It may seem self-evident what "the Pacific" is, and it is certainly the case that "Pacific history" has long been a flourishing field; moreover, law faculties are following suit, and some are now offering courses in Pacific Legal Studies, one of which I teach, showing the expansion of "the Pacific" as a disciplinary field. In fact, the boundaries of the Pacific are anything but obvious, especially on its western rim, where the Pacific and Indonesian worlds intermingle in a very untidy way. Teachers of courses in Pacific history struggle to draw meaningful boundary lines around their subject, both historically and geographically. Historians work from documents, but in the Pacific, the materials of history often turn out to be less written texts than archaeological evidence and the history embedded in traditional narratives. The latter can either be located in oral narratives collected at the present day, or might be recorded in writing by indigenous authors or by Europeans before or after the advent of colonialism. Such sources, especially archaeological material and linguistics, fail to tidily divide between Oceania and island Southeast Asia, certain ceramic styles, language families, and genetic evidence pertaining to both zones. Even to the east, where the American continents seem to mark a clear boundary to the Pacific world, certain cultigens are found in both regions, most famously the sweet potato (kumara) known even in Aotearoa, practically on the other side of the globe from its Andean homelands.

One option might be to replace "the Pacific' by an arguably more meaningful geographical conception, for example, Austronesia, that part of the globe settled by speakers of Austronesian languages who originated from Taiwan and journeyed by

2 For an introduction to the history of Han China, see Mark Edward Lewis *The Early Chinese Empires: Qin and Han* (Belknap Press of Harvard University Press, Cambridge (Mass), 2007). Lewis characterises Han China as a "*state* organized for war", at 30–50.

3 Mark Edward Lewis *China's Cosmopolitan Empire: The T'ang Dynasty* (Belknap Press of Harvard University Press, Cambridge (Mass), 2012).

sea to the south and east (and on occasion far to the west).[4] The Austronesian world was a vast human cultural unit, defined by open-ocean sailing, certain ceramic styles, and Austronesian languages. An imagined Austronesia would include all of Polynesia, all of island Southeast Asia, Taiwan herself, and even Madagascar. Austronesia was that part of the globe colonised by Neolithic Austronesian seafarers in the first millennium BC, parts – but very definitely not all of which were uninhabited before their arrival. But there are other indigenous peoples in the island Southeast Asia and in the Pacific islands who are not Austronesian, either genetically or linguistically. Some areas usually thought of as undoubtedly "Pacific", New Guinea for instance, had already been settled by non-Austronesian peoples for at least 40,000 years before any Austronesians arrived. Putting that rather important aspect to one side, within the vast realm of the Austronesian peoples, states certainly formed in some areas (Java, Sumatra, coastal Vietnam), and perhaps it makes better sense to see state formation in Tonga and Hawa'i not as isolated phenomena in the Pacific but rather as cognate to the historically well-documented states of pre-colonial Indonesia and Madagascar.

State formation in the Pacific needs to be broken in two phases. The best-known phase is that of the formation of historic kingdoms in the 19th century, often partly under missionary influence and certainly influenced by the teachings of Christianity, of which the best-known examples are the kingdoms that emerged in Tonga,[5] in Hawai'i, and the Māori King movement (Kingitanga) in Aotearoa New Zealand. Tonga still remains an independent kingdom to this day, the Kingitanga remains an important political force in contemporary New Zealand, and while the independent Hawaiian kingdom was overthrown by the United States at the end of the 19th century, a powerful Hawaiian independence movement remains very much alive, an important component of which is the memory of Hawaii's status as a recognised independent country with her own monarchy throughout most of the 19th century. These polities are well-known and well-studied, albeit that there is much to be learned about them. All have every right to be regarded as states,

4 Key up-to-date presentations of the history and archaeology of the peopling of the Pacific are PV Kirch *On the Road of the Winds: An Archaeological History of the Pacific Islands before European Contact* (2nd ed, University of California Press, Oakland, 2017); and Mike T Carson *Archaeology of Pacific Oceania: Inhabiting a Sea of Islands* (Routledge, London and New York, 2018). While the direction of Austronesian expansion and colonisation was generally southwards and eastwards, that was not always the case. Austronesian peoples crossed the entire Indian Ocean sailing westwards from Borneo to Madagascar; and while the great Polynesian voyages of around CE 1000 from Hawaiki, the latter now confidently identified with Tonga, Samoa and northern Fiji, were mainly to the south and east, some intrepid voyagers sailed westwards from Hawaiki to the "Polynesian outliers", such as Tikopia and Ontong Java.

5 On the history of the Tongan kingdom, see IC Campbell *Island Kingdom: Tonga Ancient & Modern* (Canterbury University Press, Christchurch, 1992); and Elizabeth Wood-Ellem *Queen Sālote of Tonga: The Story of an Era 1900–1965* (Auckland University Press, Auckland, 1999).

at least during their florescence, and no one can be in any doubt about the status of independent Tonga today. But the most recent literature is about a different phenomenon entirely: the formation of states in *pre-European* Polynesia.

Were there states, then, in the pre-European Pacific? And so what, if there were (or were not)? Is this just an argument about the meaning of words? No one doubts that there were numerous powerful polities, to use a neutral term which the 18th-century navigators of the European Enlightenment, Cook and Bougainville most famously reached on their voyages, but did they encounter "states"? The focus here, as explained, is on Polynesia, Micronesia, and "Melanesia", not on island Southeast Asia, the boundaries between which and the Pacific are, as already discussed, notoriously fuzzy. Obviously, there were, or had been, states in places such as Java and Sumatra, as anyone who has visited the great Hindu and Buddhist monuments at Palembang and Borobudur can see: only a state could marshal the resources to construct such vast and magnificent monuments. Quite obviously powerful kingdoms and sultanates in were thriving in southeast Asia when the 18th-century navigators arrived. Whether, however, there were *states* in Polynesia and Micronesia, is, however, less certain. In fact, a number of archaeologists have recently argued, as noted, that there were at least two Polynesian states in existence at European arrival; there are also other possible candidates, in Polynesia and perhaps Micronesia as well. To even raise this possibility almost immediately provokes an obvious rejoinder: "What is a 'state', anyway?"

As with most important concepts in social theory, there is no clear answer. There are many approaches, too many to review here, most of them engaging in various ways with a Marxist emphasis on the state as an instrument of class rule on the one hand, or with Max Weber's emphasis on a legitimate monopoly of force within a defined territory on the other. Archaeologists, historians, and political philosophers discuss states in different contexts and for their own purposes. Archaeologists, for example, seek to differentiate the material remains left by entities we might choose to call states from those left behind by entities of some other kind, while political philosophers are not concerned with material artifacts and historic monuments at all.

But does it matter whether there were states in the Pacific or not? Arguably, it obviously does, if the question is restated as one as to what difference would it make if it was accepted that there *were* states, in old Polynesia? I would argue that it *does* make a difference. Once it is accepted that there were ancient Polynesian states, then the whole of Pacific history is clearly immediately re-cast. Such acceptance trains attention on Pacific political formations, awards them a new dignity and seriousness, and helps push European colonisers off their pedestal a little,

discrediting any suggestion that the road to states in the Pacific began only when Britain sent a small fleet of convicts to Botany Bay at the end of the 18th century, or when missionaries made an appearance and began proselytising in Tonga and Hawai'i. It *does* make a difference if ancient Tonga or Hawai'i is described as a state rather than as a chiefdom. What is a "chiefdom" anyway? What are the real consequences of believing that there were early states in the Mediterranean but none in the pre-European Pacific?

The issue is really one of perception: to say that there were no Polynesian states is not a statement of historical or archaeological fact only, but also a judgment of capability. Denying the existence of states in ancient Polynesia is tantamount to claiming that Polynesians were not *capable* of developing states until Europeans were around: surely that implication is there, and just as surely, it is a denigration of Polynesian capabilities. Ancient Mycenae or ancient Troy was a state and ancient Tonga was not: can that be so? Who says so, and why? To deny that Tonga or Hawai'i were states, immediately invites interrogation: why would anyone want to say that? The issue becomes somewhat clearer if attention is directed away from the Pacific to Africa. Why would anyone want to say that there were no states in sub-Saharan Africa before European colonisation? And what are the consequences of accepting, as was certainly the case, that there were many states in pre-colonial Africa? That *denying* the existence of states in Africa or the Pacific before the arrival of Europeans is clearly entangled in wider issues of denigration and racism seems obvious, even if, as it must be admitted, these entanglements are rather difficult to disentangle and state clearly.

Accepting that there were, or where not states, leads to analytical consequences. States, for example, have taxation systems, non-states have something else, tributes, perhaps? What is the difference between a tax and a tribute? Or does "tribute" really accurately describe the burdens that were imposed on commoners in Hawai'i and Tonga? States have legal systems, non-states, again, have something else: customary law, or custom law? These terms may well be appropriate, for (say) Aotearoa, but arguably not at all for Hawai'i. Some societies in Polynesia might have run on something that might quite accurately be described as customary law, but it does not follow that this is universally true for all of Polynesia: if the conceptual and intellectual foundations of law throughout Polynesia are – as I would argue – related and based on common philosophical systems, there may be some areas where such rules of social organisation had moved beyond the customary to the official and legal, and enforced by a ruling establishment, and where there may have emerged a class or an elite group of legal specialists. That very transition seems to have occurred in ancient Hawai'i and Tonga.

More positively, investigating whether there were states in Polynesia, opens up many avenues for inquiry and thought. It is an enriching and stimulating question: in what ways was Tonga, for example, a state? How were taxes levied and assessed; what was the role of monumental architecture in the origins and maintenance of state power; what ideologies were in play, and how were they expressed in literature and art? Many doors are opened when the concept of a state has become part of the analysis, far more so, for example with the rather bland and less than incisive category of chiefdom, which might include a wide array of very different kinds of political organisations.

Thinking about ancient states in the Pacific has beneficial consequences for the study of legal history. There is already emerging, perhaps somewhat haltingly, a call for the field of legal history to emancipate itself from its fixation on the United States and Europe. John Harris, professor of legal history at Tel Aviv University, has recently argued that the time has arrived for "a non-Euro-American legal history".[6] Professor Harris, to bolster his thesis, has pointed out that at conferences of the American Society of Legal History, there can typically be more panels devoted to the history of American constitutional law than to the entirety of the legal history of the rest of the globe.[7] Civil lawyers, for their part, remain transfixed by Roman law, even as they are now making an intellectually challenging transition to seeing Roman law within its historical and cultural context in Rome rather than as a source for the underlying rules of,[8] or background to, the contemporary law of obligations and other fields of private law in such great Civil Law jurisdictions as France, Italy, Germany and South Africa.[9] (As an aside, one must note that the two biggest Civil law countries of the present day are no longer Germany and France but Mexico and Brazil, both with Civil Codes and both deeply influenced by the Iberian variants of the *ius commune* of Western Europe.) Undoubtedly Mexico, at least, possessed an array of indigenous states long before the arrival of the Spanish in the 16th century.

Accepting that there were states in the pre-European Pacific may assist with this very important task of developing a non-European legal history. States have, above all, a continuous and sovereign existence; by definition, they have histories. If pre-European Tonga and Hawai'i are seen as states, then those states will have histories, and hence, legal histories. Arguably, that is another advantage of accepting that that there have been indigenous states in the Pacific; to accept that makes the

6 See Ron Harris "Is it Time for a Non Euro-American Legal History?" (2016) 56 The American Journal of Legal History 60.

7 At 60.

8 Aldo Schiavone *The Invention of Law in the West* (Belknap Press of Harvard University Press, Cambridge (Mass), 2012) (originally published in Italian in 2005).

9 For a recent unified treatment of the Civil Law of obligations, see Reinhard Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press, Oxford, 1996) – a truly heroic work.

historicisation of Pacific laws and legal systems somewhat easier to think about, research, and write about.

State formation in Polynesia has a resonance of its own in Southeast Asia. It is well-known that Austronesian peoples formed states in Java, and, in the case of the Chamic peoples, in coastal Vietnam.[10] Some historians have suggested that state formation in these zones was largely a result of the stimulus provided by Hinduism and Buddhism from India,[11] where, of course, there have been states since early Antiquity. The period of Hindu and Buddhist influence from India has long been regarded as the "classic era" in the history of ancient societies in Java, Vietnam, and Cambodia.[12] Other scholars, however, have given emphasis to the growing sophistication of societies and cultures in Southeast Asia itself, a sophistication on which Buddhism and Hinduism certainly had an effect, but these great faiths were not necessary preconditions to the emergence of states in Indochina or in Indonesia.[13] The Javanese and the Chams were Austronesian peoples too, as were the Hawaiians and the Tongans. So, arguably if Austronesian peoples did indeed create states far off in the Pacific, then maybe they could have done so just as readily in Indonesia or coastal Vietnam, with or without the undoubtedly important cultural stimulus of the great religions of India. The current thinking about state formation in Southeast Asia has been summarised in a recent article by Stephen A Murphy:[14]

> The transition from prehistory to history in mainland Southeast Asia has been a central issue of scholarship ever since the first attempts to explain the origin of its "classical states" over a century ago. Ideas based around the "Indianisation" paradigm saw this transition as happening over a short period of time based almost exclusively on external influences. However, today has reached a more nuanced

10 The Chamic peoples are especially interesting in that while Austronesian peoples are mainly distributed in *island* Southeast Asia (Java, Borneo, the Philippines and so on) and throughout Oceania, including Polynesia, the Chamic peoples, who are undoubtedly Austronesian and who undoubtedly established states, are located in *mainland* Southeast Asia (on the coast of central Vietnam). See generally Graham Thurgood *From Ancient Cham to Modern Dialects: Two Thousand Years of Language Contact Change* (University of Hawai'i Press, Honolulu, 1999).

11 The classic statement is usually seen as G Coedès *The Indianized States of Southeast Asia* (University of Hawai'i Press, Honolulu, 1968) (originally published in French, 1964).

12 S Le Long "'Colonial' and 'Postcolonial' Views of Vietnam's Pre-history", (2011) 26(1) Sojourn: Journal of Social Issues in Southeast Asia 128.

13 See especially P Wheatley *The Golden Khersonese: studies in the historical geography of the Malay peninsula to AD 1500* (University of Malaya Press, Kuala Lumpur, 1961). For a historiographical analysis of the "Indianisation" perspective see Charles Higham *The Archaeology of Mainland Southeast Asia* (Cambridge University Press, Cambridge (UK), 1989) at 306–309.

14 Stephen A Murphy "The Case for Proto-Dvāravatī: A Review of the Art Historical and Archaeological Evidence" 47(3) Journal of Southeast Asian Studies 366.

> understanding of this process and sees it as encompassing an interplay between both internal and external factors. Despite this, considerable debate still revolves around the precise nature and timing of the specific transitions in the various regions and cultures.

Most of the peoples of island Southeast Asia were Austronesians, that is, belonging to the same wider linguistically-defined grouping of peoples who include the Polynesians of the eastern Pacific. Given that it is undoubted that Austronesian peoples certainly established states in Southeast Asia, it should not be surprising that Austronesian peoples in the Pacific arguably did the same.

> It is widely accepted that were states in both island and in mainland Southeast Asia in ancient times. With respect to the Pacific, however, which was settled by peoples who migrated originally from Southeast Asia, the question of state formation is a novel one and a literature is only beginning to emerge. The point above can be re-stated; however, if Austronesian peoples in Southeast Asia certainly established states, it is not unexpected that their descendants (including the Polynesians) would also have done so. To put it another way, the states of Tonga, Hawai'i and Micronesia might be seen as components of a wider zone of Austronesian peoples who not only sailed, spoke Austronesian languages, also had the cultural capacity to establish polities large and sophisticated enough to be accurately characterised as states.

Another benefit from accepting that there were ancient states in the Pacific might be the creation of cultural or historical maps of the Pacific that finally escape from Dumont D'Urville's outworn Polynesia/Melanesia/Micronesia geographical classification of the Pacific islands, aspects of which, especially Melanesia (that is, "Black Islands", so-called because the inhabitants were perceived as Black) have been criticised as fundamentally racist.[15] Similarly, 19th-century Europeans made up their own cultural mental maps of "Black", "Arab", "White" or "Moorish"

15 Serge Tcherkézoff *Polynésie/Mélanésie: L'invention française des « races » et des régions de l'Océanie (XIVe-IIxe siècles* (Au Vent des Îles, Papeete, 2008).

Africa,[16] imposing conceptual boundaries that would have meant nothing to the peoples of Africa, many of whom were literate and who had certainly formed states before Europeans started travelling into the interior of the continent. In the case of the Pacific, while retaining Polynesia as a real phylogenetic human grouping, archaeologists and anthropologists generally prefer to speak of "Near" and "Remote" Oceania, an improvement on earlier nomenclature, but also problematic in its way: ("near" to what?). By this marker, New Guinea, the Bismarcks, and the Solomons, are all "near", while the Marianas, Vanuatu, New Caledonia, Easter Island and Aotearoa are all equally "remote". It might be enlightening, however, to see a map of, say, the 18th-century Pacific where the Tongan, Hawaiian (and other) archaic or primary states are identified as such, and so dispelling the impression that the Pacific was a vast ocean space dotted with isolated tiny islands waiting to be explored by French and British navigators. What would we think of a map of 18th-century Africa which divides the continent into "Moorish", "Black", "Arab", or "forest", or "desert" Africa omitting the powerful indigenous states of Mali and Songhay? That is basically how the Pacific is still often mapped in works of history.

II. Defining the "State"

Definitions of the state are legion, and none are universally accepted. Most of these definitions revolve around the Weberian concept of a community that is able to claim a monopoly of the use of physical force within a given territory. In this article the focus will not, however, be on the endless debate within the fields of political thought and jurisprudence on the meaning of the state, but will concentrate rather on archaeological understandings, which seem to be a more practical way of proceeding when it comes to the pre-European Pacific.

More recent theorists of the state are Robert Carneiro and Elman Service. Carneiro is one of those who believes that it is possible to develop a general theory of state formation.[17] (Not everyone agrees even with that postulate.) He argues that once a certain number of preconditions are met, a state will form in response. Essentially his focus is on warfare, concentration of resources, and population pressure.

If there is a restricted availability of agricultural land, Carneiro argues, and as a result there is increased competition over cultivable land, a process of armed struggle will begin and intensify, leading to a dominating and victorious community that acquires the hallmarks of a state. Carneiro's theory is certainly materialist,

16 See Ghislaine Lydon *On Tans-Sharan Trails: Islamic Law, Trade Networks, and Cross-Cultural Exchange in Nineteenth-Century Western Western Africa* (Cambridge University Press, New York, 2009) 39–43.

17 RL Carneiro "A Theory of the Origin of the State" (1970) 169 Science 33.

and at least quasi-Marxist. In Patrick V Kirch's summation: "In Carneiro's model, chiefdoms became states through conquest warfare and expansion, after reaching conditions of environmental circumscription when land became limiting."[18]

Elman Service, on the other hand, focuses on cultural factors and the development of bureaucracies.[19] His theory is gentler, and owes much to Max Weber in its focus on legitimacy. Service is a neo-cultural evolutionist (his evolutionism must be differentiated from the classical evolutionism of 19th-century anthropology, which ranked societies around according to an imagined position on an evolutionary scale ("hunter-gatherers", "animists", "shepherds", horticulturalists", "farmers", "metal-workers" and so forth.)[20] In Service's view, ruling circles within pre-state societies, chiefdoms, perhaps, evolve and specialise, developing methods of managing conflict and bring communities together into states.

Both Carneiro and Service accept that chiefdoms were precursors of states, but they see the transition from chiefdom to state in different ways. In Carneiro's somewhat dystopian vision, chiefdoms struggle over circumscribed lands and resources, and the state is that chiefdom which succeeds in destroying its rivals, and which works out strategies of how to succeed in the struggle. To Service, states arrive on the scene when the rulers of chiefdoms became successful in persuading everyone to get along and in developing techniques of integration and of moderating behaviours. About the best that can be said is that both options are at least possible.

Yet another, much less schematic, approach is to develop an agreed set of criteria which plausibly characterise "Archaic states". This suggests that state formation is a normal stage of cultural development and implies that such archaic states are likely to be found at different times and places all over the world (as in fact is the case). Such is the approach of Marcus and Feinmann:[21]

> In contrast to modern nation states, archaic states were societies with (minimally) two-class endogamous strata (a professional ruling class and a commoner class) and a government that was both highly centralized and internally specialized. Ancient states were regarded as having more power than the rank societies that preceded them,

18 PV Kirch *How Chiefs Became Kings: Divine Kingship and the Rise of Archaic States in Ancient Hawai'i* (University of California Press, Berkeley, 2010) at 7.

19 ER *Service "Origins of the State and Civilization: The Process of Cultural Evolution,* (Norton, New York, 1975). See also ER Service *Primitive Social Organization: An Evolutionary Perspective* (Random House, New York, 1967).

20 The classic exposition of 19th-century cultural evolutionism is George W Stocking, Jr *Victorian Anthropology* (Free Press, New York, 1991).

21 J Marcus and GM Feinman "Introduction" in GM Feinmann and J Marcus (eds) *Archaic States* (School of American Research Press, Santa Fe, 1998) 1–13 at 4–5

> particularly in the areas of waging war, exacting tribute, controlling information, drafting soldiers, and regulating manpower and labour... For some well-known states, where texts are available, one could add to this stipulation that archaic states were ruled by kings rather than chiefs, had standardized temples implying a state religion, had full-time priests rather than shamans or part-time priests, and could hold on to conquered territory in ways no rank society could.

One thing underlies the varying approaches of Carneiro, Service, and Marcus and Feinman: archaic states are normal and all societies are likely to form them if the conditions are ripe. All these scholars would repudiate any suggestion that states only emerged in certain parts of the globe and diffused from there. The precursor of the state is the "centralised chiefdom", the existence of which in the case earlier societies might be inferred scientifically, that is, archaeologically.[22] For example, the existence of a single set of rich burials of elite people in a central settlement might be one indication of a centralised chiefdom, as may temples, walls, or moats around a central place. This seems rather schematic, however, and it is more than questionable whether it is in fact possible to infer centralised chiefdoms from strictly archaeological criteria of this sort. In the case of a state, however, it may be more possible to identify the archaeological criteria that allow us to infer a state from material criteria. What does it mean to say that it is *obvious* from the evidence of archaeology that an ancient polity must have been, or perhaps *can only have been* a state? Perhaps simply *large* monuments, irrigation works, mounds, and so forth, observable archaeologically, might infer state organisation, but how large is necessary to cross the chiefdom/state boundary? There is no clear answer.

III. Studying Ancient State Formation and the Role of Legal Records

Studying state formation in antiquity typically demands a close synthesis between written records and archaeology. In Mesoamerica, for example, studies of the formation of the Tarascan state in western Mexico have drawn on colonial Spanish chronicles, notably on the *Relación de Michoacán* (probably composed from

22 See CS Peebles and SM Kus "Some archaeological correlates of ranked societies" (1977) 23(3) American Antiquity 421. See also Higham, above n 13, at 154. This largely fits within Elman Service's neo-evolutionist approach.

1539–1541) as well as on archaeological evidence.[23] In the Austronesian world, studies of early state formation in Java likewise draw on written records, mostly in Chinese, but also inscriptions in Sanskrit and Old Javanese. Combining the study of Chinese sources and Sanskrit inscriptions with on archaeological research facilitates the study of emergence and development of such great kingdoms as Śrīvijaya (Sumatra and Java),[24] and Majapahit (Java).[25] In Vietnam, Chinese written records document the existence of a powerful state named Funan based in the Mekong delta and which seems to be the same entity that generated such celebrated archaeological sites as Oc-éo which at least seem to be in the right place to be attributed to the known state of Funan.

In Southeast Asia there are written records in Chinese and Sanskrit, some of them composed by visitors to Southeast Asia from China and parts of India; while in the Americas and the Pacific, studies of the state have to rely on archaeology supplemented by indigenous sources; the latter can include manuscripts written in indigenous languages or in inscriptions, or by European and American residents who became interested in indigenous histories, collected data from oral informants, and who composed narratives in French, English and German.[26]

There is also the living oral tradition still extant today. The oral tradition which can be accessed by oral interviews today, or might be recorded as testimony regarding indigenous histories given to Native Land Courts, or in the course of similar proceedings (such as the Kingdom of Hawai'i's Land Commission.[27] Other types of legal records can be relevant, such as the private legal records studies by Ghislaine Lydon in her book on trade and commerce in the Sahara, the famous records of the Cairo Geniza, and legal papyri, which continue to be found in Egypt and to be published in specialist papyrological journals. In Southeast Asia, it is increasingly coming to be recognised that much of the customary law (*adat*) was also written down.[28]

23 HP Pollard "Model of the Emergence of the Tarascan State" (2008) 19(2) Ancient Mesoamerica 217. On the colonial period in Michoacán, see J Benedict Warren *The Conquest of Michoacán: The Spanish Domination of the Tarascan Kingdom in Western Mexico* (University of Oklahoma Press, Norman, 1977).

24 OW Walters "Studying Srivijaya" (1979) 52(2) Journal of the Malaysian Branch of the Royal Asiatic Society 1.

25 Amrit Gomperts, Arnoud Haag and Peter Carey "Mapping Majapahit: Wardenaar's Archaeological Survey at Trowulan in 1815" (2012) 93 Indonesia 177.

26 Augustin Krämer *The Samoa Islands* (Pasifika Press, Auckland, 1994), originally published as *Die Samoa Inseln* (E Schweizerbartsche, Stuttgart, 1902–1903).

27 On the records of the Hawaiian Land Commission see Patrick V Kirch and Marshall Sahlins *Anahulu: The Anthropology of History in the Kingdom of Hawaii: Vol I: Historical Ethnography* (University of Chicago Press, New York, 1992) 9–14.

28 Timothy Lubin "Writing and the Recognition of Customary Law in Premodern India and Java" (2015) 135(2) Journal of the American Oriental Society 225–259; and Helen Creese "Judicial processes and legal authority in pre-colonial Bali" (2009) 165 (4) *Bijdragen tot de Taal-, Land- en Volkenkunde* 515.

IV. Indigenous State Terminology: Maṇḍala, Alteptl, Cah, Nuu

Rather than attempt to use universally applicable material definitions of the state, there is an increasing willingness to accept that it may be more fruitful to adopt indigenous conceptualisations and work from there, Increasingly, archaeologists and historians writing about early states prefer to use indigenous terminology in order to achieve greater precision and also in order to avoid the complexities of the endless theorising across disciplines about the meaning of the word "state" and the impossibility of achieving any general agreement. The same, of course, goes for "law", the anthropological understanding of law being distinctive, and, of course, even with the field of jurisprudence itself, there is no general agreement.

In Southeast Asia, many specialists, instead of state prefer to use the Sanskrit term *maṇḍala* to refer to early states, or state-like formations, that developed in Cambodia, Thailand, Vietnam and as well as in India itself. After all, Sanskrit was, and is, a highly developed language with a rich vocabulary relating to political thought and philosophy. It makes sense to work with Sanskrit concepts. The term *maṇḍala* captures a sense of a highly organised polity that is much larger and more powerful than a chiefdom while escaping the baggage that comes with the terminology of the state. According to Charles Higham in his recent survey of the archaeology of mainland Southeast Asia:[29]

> In Indian political terms, the doctrine of the *maṇḍala* determined the relationships between rulers whose territories were visualised as circles. The ruler of the neighbouring circle is by definition an enemy, while that in the circle beyond the immediate enemy is a potential ally. In essence, the idea emphasises the importance of alliances in maintaining a hold on allegiance and power. There is no English word to provide a neat translation, but essentially in political terms a *maṇḍala* describes a political apparatus fluid in terms of territory and therefore without fixed frontiers.

Higham explains that his decision to prefer indigenous political terminology was dictated by the fact that there is "no generally accepted model which can be employed to explain the origin of centralised state-like polities in a particular place".[30]

29 Higham, above n 13, at 240.
30 At 240.

The concept of *mandala* is explored more intensively by Kenneth R Hall in his classic study, *Maritime Trade and State Development in Early Southeast Asia*.[31] In explaining the concept, Hall gives primary emphasis on cultural concepts derived from India and the Sanskrit language:[32]

> Summarizing their perceptions of the Hindu and Buddhist traditions, early Southeast Asian rulers fused these cosmological principles with Indic topographical formulas *(maṇḍala* – "contained core") that provided a design for the integration of a clan or lineage-based groups into more complex centralized polities. In the Indian philosophical tradition a *maṇḍala* was a sacred diagram of the cosmos that was normally depicted in art as a geometric construct of encompassed circles and rectangles. The worldly *maṇḍala* (state) in early Southeast Asia was defined by its centre, not its perimeter, as there was no notion of a firm frontier. Subordinate population centres surrounding the centre were invariably drawn to participate in the ceremony of the state system. To encourage their participation, the personal and regional cults practiced in the state's regions were assembled at the centre. One theoretically moved from the mundane world toward the spiritual one by approaching the sacred axis from one of the four quarters (defined by the points of the compass).

Other specialists, again in the field of Southeast Asian archaeology, have discarded the term state altogether, primarily because it seems to exemplify long-discredited early cultural evolutionism, according to which indigenous polities were ranked from primitive to complex on an evolutionary scale. This is the stance of John N Miksic and Geok Yian Goh in a newly published (and fascinatingly interesting) study of historical archaeology in Southeast Asia. Much of the book is, of course, devoted to the Austronesian peoples of the region, so for that reason, their approach may have some resonances for Polynesia. Better, they think, to discard all talk of the "state" completely:[33]

31 Kenneth R Hall *Trade and Statecraft in Early Southeast Asia* (University of Hawai'i Press, Honolulu, 1985).

32 At 7–8.

33 John N Miksic and Geok Yian Goh *Ancient Southeast Asia* (Routledge, London and New York, 2017) at 23–24.

> The paradigm used in this book differs from that used by other scholars who have written on historical archaeology in Seasia. The terms "states" and "state formation" will *not* be used. They imply that political systems can be divided into four stages: the band, the tribe, chiefdom, and state; these four stages are divided by sharp thresholds, and evolution from one to the next must follow the same sequence.

This seems a little bleak, however, in that there are plenty of scholars of Asia and the Pacific (and elsewhere, come to that) who *do* find it interesting and enriching to think about state formation in island Southeast Asia and the Pacific who would not, I am sure, ever want to subscribe to the evolutionary approach that Miksik and Goh understandably dislike. No one plays the ranking game of band-tribe-chiefdom-state anymore. The cultural evolutionism of the present day is a very different mode of analysis altogether.

Other examples of reliance on indigenous terminology to characterise "state-like" polities comes from the field of Mesoamerican studies, and, in particular, from documentary historians who are referred to as affiliating to the "Stanford", "New Philology" or – after its leading member, James Lockhart, the "Lockhart" historiographical group, or school. This is a group of historians mainly based at Stanford University who specialise in the history of Mesoamerica during the Spanish colonial period. What distinguishes this group is that all its practitioners insist on confining themselves to a particular type of primary source material this being "mundane" documents (such as wills, notarial documents, land records and the like *written in indigenous languages* such as Nahuatl, Mixtec, and Yucatec Maya). These historians eschew more standard primary sources, particularly narrative chronicles written in Spanish. By proceeding in this rather demanding way, these historians impose on themselves the challenge of acquiring high standards of competence in *written* Nahuatl, Maya, and other indigenous languages of Mexico and Central America. Some historians of this group have moved beyond using documents written in Maya and Nahuatl as a source to publishing sophisticated grammatical works and collections of documents translated from indigenous languages.[34] Other specialists, mainly based in Mexico, have published detailed analyses of chronicles, legal documents and religious works written in indigenous languages. [35] (Scholarly

34 James Lockhart *Nahuatl as Written: Lessons in Older Written Nahuatl with Copious Examples and Texts* (Stanford University Press/ UCLA Latin American Centre Publications, Stanford (Cali), 2001).

35 Ethelia Ruiz Medrano, Claudio Barrera Gutiérrez and Florencio Barrera Gutiérrez *La Lucha por la Tierra: Los títulos promordiales y los pueblos indios en México, siglos XIX y XX* (Fondo de Cultura Económica, México DF, 2012).

literature on the colonial Pacific has far to go before it can reach these heights.) These specialists are certainly interested in indigenous political formations, formations which were certainly state-like, but Lockart and others carefully use indigenous words to characterise the political entities they are writing about. (It is important to bear in mind that the Nahua (Aztecs), Maya, and Mixtecs all had written languages before the Spanish conquests of the 17th century, and thus developed vocabularies of political thought – like Sanskrit.)

In the case of the Nahua (mis-named the Aztecs) of Central Mexico, who spoke and wrote the language known as Nahuatl – still spoken by millions of people in Mexico today – the term that comes closest to state is *altepetl,* a strictly indigenous word identifying a strictly indigenous political conceptualisation. While the concept of the *maṇṇala* in Southeast Asia was deeply embedded in the Sanskrit language and Indic thought, the *altepetl* was no less embedded in Mesoamerican glyphic writing.[36] Mesoamerican glyphs were, like Chinese writing, a non-phonetic script: the same glyph was used for state and pronounced differently should one happen to speak Nahuatl, Maya, or Mixtec (or some other language). The concept did not change, but the pronunciation, and indeed the language might, in the same way that speakers of Japanese and Chinese can read the same characters in terms of meaning. Thus *altepetl* (literally, "the water, the mountain", meaning a particular type of state and represented by a glyphic representation of a hill and water, conveyed the same meaning to a Maya speaker, although in Yucatec Maya the word is *cah.* The glyph conveyed not exactly state but a Mesoamerican conceptualisation of an entity, that dependent on its size, that *we* might recognise as a state. In the same way that the great functionalist anthropologists have insisted that the meaning of an economy is culturally relative, the same may be true of the state.

In the Mixtec (Ñudzahui) language of Oaxaca (in southern Mexico) the equivalent of Nahua *altepetl* and Maya *cah,* was *yuhuitayu,* often translated in Spanish-language documents as *ciudad* (city) or *señorío* (lordship) According to Kevin Terraciano in his ethnohistory of the Mixtecs:[37]

> The prominence of the term *yuhuitayu* in colonial documentation, represented by a metaphor rooted in the

36 James Lockhart *The Nahuas After the Conquest: A Social and Cultural History of the Indians of Mexico, Sixteenth Through Eighteenth Centuries* (Stanford University Press, Stanford) at 14–58. To Lockhart, *altepetl* conveys the idea of "ethnic state" (at 14), which might be very small or very large. Political formation in Mesoamerica was segmentary, so the Aztec state or empire, or its great capital city of Tenochtitlán, was an *altepetl* made up of massive assemblages of *altepetl.* The Aztec state, or "empire" was, in reality, an alliance of three great Nahua *altepetl.* See Pedro Carrasco *Estructura politico-territorial del Imperio tenocha: La Triple alianza de Tenochtitlan, Tetzcoco y Tlacopan* (Colegio de México and Fondo de Cultura Económica, México DF, 1996).

37 Kevin Terraciano *The Mixtecs of Colonial Oaxaca* (Stanford University Press, Stanford, 2001) at 104.

> reality of local rule and applied to specific places, confirms its indigenous origins. As a metaphorical doublet representing an actual place, the yuhuitayu is comparable to the Nahuatl term for the local ethnic state, *altepetl,* a combining form of *atl,* "water," and *tepetl,* "hill". The symbol of the yuhuitayu represented an institution that joined the resources and rulerships of two ñuu [places, localities] without compromising their autonomy and separateness. The yuhuitayu survived the conquest and persisted throughout the colonial period.

The Maya equivalent is *cah,* Maya writing employing the same glyph with the same meaning:[38]

> The cah is ubiquitous throughout the Maya notarial record: it was the fundamental unit of Maya society and culture. Every cah had its place in the geopolitical framework of Yucatan, just as every individual Maya still tied to indigenous community was a *cahnal,* "cah member," in the general sense, as surely as she or he lived on a cah house plot with relatives of the same, or an associated, patronym group.

The concepts of *mandala, altepetl, yuhuitayu,* or *cah* have the conceptual advantage of being "emic" (from within) categorisations rather than the "etic" category of "state". It really does seem best to start from an indigenous concept, one that might be translated, in certain contexts at least, as "state". As far as I am aware, however, there is no such concept in the eastern Polynesian languages (Hawaiian, Tahitian, Māori, Rapanui) that could be generally translated as "state", leaving the existence of states to be inferred primarily from archaeology rather from linguistics, or sociolinguistics. (Perhaps there is such a term in the western Polynesian languages: Samoan, Tongan, and their neighbours). By sticking to Mesoamerican concepts of *cah, altepetl,* and *yuhuitayu,* the ethnohistorians of the "Stanford" or "New Philogical" school have empowered themselves to write about indigenous political formations in a highly nuanced and deeply culturalised way which so far has proved difficult to achieve for Polynesia. But it does not follow that it is only possible to work within emic categorisations when writing about pre-European polities. The general issues about historic transition from "non-state" to "state" still remain. Some *altepetl* are

38 Matthew Restall *The Maya World: Yucatec Culture and Society, 1550–1850* (Stanford University Press, Stanford, 1997) at 13.

recognisable as states, such as the "Aztec" state based on Tenochtitlán for example, and some *mandala,* such as the Cham and Khmer polities of Cambodia and Vietnam are equally clearly states, while some *mandala,* by the same token, are not.

In the case of Polynesia, the study of indigenous political formations and vocabularies is still in its infancy, and the vocabulary that has been used to describe pre-European politics have been entirely etic (external), that is, chiefdom, state, empire and so on. There is a strong case for adapting the emic/linguistic approach to the legal and political history of Polynesia, as I have argued elsewhere,[39] but there are no real indications of this happening any time soon. To the objection that there are no written documents relating to Polynesia that can serve as a counterpart to Sanskrit inscriptions and texts in Southeast Asia or indigenous glyphic writing in Mesoamerica, it can be responded that in Polynesia there are richly documented oral histories that have written down by indigenous scholars or by ethnographers from outside. So far, these texts have not been analysed in detailed ways that might allow for the emergence of a full analysis of indigenous political terminology as has been analysed elsewhere. Meanwhile, then, there is no alternative to the etic state/chiefdom dichotomy, and this article proceeds accordingly.

V, The State and Law

Since this article is, after all, being published in a law journal, it is necessary to ponder the implications of possible state formation in the Pacific for Pacific legal studies. As Teemu Ruskola has observed, "[i]t is exceedingly difficult, if not impossible, for us to think of politics outside the framework of states, and of states outside of law".[40]

The only law book of more than local importance published by a New Zealand lawyer in the first half of the 20th century was Salmond's *Jurisprudence,* published in 1902 while he was a professor at the University of Adelaide, and updated regularly by Salmond himself and then by others.[41] Salmond's book is an austere treatment of the subject, and despite its title, is more of an analytical presentation of the Common Law than a discussion of jurisprudential theory. Within these limits it

39 RP Boast "Bringing the New Philology to Pacific Legal History" in M Stephens and A Angelo (eds) *Droit et Langue dans le Pacifique Sud: Essais Comparatistes/ Law and Language in the South Pacific: Comparative Studies* (Revue Juridique Polynesienne, Papeete, 2011) at 237.

40 Teemu Ruskola *Legal Orientalism: China, the United States and Modern Law* (Harvard University Press, Cambridge (Mass), 2013) 1.

41 John W Salmond *Jurisprudence: or The Theory of the Law* (Stevens and Haynes, London, 1902). For the purposes of citation, I have relied on the 2nd ed (Stevens and Haynes, London, 1907). For information regarding the circumstances of the publication of this book see Alex Frame *Salmond: Southern Jurist* (Victoria University Press, Wellington, 1995) at 54–71.

is a work of great learning and clarity, and it provided a high-quality analytical survey of English law for beginning students. The book was widely praised in its day, and Frederic Maitland, no less, regarded it as "liberal and liberating", a somewhat surprising judgment it must be said.[42] With apologies to Salmond's admirers, it is hard to imagine that anyone would want to read Salmond's *Jurisprudence* these days, except perhaps as a window into the world of orthodox British legal positivism at the beginning of the 20th century. To a contemporary reader, the book seems dominated by a fixation on endless arid logical classifications: supreme and subordinate legislation; declaratory and original precedents; authoritative and persuasive precedents; wrongs, duties, and rights; elements of legal rights; proprietary and personal rights; legal and equitable ownership; possession in law and in fact; corporations aggregate and corporations sole; and so forth.

Although entitled *Jurisprudence,* the book is not a work of legal philosophy and is almost wholly focused on English law, plus a few scattered references to Roman law and German and French legal writing. The book is essentially an analytical distillation of the main distinctions of English law and can be seen as an attempt to create a theory of English law.[43] Moreover, the book is written as an English lawyer, not as an Antipodean one, and one searches it in vain for any discussion of New Zealand's own legal and historical circumstances. Indeed, the book, which is remorselessly synchronic in its presentation, is not a historical treatment in any sense. Salmond, a believer in the enlightened state, believed that "it is in and through the state alone that law exists" and his discussion of custom as a source of law is mainly focused on the restrictive rules of the courts of common law as to when a custom may be given effect to.[44] Legal positivism has many varieties, but one important strand within legal positivism does indeed tend to link the concept of law with the state: only "states", in Salmond's view, can have "law". Few theorists of law would be inclined to be dogmatic about this connection these days. In fact Salmond himself certainly understood, as Paul McHugh puts it, "that the established, ingrained patterns for the conduct of political life determined the nature of the constitution".[45] It might be possible, on one hand, to imagine a state which does not have law, although admittedly it is difficult to conceive of what such a polity might

42 HAL Fisher (ed) *Collected Papers of Frederick William Maitland* (Cambridge University Press, Cambridge, 1911) vol 3 at 429, cited by Frame, above n 41, at 71.

43 See AWB Simpson "The Salmond Lecture" (2008) 38 Victoria University of Wellington Law Review 669. Simpson emphasises the role of Salmond's book as an introductory text for students taking degrees in law at university: Salmond "was writing for students of the common law who were embarking primarily on the study of what we sometimes call lawyer's law" (at 677). Simpson's approach to Salmond is, on the whole, respectful but not enthusiastic.

44 Salmond (1907), above n 41, at 93.

45 PG McHugh "Tales of Constitutional Origin and Crown Sovereignty in New Zealand" (2002) 52(1) The University of Toronto Law Journal 69 at 82–83.

be like, or to think of concrete historical or contemporary examples of a "lawless" state, meaning something other than a "rogue" or a "failed" state to mean a state which has no internal law of any kind at the state level. On the whole, the current position, *pace* Salmond, seems to be that while states will normally have law, it does not follow that law only exists in and through states. There are no lawless states but law does not always need a state.

It really does seem easier to say that states imply law than the countervailing proposition that there can be no such thing as law *without* a state, meaning that only those rules that are enforced by the special coercive machinery possessed by states are "law". That was, for example, Sir John Salmond's view. But what did Salmond have in mind by a "state"? Presumably he had France, Germany, or Great Britain in mind, and if Salmond can be taken to mean, as is probably the case, that only European countries and a handful others around the globe can be said to have "law", then Salmond's proposition is indefensible, or is, at least, totally at odds with modern thinking in either jurisprudence or anthropology. More precisely, states do not so much imply law but rather *public law*. Rules relating to deference to chiefs and rankings among siblings may move to the domain of the powers and prerogatives of kings, to the deference that subjects must pay to monarchs, and rules relating to royal succession. Something like that appears to have occurred in Hawai'i and probably also in Tonga.

If Salmond's view is widened, or qualified, by broadening the concept of the state, to take in the *altepetl* of Mesoamerica or the *mandala* of Southeast Asia, we are left with a more moderate positivist situation: "law" is linked with especially large, powerful, polities, including "Archaic" states, but not so much with less complex forms of political organisations. Even this moderated form of positivism will be difficult for many to swallow, but perhaps if it may seem more acceptable if moderated further to the suggestion that "law" as applied and elaborated in polities sufficiently large, or organised, to be understood, however broadly, as states, becomes somewhat different from legal rules enforced at a more local level by "non-states". There can be "law" without states, but where law is linked to a state it becomes, arguably, a different kind of law from laws that exist independently of states. In this highly attenuated way, then, perhaps it is actually true that the law of a state is different from that of non-state laws, or even, turning the proposition around, one essential attribute of a "state" is that it possesses, in whatever sense, "state" or "public" law.

So, the conclusion must be that it is not necessary to show that at least some Polynesian polities have to qualify as states before it can be accepted that there was such a thing as Polynesian law; Polynesian norms can be law quite irrespective of

whether the rules existed and were enforced within the framework of a state (Tonga) or not (Tikopia, Rarotonga, Aotearoa). But if the issue is rephrased slightly, if it is accepted that ancient Hawai'i was a state, what are the consequences of that for the study of Hawaiian law and Hawaiian legal history? Did customary law fragment into something like private law and into something like public law? Before embarking on that inquiry, it is necessary to look at Hawai'i and Tonga more closely.

VI. Recent Studies: Tonga and Hawaii

Historians, anthropologists, and others have long been interested in state formation in Hawaii. Until recently, however, most discussions of state formation in Hawaii focus on the 19th century and the well-known unification of the whole archipelago under Kamehameha I around 1890–1910. This itself is much debated. Most of the earlier historiographical debates focused on the role of firearms, some historians (mainly Americans) arguing that possession of firearms by Kamehameha's forces was the decisive factor in their success and the establishment of the Hawaiian kingdom.[46] Lest it be thought that this might be another symptom of the excessive interest of Americans seem to have in guns, in fact there was a similar debate about the "musket wars" in Aotearoa, regarding which historians now tend to downplay the role of muskets *per se.* Angela Ballara analyses these colossal conflicts, the biggest wars ever fought in Aotearoa, in cultural terms, stressing the inability of Māori customary legal norms to adapt to the changed realities of the 19th century.[47] In Ballara's view, "muskets and guns did not alter the cultural norms of Maori warfare itself".[48] Guns were important in a way, however, because they meant that cycles of retaliation and revenge could prove calamitous when everyone was armed with guns that could kill at a distance. Concepts of *utu* and *mana* did not evolve fast enough to moderate the effects of a new age of guns.

But, more recently, the focus has shifted away from the 19th-century kingdom of Hawai'I, about which there is no shortage of historical documents or any reason at all to doubt that it was a state, to much earlier times. Recently discussion of state formation has turned to ancient Polynesian Hawai'i, a long-ago Hawai'i where, so it has been recently suggested, states may have come into being long before the 19th century. Two recent books, contemporary productions, have engaged with this question. These are *How Chiefs Became Kings: Divine Kingship and the Rise of Archaic*

46 On this issue see Paul D'Arcy "Warfare and State Formation in Hawaii: The Limits on Violence as a Means of Political Consolidation (2003) 38 (1) Journal of Pacific History 29.

47 Angela Ballara *Taua:'Musket wars', 'land wars' or tikanga: Māori Society in the Early Nineteenth Century* (Penguin Books, Auckland, 2003).

48 At 25.

States in Ancient Hawa'i,[49] and *The Ancient Hawaiian State: Origins of a Political Society*.[50] Both authors are archaeologists. Patrick Kirch, of *haole* (Hawaiian Pākehā) background is one of the best-known and most distinguished contemporary archaeologists of the Pacific, Polynesia in particular, and has written numerous books and articles about the prehistoric settlement and colonisation of Oceania, about human modifications of Pacific island environments, and many specialist studies of Hawaiian archaeology. RJ Hommon was, for some years, an archaeologist with the United States National Park Service in Hawai'i and is primarily an archaeologist of Hawai'i itself. Both authors are well-known amongst the community of Pacific archaeologists, a community that draws its ranks from Hawai'i, Aotearoa, Australia, New Caledonia, Taiwan, Chile and Japan (and other places further afield). The two books by Kirch and Hommon on ancient Hawai'i, quite naturally, approach the issue of state formation from the perspective of archaeology, and by definition, of material culture, including what can be inferred from material culture and from the expansion and intensification of agriculture about social organisation.

Hommon and Kirch, to repeat a point made at the beginning of this article, are considering, not the well-known 19th-century independent Hawaiian kingdom established initially by Kamehameha the Great (1758–1819), but rather pre-European Hawai'i, meaning that the evidence for the phase of state formation they are interested in cannot be written records (except written records which preserve indigenous oral traditions), but rather must derive from archaeology and the indigenous oral tradition. The 19th-century independent Polynesian kingdom as is well-known, left a mountain of documentary records, and has a rich historiography, but the arguments of Kirch and Hommon that there were states in ancient Hawai'i is a new trend. Implicit in this argument is the suggestion that Hawai'i was not merely quantitively different from the rest of pre-European Polynesia, in its high population (which could have been around one million people) and the scale of Hawaiian agricultural diversification and intensification so obvious in Hawaiian archaeology.[51] The argument is, rather, as Kirch puts it, that "Hawaiian society at the time of contact with the West was *qualitatively* distinctive from other Polynesian groups".[52] Kirch eschews simple models of state formation and is cautious about engaging with the general literature on state definition as exemplified by Max Weber. Rather, Kirch's approach focuses on the particular historical evolution of Hawai'i itself and

49 Kirch, above n 18.

50 Robert J Hommon *The Ancient Hawaiian State: Origins of a Political Society* (Oxford University Press, Oxford, 2013).

51 See PV Kirch *Feathered Gods and Fishhooks: An Introduction to Hawaiian Archaeology and Prehistory* (University of Hawaii Press, Honolulu, 1985); and PV Kirch *A Shark Going Inland Is My Chief: The Island Civilization of Ancient Hawai'i* (University of California Press, Berkeley, 2012).

52 Kirch, above n 18, at ix.

leans towards the inclusive approach of Marcus and Feinmann. Kirch's approach is to pay equal attention to material changes (archaeological evidence of agricultural expansion and intensification and the development of monumental architecture, and the ideological). It is with the latter that Kirch is most interesting and creative, his approach indicative from the very title of his book, *How Chiefs Became Kings.* In ancient Hawai'i, Kirch argues, control over land and resources became separated from the traditional Polynesian kin-based "clan" system of social organisation (as seen, for instance, with the Māori people) and was replaced by royal government and the development of a ruling class:[53]

> Thus, instead of sitting at the apex of a 'conical clan.' Which ramified downward to incorporate the entire society, the hereditary *ali'i* (elites) of Hawai'i had become a separate, endogamous class. The highest *ali'i* claimed descent from the gods; indeed, they claimed to be *ali'I akua,* 'god-kings.' As in other parts of the ancient world, the Hawaiians had invented divine kingship, a hallmark of archaic states.

Kirch gives considerable weight to ideology as a component of state-formation, albeit that in his presentation of the evidence ideology and such factors as agricultural intensification and expansion and the development of monumental architecture are all interlinked. According to Kirch:[54]

> Yet chiefs did not become kings solely through their extraction of surplus, or by taking direct control over land allocation. The very social contract had to be rewritten, requiring the manipulation of *ideology*, notably through daily practice and *materialization.* In Hawai'i, as elsewhere, elites built on preexisting power relations, which in Polynesia included birth-order ranking and its inherent relationship to *mana* and the ancestral sources of fertility, to elaborate new structures of authority and command. A major arena for these restructurings was in the rituals of first-fruits and of sacrifice. These had always been the prerogative of the senior ranks, but which were now transformed into state cults of tribute collection and of war (the cults of Lono and Kū, respectively.

53 Kirch, above n 18.
54 At 220.

Hawai'i's transition to a primary state still occurred within a framework of Polynesian social organisation and customary law, but both of these were, as it were, scaled up. Ritual actions formerly carried out by elites expanded into "state cults"; royal ideologies built on existing cultural concepts and rules relating to birth-order ranking and concepts of mana and authority. In a sense, the existing cultural order and existing systems of law and ritual are intensified. In the zone of law, rules relating to the mana and prestige of chiefs move upwards into rules relating to deference to kings and royal rights to land and tributes: something like public law emerges. (Kirch does not focus on law, but arguably ideologies relating to law and jurisprudence fit quite easily into his general approach.)

Apart from Hawai'i, Tonga presents the strongest case for state formation in the pre-European Pacific. Hommon argues that "the ancient Tongan kingdom satisfies the definition of primary state in every significant respect".[55] Ancient Tonga was a "durable autonomous society" that was "large in territorial extent and population".[56] Ancient Tonga was a kingdom, headed by the leader of the dominant lineages, the Tu'i Tonga, who can be thought of as a religious and cultural head of state, supported by a high chief known as the *hau*, the secular head of state, or co-ruler. According to Hommon:[57]

> The co-rulers [of Tonga] exercised central authority legitimized by divine ancestry and political power, backed by the occasional application of force. The *hau,* in his capacity as active ruler, commanded at least six strata of bureaucrats who carried out tasks including tax collection and state rituals such *as 'inasi* and royal funerals.

Hommon suggests that primary state formation in Hawai'i and Tonga were "convergent", but emerged in divergent ways within "a common [i.e. Polynesian] cultural tradition", by which the two societies "arrived at a similar systemic state by disparate routes".[58] On the whole, Tonga's pathway to primary statehood appears to have been much more peaceful than in Hawai'i. There was little or no intra-archipelagic warfare in Tonga, but the outcome was the same:[59]

> Whatever the effect of each of these divergent elements in each archipelago, the result was, in terms of this study, virtually identical: the emergence of one or more primary states with centralized governments led by symbolic and

55 Hommon, above n 50, at 198.
56 At 198.
57 At 198.
58 At 198.
59 At 199.

> active rulers directing bureaucracies conducting tasks such as collecting taxes and building public works.

This article has taken as its main focus the new thinking about state formation in the ancient, or pre-European Pacific, while referring to the historic 19th-century Polynesian kingdoms from time to time. But arguably, the two phases of Pacific state-building are connected. If it is correct, as Hommon and Kirch argue, that the most compelling examples of primary state formation to be found in Polynesia are Tonga and Hawai'i, it is striking that both became internationally-recognised independent Christian kingdoms in the 19th century. Tonga proudly maintains her independence as an independent Pacific Christian monarchy to this day and is a full member of the international community. In the course of the 20th century, Tongan monarchs such as Queen Sālote were familiar and much-esteemed international figures.[60] Might there be some cultural continuities that underpin the two separate phases of state formation in both countries?

While Tonga has maintained her independence, Hawai'i has not. After a lengthy and eventful history as an independent monarchy, the kingdom was annexed by the United States in 1898 and became a United States plantation colony. Immediately before annexation, the monarchy was overthrown by a coup orchestrated by American commercial interests. The annexation was opposed by the people of Hawai'i and by some Americans, but was ratified by Congress nevertheless. The annexation of Hawai'i by the United States in 1897–1898,[61] it has to be said, was no more justifiable than that of Crimea by Russia in 2014. Americans may feel that, unlike being annexed by Russia, annexation by the United States leading to statehood is a blessing, but many indigenous Hawaiian people do not seem to be of that opinion. A movement for Hawaiian independence and sovereignty continues to be very active. Today Hawaii only has a qualified sovereignty as a state within the American Union but is the only part of the United States of America deriving from the forcible annexation of an independent foreign country after American independence – unless one also counts Texas, which had a rather different history, although the coup toppling the Hawaiian monarchy before annexation may well have drawn some inspiration from the events leading to the annexation of Texas.

To return to the point made above, both Tonga and Hawai'i were places where primary states developed and both of which became independent Polynesian kingdoms. Both Tongans and Hawaiians also have histories and historical memories of being citizens of established independent Polynesian countries, fully realised and

60 See Elizabeth Wood-Ellem, above n 5.

61 For an excellent political history of the annexation of Hawai'i, see Tom Coffman *Nation Within: The Story of the American Occupation of Hawai'i* (Koa Books, Honolulu, 1998).

safeguarded in Tonga and thwarted in Hawai'i. But New Zealand, too, also possesses an independent Polynesian monarchy, albeit one that is resolutely ignored by New Zealand public lawyers at the present time. As a kind of coda, the New Zealand's Polynesian monarchy will be considered in the remaining part of this article.

In the domain of public law, it follows that public law in the Pacific did not begin with Europeans. States, and perhaps only states, have public law. Once a chiefdom becomes a "state", or when, using Kirch's phraseology, when chiefs become kings, aspects of customary law become public law. The authority of a chief to control resources and obtain tribute become royal commands, and tributes become taxes. The advisors and counsellors of chiefs become royal counsellors, a chief's helpers and managers become a bureaucracy. Rules about succession to real and personal property move into a public domain. It is with this transition, perhaps, that public lawyers can make a special contribution to Polynesian legal history, as it is they who are used to thinking of "law" in the public or governmental sphere and about its special features and characteristics as such. This applies both to the states of ancient Polynesia and to the historic kingdoms of Tonga, Hawai'i and elsewhere. Tonga, especially, provides a fascinating example of the transition from customary law to public and private law within a state formation since the early 19th century.

VII. Conclusions

So, at the very least, it can be said that the topic of state formation in the pre-European Pacific has undergone a transformation from a somewhat marginal or even heretical concept to something much more central, so much so that, as shown, recent articles about the archaeology of Tonga refer quite naturally to the "Tongan state" – meaning pre-European Tonga, not the historic Tongan kingdom, while yet other scholars, no less open-mindedly, address themselves to Tonga's "empire", or its maritime empire.[62] It is time for public lawyers and legal historians to take note. Moreover, recognising that there may have been states, or at least state-like polities in ancient Polynesia might also serve to enrich the study of the 19th-century Polynesian kingdoms in Hawai'i, Tonga and Aotearoa. Such kingdoms were not anomalous, or merely a response to the advent of European powers in the Pacific or to the teachings of Christianity (although both of these were important) but reflect, rather, a long history of state formation in Polynesia and perhaps in other parts of Oceania as well. I believe, also, that recognising that the Pacific has its own history

62 See Glenn Petersen "Indigenous Island Empires: Yap and Tonga Considered" (2000) 35 (1) Journal of Pacific History 5. This article was written before the current surge of interest in state formation in Polynesia, but now seems even more relevant. It is surely plausible that a polity possessing a maritime empire must have a state at its centre.

of state-building has many positive benefits for the history, including the legal history, of Oceania. Such recognition stimulates the investigation of economies, social stratification, the ideological functions of monumental architecture, and – most important for present purposes – of law and of legal systems.

SAMOA LAW REFORM AND LEGAL PLURALISM: CRITICAL CHALLENGES TO ACHIEVING LEGAL RECOGNITION OF *FA'ATAMA* AND SOGIEC

Bridget Fa'amatuainu*

Abstract

In this article, I draw attention to Samoa's women's gender quota cases which brought into question the legal and constitutional language adopted in laws, constitutional interpretation, human rights, judicial independence of the courts and rule of law in conflict with Samoan customs. What the constitutional cases demonstrate is a more modern egalitarian Samoan legal and political system which highlights how this modern conception of justice undermines the Samoan political and legal values that traditionally begin with fostering and enhancing fundamental interpersonal relations first, because it is there that we observe the modern state or community's most fundamental values with respect to the politico-legal realm. This article argues for a critical examination of these ongoing challenges and tensions first before considering whether the best pathway for recognition of the status of fa'atama and diverse sexual orientation, gender identity expression and sex characteristics (SOGIEC) representation is achievable in Samoa.

I. Introduction

In Samoa, the indigenous Samoans operate a bijural system of law where both customary law and state law co-exist.[1] Samoa has a population of 200,010 people, with English and Samoan as the official languages. The *fa'amatai* (Chiefly system) acts as the main source of Samoa's customary law and is enforced in varying

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1 For this article, any reference to "customary law" is used interchangeably with Samoa "customs", "customary legal system" and "customary practices"; any reference to "gender equity" is used interchangeably with Samoa all Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual and diverse Sexual Orientation, Gender Identity Expression and Sex Characteristics ("SOGIEC") and "gender diversity"; and lastly, any reference to "bijural" is used interchangeably with "legal pluralism".

degrees across Samoa's 220 traditional villages (*nu'u fa'avae*) governed according to each village council (*fono*) and customary practices.[2]

This article explores the interface between Samoa law reform and legal pluralism, with an emphasis on legal recognition of *fa'atama* ("in the manner of men" is the literal translation of the Samoan word *fa'atama*: "like" (*fa'a*), a "man" (*tama*)) and SOGIEC representation in the law. As evident in the experience from legally pluralistic Pacific nations outside Samoa, law reform points to the effectiveness of accommodating legal pluralism to enable a sustainable pathway, where both tensions in customary law and state law are reconciled, and customs are incorporated and recognised in state law.

Because I express opinions based on lived experience and observations from recent empirical research based in Samoa, it is important that I refer to my "positionality". The author is a law academic who lived and worked in Samoa as a law reformer, commercial law academic, lawyer and gender consultant.

In terms of structure: Part II provides an explanation as to why I have chosen the principal theories, concepts, customs and processes under review followed by a critique of these theories; Part III examines the case study of Samoa's women's gender quota cases. It responds to the analysis from Part II and outlines potential challenges to address; and, finally, in Part IV, I respond to lessons from Part III in addressing what challenges lie ahead with respect to *fa'atama* and SOGIEC representation in Samoa customs and laws.

II. Relevant Theories, Concepts, Customs and Practices

In this part, I present a critique of some of the relevant theories, concepts, customs and practices at the intersection between gender and law.

A. Patriarchy

It is well known in the literature that unequal power relations exist between men and women. This is often embedded in terms such as "patriarchy" and "gender inequality".[3] Even when taking cultural and institutional variation into consideration, patriarchal structures exist in social systems characterised by male

2 Jennifer Corrin "Land, Law and the Fa'a Samoa" [2008] LAWASIA Journal 46 at 49–50; and see generally Richard P Gilson *Samoa 1830 to 1900: The Politics of a Multicultural Community* (Oxford University Press, Melbourne, 1970) at 29.

3 Pamela Paxton and Melanie Hughes *Women, Politics and Power* (Sage Publications, California, 2007).

dominance or control over females and other genders. The imposition of colonial and Christian values, with a built-in patriarchal system, has had detrimental impacts on Pacific cultures with matrilineal economic and political structures, or in some aspects, land inheritance which could be traced through the matrilineal as opposed to patrilineal line.[4] The rights of indigenous women to land, decision-making and economic exchange were further undermined after colonisation, when colonial governments established institutions and legal systems that reflected patriarchal and religious ideals of their own societies which no doubt impacted political and legal thought on democracy and justice.[5]

B. Human Rights

Human rights refer to the fundamental rights that every human being is entitled to, such as the right to life, freedom of speech and freedom from discrimination. These rights are recognised and protected by law and society. On the other hand, responsibilities and obligations refer to the duties that individuals and institutions have towards themselves, others, and society. These duties include obeying the law, contributing to society, and treating others with respect and consideration. The key difference between human rights and responsibilities and obligations is that human rights are protected by law and are considered inherent to every individual, while responsibilities and obligations are imposed on individuals by society and laws. In other words, human rights are entitlements, whereas responsibilities and obligations are duties.

Based on Va'a's indigenous Samoan analysis, human rights are framed as duties rather than entitlements, held in common by all on the basis of being human.[6] Further to his indigenous view, Va'a makes the contradictory assertion that the basis of human rights differs between Western Euro-centric cultures and the Samoan culture, while the overall understanding is not different. Arguably, Va'a is wrong to assert that this system of duties, obligations and responsibilities form part of the system of human rights or that the West did not have a system of this kind in place, as this is a fundamental aspect for which most societies could not exist. However, the rationale behind Va'a's claim links to his argument about the evolution of human rights in Samoa which is evident in the two sets of codes – the traditional notions

4 Martha Macintyre and Carolyn Brewer "Gender Violence in Melanesia and the Problem of Millennium Development Goal No. 3" in Margaret Jolly and Christine Stewart (eds) *Engendering Violence in Papua New Guinea* (ANU Press, Canberra, 2012); and Meta Motusaga "Women in decision making in Samoa" (PhD Thesis, Victoria University, Victoria, 2017).

5 Elise Huffer "Desk Review of the Factors which Enable and Constrain the Advancement of Women's Political Representation in Forum Island Countries" in *A Woman's Place is in the House – the House of Parliament; Research to Advance Women's Political Representation in Forum Island Countries* (Pacific Islands Forum Secretariat, Suva, 2006).

6 Unasa Va'a "Samoan Custom and Human Rights: An Indigenous View" (2009) 40(1) VUWLR 246.

expressed in reciprocal and interpersonal responsibilities and obligations to family, community and others; while the other is Western – influenced by "western notions of human rights, such as those based on the philosophical principles of natural justice and divine law" in Ancient Greece,[7] Thomas Aquinas' theory of natural rights, Christian principles, and so on. In Samoa, Va'a claims that the equivalent ideas are sourced from custom.

Va'a states that the Samoan human rights notions spelt out in *suli* and *feagaiga* suggest that Samoa had a pre-existing system of human rights before colonisation.[8] Firstly, the *suli* is the right of the heir belonging to a kinship group/family who holds one or several Chiefly titles in a village, as determined by blood connections. As Samoan custom dictates, all Samoans can trace their genealogy to the *Atua* (Supreme God/Creator), *Tagaloalagi*, and by virtue of their ancestry, all Samoans accord respect and dignity for individual life irrespective of gender. Secondly, the *feagaiga* system is likened to a social contract between two parties: sister-brother, female descendant of a Chiefly title *(tama fafine* – male descendant of a Chiefly title (*tama tane*)):[9]

> For instance, A (female) marries B (male) and their children are C (female) and D (male). C is *tama fafine* in this particular family, and D is *tama tane*. C and D are *feagaiga.*

While multiple relational arrangements and other considerations factor into this, such as the status ascribed to each party, this system is meant to be complementary or harmonious.

Further to this point, Va'a asserts that human rights are equated to custom (and vice versa), in a Samoan context and embedded in the rights of feagaiga and the rights of a suli. He considered the feagaiga as "special rights which function to maintain a balanced relationship between the genders".[10] The rights of a suli are universal rights which include "the right to live and survive so as to serve the kin group and community".[11] On this view, Samoan people and other indigenous communities view human rights through the lens of custom. Thus, the core values and beliefs that underpin the customary obligations and hierarchal status embedded in the fa'amatai (Chiefly) system and in fa'asamoa (the Samoan way) are inextricably linked to Samoan notions of human rights.

7 At 246.
8 At 245.
9 At 242.
10 Va'a, above n 6, at 245.
11 At 245.

Most *Samoan* political academics interviewed in a 2009 study on "Samoanizing" human rights had affirmed that human rights are part of the *fa'asamoa*.[12] However, the lack of education on human rights, generational differences and conflicting notions between individual rights and Samoan communal values within the *fa'asamoa* add to the obstacles facing the full realisation of human rights in contemporary Samoa.

While this is quite a different claim, it is worth noting that Samoan political historian Professor Meleisea contends that "individual" human rights are not incompatible with traditional communal Samoan values of equality, protection, respect and dignity. He contends that the demystified dichotomy between Samoan notions of human rights and Western notions of human rights is based on the wrongful assertion of Samoan customary values. The protection of the individual means the protection of the community. On this view, the 2015 State of Human Rights Report also highlighted that human rights are deeply rooted in *fa'asamoa* values and are not foreign ideals or incompatible, as both ideals create a more harmonious Samoa. Here, essential Samoan values cross over and emphasise mutual compatibility or harmonisation in relation to the promotion of universal human rights protection.[13]

Nonetheless, one Samoan political academic, Nanai Sovala Agaiava, agrees with Va'a that Samoan human rights must be contextualised through the Samoan lens rather than a Western lens.[14] Importantly, Nanai pointed to obstacles in *fa'asamoa*, specifically the oppressive hierarchal structures embedded in the *fa'amatai* system and village *fono* (village council) which inhibit the full acceptance of human rights in contemporary Samoa.[15] He provided examples about village governance led by the village *fono* which are comprised exclusively of *matai* (Chief) – this is likened to local councillors elected to represent their local council, in this case, a village. *Matai* in the village *fono* are authorised to define village council policy (*faiga fa'avae*) and develop procedures to guide the determination of village council decisions (*i'ugafono*) in accordance with the Village Fono Act 1990.[16] Here, Nanai claims the conflict between *fa'asamoa* and human rights is based on the principles and values embedded in the *fa'asamoa* which inhibit the full realisation and acceptance of human rights in Samoa, unless human rights are reframed primarily in the context of the *fa'asamoa*. For example, according to the *fa'asamoa* context, children's rights are often misconstrued as giving children the authority to disrespect their elders

12 Margaret R Smith '"Samoanizing' Human Rights: A Generational Comparative of Views on Human Rights in Contemporary Samoa" (2009) *Independent Study Project (ISP) Collection* 635 <https://digitalcollections.sit.edu>.

13 Government of Samoa "State of Human Rights Report" (8 November 2015) Office of the Ombudsman (Samoa) <https://ombudsman.gov.ws>.

14 Nanai Agaiava, Principal Youth Development Officer, Division of Youth Office, Apia, 6 May 2009, as cited in Smith, above n 12, at 30.

15 At 30.

16 Village Fono Act 1990, s 5.

unless emphasis is reframed to focus on promoting children's rights in the context of protection from harm which is indeed compatible with *fa'asamoa* values.

Asofou So'o, another Samoan political academic interviewed in the same study, argued that the older generation view human rights as empowering children with equal rights to adults which is not only a threat but contradicts the traditional hierarchal Samoan notions of authority.[17] Further to this point, So'o asserted that in Samoa, the reality is that human rights is considered a *palagi* (literal translation is "White") idea that would only serve some use in Samoa if it was Samoanised.[18]

It is questionable whether human rights are a Samoan concept or an introduced concept. With this background in mind, Samoa has become an increasingly egalitarian society, as noted by an increase in the conferring of *matai* titles.[19] Thus, it becomes clearer that human rights must be reframed and contextualised through a Samoan lens, rather than relying on Western ideas of human rights. This way, it may serve to achieve the best conditions for collective recognition of *fa'atama* in Samoa laws and customary laws.

In the same way, it is debateable whether principles of the *fa'asamoa* are indeed democratic by nature, especially when key aspects of village *fono* and *matai* representation are incompatible with principles embedded in the theory of representative democracy. As Maddox explains, representative democracy "implies the transmission of the people's authority to elected representatives".[20] Unlike Samoa's village government, representatives are not democratically elected. Representatives are appointed to the village *fono* by right as heirs and *matai* of the family (or extended family). This is problematic because not all views expressed will represent the minority, including *fa'atama* and the SOGIEC community. In

17 Asofou So'o, Vice Chancellor, NUS (National University of Samoa) 27 April 2009/7 May 2009, as cited in Smith, above n 12, at 33.

18 At 33–34. See Nanai, above 14, at 29–30, who also asserts that human rights will need to be "Samoanized" first in order to be fully accepted in fa'asamoa culture.

19 Malama Meleisea and Penelope Schoeffel "Sāmoan Custom, Individual Rights, and the Three 2020 Acts: Reorganizing the Land and Titles Court" (2022) The Journal of Pacific History DOI: 10.1080/00223344.2022.2058475.

20 Graham Maddox "Representative Government" in Tony Blackshield, Michael Coper and George Williams (eds) *The Oxford Companion to the High Court of Australia, Melbourne* (Oxford University Press, Oxford, 2002) 33, as cited in Allan Beever *Forgotten Justice: The Forms of Justice in the History of Legal and Political Theory* (Oxford University Press, Oxford, 2013) 293. HLA Hart identified three secondary rules – rules of adjudication, rules of change and the most significant one, the "rule of recognition" [Herbert LA Hart *The Concept of Law* (2nd ed, Oxford University Press, 1994) at 21, 103, and 108, as cited in Beever at 153, 155]. While space constraints limit a full discussion of this, a full treatment of the rules of recognition will be covered in a separate paper. I only focus on the rule of recognition for human institutions (rather than rules for informal institutions) because the rule of recognition determines whether a rule is legally valid or not and, recognises (whether or not) a rule is a law of the relevant jurisdiction. Beever (at 155) also points to one of the mistakes in Hart's argument which is the claim that human institutions are not constituted by constitutive rules which further highlights Hart's misunderstanding about the nature of rules.

the village context, members who challenge their *matai* and village *fono* may, in some cases, be subject to village misconduct and penalised.[21] Thus, I argue that the representative democratic process is not evident in Samoa's village context where customary protocols are prominent which is, in fact, an embodiment of the Samoan customary rule of recognition.

Where modern demands (including access to formal education, health, technology, human rights) cannot be met by the customary legal system, the state holds the responsibility to ensure central public infrastructure, including any law-making process, must satisfy the demands of a diverse and plural society. Thus, the interdependent relationship between the state law and customary law is significant. State intervention occurs when customary law fails, and this approach is worth exploring within the context of law reform alongside the role of traditional authorities in customary law.[22]

C. Customary Law

In this section, I examine Samoa's customary law system and what it entails. As a starting point, the historical understanding of customary law reveals some of the key challenges faced by legal pluralism.[23] This effectively reveals why a critique of both historical and common understandings of customary law have emerged in modern Samoa, which will also be discussed in turn.

While there is no general consensus on the definition of customary law or whether it exists, some of the common features applied in Commonwealth Pacific nations comprise a set of rules based on local customs and usages, traditionally passed down by oral culture.[24] In the Samoan context, customary law is based on customs, practices or rules of conduct, formally prescribed and recognised as binding or enforced by a competent controlling authority or multi-dimensional traditional authority (for example, the Land and Titles Court or Village *Fono*).[25] Va'a asserts that such customs form the basis of human rights, and human rights protect the *vā* between individuals, in line with interpersonal justice (via the mechanism of *suli* and *feagaiga* – discussed earlier). From a traditional Samoan perspective,

21 Village Fono Act 1990, ss 4–6, 8.

22 Campbell McLachlan "State recognition of customary law in the South Pacific" (PhD Thesis, University of London, 1988) at 336.

23 I note this article is thematically incomplete without a full discussion on legal pluralism for which I apologise. This had to be removed due to word constraints. A full treatment of legal pluralism will be covered in a separate paper.

24 Constitution of the Independent State of Samoa (1962) art 111; Bernard Narokobi *Lo Bilong Yumi Yet: Law and Custom in Melanesia* (Melanesian Institute for Pastoral and Socio-Economic Service and the University of the South Pacific, Fiji, 1989) at 4; and Jonathan Aleck "Introduction: custom is law in Papua New Guinea" in Jonathan Aleck and Jackson Rannells (eds) *Custom at the Crossroads* (University of Papua New Guinea, Papua New Guinea, 1995) at 3.

25 See Meleisea and Schoeffel, above n 19.

this argument sounds attractive but, as we will see later, the modern approach to the politico-legal realm and justice, as demonstrated in the treatment of the state law cases (in Part III), is not compatible with this approach. This is particularly problematic for *fa'atama* seeking protection and recognition in customary law and state law.

While I agree that customary law exists in Samoa, there are opposing views, however, that challenge this claim. Over the past half-century, Meleisea and Schoeffel contend that Samoa has been driven by an intricate set of customs and protocols embedded in many aspects of the *fa'asamoa*, such as the protocols which underpin village governance, ethical behaviour, gender relations and social conventions governing meaningful and respectful relationships – that is, "space" (*vā*), in terms of maintaining reciprocal obligations and duties between individuals and groups which carry different status. Meleisea and Schoeffel assert that Samoa protocols protect Samoan communalism more from individualism as opposed to modern principles based on individual rights. Based on the lack of common law evidence to support the argument that Samoa's Constitution has diminished Samoan custom and communal rights,[26] Meleisea and Schoeffel further assert that Samoa has no customary law embedded in its legal system.[27] On this point, Meleisea and Schoeffel would support the reasoning that customs are a collectively recognised social practice that form the foundation of law, just not "customary" law. I view this as a powerful argument because it effectively undermines the legitimacy of human institutions set up to address customary and legal matters.

Another view is that if customary laws formed the basis or became an operative part of Samoa's primary laws and legal system, then a critical review of existing evidence is required to understand what this means in a law reform context. This is because any research on the law reform of Samoa's customary legal system is inseparable from the operation of the state legal system – that is, Samoa's bijural system that exercises executive, enforcement and law-making functions.[28]

D. Fa'atama and SOGIEC

The SOGIEC non-heteronormative or non-binary concept or term is not problematic in the Pacific, insofar as there is an understanding of the specificities and particularity to the cultural and political context to which it is applicable. The use of terms and labels to define *fa'atama* may be incompatible with their

26 See Meleisea and Schoeffel, above n 19.
27 See Meleisea and Schoeffel, above n 19.
28 Aiono Le Tagaloa "The Samoan Culture and Governance" in Ron Crocombe, Uentabo Neemia and others (eds) *Culture and Democracy in the South Pacific* (University of the South Pacific, Institute of Pacific Studies Publication, Suva,1992) at 117, 121.

overriding identity when contextualised to their traditional role and status in the home, family, village and community. When comparing *fa'atama* to accepted perceptions and sociocultural understandings of masculinity, some *fa'atama* may choose to distance their gender identity from how they are generally perceived, which also highlights the danger of fitting *fa'atama* under broader gender-inclusive terminology. For example, non-heteronormative males in Samoa who identify as gay may reject the term "*fa'afafine*" (literally translated as "in the manner of women") as it prefaces a sexual persona to which they seek to not be associated.[29] Similarly, non-heteronormative females in Samoa may reject the term "*fa'atama*" and not subscribe to sexological gender and legal discourse. Based on data from the author's research in Samoa, all *fa'atama* participants identify as transmen.[30] The reasons were varied as to why some perceive their gender identity as an individual decision separate to their role in the family, the church and wider village community; other participants were concerned with the more immediate aspects of their daily life such as responsibilities to their family, village, church and community. In short, their gender identity is not a core aspect of their life but considered more when they are denied legal protection and access to employment opportunities, health care and justice.

1. Problems facing Fa'atama and SOGIEC recognition in Samoa customs and laws

In accordance with Samoan custom which informs human rights protection, *fa'atama* gender identity is not a socially recognised practice and, hence, does not have the full status or recognition to justify a Samoan customary rule of recognition; nor is it compatible with the theory of representative democracy, alluded to earlier. The perceptions of transgender and non-heteronormative people in the law are also reflected in judicial attitudes towards marriage. The role of the courts, the legal system, parliamentary processes and social media all play a significant role, in varying degrees, and influence the extent to which legal developments and advocacy for law change are relevant to *fa'atama*. In Samoa, to bring *fa'atama* within the law would be met with challenges from the present framework, heavily influenced by the imposition of introduced common law and the Christian patriarchal principles strongly embedded in Samoa's prevailing customs, traditions and values.

29 Kalissa Alexeyeff and Niko Besnier "Gender on the edge: Identities, politics, transformations" in Niko Besnier and Kalissa Alexeyeff (eds) *Gender on the Edge: Transgender, Gay, and Other Pacific Islanders* (Honolulu, University of Hawaii Press, 2014).

30 I refer to *fa'atama* interview *talanoa* (open and respectful interactions) and focus group *talanoa* data collected as part of the Auckland University of Technology Ethics Committee approved PhD data collection in Samoa in June–July 2022.

The modern conception of distributive justice distorts the traditional fundamental politico-legal values of Samoan commutative/interpersonal justice. The fundamental problem remains:[31] *fa'atama* who do not identify as women continue to be treated as women in the law against their wishes. This infringes upon their freedom of expression and other fundamental human rights. Most *fa'atama* interviewed by the author wore formal lavalava (that is, *faitaga*) worn traditionally by men, used the male toilet in public facilities, were charged with indecent activity with females in cases where consent was not an issue, to name a few.[32] Thus, by exercising and claiming legal status as *fa'atama* in the law may also serve to exclude them further from other transnational groups with concerns that cross-cut in some, but not all, areas and in most cases, *fa'atama* may even be socially excluded or outcast from their own family, village and community.

Based on *talanoa* (open and respectful interactions) with *fa'atama* in Samoa, one of the key problems that *fa'atama* highlighted is the lack of gender-responsive legislation in Samoa.[33] Without appropriate legislation that considers the specific needs and concerns of *fa'atama*, they may experience various problems when it comes to accessing their rights and participating fully in society.

Some of these problems are detailed below:[34]

a) Limited customary and legal recognition of fa'atama status: Fa'atama are underrepresented in political and decision-making positions, as there are no specific laws, customary laws or policies that promote pathways to increase fa'atama representation as matai while frameworks to enhance gender equity generally avoid fa'atama in these areas.
b) Limited access to justice: Fa'atama who experience violence or discrimination also face obstacles in accessing justice, as there are no specific legal frameworks in place that legally recognise the constitutional status of fa'atama gender identity in laws and customs. This means no constitutional protection under the law.
c) Limited economic opportunities: Fa'atama face discrimination in the workplace compounded by limited access to resources and opportunities that could help them to become economically empowered.

31 *Fa'atama* interview, above n 30.
32 *Fa'atama* interview, above n 30.
33 *Fa'atama* interview, above n 30.
34 *Fa'atama* interview, above n 30.

d) Limited access to education: Fa'atama face barriers to education, such as bullying in schools and compulsory dress codes requiring fa'atama to wear female uniforms or be subject to suspension with no specific policies or laws in place that promote equal access for fa'atama to education.

2. Potential solutions

To address these problems, there is a need for gender-responsive legislation that promotes gender equality and addresses the specific needs and concerns of *fa'atama* in Samoa.[35] This could include laws and policies that promote equal representation of *fa'atama* in decision-making positions, address gender-based violence and discrimination, and promote equal access to education and economic opportunities. Overall, the lack of gender-responsive legislation in Samoa poses significant challenges for *fa'atama* and their ability to fully participate in society. Addressing these issues will require a commitment from policymakers and civil society organisations to promote gender equality and ensure that *fa'atama's* rights are equally protected and promoted.

In the light of the development of Samoan human rights and customary norms, the doctrinal approach continues to be employed by the judiciary in understanding the language of the law. Arguably, the Samoan customary norms and non-legal aspects were not significantly considered, as evident in the women's gender quota cases (discussed next). Although *fa'atama* do not identify as women, it helps to explore some of the judicial reasoning around the women's gender quota cases reasons to better understand what potential legal challenges lie ahead for *fa'atama* seeking to achieve recognition in Samoa laws and customs, which will be discussed in more detail next.

III. Women's Gender Quota Cases

In the previous section, we saw that Samoan customary law has built in a customary rule of recognition as evident in the village *fono* and *matai* representation. I turn now to some of the challenges faced by the Samoa Law Reform Commission (SLRC) as well as the Women's gender quota cases. Some of the learnings here may be instrumental in the development of pathways for *fa'atama* and other SOGIEC groups in Samoa to consider when advocating for law reform and better recognition in Samoa laws and customs.

35 *Fa'atama* interview, above n 30.

I respond to potential law reform challenges in this section, not to dismiss the Samoan government and agents of law reform, but to critically highlight challenges to the modern state agenda and whether it honours or effectively undermines the traditional Samoa notions of legal and political community.

When Samoa gained independence, *matai* suffrage was introduced which legally permitted only registered *matai* the right to vote. In 1990, Samoa introduced universal suffrage but retained *matai*-only candidacy. More than two decades later the women's parliamentary quota was introduced in 2013, which was hailed as a progressive move to increase women's political participation in Parliament. The original drafters to art 44(1A) of Samoa's Constitution could not have foreseen the attempted exploitation of these special temporary measures for political purposes. The 2016 General Election activated the women's quota (that is, 10 per cent, which amounted to 4.9 or 5 out of a total of 49 seats) with the appointment of the fifth woman MP after only four were elected.

The 2021 General Election led to unprecedented constitutional challenges. Samoa's constitutional crisis posed a threat to the foundations of Samoa's democracy, independence of the judiciary, rule of law and customary laws. Consequently, the women's quota was activated for the second time by the Electoral Commissioner in an already highly charged political atmosphere. One of the issues under consideration was whether the women's quota required five or six women MPs.

Further to this, the Explanatory Memorandum to the Constitution Amendment Bill 2020 illuminates the sociocultural and political context of Samoa with respect to legal pluralism, justice and human rights:[36]

> This Bill is a response by Samoa to respond to the challenges of "legal pluralism", a legal theoretical framework with features prevalent in most post-colonial societies. A review of all other Pacific Islands Constitutions show that since gaining political independence, the Pacific Islands had expressly aspired to adopt in their Constitution and laws the context of their cultures, custom, and traditions to which they belong. However, to date many countries have applied caution, and the express establishment of systems to accommodate both their customary systems with the modern western system in their supreme laws has not been pursued.

36 Constitution Amendment Bill 2020, Explanatory Memorandum, at [1.4] and [1.6].

> In response to these challenges, Samoa, through this Constitution Amendment Bill 2020 has opted to give more recognition of Samoa in our own Samoan Constitution. This is without removing our current rights and freedoms. In this Constitution Amendment Bill, we adopt the best of both the modern principles and the customary values in moving forward, so that Samoan customs and usages are not lost, not now, not in the near future, and it is hoped for a very long time to come.

The Constitutional Amendment Bills objective was to "adopt the best of both the modern principles and the customary values" which aligns closely with strong pluralism in the independent operation of multiples sources of law.[37] However, critics still view that even without the oversight of the Supreme Court (SC) in the Land and Titles Court (LTC) hierarchy, the 2020 reforms introduce more challenges and overlaps suggesting the prevalence of legal pluralism.[38] With judicial discretion to decide on customary considerations leaves it open to ambiguous interpretation which could have been resolved with the adoption of the draft judicial guidance clause,[39] which required the "systematic consideration of relevant customs in all cases".[40] By drawing lessons from other Pacific nations, such as Palau, the SC entrenched a systematic approach taking into broad consideration the relevant customs whilst specifically outlining the relevant principles of procedure in order to plead and establish customary law.[41] If this approach is adopted in Samoa, it could avoid further ambiguity in interpretation with "legislative specificity".[42] "Legislative specificity" refers to the degree of detail and clarity in the language of a law or regulation.[43] Thus, the extent to which a statute or regulation is precise, unambiguous and specific in its wording, as opposed to vague or general. The more specific a law is, the more it can help guide behaviour, provide clarity, and prevent misunderstandings. Specificity in legislation is critical because it can help to ensure that the law is applied consistently and fairly, and that it achieves its intended goals. Conversely, the lack of legislative specificity can lead to confusion, inconsistency and

37 At [1.6].
38 Jennifer Corrin "Customary Land and the Language of the Common Law" (2008) 37(4) Common Law World Review 305 at 331.
39 Constitution Amendment Act 2020, s 4, amending art 71.
40 Craig Land "One Boat, Two Captains: Implications of the 2020 Samoan Land and Titles Court Reforms for Customary Law and Human Rights" (2021) 52(3) VUWLR at 537.
41 *Beouch v Sasao* [2013] PWSC 1 at 9–14.
42 See Land, above n 40, at 538.
43 Teleiai Lalotoa Mulitalo Ropinisone Silipa Seumanutafa ("Mulitalo") *Law Reform in Plural Societies* (Springer, Cham, Switzerland, 2018) 20.

ambiguity in the application of the law. Section 5 of Samoa's Electoral Amendment Act 2009 did not specify or define the diversity and uniqueness of "village service requirements" specific to each village, which is a prime example of the problems connected to the lack of legislative specificity.

When considering the constitutional interpretation of art 44(1A), the Courts adopted the traditional literal (purposive) approach. The Court also sought guidance from common law authorities where meaning was found by doctrinal legal reasoning as opposed to "more recognition of Samoa" or "customary systems", as clearly alluded to in the Explanatory Memorandum. Evidently, the *Olomalu* landmark case adopted a purposive approach where primary attention was given "to the words used but being on guard against any tendency to interpret them in a mechanical or pedantic way".[44] The *Olomalu* case is a significant legal case in the history of Samoa. The case arose from a dispute over the ownership of land in the village of Vaitele-fou. The village council had allocated a portion of communal land to Saipaia Olomalu, who had built a house on the land. However, the Attorney General of Samoa argued that the allocation was illegal and that the land belonged to the government. The case was heard in the LTC of Samoa, which held that the village council's allocation of the land to Saipaia was valid. The Attorney General appealed the decision to the SC of Samoa, which upheld the lower court's ruling. The case is significant because it established the principle that customary land rights in Samoa are protected by law. It affirmed the importance of the traditional Samoan system of land tenure, in which land is owned communally and allocated by village councils according to customary practices. *Olomalu* also demonstrated the independence of the Samoan judiciary and its commitment to upholding the rule of law.

The purposive approach was also adopted in *FAST Party v Electoral Commissioner*, where it was accepted that the "Court does not have the power to go beyond the clear and unequivocal words".[45] This case centred on the outcome of the 2021 General Election. The *Fa'atuatua i le Atua Samoa ua Tasi* (FAST) Party, which was the opposition party at the time, won a narrow majority of seats in the Legislative Assembly, but the ruling party, the Human Rights Protection Party (HRPP), refused to concede defeat and challenged the election results. The dispute ultimately led to a legal challenge by the FAST Party, which claimed that the appointment of additional members to the Legislative Assembly by the Head of State was unconstitutional and void. The main issue in the case was whether the appointments made by the Head of State were in accordance with the Constitution of Samoa. The FAST Party argued that the appointments were unconstitutional and, therefore, invalidated

44 *Attorney General v Saipaia Olomalu* [1980–1993] WSLR 41. This case also explored the issue of whether *matai* suffrage and an individual voter's roll was discriminatory according to art 15.

45 *FAST Party v Electoral Commissioner* [2021] WSSC 23, at 29.

the election results. The Supreme Court of Samoa agreed with the FAST Party and declared that the appointments were unconstitutional and void. The court ordered a recount of the election results, which ultimately confirmed the FAST Party's victory. The case is significant because it affirms the rule of law and the independence of the judiciary in Samoa. It also highlights the importance of constitutional provisions and the need for transparent and fair electoral processes in promoting democracy and good governance.

In following *Olomalu*, the Court resolved the tension around the uncertainty created by the 10 per cent women's quota enshrined in art 44(1A): "which for the avoidance of doubt is presently 5" (avoidance of doubt rider). This approach also cautioned against the use of the explanatory memoranda or parliamentary debates or as put in *Olomalu*:[46]

> ... without the aid of reference to the Convention's proceedings; but we think it right to refer to those proceedings to make sure that the words of the Constitution as adopted by the Convention do convey what was truly intended.

The Court accepted the plain wording that a minimum of five women MPs was the correct constitutional interpretation. The SC decision was appealed. The dissenting opinion of Justice Vui Nelson in *FAST Party v Electoral Commissioner* is worth noting, as he emphasised the intended purpose behind the increase in women's representation in Parliament.[47] His reasoning is that the avoidance of doubt rider was framed for the 2016 General Election and not the 2021 General Election which, following the 2019 Amendment, required an increase in the total number of MPs to 51 and a proportional increase in the number of women MPs to a minimum of six. However, the Court of Appeal did not follow the SC decision.

In Samoan judicial history, *Electoral Commissioner v FAST Party* marked the first Court of Appeal sitting comprised of a Samoan bench with the "knowledge, capacity and competence to deal with Constitutional issues".[48] Ironically, the sixth woman MP unsuccessfully appealed to include an overseas or expatriate New Zealand Judge on the panel, as was common practice in the past. The Court of Appeal also held that the avoidance of doubt rider was otiose, although it largely reflects the intention and purpose of Parliament. This would, no doubt, create future challenges in constitutional interpretation when taking into consideration the purposive approach adopted in the SC. The Court also relied, in part, on the dissenting opinion

46 *Attorney General v Saipaia Olomalu*, above n 44, at 41.
47 *FAST Party v Electoral Commissioner* [2021] WSSC 23, at [62]–[79].
48 *Electoral Commissioner v FAST Party* [2021] WSCA 3, at 10.

of Justice Vui Nelson.[49] However, it found the primary intention behind art 44(1A) ambiguous and relied on a more purposive approach that enhanced the credibility and promotion of human rights practices and, in this matter, women's participation through the endorsement of women's quotas. As such, a more purposive approach was enunciated by the Court of Appeal in *Mulitalo v Attorney General*, as Samoa has become an increasingly egalitarian society since independence, with a Constitution that has undergone amendments 12 times since 2005 to reflect more modern values.[50] As a landmark case in the history of Samoa, *Mulitalo v Attorney General* dealt with the issue of gender equality and the interpretation of Samoa's Constitution. The case arose from a challenge brought by a woman named Mulitalo Siafausa Vui against certain provisions of the Samoan Constitution that discriminated against women. Specifically, Mulitalo argued that provisions of the Constitution that only allowed *matai* (traditional chiefs) to be elected to the Legislative Assembly and hold certain other positions were discriminatory and violated her rights as a woman. The case was heard by the SC of Samoa, which ruled in favour of Mulitalo. The court held that the relevant provisions of the Constitution were discriminatory and violated the principle of equality under the law. The court ordered that the Constitution be amended to remove the discriminatory provisions. *Mulitalo v Attorney General* is significant because it affirmed the principle of gender equality in Samoa and helped to promote women's rights and empowerment in the country. It also demonstrated the importance of an independent judiciary in interpreting and upholding constitutional rights and protections.

Here, we see how the judiciary applied caution to resolve tension (as discussed further next) to accommodate customary norms with modern western norms in the constitution alongside other, and often competing considerations – legal pluralism, the interpretation of language in the law, the intention of Parliament, the context of customs and traditions, and so on. In Part IV, we explore this deeper in the case of *fa'atama* and SOGIEC recognition where we will explore some of the ways to address the key challenges concerning Samoa's law reform process in response to *fa'atama* and SOGIEC considerations.[51]

IV. Resolving Tension

The more purposive approach adopted in *re the Constitution, Mulitalo v Attorney-General* [2001] and, more recently, the *Electoral Commissioner v FAST Party* [2021]

49 *FAST Party v Electoral Commissioner* [2021] WSSC 23, at 29.
50 *In re the Constitution, Mulitalo v Attorney-General* [2001] WCSA 8.
51 *In re the Constitution*, *Mulitalo v Attorney-General 8* (Samoa 2001); and *Electoral Commissioner v FAST Party*, WSCA 3, at 10.

would suggest that not all hope is lost.[52] Some of the critical lessons we can take from the cases is the Court's plea for more thorough drafting, a pragmatic comprehensive process of constitutional reform "free from the furnace of partisan politics",[53] an independent judiciary that defends the Constitution and rule of law even despite significant political pressure or otherwise but, more importantly, the judicial interpretation of law that takes into consideration the promotion of human rights practices in an increasingly egalitarian Samoan society. In the words of the SC: "The whole raison d'etre of Independence was for Samoa to free itself from its colonial shackles retaining only those institutions and practices it considered worthwhile".[54] Thus, embedded in the "more purposive approach" is the promotion of human rights and considerable attention to the primary intention behind specific language in the law. I view this as a powerful mechanism that would enrich any future judicial decisions especially as it relates to *fa'atama* and SOGIEC matters in the law.

Ironically, Va'a envisions the recent constitutional crisis would occur in Samoa almost a decade earlier:[55]

> … the existence of this harmonious relationship between state law and custom is no guarantee that this will last forever. There may well be controversial issues … that might bring this conflict, between centralised control of economic resources and localised control exercised through customary institutions, into the open. We may well see a conflict of gigantic proportions, if it is not resolved properly.
>
> This raises the question: is the human rights problem in Samoa today the lack of consultation, transparency and accountability? And how are these terms to be defined and understood? Still, for the time being, the prognosis for human rights development in Samoa for the future remains good. And it will be better still when the political parties have resolved their differences.

52 At 10.
53 *FAST Party v Electoral Commissioner*, above n 51, at 75.
54 *FAST Party v Attorney General* [2021] WSSC 24 at 91.
55 See Vaá, above n 6, at 249, 250.

Along with this view, Land further asserts that "reform should seek to promote a sense of Samoan "ownership" over Samoan law,[56] while avoiding "a contest between custom and human rights when both are plainly important and bring satisfaction to large numbers of people".[57] Although anecdotal because there are no official records detailing the number of *fa'atama* in Samoa, "anecdotally", if there is one individual who identifies as *fa'atama* in each village, it is reasonable to assume that there are more than 200 *fa'atama* in Samoa.[58] On this view, it would be fair to say the majority of *fa'atama* live in rural Samoa, where most land is under customary land status and governance of village *fono*. Consequently, Samoa's *fa'atama* and SOGIEC community (while not wholly representative of all legal pluralism and customary considerations), may continue to advocate for effective gender equity considerations in the law reform process in a variety of ways. According to the SLRC law reform process, there are general announcements to the public to participate in *talanoa* consultations where they are invited to attend or provide submissions and comments to any issues, they wish to address with respect to any review undertaken by the SLRC.[59] However, the logistical challenges are worth noting. To address the resource and capacity limitations, SLRC use social media to raise their awareness of law reform in addition to inviting the general public to input and complete questionnaires online. SLRC have also gone to the rural villages, if they are unable to attend the public consultations in Apia. Extensions to submission deadlines are often granted to ensure all input is included. Consultations are also dependent on many factors such as available funds and the nature of the law review where a more targeted approach may be considered. For instance, a family law review may require specific consultations with a certain class of persons commonly referred to as minority groups in Samoa, such as *fa'afafine* and persons with disabilities. As such, the law reform process does not seek to exclude any minority group or class of persons in the general call for consultations. SLRC view the consultations as the evidence-base to better inform the findings that are considered when providing recommendations on any law reforms to Parliament. Therefore, it is vital that *fa'atama* and the SOGIEC community actively participate in SLRC consultations as the findings from the consultations influence the direction of any draft laws in Samoa.

In Samoa's draft bill process, a Bill undergoes procedural vetting for both constitutional compliance and gender neutrality – which is carved out into the law reform process.[60] Indeed, the language of the law is gender neutral and Article

56 Land, above n 40, at 539.
57 At 539; and New Zealand Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP17, 2006) at 41.
58 *Fa'atama* interview, above n 30.
59 *Fa'atama* interview, above n 30.
60 See Mulitalo, above n 43.

15 of Samoa's constitution provides that all persons are equal before the law. Part IV will explain the inadequacies in this claim.[61] Thus, I propose the development of a tool similar to the Gender Legislative Index which provides a benchmark to assess legislation from gender-regressive (or gender-blind) to gender-responsive legislation (to resolve some of the problems facing *fa'atama* and SOGIEC recognition in the law, as mentioned at the start in Part II, D *Fa'atama and SOGIEC*), thus providing standards for non-discrimination and inclusion.[62] The current vetting process is inadequate and the recommendation for express provisions in the law to resolve this issue aligns with the author's data from *talanoa* focus group and interviews conducted in Samoa recently.[63] Notably, Samoa's constitution provides no mechanism to reconcile this tension. Needless to say, the constitutional challenges expressed in the three Bills and gender quota cases did not cast any consideration to the collective recognition of social practices which do not fit neatly into Samoa customary values and the law.

Similar to other post-colonial experiences, there is a lack in the modern socio-economic features to support successful legal transplants in which customary laws become the basis of primary laws.[64] Samoa's legal system continues to address these limitations by exploring ways to accommodate modern features into the structures of its customary legal system. Based on recent interviews conducted by the author, conflicting views promote law reform in favour of preserving only the existing customs and traditions in Samoa's formal state laws if compatible with recognition of fa'atama and SOGIEC rights through a more inclusive and equitable law reform process. The process of codifying customs was highlighted as the best pathway to achieve this. In contrast, the more modern view was to explore how Samoa's bijural system can uphold the Constitution. Other critics suggest that to achieve an effective law reform process would require an incremental and cautious approach, thus involving public consultations and submissions from the general population.[65]

The absence of a comprehensive anti-discrimination framework in Samoa's Constitution on gender identity enables a discriminatory culture against SOGIEC

61 *Fa'atama* interview, above n 30.

62 Ramona Vijeyarasa "Making the law work for women: Standard-setting through a new Gender Legislative Index" (2019) 44(4) Alternative Law Journal at 275–280, DOI:10.1177/1037969X19861751.

63 *Fa'atama* interview, above n 30.

64 Abdulmumini A Oba "The future of customary law in Africa" in Jeanmarie Fenrich, Paolo Galizzi and others (eds) *The future of African customary law* (Cambridge University Press, Cambridge, 2011) at 69; and Michael Ntumy "The dreams of a Melanesian jurisprudence: the purpose and limits of law reform" in Jonathan Aleck and Ranells Jackson (eds) *Customs at the crossroads*. (Melanesia Law Publishers, Papua New Guinea, 1995) at 11.

65 See Mulitalo, above n 43.

people.[66] Moreover, to resolve the tension in the structural division between custom and fundamental rights, Samoa can carve out customary exceptions to constitutional human rights' provisions.[67] In the absence of legislative specificity in customary exceptions, a custom may prevail in cases of religious and gender discrimination, as experienced in Tuvalu and Samoa, to name a few.[68] Similarly, Samoa has exercised this exception to preserve communal services (*tautua*) embedded in Samoa's *matai* system against the right to forced labour. This complements the United Nations vision "that human rights should adapt to the local context".[69]

The development of state laws as contextualised to Samoa's socio-cultural context is riddled with challenges. In this regard, the challenge derives from local populations who demand this change, as well as relevant institutions mandated with principal functions to enable it experience considerable setback due to the absence of institutional polices and government directives (mechanisms to ensure law reforms undergo a customs analysis and public consultation).

V. Fa'atama and SOGIEC Recognition

As demonstrated in the approach adopted by Samoan Courts in constitutional interpretation, the pathway to progressive recognition of *fa'atama* in Samoa's Constitution and customary practices is riddled with many challenges. In proposing a more inclusive and meaningful law reform process that recognises *fa'atama* and members of the SOGIEC community, we need to understand the context to which it is applied to particular cases. This will yield a comprehensive understanding about the scope of law reform task ahead and what is problematic about it. Importantly, building on the understanding of the Court's approach outlined in the previous section has provided some critical lessons.

For any robust Samoa law making and reform, it begins primarily with a *talanoa* with the people to whom it will serve, in line with well-established customary protocol. There should also be focused *talanoa* focus groups and informant interviews in direct consultation with members of the SOGIEC community, directly impacted

66 See Constitution of the Independent State of Samoa (Samoa), art 15; see Universal Periodic Review of Samoa*:* 39th Working Group Session *Fa'afafine Association Inc Joint Stakeholder Submission* (21 September 2021).

67 See Constitution of the Independent State of Papua New Guinea, art 53(5)(d); Constitution of Solomon Islands 1978 art 15(5)(d); Samoan Constitution, art 8(2)(d); Samoan Constitution, preamble, pt II and pt IX; and International Council of Human Rights Policy *Taking Duties Seriously: Individual Duties in International Human Rights Law – A Commentary* (Versoix, 1999) at 24–25.

68 Dejo Olowu "When Unwritten Customary Authority Overrides the Legal Effect of Constitutional Rights: A Critical Review of the Tuvaluan Decision in *Mase Teonea v Pule O Kaupule & Another*" (2005) 9(2) Journal of South Pacific Law.

69 See Land, above n 40, at 539.

by proposed law and policy changes. This is the empirical approach adopted by the author having recently collected interview *talanoa* and focus group *talanoa* data in Samoa.

Now let us explore Samoa's Constitution in more depth. According to Article 15 it states:[70]

> (1) All persons are equal before the law and entitled to equal protection under the law.
> (2) Except as expressly authorised under the provisions of this Constitution, no law and no executive or administrative action of the State shall, either expressly or in its practical application, subject any person or persons to any disability or restriction or confer on any person or persons any privilege or advantage on grounds only of descent, sex, language, religion, political or other opinion, social origin, place of birth, family status, or any of them.
> (3) Nothing in this Article shall:
> (a) prevent the prescription of qualifications for the service of Samoa or the service of a body corporate directly established under the law; or
> (b) prevent the making of any provision for the protection or advancement of women or children or of any socially or educationally retarded class of persons.
> (4) Nothing in this Article shall affect the operation of any existing law or the maintenance by the State of any executive or administrative practice being observed on Independence Day: PROVIDED THAT the State shall direct its policy towards the progressive removal of any disability or restriction which has been imposed on any of the grounds referred to in clause (2) and of any privilege or advantage which has been conferred on any of those grounds.

It is worth noting that this Article is dated. The last time it was amended was in 1960. The Preamble of Samoa's Constitution references Samoan customs and traditions, and Christian principles, as well as fundamental freedoms, however: "Sexual orientation and gender identity are notably absent from this list of prohibited

70 See Constitution of the Independent State of Samoa (Samoa), art 15.

grounds of discrimination."[71] Consequently, art 15(4) permits the enforcement of provisions that existed prior to the enactment of Samoa's Constitution. This removes any protection from discrimination based on disability and gender identity. It safeguards existing customs and usages but did not clearly articulate how laws facilitate special measures to guarantee substantive equality until recently. The discriminatory sodomy provisions still remain in Samoa's Crimes Act 2013, criminalising consensual sex between men only. It could also be used to criminalise persons ascribed the male sex at birth, such as *fa'afafine*. Thus, there is limited scope to bring *fa'atama* (often misgendered as lesbians) within Samoan laws with Samoa's Constitution serving as the starting point.

The reality of legal protection to a full suite of fundamental rights as enshrined in constitutions is an entitlement not yet afforded to *fa'atama*. Insofar as Samoa's laws and Constitution does not prohibit discrimination on the basis of gender identity, it also does not make it illegal. Arguably, shoehorning *fa'atama* and SOGIEC members into recognised gender binary norms in the law is also not ideal. As evident in the cases discussed in Section III, caution needs to be taken when adopting inclusive legal language such as "sexual orientation", "gender" and whether inclusiveness of *fa'atama* and transgendered people may dismiss any distinctive feature they seek to preserve.

More importantly, before considering any proposed law reform and legal transplant, it must be driven by what fa'atama want. If diverse SOGIEC people in the Pacific seek to act as agents to influence legal change to recognise their legal status within the law or to drive more meaningful and appropriate models for law reform, the power to influence this change invariably lies with fa'atama themselves. Their lived experience determines how they construct and maintain their identities within the wider context of the influences from globalisation, Westernisation, migration and Samoa's shifting political economy. This, then, is a matter within the scope of SLRC's mandate which is guided by the Law Reform Commission Act 2008. Thus, any review or reform must promote the Samoan customs, enhancing the development of Samoa and ensure all laws are in accordance with the Constitution and meets the needs of the Government and the people. As a recommendation, community village outreach, education awareness campaigns are a few ways to enable input from the fa'atama community as noted during both interview and focus group talanoa.[72]

While the experiences of fa'afafine dominate Samoa's SOGIEC literature, the experiences of Samoa's SOGIEC community are not homogeneous, and the emphasis on fa'afafine could effectively render the experiences of other members of the SOGIEC

71 Bridget Crichton "Gender equity in Samoan laws: Progress vs contradictions" (2018) Journal of South Pacific Law (Special Issue on Pacific Custom) 125–142.

72 *Fa'atama* interview, above n 30.

community invisible in official data reporting. The Samoa Fa'afafine Association (SFA) also observed that, while both fa'afafine and fa'atama members continue to face numerous challenges, fa'atama are much more vulnerable to discrimination, stigmatisation and are invisible in official data and policies.[73] Unlike fa'atama, there is a large body of anthropological literature on fa'afafine, but very limited research regarding their human rights concerns.[74] There is no formal statistical data and estimates of the number of people identifying as fa'afafine and fa'atama vary. There is a lack of scholarly or applied policy literature on fa'atama, and no corresponding non-government organisation to the SFA. Fa'atama members sit within the SFA. This is problematic and, over time, fa'atama are likely to organise a separate and independent NGO driven specifically by fa'atama-framed ideals.

In 2018, Samoa's National Human Rights Institution (NHRI) and the SFA developed a national action plan to advance the human rights of the *fa'afafine* and *fa'atama* communities in Samoa and recommended the development of guidelines and standards by law enforcement agencies. The national action plan identified two overarching goals: (1) to strengthen the rights to health of *fa'afafine* and *fa'atama* communities and (2) to build the institutional capacity of NRHI staff to promote and protect the human rights of SOGIEC/LGBTI people particularly through capacity building and sensitisation activities.[75] The SFA's human rights advocacy is planned to include submissions to the review of the Births Registration legislation to enable recognition and ability to change their official sex ascribed at birth to recognise their gender identity.[76] It is also important to note that a representative from Samoa's SOGIEC community is part of Samoa's Human Rights Council of the Office of the Ombudsman. This is Samoa's National Human Rights Office and thus, Samoa's inclusion of "SOGIEC" in the Samoa Ministry of Women Community and Social Development was approved in the recent *National Gender Policy 2021–2025*.

To understand the depth of reality to laws and customary practices in Samoa, without paying attention to the lived experience of Samoan *fa'atama* and SOGIEC people, is unjust. In Samoa, *fa'atama* are still denied the common legal protections and human rights afforded to heteronormative individuals. It reflects a legally pluralistic legacy where historical association of legal status is closely aligned to the binary, biological and universal notions of female and male. Even in contemporary Samoa, the SOGIEC community, specifically *fa'atama*, are underrepresented in local

73 Consultation with Samoa Fa'afafine Association, 20 October 2020, Apia.

74 Saunoamaali'i Karanina Sumeo "Land rights and empowerment of urban women, *fa'afafine* and *fakaleiti* in Samoa and Tonga" (PhD Thesis, Auckland University of Technology, 2017).

75 Commonwealth Forum of National Human Rights Institutions *NHRI Samoa: A Case Study on Sexual Orientation and Gender Identity Rights* (2019).

76 See Consultation with Samoa Fa'afafine Association, above n 73.

Samoan discourse.[77] The problem is that *Fa'atama* who identify as transmen do not fit into the traditional sex categories and may continue to be ignored or beyond the scope of the law. In line with Samoan and Christian principles, art 15 of Samoa's Constitution adopts a functionalist interpretation of "sex" (sexual orientation) and makes no explicit reference to "gender" (gender identity). Therefore, it does not prohibit discrimination on the grounds of gender identity, nor does it make gender discriminatory practises illegal. This is why the repeal of all gender discriminatory laws and provisions (embedded in Samoa's civil and criminal codes which discriminate on the basis of SOGIESC status) is on SFA's agenda. By drawing on lessons from other repeals such as the Crimes Act 2013 in relation to the decriminalisation of female impersonation and the Mental Health Act 2007 removal of sexual preference or sexual orientation from the statutory definition of "mental disorder" (where "a person is not considered mentally ill" if "the person expresses or refuses or fails to express a particular sexual preference or sexual orientation"). Further to this, the development of special mechanisms (administrative, legal, policy) that adequately address gender-based violence (and social stigma, stereotyping) against Samoa's SOGIEC community and, finally, consideration as to the most appropriate approach to adopt (which could form a combination of approaches), whether it be calling a public referendum, seeking judicial interpretation, advocating for a Member of Parliament to move a private member's bill or even seeking an explicit repeal of art 15 of Samoa's Constitution.

VI. Conclusion

If *fa'atama* and SOGIEC wish to effect legal change in Samoa, Farran argues:[78]

> ... to resist introduced legal transplants, it is important that, more work of the kind presented ... is undertaken in order to establish what factual circumstances and needs the present laws must respond to and what models, if any, transgender Pacific Islanders wish to adopt to bring them more securely within the law.

77 Sue Farran "Out with the Law in Samoa and Tonga" in Niko Besnier and Kalissa Alexeyeff (eds) *Gender on the Edge: Transgender, Gay, and Other Pacific Islanders* (Honolulu, University of Hawaii Press, 2014) at 347–370.

78 At 367.

From the above discussion, this article proposes how to minimise conflicts between the customary and state legal system. This includes public awareness with an emphasis on formal education as a way to bring about understanding of Samoa's legal system and laws, to not only notify the public about upcoming law reform consultations but to encourage contribution or participation from members of the public that are under-represented in consultations, specifically *fa'atama* to better understand the process of law reform and state laws as well as individual rights, with an emphasis on *fa'atama* recognition and gender diversity in the customary and state legal context, all of which support mechanisms to ensure access to justice, education, employment and health. Court procedures and professional ethics training for members of the judiciary must be developed with reference to Samoa's gender diverse and customary context, to foster a deeper understanding of the evolving sociocultural environment they operate in and how their decisions must give due consideration to changes in the local and global context. Similarly, professional training is required for both parliamentarians and members of the legal profession.

For the parliamentarians, due consideration must be given to the customary environment of law making, duties to the village or constituencies they represent and how to introduce a private members bill. They must work closely with law reformers or legislative drafters as required. This will ensure that parliamentarians understand how to propose legislative or constitutional amendments to outdated ideas such as those that promote gender discrimination in the state and customary legal context.

For the legal profession, suitable training on Samoan custom, gender, tradition, protocol and language must be provided to lawyers involved in some aspect of law reform, while engagement and participation in quality research and conferences are necessary as they relate to work on law reform.

For the customary law context, village mayors should be encouraged to understand modern state laws and principles of human rights in the context of gender diversity and individual rights, then to examine the suitability of those laws and principles in the village context. Further, training for village mayors is critical in the development of villages rules and bylaws according to Samoa's constitution. The involvement of villages in law reform achieves several goals:

1. by contributing to the law reform process, it empowers the community to have a sense of shared ownership of the laws and customary reform;
2. it manages budget constraints by reducing consultation project costs; and
3. it widens the reach of village participation to include members of the *fa'atama* community, which enriches the quality of the responses.

On the whole, this article highlights key critical gaps to address such as the most culturally suitable methodology and critical legal theory to support gender and law research, with an emphasis on law reform and *fa'atama* recognition in the context of Samoa customs and laws.[79] This was informed by the evidence from relevant literature and empirical data.[80] The judicial guidance from the women's gender quota cases has given shape to the framing of *fa'atama* and SOGIEC recognition in state law which highlights the potential challenges to law making and law reform in the customary legal context.

79 Bridget Fa'amatuainu "Talanoa methodology in Samoa law and gender research: The case for a Samoan critical legal theory and gender methodology" (2023) 7(1) Pacific Dynamics: Journal of Interdisciplinary Research 422–441.

80 *Fa'atama* interview *talanoa* and focus group *talanoa*, above n 30.

IS THE AOTEAROA / NEW ZEALAND LAW STUDENT AND LAW GRADUATE EXPERIENCE A GENDERED EXPERIENCE?

Lynne Taylor, Natalie Baird, Ursula Cheer, Valerie Sotardi and Erik Brogt*

Abstract

From 2014 to 2019, we conducted a national longitudinal study capturing the law school and beyond experiences of a self-selected cohort of students who were enrolled in first-year law programmes at the Universities of Auckland, Canterbury, and Waikato in 2014. Our aim was to provide law students, law teachers, law schools, the Council of Legal Education, and the legal profession with comprehensive data on the Aotearoa | New Zealand law student and law graduate experience. Data were collected on seven different occasions over students' time at law school and transition into the workforce. A total of 75 students (9.5 per cent of the full dataset, n = 785) participated at each data point, and we sought to capture their lived experiences as law students and graduates. Consistent with actual enrolments at Aotearoa | New Zealand law schools, a majority of the cohort (64 per cent, n = 48) was female. Consistent with the gender-focused Aotearoa | New Zealand and international literature, our results show that in some respects the law student experience was a gendered one. However, this finding was not replicated in early workplace experiences. We consider what lessons the identified gender differences offer for law teachers, the legal profession, and employers of law graduates.

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I. Introduction

From 2014 to 2019, we conducted a national longitudinal study capturing the law school and early career experiences of a self-selected cohort of Aotearoa | New Zealand students who were enrolled in first-year law programmes at the Universities of Auckland, Canterbury, and Waikato in 2014.[1] Our aim was to provide law students, law teachers, law schools, the Council of Legal Education, and the legal profession with comprehensive data on the Aotearoa | New Zealand law student and law graduate experience. We collected data from participants on seven occasions over their time at law school and first years in the workforce. Seventy-five of the starting cohort of 785 participated in every survey across the longitudinal study, and it is their responses that are analysed by gender in this paper. Consistent with actual enrolments at Aotearoa | New Zealand law schools, a majority of the 75 were female. We present their responses as reported and track trends across time.

Throughout the longitudinal study, we contextualised the data collected on the law school experience with reference to the factors identified in higher education literature as aligned with student persistence, positive student engagement and self-efficacy. Our results are grouped in accordance with this framework. By the time of the last data collection, most of the cohort of 75 had completed a law degree and were employed in work of a legal nature that they found satisfying and, for the most part, enjoyable. As was predicted by their pre-university backgrounds and characteristics, they were largely persisting, engaged and confident students. Although unique in the respects we have identified, the cohort is nevertheless a constituent group within the wider law student population. Our focus is whether this persisting and successful cohort reported a gendered experience at law school and beyond. Consistent with the gender-focused Aotearoa | New Zealand and international literature, we conclude that in some respects the cohort's law student experience was a gendered one, but that this was not so for the cohort's reported workplace experiences. Identified gender differences at law school included reported experiences of formal learning opportunities and self-efficacy levels. We also consider what lessons the identified gender differences offer for law teachers, the legal profession, and employers of law graduates.

1 The law schools at the participating universities make up half of all Aotearoa | New Zealand law schools. The law school at the University of Auckland is Aotearoa | New Zealand's largest law school. The University of Waikato is one of Aotearoa | New Zealand's newer law schools. The Universities of Auckland and Waikato are situated in the North Island of Aotearoa | New Zealand. The law school at the University of Canterbury is one of two law schools situated in the South Island. The participating law schools represent a cross-section of Aotearoa | New Zealand law schools.

Results and findings are based on data collected prior to the COVID-19 pandemic, but still provide a useful point in time reference. Key gender differences also remain relevant in the post-COVID-19 learning and teaching and working environment. For example, law teachers may take account of identified gender differences in the learning experiences they provide for their students in the post-Covid setting in which attendance at face-to-face classes has fallen and online learning has become more common.

The next section overviews legal education in Aotearoa | New Zealand. This is followed by a literature review and description of the longitudinal study method. Results are presented and discussed. The final section concludes.

II. Legal Education in Aotearoa | New Zealand

The law degrees offered at the universities participating in this study all require a four-year, full-time undergraduate programme of study. Many of our cohort of 75 completed a law degree concurrently with another degree (most frequently a Bachelor of Arts), resulting in a five–five-and-a-half-year, full-time programme of study. Each of the law degrees offered by the participating universities is approved by the New Zealand Council of Legal Education (CLE). Completion of an approved degree is one of the requirements for admission as a Barrister and Solicitor of the High Court of New Zealand. The other requirement is the completion of the Professional Legal Studies Course, a 13-week full-time, skills-based course offered by several non-university providers. Only those admitted as a Barrister and Solicitor may be issued a practising certificate by the New Zealand Law Society | Te Kāhui Ture o Aotearoa. An individual must hold a current practising certificate before they may offer legal services as a lawyer.[2]

CLE-approved law degrees are made up of a series of compulsory courses that students complete across their first three years of study. These courses are perceived to be fundamental to legal practice and include the *Legal System, Law of Contract, Law of Torts, Criminal Law, Public Law,* and *Property Law* (or both *Land Law and Equity/Law of Succession).* Because of their compulsory nature, these courses have large enrolments (200 or more students) and are taught via a combination of large classes (lectures) and small classes (tutorials). Lectures are timetabled more frequently than tutorials at each of the participating law schools. To ensure

2 Lawyers and Conveyancers Act 2006 (NZ), s 4 (see the definitions of "lawyer", "legal services" and "legal work").

consistency between law schools,[3] the CLE controls the content, assessment, and outcomes of these compulsory courses. Students in their later years at law school complete a specified number of optional courses, where enrolment numbers range from 15 to over 200. All law schools offer optional courses in commercial law, company law, employment law, family law, the law evidence, and the like. Many also now offer a wide range of other optional courses including, for example, courses focusing on workplace skills, Māori and indigenous law, jurisprudence, and gender studies.

III. Literature Review

The general higher education literature reports that students' persistence and engagement with their studies is influenced significantly by their interactions with the universities at which they are enrolled.[4] The impact of these interactions (positive or negative) is affected not only by university policies and practices, but by students' backgrounds (including, for example, their ethnicity, socio-economic status, and whether they are the first in their family to engage in higher education) and the external life events students experience whilst studying. Positive interactions are linked to persistence, positive engagement and readiness to transition to the workforce after graduation. Complementing these findings, social cognitive theory, a psychological perspective of human behaviour, reports that students who feel positive about their academic performance exhibit higher levels of self-efficacy (or confidence in their ability to perform a task).[5] Self-efficacy is strongly linked with positive student achievement and student perceptions of employability after graduation.[6]

3 *Twenty sixth report of the New Zealand Council of Legal Education to the House of Representatives* (2016) 5.

4 See, for example, Vince Tinto *Leaving College: Rethinking the Causes and Cures of Student Attrition* (2nd ed, University *of* Chicago Press, Chicago, 1993); George D Kuh "Unmasking the Effects of Student Engagement on First Year College Grades and Persistence" (2008) 79(5) Journal of Higher Education 540; Ella R Kahu and Karen Nelson "Student engagement in the educational interface: understanding the mechanisms of student success" (2018) 37(1) Higher Education Research & Development 58; and Amy N Farley and others "A Deeper Look at Bar Success: The Relationship Between Law Student Success, Academic Performance and Student Characteristics" (2019) 16(3) Journal of Empirical Legal Studies 605.

5 Albert Bandura *Social foundations of thought and action: A social cognitive theory* (Prentice Hall, New Jersey, 2001); and Dale H Schunk and Maria K DiBenedetto "Motivation and social cognitive theory" (2020) 60 Contemporary Educational Psychology 101832.

6 Kathryn Bartimole-Aufflick and others "The study, evaluation, and improvement of university student self-efficacy" (2016) 41(11) Studies in Higher Education 1918 at 1923; and E Qenani, N MacDougall and C Sexton "An empirical study of self-perceived employability: Improving the prospects for student employment success in an uncertain environment" (2014) 15(3) Active Learning in Higher Education 199 at 202.

We used the persistence, engagement, and self-efficacy literature as an analytical framework for the longitudinal study. As noted above, results, as they relate to the cohort's law school experiences, are grouped according to factors identified in this literature as aligned with student persistence, positive engagement, and confidence. Our key focus, however, is whether, consistent with the gender-focused Aotearoa | New Zealand and international literature, our cohort of 75 had a gendered experience at law school and beyond. Much of the local and international literature reports gender differences in the way that male and female students engage in formal learning opportunities, and experience law school. Gender differences are also reported in self-efficacy levels and, ultimately, in legal workplace experiences.

The international general and legal education literature reports that male students are more likely to participate in university classrooms.[7] When female students do speak, they are reported as doing so for shorter periods than male students.[8] A recent study from the United States highlights the significance of the "social context" in classroom settings, with female law students reporting themselves less willing to participate because of facing a "greater backlash" or social cost than their male peers.[9] Other studies report greater parity of participation by female law students in small classrooms (those with 25 or fewer participants).[10] One recent study reports the gender participation gap closes in students' final year at law school.[11] In Aotearoa | New Zealand, and following a number of female students speaking up about incidents of sexism at the University of Auckland Law School, Anna Hood and Julia Tolmie hosted discussion groups and conducted a survey that formed the basis of a report on gender issues in 2016.[12] Their report usefully summarises the likely reasons for the gender participation differences at Aotearoa | New Zealand law schools. Consistent with international studies, they suggest that female students' willingness to participate in classes is affected by class size, but also by how skilful the lecturer is at facilitating discussion, the gender split of the class, the gender of the lecturer, whether class contribution is voluntary, and (again

7 Molly Bishop Shadel, Sophie Trawalter and J H Verkerke "Gender Differences in the Law School Classroom Participation: The Key Role of the Social Context" (2022) 108 Virginia Law Review 30; Daniel E Ho and Mark G Gelman "Does Class Size Affect the Gender Gap: A Natural Experiment in Law" (2014) 43(2) Journal of Legal Studies 291 at 293; Yale Law School Faculty and Students *Speak Up about Gender: Ten Years Later* (Yale Law Women, 2012) at 22; Kelly A Rocca "Student Participation in the College Classroom: An Extended Multidisciplinary Literature Review (2010) 59(2) Communication Education 185 at 196; Gail Crombie and others "Students' Perceptions of Their Classroom Participation and Instructor as a Function of Gender and Context" (2003) 74(1) Journal of Higher Education 51 at 69; and Taunya Lowell Banks "Gender Bias in the Classroom" (1988) 38(1) J Leg Ed 137 at 138.

8 Shadel, Trawalter and Verkerke, above n 7, at 49.

9 At 50.

10 Ho and Gelman, above n 7, at 293; and Yale Law School Faculty and Students, above n 7, at 25.

11 Shadel, Trawalter and Verkerke, above n 7.

12 Anna Hood and Julia Tolmie *Auckland Law School Gender Report 2016* (unpublished report).

consistent with international studies) "a fear of receiving negative comments from a cohort of vocal male students".[13]

Several studies from the United States have linked the Socratic dialogue teaching method, a teaching method unique to law, with lower female law student classroom participation rates.[14] In Aotearoa | New Zealand, Caroline Morris inquired into the experience of students enrolled in 200 level or 300 level law courses at Victoria University of Wellington in 2004,[15] the one Aotearoa | New Zealand law school where the Socratic dialogue teaching method is frequently used.[16] Consistent with the United States studies, Morris found that female students made voluntary class contributions less frequently than their male peers and that a higher percentage of female students never contributed in class.[17]

In terms of self-efficacy, several studies report that female students are more likely to underestimate their academic performance. One study focusing on medical students (who, like law students, are engaged in a professional course of study), suggests this is connected to research showing that "female medical students often have problems with self-confidence (when compared to their male peers)".[18] It is the case that males are reported to score higher on standard measures of global self-esteem than females.[19] Muddying the waters somewhat, gender self-report biases are also well documented, with the authors of a study of medical students concluding:[20]

> Female medical students may just be more willing to admit that they are feeling anxious, stressed, or that they lack confidence in their abilities. Male medical students might be anxious or stressed to the same degree but are more reticent to admit these negative feelings.

13 At 7.
14 Yale Law School Faculty and Students, above n 7, at 8; and Ho and Gelman, above n 7, at 293.
15 Caroline Morris "A 'Mean Hard Place'? Law Students Tell It As It Is" (2005) 36 VUWLR 197.
16 See "Law: Overview" Victoria University of Wellington|Te Herenga Waka (2021) <https://www.wgtn.ac.nz>.
17 Morris, above n 15, at 205.
18 D Blanche-Hartigan "Medical students' self-assessment of performance: results from three meta-analyses" (2011) 84 Patient Education & Counselling 3 at 6–7; and E Svirko, T Lambert and MJ Goldacre "Gender, ethnicity and graduate status, and junior doctors' self-reported preparedness for clinical practice: national questionnaire surveys" (2014) 107(2) Journal of the Royal Society of Medicine 66 at 71.
19 KC Kling and others "Gender differences in self-esteem: a meta-analysis" (1999) 125 Psychol Bull 470.
20 DC Blanche and others "Medical student gender and issues of confidence" (2008) 72 Patient Education Counselling 374 at 376.

To the extent that gender differences in self-reported confidence and/or self-esteem levels are real, an interesting question is whether these are the product of students' pre-university experiences, the university environment in which are studying, or some combination of both.[21] A study of American college students concludes:[22]

> ... gender differences observed at the end of college are largely unrelated to the college experience itself. Instead, the source of gender differences extends back to the pre-College years, where women and men develop different values, confidences, aspirations and patterns of behavior. For the most part these gender differences persist throughout college, and may even grow greater over time.

The authors note that this finding does not absolve universities from addressing gender inequities but should challenge them to identify experiences that may work to accommodate the effects of students' pre-college experiences.[23] We concur with this view.

Given the reported gender differences in terms of classroom participation and self-efficacy, it is no surprise that female students in several early United States' studies reported a negative or mixed law school experience,[24] a finding replicated in Morris' 2004 study of law students enrolled at Victoria University of Wellington.[25] Hood and Tolmie's 2016 report also identified a negative experience for female students at Auckland Law School. Commenting on the overall culture at the Law School, they noted that "[m]ale views, attitudes and approaches are dominant in many aspects of Law School life" with many women frequently feeling "uncomfortable, intimidated, excluded and marginalised.[26]. But such findings are not universal. For example, a key finding of a longitudinal study of the law student experience at the University of Toronto was that gender did not have the influential role it had been accorded in other studies.[27]

21 At 378.

22 Linda J Sax and Cassandra E Harper "Origins of the Gender Gap: Pre-College and College Influences on Differences between Men and Women" (2007) 46 Research in Higher Education 669 at 690.

23 At 690.

24 Suzanne Homer and Lois Schwartz "Admitted but Not Accepted: Outsiders Take an Inside Look at Law School" (1990) 5 Berkeley Women's LJ 1; and Lani Guinier and others "Becoming Gentlemen: Women's Experiences at One Ivy League Law School" (1994) 143 U Penn L Rev 1 at 2–3.

25 Morris, above n 15, at 217–220. For a useful summary of the older literature on this issue, see Catherine Carroll and April Brayfield "Lingering Nuances: Gendered Career Motivations and the Aspirations of First-Year Law Students" (2007) 27 Sociological Spectrum 225.

26 Hood and Tolmie, above n 12, at 9.

27 Cassandra Florio and Steven Hoffman "Student Perspectives on Legal Education: A Longitudinal Empirical Evaluation" (2012) 62 J Leg Ed 162.

There are mixed reports as to whether gender is a determining factor in differences in students' perceptions of their readiness to join the workforce. Work readiness is linked in the general literature to positive student engagement and self-efficacy. Although one European study found this not to be the case,[28] another reported that male engineering and agricultural students (who made up the majority of the studied cohorts) were more confident of finding full-time work after graduation, with the authors suggesting that universities need "to do more to enhance self-confidence among female students so they feel secure of their identity, knowledge, and skills when entering the labor market".[29] It has been reported that female junior doctors are slightly less likely than males to feel prepared to join the workforce, with the authors of this report noting that as "there is little reason to suppose that female students leave medical school less prepared than men for work", the gender differences may be explained by the "well-documented gender differences in personality" which, they suggest may "result in gender differences in self-evaluation", with "some female doctors underestimating their levels of preparedness (or some men overestimating theirs)".[30] The gender differences to which the authors refer are the already referenced differences in self-esteem and self-confidence.[31]

Gender disparities are also reported in male and female graduates' workplace experiences. Two European studies report that male graduates are "favoured" at the start of their professional life and express greater levels of satisfaction with their career trajectory,[32] with an Australian study suggesting this is also likely to be so for male law graduates.[33] In Aotearoa | New Zealand, Josh Pemberton's 2016 study of the experiences of junior lawyers (defined more broadly than just law graduates, including those with a first practising certificate issued within the preceding three years) found that while work satisfaction levels were similar for male and female junior lawyers, and both genders reported a similar likelihood of remaining in the legal profession in the future, almost two-thirds of junior female lawyers reported that their gender impacted negatively on their prospects in the profession.[34]

28 Adëla Garcia-Aracil, Silvia Monteiro and Leandro S Almeida "Students' perceptions of their preparedness for transition to work after graduation" (2018) 22(1) Active Learning in Higher Education 49.

29 Qenani, MacDougall and Sexton, above n 6, at 211.

30 Svirko, Lambert and Goldacre, above n 18, at 71.

31 At 71.

32 García-Aracil, Monteiro and Almeida, above n 28, at 211; and GA Maxwell and A Broadbridge "Generation Y graduates and career transition: Perspectives by gender" (2014) 32(4) European Management Journal 547.

33 Angela Melville and Amy Barrow "Persistence Despite Change: The Academic Gender Gap in Australian Law Schools" (2022) 47(2) Law & Social Inquiry 607 at 609.

34 Josh Pemberton "First Steps: the Experiences and Retention of New Zealand's Junior Lawyers" (New Zealand Law Foundation, Wellington, 2016) at 4.

More broadly, much work has also been done over many years on women's overall lack of progression in the Aotearoa | New Zealand legal profession.[35] In 2018, the law profession was also challenged by allegations of sexual assault and harassment of female law clerks and law graduates at top-tier law firms.[36] The 2018 *New Zealand Law Society Workplace Environment Survey* revealed that 55 per cent of young women lawyers (defined as those aged under 30 with a current practising certificate) had been sexually harassed in the preceding five years.[37] One response to those events was the 2019 *Purea Nei: Changing the Culture of the Legal Profession* report.[38] The focus of this report was how to change the culture of the legal profession, but it rightly identified that diversity and inclusion initiatives need to take account not only of the male/female binary, but also of the way in which the profession shuts out gender-nonconforming and queer people, Māori, Pasifika and other minority ethnicities, and lower socio-economic groups.[39] As our cohort of 75 self-identified only as male or female, we have not reviewed the literature as it relates to the experiences of students who identify as gender diverse/non-binary.

35 See, for example, Judith Pringle and others *Women's career progression in Auckland law firms: Views from the* top*, views from below* (Gender & Diversity Research Group, AUT University, 2014); Susan Glazebrook "Gender Myths and the Legal Profession" (2016) 22 Canterbury Law Review 171; John Caldwell "Gender and the legal profession" [2016] NZLJ 51; NZLS CLE and New Zealand Law Society *Working Towards Gender Diversity in NZ Law Firms: Four practical approaches to achieving change* (New Zealand Law Society, Wellington, 2016); Ursula Cheer and others *Flexible and Part-time Work Arrangements in the Canterbury Legal Profession* (Report for the Canterbury Women's Legal Association by the Socio-Legal Research Group, University of Canterbury, 2017); Sarah Taylor *Valuing Our Lawyers: The untapped potential of flexible working in the New Zealand legal profession* (Report for the In-house Lawyers Association of New Zealand, New Zealand Law Society, Wellington, 2017); Louise Grey "Reflections from a young woman entering the profession: would a female partner quota address gender inequality within the New Zealand legal profession?" (2017) 1 New Zealand Women's Law Journal 51; Nicole Ashby "Absent from the top: a critical analysis of women's underrepresentation in New Zealand's legal profession" (2017) 1 New Zealand Women's Law Journal 80; Alice Anderson and Mary Sholtens QC "'Even now, people still see a good lawyer as being a man in a suit': The voice of women in New Zealand's senior courts" (2019) 3 New Zealand Women's Law Journal 183; Jenny Cooper QC "Who gets to speak in New Zealand's top courts?" (2019) 3 New Zealand Women's Law Journal 189; and Anna Hood "Employing Art in the Fight for Gender Equality in Aotearoa New Zealand's Legal Profession" (2022) 7 New Zealand Women's Law Journal 145.

36 See for example, Margaret Bazley *Independent Review of Russell McVeagh: March–June 2018* (5 July 2018); Zoe Lawton "#Metoo Blog" (2018) <www.zoelawton.com>; New Zealand Law Society *Report of the New Zealand Law Society Working Group: To enable better reporting, prevention, detection, and support in respect of sexual harassment, bullying, discrimination and other inappropriate workplace behaviour within the legal profession* (8 December 2018); Gill Gatfield "Be Just and Fear Not" (2018) 2 New Zealand Women's Law Journal 43; and Anna Hood "Reflections on the Perpetual Cycle of Discrimination, Harassment and Assault Suffered by New Zealand's Women Lawyers and How to Break it After 122 Years: Reviewing Gill Gatfield's *Without Prejudice*" (2018) 2 New Zealand Women's Law Journal 249.

37 Colmar Brunton *Workplace Environment Survey* (New Zealand Law Society, 28 May 2018) at 18.

38 Allanah Colley, Ana Lenard and Bridget McLay *Purea Nei: Changing the Culture of the Legal Profession* (December 2019).

39 At 26–27.

IV. Method

Our longitudinal study followed protocols approved by the University of Canterbury's Educational Research Human Ethics Committee (2019 69 ERHEC). The framework for the longitudinal study and data collection methods was informed by a literature review. Given that participants at the participating universities were spread across Aotearoa | New Zealand, we used online surveys to capture data. The longitudinal study was promoted by teachers to the first-year cohort at the participating universities to maximise the sample group. To preserve participants' anonymity, the participating universities supplied first-year students' university email addresses to an independent educational consultant, employed by the author team. The consultant emailed each first-year student an invitation to participate in the study. Seven hundred and eighty-five students accepted the invitation and were subsequently sent a link to participate in the first of seven online and anonymous surveys. The first survey and data collection took place in the first quarter of the 2014 academic year. The consultant sent participants a link via their university email address to complete a second survey in the second half of the 2014 academic year. The consultant also sent participants email links to complete subsequent data collections in the 2015–2019 academic years. Data collection in the second and subsequent surveys occurred during August–October, a time before participants were fully engaged in their end-of-year assessment schedule. Those who completed the 2017 and 2018 surveys (Surveys 5 and 6) and who reported they were in their final year of university study were asked to provide a non-university email address. The consultant sent invitations to this address asking participants to complete subsequent surveys as graduates. The author team received anonymised and collated data and were unable to identify any individual student participating in the study. However, if a participant's responses indicated they were at risk in terms of their wellbeing, provision was made for them to be identified by the consultant and offered help.

Data were collected from participants to assess whether their pre-law school and law school experiences were consistent with factors identified in the literature review as aligned with student persistence, positive engagement and positive self-efficacy. Initial data collected in the first 2014 survey focussed on participants' backgrounds, characteristics, commitment to their law studies and a legal career, and feelings of confidence about studying at university. Subsequent data collected from participants while they were studying at law school focussed on factors identified in the literature review with positive student engagement, such as whether participants experienced positive and constructive relationships

with their teachers and peers, and whether they regularly participated in active learning activities. We also asked a series of repeated questions to probe whether participants' starting commitment to their law studies and a legal career, and their reported self-efficacy, changed across their time at law school. Questions that were asked of participants as graduates sought information on how they were using (or not) their law degrees. We collected data on their employment destinations and experiences, and future career plans. We also asked graduates to look back and reflect on their law school experiences. In the results section below, we report our gender analysis of the responses to the questions asked of the cohort across their time at law school and beyond.

The number of study participants decreased over time as is usual with longitudinal studies.[40] For example, 146 of the original 785 participants completed the seventh and final data collection in 2019. Of the cohort of 75 who completed every online survey, 36 per cent (27) were male and 64 per cent (48) were female. Participants were offered the option to choose "other, please explain" for their gender, but none of the 75 participants selected this option.[41] This gender split is consistent with female participation in the longitudinal study across time,[42] and with actual enrolments at New Zealand law schools.[43]

All 75 participants were engaged in university study across 2014–2017. The number of participants still studying dropped over 2018 and 2019, as participants finished their degrees and entered the workforce (Surveys 6 and 7). In 2018 (Survey 6), 70.4 per cent of males (n=19) and 58.3 per cent of females (n= 28) were still studying. By 2019 (Survey 7), the proportion of those still studying had fallen to 29.6 per cent of males (n=8) and 16.7 per cent of females (n=8). Because the number of participants still studying at university in 2019 was very small, their responses to repeated questions may not necessarily be representative of the larger cohort.

40 Publications reporting on other aspects of the longitudinal study include Lynne Taylor and others "The Student Experience at New Zealand Law Schools" [2018] New Zealand Law Review 693; Valerie Sotardi and others, "Influences on students' interest in a legal career, satisfaction with law school, & psychological distress: trends in New Zealand" (2021) The Law Teacher DOI: 10.1080/03069400.2021.1968166; and Lynne Taylor and others "What Happens after Graduation? The Post-Law Experiences and Reflections of Aotearoa, New Zealand Law Graduates" (2022) Asian Journal of Legal Education, DOI: 10.1177/23220058221133653.

41 This option was included in first survey in 2014. We acknowledge that we would likely have used different wording if we were designing the survey in 2023.

42 In 2014 (the first year of the longitudinal study), females made up 64 per cent of participants, in 2015, 63 per cent; in 2016, 60 per cent; in 2017, 62 per cent; in 2018, 64 per cent; and in 2019, 64 percent: see Lynne Taylor and others *The Making of Lawyers: Expectations and Experiences of Sixth Year Aotearoa/New Zealand Law Students and Recent Law Graduates* (Ako Aotearoa, Wellington, 2021).

43 Geoff Adlam "Snapshot of the Profession 2019" [2019] 926 LawTalk 27 at 31.

Students in their final year at law school completed a separate section of the 2017–2019 surveys (Surveys 5–7) and we separately report their collated responses by gender. In 2017, 40.7 per cent of males (n=11) and 35.4 per cent of females (n=17) identified as being in this category, as did 29.6 per cent of male graduates (n=8) and 41.7 per cent of female graduates (n=20) in 2018 (Survey 6), and 22.2 per cent of males (n=6) and 6.3 per cent of females (n=3) in 2019 (Survey 7).

By the time of the 2018 survey (Survey 6), 29.6 per cent of male participants (n=8) and 41.7 of females (n=20) reported that they had completed their law degree. This increased to 70.4 per cent of males (n=19) and 83.3 per cent of females (n=40) in 2019 (Survey 7). Graduates completed separate sections of the 2018 and 2019 surveys (Surveys 6–7) and again we report their responses separately by gender.

In addition to the unique and persisting nature of the cohort, we acknowledge several limitations to the results we present and discuss below. As links to complete the second and subsequent surveys were sent to participants' university email addresses, the study does not capture those who chose not to participate in university study or moved to another university. Only those who provided a non-university email address in their final year of study were sent a link to participate in subsequent surveys as graduates. Findings are based on the self-reported expectations and experiences of a self-selected cohort. The non-response bias is unknown. We do not know the extent to which our cohort's reflections and experiences are consistent with students who did not participate in the study, or with students who began but did not complete the study. Finally, we only captured, and so can only report and discuss, a binary gender perspective.

V. Findings

Findings are presented in three sections, beginning with a summary of data collected in the first 2014 survey (Survey 1) about the cohort's pre-university backgrounds and characteristics, including how confident they felt about undertaking university study. The second section presents findings on participants' university learning and teaching experiences and the third section focuses on participants' transition from law school to the workforce.

A. Pre-university Backgrounds and Characteristics

Students' pre-university backgrounds determine to a large extent their starting intentions with respect to their university studies in terms of persistence and engagement.[44]

1. Demographic data

A majority of the cohort of 75 participants were female. Sixty-four per cent (n=48) were female and 36 per cent (n= 7) of participants were male. As noted above, cohort members identified as either male or female.

Participants were enrolled at the Universities of Auckland, Canterbury and Waikato. Most participants began their legal studies at the University of Auckland, New Zealand's largest university and law school (53 per cent of males (n=17) and 41.7 per cent of females (n=20)). Just under 30 per cent of males (n=8) were enrolled at the University of Canterbury, as were 31.3 per cent (n=15) of females. The remainder were enrolled at the University of Waikato (7.4 per cent of males (n=2) and 27.1 per cent of females (n=13)).

Most participants were aged 20 or under at the time the study began in 2014 (85.2 per cent of males (n=23) and 81.3 per cent of females (n=39)). Most reported that they had been at high school in 2013 (70.4 per cent of males (n=19) and 66.7 per cent of females (n=32)). A further 10.5 per cent of females (n=5) had enjoyed a gap year in 2013. A slightly higher proportion of males (18.5 per cent (n=5) reported they were in employment in 2013, compared to 14.6 per cent of females (n=7). Most participants were new to university study, with only 7.4 per cent of males (n=2) and 10.9 per cent of females (n=5) reporting that they had already completed one or more degrees.

Most participants were studying full-time (81.5 per cent of male participants (n=22) and 91.7 per cent of females (n=44)). This proportion remained consistent over time. In 2015 (Survey 3), most of both genders reported that they were also enrolled in a concurrent or double degree programme (63 per cent of male participants (n=17) and 56.3 per cent of females (n=27)). For both genders, the most popular second degree was a Bachelor of Arts, followed by a Bachelor of Commerce.

Most participants identified as New Zealand European | Pākehā (77.8 per cent of males (n=21) and 55.3 per cent of females (n=26)). One male and three females identified as Māori, and one female as Pasifika. A majority were New Zealand citizens (88.9 per cent of males (n=24) and 85.4 per cent of females (n=41)) or New Zealand permanent residents (11.1 per cent of males (n=3) and 12.5 per cent of females (n=6)). One female participant identified as an international student.

44 Tinto, above n 4; Kahu and Nelson, above n 4.

Most participants reported that they did not have a disability that affected their ability to study and learn (92.6 per cent of males (n=25) and 93.6 per cent of females (n=44)).

A greater proportion of male participants reported having a mother whose highest qualification was an undergraduate university degree or higher (62.9 per cent (n=17)) compared to females (45.9 per cent (n=22)). A smaller proportion of males and females reported that their father's highest qualification was a university degree or higher (37 per cent (n=10) of males and 35.3 per cent (n=17) females). Just over 22 per cent of male participants reported that their mother's highest qualification was a school qualification (n=6), as did 25 per cent of female participants (n=12). The same proportion and number of male participants reported that their father's highest qualification was a school qualification, as did a similar proportion of female participants (22.9 per cent, (n= 22)). It is likely that a substantial minority of the cohort were the first in their family to study at university. A greater proportion of female participants reported having no family member (parent, sibling, uncle, aunt, cousin or other relative) or another significant person who influenced them with a law degree (77.1 per cent of female students (n=37) compared to 51.9 per cent of male students (n=14)).

2. Confidence in undertaking university study

As well as collecting demographic data, we asked participants how confident they were about studying at university. Participants were able to select an option on a five-point Likert scale ranging from "not confident at all" to "very confident". Male and female responses were consistent: 24 per cent of males and 25 per cent of females selected the midpoint option, 56 per cent of males and 56.3 per cent of females selected the "confident" option, and 16 per cent of males and 10.4 per cent of females selected the "very confident" option.

B. Learning and Teaching

A significant part of each data collection was devoted to participants' learning and teaching experiences in law school and the extent to which these aligned with factors linked to student persistence and positive engagement. For example, the literature on persistence reports that positive student interactions with their law school's academic systems and social systems reinforce persistence.[45] Syntheses of the literature on student engagement highlight factors associated not only with persistence, but academic performance and readiness to transition to the

45 Tinto, above n 4.

workforce. These include encouragement to engage in active learning activities and having positive and constructive relationships with teachers and peers.[46]

1. Classroom experiences

Consistent with what might be expected of a cohort who persisted with their studies until completion of a law degree, male and female participants reported high lecture and tutorial attendance rates across time, a stark contrast to the in-person class attendance rates in the post-Covid-19 environment. For example, both genders reported they attended between 80–100 per cent of their lectures across 2015 and 2016, and between 80–100 per cent of their tutorials in 2015. Both genders then reported a slight drop in lecture attendance in 2017 and for the remainder of their time at law school.

We asked participants questions probing the nature of their large class (lecture) experiences in 2015 and 2016, the years in which they would have been completing the large, compulsory law degree courses. Participants were provided with a list of options from which to select and were able to select more than one option. The most frequently reported activity by both genders was listening to what the lecturer had to say: 81.5 per cent of males and 83.3 per cent of females in 2015, and 81.5 per cent of males and 87.5 per cent of females in 2016. A significant percentage of both genders also reported taking notes. We see this data as not only indicating that a primary purpose of large classes was information transfer, a learning activity of a passive nature, but that the Socratic dialogue was not frequently used as a teaching method.

Female participants reported greater rates of accessing the internet to locate materials relevant to the lecture (41.7 per in 2015 and 60.4 per cent in 2016, compared with 25.9 per cent of males in 2015 and 40.7 per cent of males in 2016). Consistent with several studies reported in the literature review, a further difference was apparent in the frequency of selection of activities indicative of whole classroom participation. For example, the "ask questions of the lecturer" option was selected by just over 22 per cent of males in 2015 and 2016, compared with just 6.3 per cent of females in 2015 and 8.3 per cent of females in 2016. A greater percentage of male participants also selected the "answer questions asked by the lecturer" in 2015 and 2016 (29.6 per cent in 2015 and 37 per cent in 2016, compared with 20.8 per cent of females in 2015 and 2016). On the other hand, roughly similar percentages of both genders reported engaging in lecturer-directed group activities, although a greater proportion of females selected the option indicating that they had engaged in lecturer-directed

46 Nick Zepke and Linda Leach "Improving student engagement: Ten proposals for action" (2010) 11(3) Active Learning in Higher Education 167; and Katherine Wimpenny and Maggi Savin-Baden "Alienation, agency and authenticity: a synthesis of the literature on student engagement" (2013) 8(3) Teaching in Higher Education 311.

individual activities (18.8 per cent of females in 2015 compared with 11.1 per cent of males, and 50 per cent of females in 2016 compared with 25.9 per cent of males).

Participants at the three law schools had the benefit of a supporting tutorial programme when enrolled in the large, compulsory law degree courses in 2015 and 2016. Tutorials are small classes, and this may account for the fewer differences in the responses of male and female participants, as is reported in some studies. Similarly large percentages reported listening to the tutor (88.9 per cent of males and 89.6 per cent of females) and taking notes. Similar proportions reported answering questions asked by their tutor (51.9 per cent of males and 54.2 per cent of females) and engaging in tutor-directed group activities (74.1 per cent of males and 79.2 per cent of females) and individual activities (44.4 per cent of males and 56.3 per cent of females).

By the time of the 2016 survey (Survey 4), participants were likely to have been enrolled in some optional courses, with some of these having smaller class numbers when compared to the large, compulsory courses. In Survey 4, we asked participants what activities they frequently engaged in during small classes. Participants were given the same list of activities when they were asked this question concerning the large, compulsory courses. Participants were able to select more than one option. The most frequently reported activity by both genders was passive learning in the form of listening to what the lecturer had to say and taking notes. A higher proportion of females reported using the internet to access materials relevant to the class (54.2 per cent of females compared to 18.5 per cent of males). Notably, there was a reversal in the reported frequency of likely whole classroom participation. The percentage of females reporting that they had asked questions of the lecturer exceeded that of males (58.3 per cent of females compared to 33.3 per cent of males), as did the percentage of females reporting that they had answered questions asked by the lecturer (72.9 per cent of females compared to 48.1 per cent of males). Females also reported higher participation rates in lecturer-directed group activities (72.9 per cent of females compared to 48.1 per cent of males) and lecturer-directed individual activities (62.5 per cent of females compared to 33.3 per cent of males).

In 2017, by which time participants would mostly have been engaged only in optional courses, we asked how frequently they engaged in interactive activities on offer in lectures. Both sexes reported participating in the interactive activities that were on offer during lectures in similar proportions. The most frequently selected option on a five-point Likert scale was the mid-point "sometimes" option, selected by 33.3 per cent of males and 31.9 per cent of females. We followed this up with an open question asking participants to give reasons for their answers – such as why they chose to participate or not. Most participants explained why they chose not

to participate, but there was a discernible difference in their explanations. Female explanations indicated that many felt uncomfortable participating. Examples included "feeling judged" (one), "social anxiety" (four), "not wishing to get the answer wrong" (five), "not confident" (two), "not feeling comfortable to participate in large classes" (three). In comparison, just two males indicated they were uncomfortable contributing in front of their peers. Other male responses were that the interactive activities on offer "were not well thought out" or "a waste of time", that they learnt better out of class, preferred a lecture style, were not prepared to participate, did not like interactive activities, and that "others ask what I want".

In 2017, and as a further gauge of the time and effort expected of (and undertaken by) participants prior to attending class, we asked how frequently lecturers expected them to complete preparatory work. Participants were able to select a point on a five-point Likert scale ranging from "rarely" to "very often". Male and females were consistent in reporting that their teachers "often" set preparatory work. When asked how frequently they completed any expected preparatory work, where again participants were able to select a point on a five-point Likert scale, a greater proportion of females reported completing this work "often" – 34 per cent of females compared to 15.4 per cent of males. A greater proportion of male participants (34.6 per cent) reported completing preparatory work "rarely", compared to females (10.6 per cent).

2. Relationships with teachers

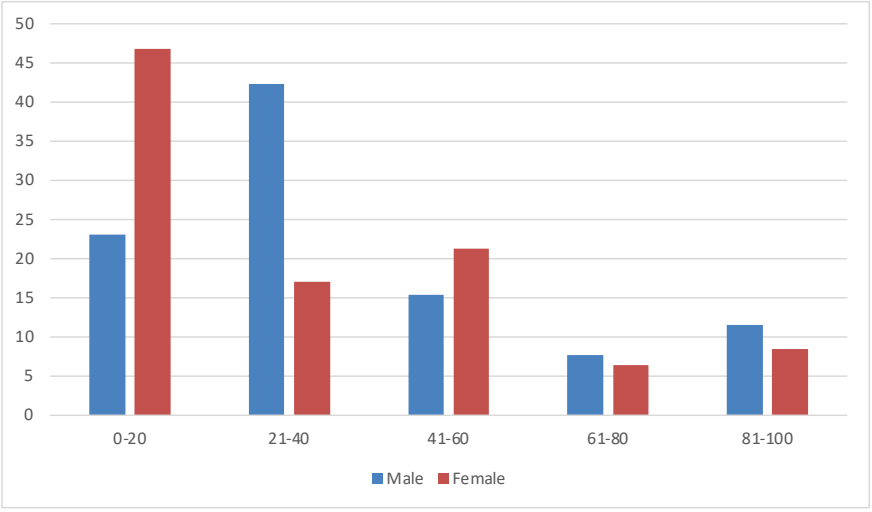
Having positive and constructive relationships with teachers is linked to positive student engagement. We identified differing patterns of responses in participants' responses to a question repeated across time asking what contact they had had with their teachers. Participants were provided with a list of options from which to select and could select more than one option. In 2015 and 2016, the years when participants would have been completing the large, compulsory law degree courses, a greater proportion of female participants reported that they had no contact with their teachers apart from attending lectures: 31.3 per cent of females in 2015 compared to 14.8 per cent of males, and 35.4 per cent of females in 2016 compared to 25.9 per cent of males. By 2017, when participants would have been enrolled in optional courses, this trend had reversed. Thirty-seven per cent of males selected this option in 2017 compared to 14.6 per cent of females. Just under 19 per cent of males selected this option in 2018 compared to 4.2 per cent of females. A similar pattern was evident in the frequency with which participants reported having contact with their teachers by asking questions after class. A greater proportion of male participants selected this option in 2015 (48 per cent of males, compared with 27.1 per cent of females) and

2016 (44.4 per cent of males compared to 37.5 per cent of females). The proportions reversed in 2017 and 2018, although there was less distance between them. Forty-four per cent of females selected this option in 2017 compared to 37 per cent of males, and 29. 2 per cent of females in 2018 compared with 25.9 per cent of males. Slightly higher percentages of males reported attending lecturers' office hours over time, and a greater percentage of females over time reported email contact with lecturers.

In 2017–2019 (Surveys 5–7) we asked participants how many of their lecturers they thought knew them. A greater proportion of male participants thought that at least some of their lecturers knew them. For example, in 2017, 22.2 per cent of males reported that they thought that 0–20 per cent of their lecturers knew them, compared with 45.8 per cent of females. Our own experience is that the gender balance of male and female lecturers is approximately equal at Aotearoa | New Zealand law schools. We did not explore whether male and female students reported that a proportionately greater number of female lecturers knew them, or vice versa.

Overall results for 2017, the last year in which all participants were engaged in university study, are shown in Figure 1 below.

Figure 1: Survey 5 (2017). How many of their lecturers that male and female participants thought knew them (percentage).

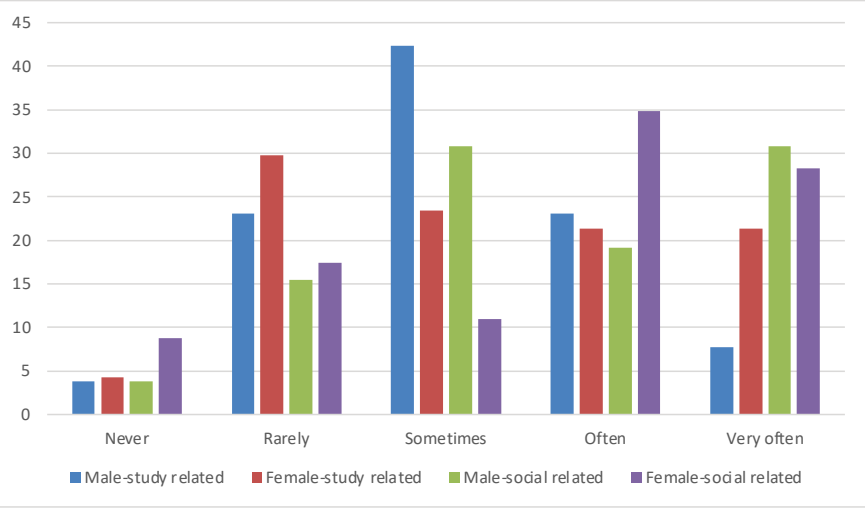


We asked participants in 2016 whether they were interested in having more contact with their law lecturers. A greater percentage of males were interested in having more contact (70.4 per cent, compared to 54.2 per cent of females).

3. Relationships with peers

Positive and constructive relationships with peers is a further factor linked to positive student engagement. When participants were asked if they regularly studied with other students across 2015–2017, there was no discernible gender trend in their responses. In 2017, we asked participants to report the frequency of their interactions with other law students for study and non-study (social) related purposes. Participants were able to select options on a five-point Likert scale ranging from "never" to "very often". As Figure 2 below shows, both genders reported more frequent social contact than study-related contact, with a slightly greater percentage of males reporting social contact with other law students "very often". On the other hand, a greater proportion of females, reported that they studied with other law students "very often".

Figure 2: Survey 5 (2017). Frequency of reported contact with other law students for study and non-study (social) purposes (percentage)



4. Self-study

We asked participants to report the number of hours they typically devoted to each of their law courses each week across 2015–2019 (Surveys 3–7) as an indicator of the time and effort they had devoted to their studies. We identified no significant differences in the hours that male and female participants reported devoting to their studies, or in the activities in which they engaged during periods of self-study. Although writing up and supplementing lecture notes was a frequently reported

activity by both genders, both also reported activities more likely to be of an active learning nature, such as engaging with primary materials (reading cases and legislation) and reading articles and texts.

5. Self-efficacy

Participants of both genders began their university studies with similar levels of confidence. We also detected no significant differences in reported confidence in the second 2014 survey (Survey 2), when it came to expectations of entry into second-year law programmes. Male and female participants selected options on a Likert-scale indicating a degree of confidence, with similar proportions indicating they did not know whether they would do well enough (20 per cent of males and 25.6 per cent of females).

There were some divergences in male and female responses to a question asked across 2015–2019 (Surveys 3–7) as to how confident they were in passing all their law courses. Participants were able to select a point on a five-point Likert scale ranging from "not at all" to "very confident". Across 2015–2017 (the years when all participants were engaged in university study), a greater percentage of male participants indicated they were "very confident" in passing. Overall results are shown in Figure 3 below.

Figure 3. Surveys 3–5 (2015–2017). Reported confidence in passing all law courses (percentage)

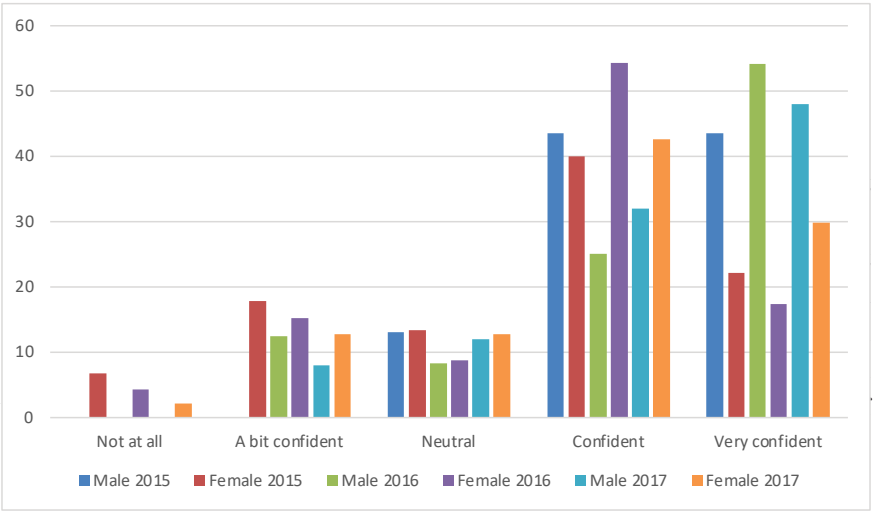
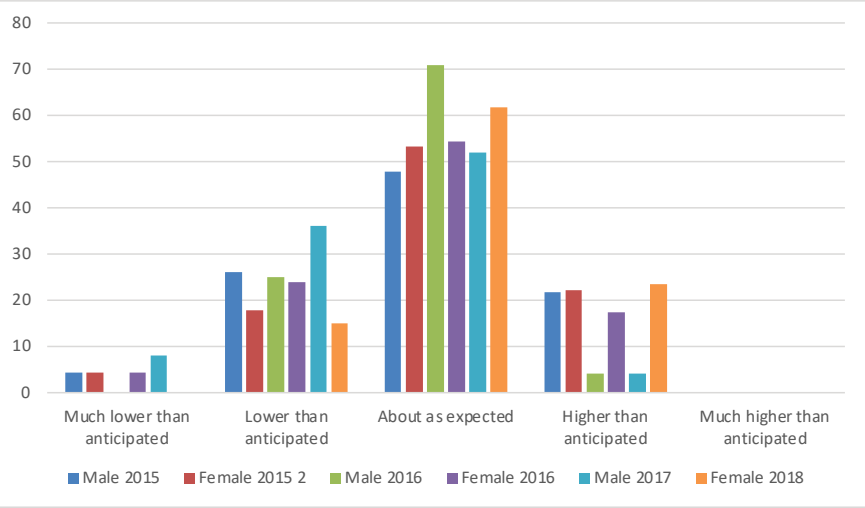


Figure 4: Surveys 3–5 (2015–2017). To what extent the assessment results that participants received reflected their expectations? (percentage)



The differing patterns of responses on whether participants received the results they expected occurred notwithstanding males and females reporting that they had in fact received similar grades across 2016–2017. For example, 37.5 per cent of males reported receiving A grades in 2016 compared to 38.3 per cent of females, and 58.3 per cent of males reported receiving B grades compared to 57.4 of females. Thirty two percent of males reported receiving A grades in 2017 compared with 36.2 per cent of females, and 64 per cent of males reported receiving B grades compared with 59.6 per cent of females. The proportion of A grades received by male and female participants exceeds the norm in view of our experience as teachers at the University of Canterbury and as assessors of law courses offered at other Aotearoa | New Zealand law schools and is an indicator that many in the cohort of 75 were academically able.

6. External events

Persistence to completion of a degree is not just affected by participants' background characteristics and experiences and their law school interactions, but by external factors occurring whilst they are studying. From 2015 (Survey 2), participants were asked to select the external factors that had adversely affected

their law studies each year from a given list.[47] Participants could select more than one option and could also add their own "other" option. Across 2015–2018, the option of "home/family" was ranked number one or two by male and female participants. A possible reason for this is that many participants (and a higher percentage of males) were likely to have been living with their families whilst studying. In 2017, the last year in which all participants were engaged in university study, 37 per cent of males were living with their family, compared with 31.3 per cent of females. Just under 42 per cent of females were living with flatmates, compared to 25.9 per cent of males.

Heath issues were reported more frequently by female participants. This option appeared in the top three factors selected by females across 2015–2018 but did not make the top three male rankings in any year. A further trend apparent across time was that a greater proportion of females indicated they had been adversely affected by most of the given options. Notwithstanding this, all participants were fortunate in that they did not experience an external event that prevented them from completing their studies.

Table 1. Surveys 3–5 (2015–2017). External Events Affecting Participants' Law Studies (percentage)

	Male 2015	Female 2015	Male 2016	Female 2016	Male 2017	Female 2017
Home/family	25.9	27.1	37	41.7	40.7	59.3
Relationships	11.1	29.2	29.6	20.8	37	16.7
Health	18.5	41.7	22.2	37.5	18.5	47.7
Personal	22.2	45.8	25.9	47.9	33	41.7
Work	33.3	29.2	37	29.2	48.1	50
Finance	25.9	16.7	18.5	18.8	22.2	31.3
Accommodation	3.7	6.3	7.4	6.3	7.4	14.6
Other	0.0	10.4	3.7	12.5	7.4	12.5

7. Undergraduates' overall assessment of law school

Participants' background, experiences at law school and external events affecting their studies likely combined to determine their overall ranking of their law school experience each year they were at law school. A repeated question

47 The list from which participants could select was drawn from answers provided by participants when this question was asked in opened-ended form in 2014 (survey 2). Participants answers included an option "things to do with studying at university". We included this in the list of options from which participants could select but have not included this in the results as this option is not an "external" factor.

asked participants to select from five options on a Likert scale ranging from "very dissatisfied" to "very satisfied" to indicate their overall assessment of law school. Very similar proportions of male and female participants selected the "satisfied" and "very satisfied" options in 2015: 73.4 per cent of females and 73.9 per cent of males in 2015. A higher proportion of female students selected these options in subsequent surveys: 71.7 per cent of females compared to 58.3 per cent of males in 2016, 59.5 per cent of females compared to 44 per cent of males in 2017, and 61.5 per cent of females in 2018 compared to 36.9 per cent of males. Those who had competed their law degrees were asked in 2019 to look back and indicate how satisfied they were with their law school experience: 77.5 per cent of females selected the "satisfied" and "very satisfied" options compared to 66.7 per cent of males.

C. From Law School to the Workplace

1. Career expectations

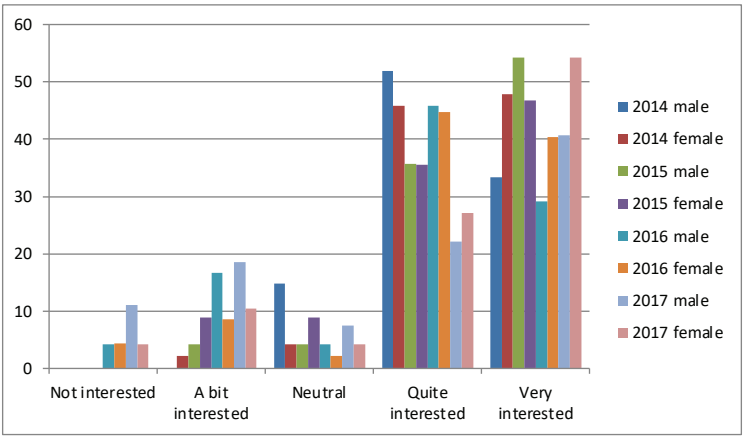
At different points during the longitudinal study, we asked participants a series of questions about their future career plans. We asked participants in 2014 (Survey 1) and 2016 (Survey 4) what their reasons were for completing a law degree, as an indication of their starting and ongoing commitment to their law studies. Participants were able to select from eight options and could select more than one reason. There was consistency in the most frequently selected options by male and female participants, although the ranking of selections varied somewhat across time and by gender. In 2014, as Table 2 below shows, the top ranked selection of males and females indicated altruistic reasons for studying law: making a difference (males) and being passionate about law and justice (females). More pragmatic reasons also featured in the top three in 2014: law being a well-paid profession (males) and being well-paid and respected (females). By 2016, both male and female participants had a joint top option, one pragmatic and one altruistic. They shared the altruistic reason, "I am passionate about law and justice", but differed on the pragmatic: law is a respected profession (male), and it is well paid (female).

Table 2: Survey 1 (2014) and Survey 4 (2016): What are your reasons for intending to pursue a legal career? (percentage)

Reason	Male 2014	Female 2014	Male 2016	Female 2016
One or more of my relatives is a lawyer	3.7	8.3	7.4	6.3
It is a good, steady profession	44.3	43.8	37	54.2
I am passionate about law and justice	51.9	60.4	59.3	58.3
Someone suggested it to me	7.4	16.7	14.8	14.6
I want to help people	44.3	58.3	48.1	54.2
I want to make a difference	55.6	58.3	33.3	50
It is a well-paid profession	51.9	45.8	40.7	58.3
It is a respected profession	37	45.8	59.3	56.3
Other	14.8	8.3	11.1	14.6

We also asked participants in the first 2014 survey (Survey 1) how interested they were in pursuing a legal career, again as an indicator of their starting intentions, and repeated this question in the 2015–2019 surveys (Surveys 3–7). Participants were able to select a point on a five-point Likert scale ranging from "not interested at all" to "very interested". Figure 5 below reports results from 2014–2017 (the years all participants were at law school) and shows that most male and female participants reported they were quite interested or very interested in pursuing a legal career at the beginning of their law studies and beyond.

Figure 5. Survey 1 (2014), Survey 3 (2015), Survey 4 (2016), & Survey 5 (2017): How interested are you at this stage of your studies in pursuing a legal career? (percentage).



We explored the type of legal career that participants were interested in across 2014–2019 (Surveys 1, 3–7). Participants were given seven options to select from and could also add their own additional option. In 2014 and across their time at university, the most frequently selected option by males and females was "private practice" (defined as "working as a lawyer in a firm or by yourself"). This was selected by approximately 70 per cent of participants across time. The second most frequently selected option by males and females was a "government position".

2. Work readiness of final year students

From 2017 onwards, those participants still at university were asked if they were in their final year of study. Those who answered "yes" (11 males and 17 females in 2017, seven males and 18 females in 2018, and six males and three females in 2019) were asked a series of questions probing how ready they felt to join the workforce. A perception of readiness to transition is linked with positive student engagement and self-efficacy, with some gender-based studies suggesting that female students are less likely to feel well-prepared.[48] This section reports the collated responses of final year students by gender across 2017–2019.

The first question asked participants whether they had employment arranged for after they had completed their law degree. Participants could select from three options: "yes, law related employment"; "yes, non-law related employment", and "no". As Table 3 below shows, the most frequently selected option by both genders was that they had no employment arranged at that stage. However, where employment had been arranged, both genders were more likely to have arranged law-related employment.

Table 3. Surveys 3–5 (2017–2019): Employment arrangements (number and percentage)

	Male (number)	Male (%)	Female (number)	Female (%)
Law related	9	37.5	14	36.8
Non-law related	3	12.5	2	5.3
No employment	12	50	22	57.9
Total	24	100	38	100

A follow up question for those who had law-related employment was whether this was with a law firm, government department, as an in-house lawyer, with an NGO/community-based organisation or for some "other" employer. Most of both

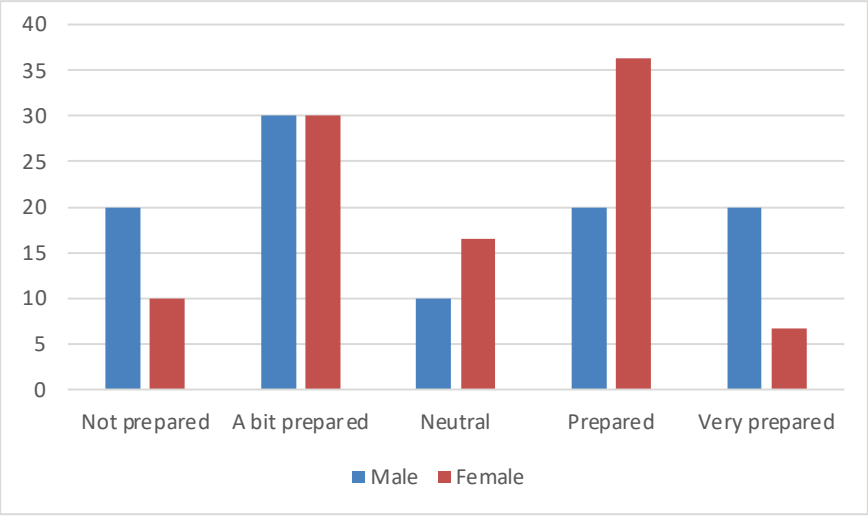
48 Qenani, MacDougall and Sexton above n 6; Svirko, Lambert and Goldacre, above n 18.

genders (69.2 per cent of males and 72.2 per cent of females) reported that they had employment arranged with a law firm.

A further question asked those who had no employment arranged to indicate how confident they felt about obtaining employment. Participants were able to select from five options on a Likert scale ranging from "not confident at all" to "very confident". A greater percentage of females selected the bottom ranked "not at all confident" option: 40.9 per cent of females compared to 33.3 per cent of males. However, when the bottom two options, "not at all confident" and "a bit confident", were tallied, 75 per cent of males had selected these options, compared to 63.6 per cent of females.

We asked all participants how prepared they felt for the workforce. Participants were able to select from five options, ranging from "not prepared at all" to "very prepared". Overall, 40 per cent of male participants and 43.07 of female participants selected the "prepared" and "very prepared" options although, as Figure 6 below shows, a higher proportion of males selected "very prepared" (20 per cent) compared to females (6.70 per cent).

Figure 6. Surveys 5–7(2017–2019). Preparedness to join the workforce (percentage)



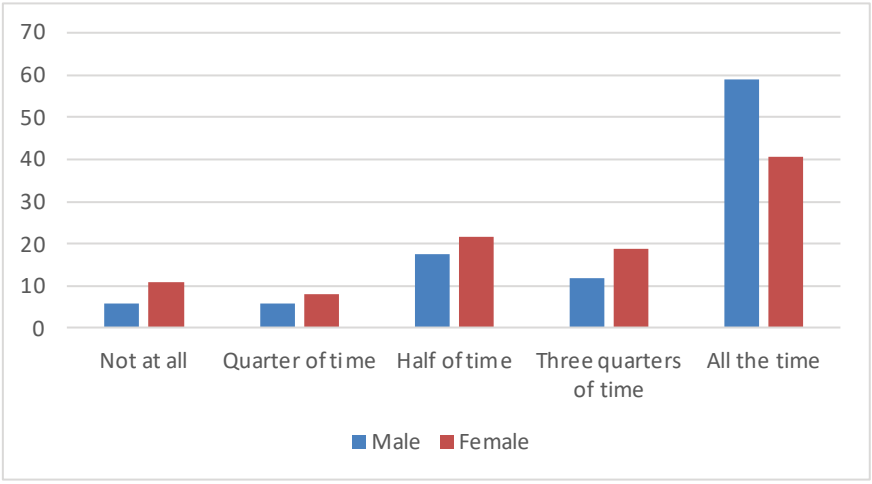
3. Work experiences and reflections of law graduates

Those who had completed their law degrees by the time of the sixth and seventh surveys completed a separate "graduate" section of the survey. There were 28 participants in this category in 2018 (eight males and 20 females) and 59 in 2019 (19 males and 40 females).

Of the 28 graduates in 2018, 62.5 per cent of males and 70 per cent of females reported that they were employed. Consistent with their starting and ongoing career intentions whilst at law school, most of both genders were employed in a law firm (60 per cent of males and 57.1 per cent of females). We asked those who were not employed what they were currently doing. Just one male and one female indicated they were job hunting, with the male participant also indicating that he was completing the Professional Legal Studies Course. Other participants who were not employed were engaged in post graduate study or completing another qualification or (in the case of two female participants) were undertaking a parental-caregiving role. The involuntary unemployment rate for both genders was low.

By the time of the 2019 survey, 89.5 per cent of males and 92.5 per cent of females were employed. Again, most of both sexes reported that they were employed by a law firm (58.8 per cent of males and 54.1 per cent of females), with 29.4 per cent of males and 27 per cent of females employed by a government department, and 11.8 per cent of males and 18.9 per cent of females selecting the "other" option. Most of both genders, as Figure 7 below shows, reported using their law degree in their current employment. Just 5.9 per cent of males and 10.8 per cent of females reported that they did not currently use their law degree in their employment, suggesting they were not employed in work of a legal nature.

Figure 7. Survey 7 (2019). Reported use of law degree in primary employment (percentage)

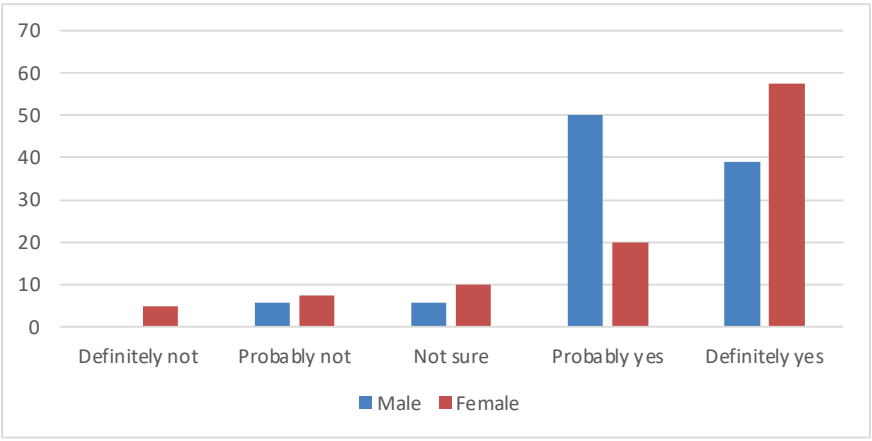


Participants' high reported rates of law-related employment and use of their law degree in their employment tally with responses to a question asking participants

whether they had completed or intended to complete the Professional Legal Studies Course in 2019 or 2020. Completion of this course is a requirement for admission as a Barrister and Solicitor. Just under 78 per cent of males and 82.5 per cent of females responded "yes" to this question. As a follow-up question, we asked participants in 2019 where they saw themselves three years from the time of the survey. Most saw themselves as still working in the law (52.9 per cent of males and 58.4 per cent of females), with just 11.8 per cent of males and 8.3 per cent of females indicating they did not see themselves working in the law. Some participants reported that they intended to be working without specifying the nature of their intended work (17.6 per cent of males and 22.2 per cent of females). Small numbers were not sure (11.8 per cent of males and 8.3 per cent of females) or intended to be travelling (5.9 per cent of males and 2.8 per cent of females).

We also asked participants if they would still choose to have studied law if they could go back in time. Participants were able to select one of five options ranging from "definitely not" to "definitely yes". As Figure 8 below shows, most of both sexes would "probably" or "definitely" choose to study law, although females were more likely to select the "definitely yes" option.

Figure 8. Survey 7 (2019): Would participants still chose to study law if they could go back in time?



We asked participants in 2019 (Survey 7) who reported that they were employed a series of open questions to gauge their employment experiences. The first of these questions asked participants what they found most fulfilling about their job. Some participants offered more than one reason. Consistent with their responses whilst at law school, the most frequently given answer by both sexes was an altruistic

reason – working with and helping clients or others. The next most frequently given response by females (but not males) was their colleagues. A greater percentage of males reported that they were making a difference. Similar proportions indicated that they enjoyed putting their knowledge into practice, the challenge of their work and/or the variety of work. A small number of females (three), although no males, reported that the most fulfilling aspect of their job was getting paid.

We then asked participants what they found most stressful about their work. The most frequently given answer by both sexes was time management and/or deadlines. As one female participant noted, "Timesheets! The feeling the clock is ticking and you are taking too long to do something." Similar percentages were concerned about making mistakes or meeting the high expectations of their employers.

We also asked participants to describe the culture of their workplace, with "culture" defined as "how employees interact with each other and management". A slightly higher percentage of males described their workplace in highly positive terms. Similar proportions, albeit small numbers of both sexes, described positive and negative aspects of workplace culture. A small number of females (four) provided negative descriptions of their workplace culture, but we are unable to determine whether these participants were engaged in legal work and, if so, the nature of that work. No male participants described their work culture in entirely negative terms.

VI. Discussion

We acknowledge at the outset that there is a lack of diversity amongst our self-selected cohort of 75 who were relatively similar in terms of their reported demographics. A majority were young, studying full-time, and identified as New Zealand European | Pākehā, and as male or female. As such, our data did not capture the diversity of backgrounds and experiences of the student body which is found in New Zealand law schools today. Nevertheless, consistent with actual enrolments at New Zealand law schools, a majority of our cohort were female. We also acknowledge that most of the 75 had starting backgrounds and characteristics that were predictive of persistence and positive student engagement. They were mostly confident in their ability to undertake university study and had a strong commitment to their studies and a legal career. Although we perhaps cannot be as confident of the quality of all the formal learning opportunities on offer to the cohort, their law school experience did not significantly moderate their persistence and/or commitment to their studies or a legal career. By the time of the last data collection, the majority had completed their law degree and were engaged in work of a legal nature that they found satisfying and enjoyable. Although their personal

characteristics and non-law school experiences likely contributed to them finding employment, the completion of a law degree was probably a requirement for the law-related employment in which many were engaged. The cohort is successful on objective measures, such as degree completion and employment, but likely also on subjective measures, such as employment satisfaction and intending to continue with a legal career.

In this section, we further explore the extent of the differences, positive and negative, when data collected from the cohort of 75 are analysed by gender, with a particular emphasis on identified differences in learning and teaching experiences, self-efficacy, and professional-work expectations and experiences. We also consider how law teachers, the legal profession and employers of law graduates might respond to these differences.

A. Learning and Teaching

There were many instances where we identified no significant gender differences in participants' reported learning and teaching experiences. For example, there were no significant differences in reported lecture and tutorial attendance rates. Because our data collection was pre-Covid, there was no universal availability of class recordings, so the reported high attendance rates would likely have been spread consistently across a semester. We note that high attendance rates are not unexpected given the nature of our cohort of persisting and committed law students. There were also few reported differences in the time that participants spent on self-study, in the activities in which they were engaged during periods of self-study and in their interactions with their peers. There were, however, several differences in participants' experiences during formal learning and teaching opportunities, particularly in large lectures, and in their reported relationships with teachers.

Consistent with our own experiences as law teachers, participants' reported experiences during large lectures suggested that the Socratic dialogue was not a frequently used teaching method. Rather, the key purpose of all lectures appeared to be information transfer from a teacher to students, although this was often broken up with various forms of interactive activities. More interactive activities were reported by both genders in smaller classes. Consistent with much of the general and legal education literature, there were gender differences in the activities in which participants frequently engaged during large lectures in the compulsory law degree courses.

A smaller proportion of female students reported that they frequently engaged in activities likely to be associated with whole classroom participation in large lectures, such as asking questions of their lecturer, or answering questions asked by

their lecturer. Female students chose to engage in other ways. A greater proportion of female students used the internet to access class-related materials. Although male and female students reported similar frequency of engagement in group activities during large classes, female students reported engaging more frequently in lecturer-directed individual activities. Female students also reported engaging more frequently in preparatory work.

There were notable differences in the responses that participants gave to an open question asking why they chose to participate (or not) in the interactive activities that were on offer during lectures. Female responses indicated that some felt uncomfortable participating in front of their peers, with some indicating this feeling was linked to class size, that is, they felt less comfortable participating in large classes. We note that while participants were attending the large lectures in the compulsory courses at the beginning of their law studies, they were also engaged in the tutorial programmes supporting those courses. Not only were there no significant reported gender differences in tutorial attendance rates, but there were also no significant gender differences in the frequency with which participants reported engaging in the activities on offer during tutorials.

In smaller lectures, more commonly found in optional courses occurring in participants' later years at law school, and in an interesting reversal of the trend identified in large lectures, female participants reported more frequently participating in activities likely to be linked to whole classroom participation, such as asking questions of their lecturer and answering questions asked by their lecturer.

Overall, our results relating to classroom participation are consistent with international studies showing greater parity of participation by female law students in small classrooms.[49] As both genders reported similarly high levels of classroom participation during tutorials in 2016, we are unable to conclude that greater female participation rates are necessarily linked to time spent at law school.[50] Females also reported more frequent participation in individual or group-directed activities in small lectures.

It is possible that the reported gender differences in classroom participation in participants' early years at law school have other consequences. A greater percentage of female participants (when compared to their male peers) reported they had had no contact with their lecturers over the period (2015–2016) in which they were completing the large, compulsory law degree courses, a trend that reversed in later years when participants would have been completing many of the smaller optional

49 Ho and Gelman above n 7; Yale Law School, above n 7.
50 Shadel, Trawalter and Verkerke, above n 7.

courses. Interestingly, and notwithstanding male students' reported reduction in contact with their lecturers in later years (when compared with female students), a greater proportion of male students reported that their lecturers knew them in 2017 and 2018. A greater proportion of male students also reported that they were interested in having more contact with lecturers.

What do these results mean for law teachers? Our findings indicate there are few gender differences in engagement in the formal learning opportunities offered by law schools, but that there are differences in the activities in which male and female students choose to engage during large classes. This may also have implications for the nature of the relationships between male and female students and their teachers. We suggest that if these differences are apparent in our cohort of persisting and successful female students, they are also likely to be present in the wider body of female (and perhaps also minority) law students. Male law students report greater frequency of asking and answering questions of their teachers (that is, participating in front of their peers) in large classes, while the reverse is true in smaller classes. Further, and given that these trends are so clear and occurred so soon after participants began their studies, we speculate that these are gender differences that developed prior to participants' enrolling in university study.[51] However, even if so, they are differences to which teachers can and should respond. In pre-Covid times, teachers could have responded by making sure that they taught their face-to-face classes in ways that accommodated the preferences of all learners. As Hood and Tolmie reported in 2016, "the best teachers are those who use a variety of teaching methodologies and those who encourage and foster (although do not require) classroom interaction".[52] For example, teachers could include not only a range of interactive activities, but a range of ways in which they might connect with their students. This might be as simple as ensuring that in large classrooms they move about and engage with students involved in group discussions or other group/individual exercises.

With the current prevalence of recorded lectures in the post-Covid environment, the large well-attended lecture has become (for the moment) a thing of the past as many students choose to listen to recorded material at a time that suits them rather than attending class in person. However, the gender differences identified in this study remain relevant. In the present environment, it is likely that many students – male, female and non-binary – are missing out on answering and asking questions of their lecturers in formal class settings. We suggest that teachers need to consider carefully whether the formal learning opportunities they offer their students will

51 Sax and Harper, above 22.
52 Hood and Tolmie, above n 12, at 7.

suitably accommodate all learners. Our findings offer food for thought for law teachers in that respect

B. Self-Efficacy

Consistent with other studies, we report some gender differences in self-efficacy across participants' time at law school. These were not evident at the outset of participants' law studies where in the 2014 survey (Survey 1), most participants of both genders reported that they felt confident or very confident about studying at university. However, the very clear nature of this trend, occurring as it did so soon after participants began their law studies, leads us to speculate that this is another difference that developed prior to participants' enrolment at university,[53] rather than it being the case that the first few months of law school had a significant and detrimental impact on female students' confidence levels. Across their time at law school, a greater percentage of male students reported that they were very confident that they would pass all their law courses each year. A greater percentage of male students also reported that their assessment results in any given year were lower than they had anticipated. On the other hand, a higher percentage of female students reported that their results were higher than they had anticipated. It seems that the expectations of some students of both genders may not be entirely accurate, with some male students over-estimating, and some female students under-estimating, their performance. No matter when it developed, this is another gender difference that will be useful to law teachers in their dealings with students. It would be interesting to measure whether addressing and responding to students' likely expectations has implications for other aspects of their law school experience. Would doing so, for example, improve male students' perceptions of their overall law school experience, which were consistently lower (when compared to their female peers) across time? Nevertheless, and consistent with participants' overall reported engagement with their studies, there were no significant differences in actual achievement, based on the reported grades, of male and female students.

C. From Law School to the Workplace

A key feature of our cohort of 75 is their strong interest across time in pursuing a legal career, an interest that many were able to realise after graduation, notwithstanding that only a minority of both genders reported they had employment arranged in the third quarter of their final year at law school. Feelings of preparedness for the workforce are associated in higher education literature with

53 Sax and Harper, above n 22.

positive student engagement and self-efficacy. As noted above, our results show that towards the end of their law studies a greater proportion of female students were reporting engaging in classroom activities of an active learning nature (asking and answering questions or their teachers and engaging in group work) but were more likely to report that few of their teachers knew them. Male participants, on the other hand, were more likely to report confidence in passing their law courses, although, for some, the results they did receive did not reflect their expectations. We suggest that our finding of no significant differences in the reported preparedness of male and female students to join the workforce is not inconsistent with these mixed results. On the other hand, a significant minority (approximately 40 per cent of both genders) reported that they felt "prepared" or "very prepared" to join the workforce. But, if many of our persisting and successful cohort of 75 were not confident about their preparedness to join the workforce in the third quarter of their final year at law school, this is likely to be replicated in the wider body of final year students. We suggest that law schools (and universities) can do more in providing students with support and information about employment opportunities and transition to the workforce.

Our general findings on male and female participants' reported self-efficacy in relation to their studies are echoed by the findings of an earlier survey of New Zealand employers of law graduates.[54] Most employers were of the view that there was little difference in graduates of different genders, although some employers did identify that they found males more confident but less competent, and females more competent but less confident.[55] A further, related difference might arise from participants' perceptions of how many of their teachers knew them. Comparatively more male participants reported that their teachers knew them. We speculate whether this difference might be reflected in the workplace in graduate male lawyers feeling more confident to engage with "authority" figures such as law firm partners and clients. It is, of course, important not to stereotype according to gender or essentialise that all female graduates are the same, given that gender alone does not account for intersectional identities such as race, sexuality, religion, age or socio-economic background. Nevertheless, law schools and employers and employers of law graduates may wish to reflect on and further investigate these reported and/or suggested gender differences.

Our findings on gender differences in graduates' experiences in their first days and months in the workplace are of particular interest considering the sustained attention given to the culture of the legal profession and law firms in recent years.

54 Natalie Baird and others "Employer Perceptions of the Work Readiness of New Zealand Law Graduates: What More Can Law Schools do?" (2018) 28 New Zealand Universities Law Review 54.

55 At 70.

Consistent with Pemberton's 2016 report on Aotearoa | New Zealand junior lawyers, both genders reported a similar likelihood of working in the law three years out from the last data collection in 2019. Responses to questions as to what was most fulfilling and what was most stressful about work were also similar. In terms of the overall culture of their workplace, a slightly higher proportion of male graduates described their workplace in highly positive terms, and a small number of female graduates described their workplace in entirely negative terms. Given the reported problems with law firm culture and the number of graduate participants employed in law firms (60 per cent of males and 57.10 per cent of females), we were somewhat surprised by this data, having expected a more negative result. However, our study participants completed the workplace culture surveys in September–October 2019. We speculate that the significant attention given to law firm culture following the bullying, sexual harassment, and sexual assault allegations that emerged in February 2018 perhaps resulted in law firms and other legal workplaces acting promptly to deal with at least some of the problematic behaviours. Equally, the spotlight on law firm culture throughout 2018 and 2019 may have empowered and enabled law graduates to make more conscious decisions about where they chose to work for their first legal job. So too the establishment of the Aotearoa Legal Workers' Union in May 2019 has shone a much-needed spotlight on the working conditions in legal workplaces. It may also be that our data is affected by timing in that many participants responded only a short time after they had had joined the workforce.

Considering the recent focus on the culture of the legal profession and legal workplaces, we suggest this is still likely to be of concern to prospective and current law students and graduates, especially female law students and graduates. In 2016, Hood and Tolmie reported that "the current generation of [law] students is not gender educated".[56] The spotlight on law firms since 2018 will have improved general awareness about not only gender issues and also about diversity and inclusion more broadly, but this may not necessarily be so for all employers of law graduates. Most of Aotearoa | New Zealand's six law schools now regularly offer a dedicated "gender and the law" course. To ensure that gender issues are not just taught in the silo of an elective course, we suggest that mainstreaming gender issues across several compulsory law subjects is also needed.[57]

The 2019 *Purea Nei* report noted the importance of law schools being "honest" about the legal profession and suggested that law students need to develop an understanding that "law is first and foremost a profession focused on client service".[58] These suggestions echo those from an earlier Australian study which identified the

56 Hood and Tolmie, above n 12, at 4.
57 At 6.
58 Colley, Lenard and McLay, above n 38, at 36.

optimistic views of law students about working as a lawyer and the need for law schools to do more to convey the realities of legal practice.[59] We did not identify a disconnect between the cohort's expectations of a legal career and the reality that many reported after joining the workforce. Rather, there was a similarity between the altruistic reasons given by many of the cohort (whilst students) for choosing to study law and the factors that many reported they found the most satisfying about their employment, such as, for example, working with and helping others. On the other hand, we collected data from the cohort very soon after most joined the workforce.

Many participants reported that they found time management in the workplace stressful, and others were concerned about making mistakes and/or meeting the high expectations of their employers. It is not surprising that even our persisting and successful graduates would find some aspects of the workplace stressful, and we suggest this is also likely to be so (if not, more so) for the wider body of law graduates. We see it as a function of law schools to support effective transitions between law school and the workplace. One way of doing this would be a "capstone" course explicitly aimed at preparing students for the world of professional work and assisting with the transition from law school to the workplace.[60] Law schools and university careers services might also do more to help all students develop a sense of their own professional identity and values to provide a solid foundation for taking on the challenges of working in the legal profession or elsewhere. Much work has been done on this in a law school context in the United States and Canada, but less so in Australasia.[61] It is also essential that the legal profession regularly reviews itself to ensure that workplaces for law graduates are fulfilling, equitable and fairly compensated, with a good work-life balance. Today's law graduates deserve no less.

VII. Conclusion

Following her 2004 study of a cohort of Victoria University of Wellington law students, Caroline Morris wrote that, despite the increased numbers of women

59 Melissa Castan and others "Early Optimism? First-Year Law Students' Work Expectations and Aspirations" (2010) 20 Legal Educ Review 1 at 6.

60 For discussion, see Baird and others, above n 54, at 80.

61 See, for example, William M Sullivan and others *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass, San Francisco, 2007); H Somerlad "Researching and Theorizing the Process of Professional Identity Formation" (2007) 34(2) Journal of Law and Society 190; Kelly S Terry "Externships: A Signature Pedagogy for the Apprenticeship of Professional Identity and Purpose" (2009) 59(2) J Leg Ed 240; K Hall and others "Developing a Professional Identity in Law Schools: A View from Australia" (2010) 4 Phoenix Law Review 21; and J Bliss "Divided Selves: Professional Role distancing among Law Students and New Lawyers in a Period of Market Crisis" (2017) 42(3) Law & Social Inquiry 855.

attending law school, female students "found the place more competitive than men, were more dissatisfied with their performance, spoke up less frequently in class and were less happy about it".[62] Encouragingly, the picture painted by our cohort of 75 who studied at three Aotearoa | New Zealand law schools is somewhat rosier, although in many respects the cohort is unique. They represent a constituent group within the wider law student population but are not necessarily representative of the wider group. Although most were female, they had similar demographic backgrounds, a similar (and strong) commitment to their studies and a legal career and were proportionately more likely (based on their reported grades) to be academically able. Most persisted to completion of a law degree and then embarked (as they had intended) on law-related employment. Yet, even within this unique cohort, we identified gender differences in reported learning and teaching experiences. Female students in our study were less likely to participate in large classes but were more likely than their male counterparts to actively participate in small classes. Female students were also more satisfied with their academic results and reported higher satisfaction with their overall law school experience. On the other hand, female students were less confident than their male counterparts and felt that fewer of their teachers knew them. We see these differences as likely to be replicated (if not magnified) in the wider law student population which is likely to be more diverse in terms of demographic backgrounds, commitment to the study of law and/or a legal career, and academic ability.

The early career experiences of our cohort of 75 study were more positive than we expected given recent widely reported instances of bullying, sexual harassment and sexual assault in the legal profession. On the other hand, most of our cohort reported stressors in the workplace (such as time management) which we see as linked to the transition between law school and the workplace. We are also mindful that our cohort's views on their workplace experiences only reflect their first few months in their workplaces.

There remains room for improvement in law schools to encourage a range of teaching methodologies to better recognise and accommodate diversity in all its many forms in the student body, and to encourage greater self-efficacy and confidence by female students and enhanced self-awareness in male students. Our gender-based results provide a starting point for law teachers and law schools to work from. Participants' reports of workplace stressors indicate that law schools also have more to do in supporting better transitions for all students from law school to the workplace. Although most female graduates in our cohort of 75 did not report a negatively gendered workplace experience, the mainstreaming of the teaching of

62 Morris, above n 15, at 220.

gender issues is also likely a priority given the wealth of recent evidence indicating that gender equality is still a work in progress for the legal profession (and perhaps also for other employers of law graduates).

REFORMING FAMILY LAW WITHOUT COMPROMISING THE INTEGRITY OF TRUST LAW: RECOGNISING WEALTH HELD IN TRUST WHEN REALLOCATING FAMILY PROPERTY ON SEPARATION

Peter Crellan Kelly*

Abstract

The relationship between trust law and social policy in New Zealand is not always an easy one. People will use trusts, where the law permits, to structure their property affairs in a way that delivers advantageous outcomes. As discretionary family trusts are unassailably entrenched in the political economy of New Zealand wealth-holding, they need to be approached in a principled way by legislation.

The law takes a different approach to trusts in a commercial context than in social policy contexts such as relationship property. Unhelpfully, some concepts that rightly belong in the relationship property context have surfaced in general trust law.

To clarify the situation, the values and approaches used in differing contexts are set out. These contexts include insolvency law, the Social Security Act, Legal Aid, the Financial Markets Conduct Act, and the Criminal Proceeds (Recovery) Act. These values and approaches are then used to critique the approach to trust property used in family property – both in the current Property (Relationships) Act, and in the Law Commission's proposed reform of the regime. Improvements to the reform proposals are identified, along with complementary reforms to reduce the pressure on the interface between the family property and trust law domains.

I. Introduction

Statute law in New Zealand provides for dividing family property on separation, as well as reallocating property in the case of death, bankruptcy and other situations. Each of these statutory interventions in property rights must interact with an unusual feature of wealth-holding in New Zealand: the prevalence of

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discretionary family trusts. Trusts have the potential to thwart the policies of the law, by ring-fencing assets as beyond a person's 'property'. The magnitude of the issue is illustrated by real estate, of which a greater value is owned by family trusts than by households directly.[1] Relationship property and testamentary property are two interlinked areas of New Zealand law that are currently being reformed, and this requires policymakers to grapple with how to deal with assets held in trust. Possible approaches include disregarding property in trust; reversing transactions that put property in trust; recognising that 'rights and interests' relating to a trust may have value that should be brought into account; and making orders directly altering the trusts themselves.

This paper focuses on property held in discretionary trusts, which are introduced in section II. Section III identifies two different approaches to 'property' in trust assets: the 'strict concepts of property law' that apply in the insolvency context, and the relaxed approach used under the Property (Relationships) Act 1976 (PRA). Section IV discusses attempts that have been made to 'bust trusts' within the general law.

Section V outlines the political economy of the New Zealand discretionary trust, discussing who uses the trusts and for what purposes. I then describe statutory approaches to wealth held in trust in section VI .

Section VII applies these materials to the Law Commission's recent review of the relationship property regime. I propose measures that would be less intrusive than the reforms that the Law Commission has contemplated. Section VIII then considers whether changes to New Zealand's generic trust law statute are warranted.

I conclude in section IX with a call for greater certainty and clarity in the law, by recognising that black letter rules work better than a discretionary approach for families that need to be able to move on with their lives after a change of circumstances.

II. The Nature of a Discretionary Trust

A discretionary trust is a type of express trust.[2] The core characteristics of an express trust are that:[3]

1 Family trusts totalling $877 billion compared with $612 billion of owner-occupied dwellings and other real estate in 2018: Statistics New Zealand "Household net worth statistics: Year ended June 2018" (14 December 2018) Stats NZ <www.stats.govt.nz>.

2 While arguably not a "term of art", the "discretionary trust" is well described in the relevant texts, see, for example, Alastair Hudson *Equity and Trusts* (7th ed, Routledge, Oxon, UK, 2014) at 186; and Law Commission *Review of Trust Law in New Zealand: Introductory Issues Paper* (NZLC IP19, 2010), at 33 n 174, discussing the distinction between powers of appointment and discretionary trusts.

3 Trusts Act 2019, s 13.

(a) it is a fiduciary relationship in which a trustee holds or deals with trust property for the benefit of the beneficiaries or for a permitted purpose; and
(b) the trustee is accountable for the way the trustee carries out the duties imposed on the trustee by law.

Trustees have a fiduciary obligation to properly consider any request by a discretionary beneficiary to receive a distribution, so it follows that the beneficiary has the reciprocal right to have such a request duly considered.[4] However, it may be that no such distributions are ever made. For that eventuality, a discretionary trust has "final beneficiaries" who have a residual property interest.[5]

In a discretionary trust each discretionary beneficiary's equitable property interest in the trust asset pool remains unallocated,[6] while the legal title is held by the trustees.[7] Collectively, the beneficiaries are able to call for the trust property to be appointed as they see fit,[8] as "together [they have] possession of the total bundle of proprietary rights".[9] However, consistently with the observation that the property interest remains unallocated, individual discretionary beneficiaries do not have a property interest in the trust corpus, just a "mere expectancy" or "hope" (*spes*).[10]

As with the "mere expectancy" associated with being a discretionary beneficiary, holding a power relating to a trust is also traditionally not held to be an interest in the underlying trust property.[11] Common powers include the settlor being able to add or remove discretionary beneficiaries.[12]

The most extensive power is a general power of appointment, where a person has a power to direct trustees to pay the estate to anyone, including themselves.[13]

4 *Gartside v Inland Revenue Commissioners* [1968] AC 553; and, for the "right to request payment", see *Chief Executive of Ministry of Social Development v Broadbent* [2019] NZCA 201, [2019] 3 NZLR 376 at [84].
5 *KA No 4 Trustee Ltd v Financial Markets Authority* [2012] NZCA 370 at [17].
6 The assets are "ownerless", per Mark J Bennett "The Illusory Trust Doctrine: Formal or Substantive?" (2020) 51 VUWLR 193 at 204.
7 Donovan Waters "Settlor control—what kind of a problem is it?" (2009) 15 T & T 12 at 12.
8 The trustees must terminate the trust on receipt of a notice signed by each beneficiary (discretionary or final): Trusts Act 2019, s 121.
9 *Re Philips New Zealand Ltd* [1997] 1 NZLR 93 (HC) at 101, provided they are all competent; *Saunders v Vautier* (1841) 4 Beav 115; Hudson, above n 2, at 182; Charlotte Beynon "The rule in *Saunders v Vautier*: to the 'residuary beneficiary', the spoils?" (2019) 25 T & T 963; and Law Commission *Perpetuities and the Revocation and Variation of Trusts* (NZLC IP22, 2011) at [4.20].
10 *Hunt v Muollo* [2003] 2 NZLR 322 (CA); *Gartside v Inland Revenue Commissioners*, above n 4; and Hudson, above n 2, at 190.
11 *Z v Z (No 2)* [1997] 2 NZLR 258, [1997] NZFLR 241 (CA) at 278, citing *Re Armstrong, Ex p Gilchrist* (1886) 17 QBD 521 at 579.
12 John Priestley "Whence and Whither: Reflections on the Property (Relationships) Act 1976 by a Retired Judge" (2017) 15 Otago LR 67 at 68.
13 Chris Kelly *Garrow and Kelly Law of trusts and trustees* (7th ed, LexisNexis NZ, Wellington, 2013) at 923; and *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551, [2016] NZFLR 230 at [60].

Where the law takes a substantive rather than formal approach to property, such a power is likely to be treated as giving ownership to the donee.[14] The following section compares the approach taken in insolvency proceedings to that used in family property law.

III. 'Property' in Trust Assets: Two Contrasting Approaches

In this section, I illustrate how New Zealand insolvency law takes a formalistic approach to the ownership of trust assets, while the family property on separation regime treats a combination of trust rights and interests substantively amounting to a general power of appointment as 'property'.

A. Under Insolvency Law

Under the Insolvency Act 2006:[15]

> … **property** means property of every kind, whether tangible or intangible, real or personal, corporeal or incorporeal, and includes rights, interests, and claims of every kind in relation to property however they arise.

The focus is on beneficial ownership rather than legal ownership, and so an interest that is legally owned by the bankrupt but beneficially owned by someone else is excluded,[16] while property that is beneficially owned by the bankrupt, or will be during the period of bankruptcy, is captured.[17] While the definition of property may appear broad, it is interpreted narrowly. An "interest as a final beneficiary" is a "future (albeit contingent) equitable proprietary interest", and so is 'property'; but:[18]

> A discretionary beneficiary does not have a defined or vested interest in the trust property but rather "an expectation or hope" that the trustee will exercise his or her discretion in

14 "There is no doubt that while for some purposes a power was not property, for other purposes the holder of a general power could be regarded as being for all practical purposes an owner": *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2011] UKPC 17, [2011] 4 All ER 704 (Cayman Islands) at [33], supported with examples from different areas of the law to [46] inclusive.

15 Insolvency Act 2006, s 3.

16 Section 104.

17 Sections 101–102.

18 *Erceg v Erceg* [2015] NZAR 1239 (HC) at [22].

> the beneficiary's favour … [and so] a discretionary beneficiary has no proprietary interest in the trust assets …

'Property' also excludes powers in relation to a trust, because they are not a right or interest *in property*.[19] In New Zealand, the Insolvency Act 1967 referred only to "interests … vested or contingent, arising out or incident to property", and the 2006 Act has not broadened its reach.[20] By contrast, the UK legislation explicitly includes powers in its definition of property.[21]

B. Under Relationship Property Law

The English and Australian approaches to dividing family property on separation each use the broad concept of the "financial resources" available to each partner.[22] This is a functional approach to the ownership of property, which Parliament has "not chosen" in New Zealand.[23] Nonetheless, the English Court of Appeal has articulated the tension well in *Charman v Charman (No 4)* as the balancing of a:[24]

> … judicious mixture of worldly realism [on the one hand] and of [, on the other hand] respect for the legal effects of trusts, the legal duties of trustees and, in the case of off-shore trusts, the jurisdictions of off-shore courts.

This led the Court to hold that:[25]

> In the circumstances of the present case it would have been a shameful emasculation of the court's duty to be fair if the assets which the husband built up in [the trust] during the marriage had not been attributed to him.

The definition of property in the PRA includes "any other right or interest".[26] Utilising the expansiveness of that phrase, in *Clayton v Clayton* the Supreme Court stated that they would take what I name the "relaxed approach":[27]

19 Insolvency Act 2006, s 101(1)(b); and see corresponding emphasis in *Clayton*, above n 13, at [27].
20 *Erceg v Erceg*, above n 18, at [15]; see also Insolvency Act 2006, s 155 which would be redundant if powers were captured.
21 Insolvency Act 1986 (UK), s 283 (4).
22 *Clayton*, above n 13, at [28].
23 At [28].
24 *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246 at [57].
25 At [57].
26 *Clayton v Clayton [Vaughan Road Property Trust]*, above n 13, at [76]; and Property (Relationships) Act 1976, para (e) of the definition of "property" in s 2.
27 *Clayton*, above n 13, at [38].

> We see the reference to "any other right or interest" when interpreted in the context of social legislation, as the PRA is, as broadening traditional concepts of property and as potentially inclusive of rights and interests that may not, in other contexts, be regarded as property rights or property interests.

The Court specifically identified that they were switching to this relaxed approach "before turning to the power of appointment" that constituted a key issue in the case, and continuing with their property rights analysis.[28] Although the Court did not find a power akin to revocation,[29] they did find a "bundle of rights" amounting to a power of appointment, which collectively was recognised as an item of property for the purpose of the PRA.[30] The court stated this recognition occurred only because it was not applying "strict concepts of property law".[31] The court declined to say whether valuing other powers was permissible.[32]

The next section sets out how this broader reading of property has found its way into core trust law, when looking at whether ownership of assets settled on trust has truly moved away from the settlor.

IV. Common Law Trust-Busting: Illusion, Sham, and Constructive Trust

A. When is a Trust "No Trust?": The Illusory Trust

One legal setting in which the "relaxed approach to property" has appeared is when evaluating a "no trust" argument.[33] It has been used to evaluate whether the property was ever truly alienated from its original owner at the beginning of the trust,[34] by looking at whether the powers retained were "tantamount to ownership".[35]

28 At [38].
29 At [49].
30 At [68], [80].
31 At [79].
32 At [33]; doubting *Walker v Walker* [2007] NZCA 30, [2007] NZFLR 772 at [49], a controversial case that represents the high-water mark of recognising bundles of rights as property. See Frances Gush "The 'bundle of rights': Unravelling trust principles?" (2012) 7 NZFLJ 157 at 158.
33 See Bennett, above n 6; and Joel Nitikman "More about illusory trusts: is 'tantamount' to ownership the same as 'ownership'? The Privy Council takes a step too far" (2021) 27 T & T 69.
34 In the terms of the Trusts Act 2019, s 15 (1)(b)(i), whether objectively they "[indicated] an intention to create a trust".
35 Such as in *The Law Society v Dua* [2020] EWHC 3528 (Ch); *Webb v Webb* [2020] UKPC 22, [2021] 1 FLR 448 (Cook Islands); and *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch), [2017] All ER (D) 72 (Oct).

At the time that a trust is settled, the settlor may reserve powers relating to the trust. The settlor may also make themselves a beneficiary or have other rights or interests relating to the trust. If the 'bundle' of retained rights and interests is too bulky, however, then it may not be certain that the settlor intended to create a trust at all, as close examination may show that they did not actually alienate the trust property from their own beneficial ownership. As Lord Kitchen observed in *Webb v Webb*:[36]

> ... there can be no valid trust if, on the proper interpretation of a trust deed, the settlor has in fact retained beneficial ownership of the property purportedly settled on the trust.

The logical converse of this issue is whether the beneficiaries of the trust other than the settlor have sufficient enforceable rights: "whether the trusts lacked the irreducible core of obligations owed by trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust".[37] If enforceable rights cannot be found, the "irreducible core" of a trust will not be present.[38] If beneficial ownership of property is effectively retained by the settlor, then beneficiaries will not have meaningful rights to it; and conversely if beneficiaries do have rights that constrain the trustees, then effective alienation has occurred.

Nonetheless, creating an "intention to alienate" standard is vexed. The boundary is explored academically under the label of the "illusory trust" doctrine, although that label has been doubted by New Zealand courts.[39] A notable feature of the Court's reasoning in *Clayton* is that no explicit statutory wording is required to broaden the definition of property in a new context.[40] *Clayton* was cited in support of the proposition that a general power of appointment is "tantamount to ownership" in the *Pugachev* decision,[41] featuring a raft of personal powers,[42] where it was held that

36 *Webb v Webb*, above n 35, at [76].
37 At [89]; see also section II above.
38 Bennett, above n 6, at 222; and *Armitage v Nurse* [1997] EWCA Civ 1279, [1997] 2 All ER 705.
39 *Vervoort v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807 at [37].
40 *Clayton*, above n 13, at [81], by approving of *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd*, above n 14; and, by comparison, for an example of where such expansion results from legislative policy, see *KA No 4 Trustee Ltd v Financial Markets Authority*, above n 5.
41 *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*, above n 35, at [161] (the bankruptcy was under Turkish law).
42 Summarised in Bennett, above n 6, at 210–211.

Mr Pugachev had not alienated the beneficial ownership of the property he had purportedly settled on trust.[43] Losing sight of the PRA context, the court held that:[44]

> [*Clayton*] shows that when considering what powers a person actually has as a result of a trust deed, the court is entitled to construe the powers and duties as a whole and work out what is going on, as a matter of substance.

Through the phrase "tantamount to ownership",[45] looking past legal form to evaluate substance was also the approach in *Webb v Webb,* which mixed in reasoning based on the UK Insolvency Act 1986.[46] As noted above, that Act includes powers in its definition of property.

The core of the 'effective alienation' analysis is to examine the rights and obligations created by the trust deed. Trusts are enforceable by their beneficiaries. In New Zealand, the Trusts Act 2019 provides for core duties of trustees, which trust deeds cannot modify or exclude.[47] Relevant to discretionary trusts, these mandatory duties are to know the terms of the trust;[48] to act in accordance with the terms of the trust;[49] to act honestly and in good faith;[50] to exercise the trustee's powers for a proper purpose;[51] and to hold or deal with trust property and otherwise act for the benefit of the beneficiaries, in accordance with the terms of the trust.[52] Sufficient trust information must be disclosed to beneficiaries to allow the trust to be enforced.[53]

Now that the Trusts Act has commenced,[54] in New Zealand it will be difficult to find that the settlor of a trust, as trustee, has complete freedom to appoint property to themselves while unconstrained by fiduciary duties to other beneficiaries.[55]

43 *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*, above n 35, at [278]; and see Nitikman, above n 33, which sets out a range of ways in which over-broad trusts have been attacked. See also Bennett, above n 6, at pt C.

44 *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*, above n 35, at [167].

45 Usefully defined in *The Law Society v Dua*, above n 35, at [157] which used the phrase in pursuit of a "no trust" argument.

46 *Webb v Webb*, above n 35, at [77] (Cook Islands, but based on the New Zealand Property [Relationships] Act 1976).

47 Trusts Act 2019, s 22.

48 Section 23.

49 Section 24.

50 Section 25.

51 Section 27.

52 Section 26.

53 Sections 49–55.

54 The Trusts Act applies to all express trusts since full commencement on 30 January 2021, per s 2, and may be applied to a trust that "does not satisfy the definition of express trust but that is recognised at common law or in equity as being a trust", per s 5.

55 A synthesis of the current "tantamount to ownership" test, from Law Commission *Review of the Property (Relationships) Act 1976* (NZLC R143, 2019) at [11.4].

Similarly, if the settlor reserves the power to dismiss and/or appoint trustees, then the powers must be exercised "in good faith, for a proper purpose and for the benefit of the beneficiaries", regardless of whether the settlor is a trustee.[56] These mandatory duties must override an intention to create a express trust, but retain effective control without fiduciary constraints. The alternative is to argue that the legislature intended all express trusts that impermissibly modify or exclude the mandatory duties to collapse on commencement of the Act: perhaps by recharacterising the express discretionary trust as instead being a bare trust for the settlor. This possibility is left open by one of the Act's architects, former Law Commissioner Geoff McLay, who observes that the approach taken is "very [much] going to depend on the view that the judge takes of the overall attempt to establish a fiduciary relationship".[57]

If it were not for the bolstering of beneficiary rights provided by the Trusts Act 2019, the most straightforward approach might have been for New Zealand law to hold that if powers "tantamount to ownership" are retained by the settlor, then the illusory trust doctrine operates to make the affected trusts *void ab initio*.[58] Less radically, the High Court has recently left open the possibility that such a trust would only terminate at the time the powers are exercised in a way that united the legal and equitable titles.[59] After briefly setting out the sham and constructive trust doctrines, in section V below I set out the political economy context in which courts will choose the path of the law. Although there have been isolated recent examples of judicial enthusiasm for developing the illusory trust doctrine,[60] due to the political context and the reality that trust deeds in New Zealand commonly reserve significant powers to the settlor,[61] my prediction is that New Zealand courts will not utilise the "tantamount to ownership" benchmark to recharacterise such discretionary trusts as the property of the settlor.

B. Alleging that a Trust is a Sham

While seldom of practical relevance, the "sham trust" doctrine also requires mention. The doctrine applies where at "settlement", there is a common intention

56 *Cooper v Pinney* [2023] NZCA 62 at [114].
57 Geoff McLay "How to read New Zealand's new Trust Act 2019" (2020) 13 J Eq 325 at 336.
58 That is, from the outset, "no trust at all": *Vervoort v Forrest*, above n 39, at [37].
59 *White v Brkic* [2021] NZHC 919, [2021] 3 NZLR 490 at [15]–[16], upheld in *Brkic v White* [2021] NZCA 670 at [42].
60 Dissent of Miller J, *Cooper v Pinney*, above n 56; and *New Zealand Bloodstock Finance & Leasing Ltd v Jones* [2023] NZHC 2111 at [27]–[29], where Downs J states that the "law appears to be in flux".
61 Law Commission, above n 2, at [2.53]; and, for example, the power to appoint and remove trustees: Kelly, above n 13, at [17.48].

between the settlor and the trustees that despite the appearance of a trust, the property will actually continue to be fully beneficially owned by the settlor.[62]

Because an allegation of sham is an allegation of fraud, it cannot be responsibly pleaded without a sound basis. It is "not permissible to make an allegation of fraud and then fish for evidence".[63] Instead, a lawyer must have reasonably credible material which appears to establish a prima facie case of fraud.[64]

Where the settlor is also the single trustee then it may be relatively easy to establish that they had no real intention to establish a trust, because only one person's intentions are at issue. However, robust evidence of a shared intention between a settlor and other individuals who are trustees will rarely eventuate.[65] The existence of trust accounts showing that the trust assets are owned by the trust will generally exclude a finding of sham,[66] unless those documents are themselves shams.[67] The party alleging a sham bears the burden of proving this,[68] using "contemporary evidence of the actions (and words) of the relevant parties showing that the trust was not intended to be genuine".[69]

However, when a trust is under "de facto control of a trust by a single trustee, who is also a beneficiary and … other trustees are clearly not involved",[70] then the assets of the trust are vulnerable to a constructive trust claim, discussed in the next section.

C. Lankow v Rose Constructive Trust

An additional common law method for attempting to claim against property in trust is to establish, as in *Lankow v Rose*:[71]

(a) Some contribution, direct or indirect, to the property at issue;
(b) An expectation, on the part of the claimant, of an interest in the property;

62 *Official Assignee v Wilson* [2007] 3 NZLR 45 (CA) at [117].
63 *Savril Contractors Ltd v Bank of New Zealand* [2002] NZAR 699 at [66].
64 *Medcalf v Mardell* [2002] UKHL 27, [2002] 3 All ER 721.
65 Andrew S Butler *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at 1212; Tony Pagone "Sham trusts revisited" (2014) 20 T & T 1081 at 1083; and Matthew Conaglen "Sham Trusts" (2008) 67 CLJ 176 at 186.
66 For example, *Vervoort v Forrest*, above n 39, at [28]; *White v Brkic* (HC), above n 59, at [18]; and compare *Kwok v Rainey* [2020] NZHC 923 at [141].
67 An example of a sham trust being found despite accounts being in place is *Rosebud Corporate Trustee Ltd v Bublitz* [2014] NZHC 2018, [2014] NZCCLR 33, where the 2011 accounts formed part of the sham, and 2012 and 2013 accounts were created only when discovery was ordered.
68 *Official Assignee v Wilson*, above n 62, at [111].
69 At [110].
70 *Vervoort v Forrest*, above n 39, at [28].
71 Principles from *Lankow v Rose* [1995] 1 NZLR 277 (CA) 294 per Tipping J, as formulated in *Preston v Preston* [2019] NZHC 3389 at [171].

(c) Proof, by the claimant, that his or her expectation was reasonable in the circumstances; and
(d) That the defendant should reasonably be expected to yield the asserted interest to the claimant.

The *Lankow v Rose* constructive trust remedy has been important for relationships that once fell outside the relationship property regime, such as defacto relationships prior to the 2001 PRA reforms.[72] The doctrine is circumscribed, however: the recent case of *Wakenshaw v Wakenshaw* emphasises the high bar to be reached evidentially and for quantum of contribution.[73] Where the relationship property regime applies to a relationship, it provides much more straightforward and expeditious remedies than the constructive trust.[74] I discuss whether both remedies should be available within a relationship at VII below.

V. The Political Economy of the Discretionary Trust

The modern discretionary trust may appear an exorbitant privilege.[75] Because such trusts offer the remarkable ability to hold the property interests of beneficiaries unallocated,[76] the property is inaccessible to many legal claims.[77] Some critics say that the normative justifications for the untrammelled proliferation of such trusts are unconvincing.[78]

Courts value certainty and security of receipt, and so avoid disturbing legal arrangements for holding property without good reason.[79] Supplementing these values, I posit that the resilience of this exorbitant privilege lies in the familiar pattern of concentrated gains to "beneficiaries" (here, those to whom the privilege

72 Priestley, above n 12, at 75.
73 *Wakenshaw v Wakenshaw* [2017] NZCA 252, [2018] NZAR 532.
74 See discussion of the "fall back" constructive trust proceedings in *Preston v Preston* (HC), above n 71, at [234].
75 "With careful planning, settlors have nothing to lose and everything to gain from placing their assets in trust": Nicola Peart "Intervention to Prevent the Abuse of Trust Structures" (2010) 3 NZ L Rev 567 at 568.
76 Law Commission, above n 2, at [3.29]; *Hunt v Muollo*, above n 10; and *Gartside v Inland Revenue Commissioners*, above n 4.
77 As in *Official Assignee v Wilson*, above n 62.
78 Mark J Bennett and Adam S Hofri-Winogradow "The Use of Trusts to Subvert the Law: An Analysis and Critique" (2021) 41 Oxf J Leg Stud 692.
79 Jessica Palmer "What to do about trusts?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge, UK, 2017) at 192.

is granted) and losses dispersed amongst potential voters at large.[80] The structures of the law have distributional consequences.[81] As trust structures provide asset protection from creditors, they are likely to be associated with a higher general cost of borrowing. While the following excerpt is discussing uneconomic projects awarded by local politicians, the same logic applies in this context:[82]

> ... there are several reasons to believe that pecuniary gains are exaggerated and pecuniary losses diminished in the representative's political calculus. They relate to the concentration of pecuniary gains and the dispersion of pecuniary losses. ... pecuniary losers [may be] unable to distinguish the source of their losses from general price inflation. ... Accompanying this asymmetry in perception is an asymmetry in capacity to convert perceptions of gains and losses into political influence. Third, then, as Peltzman has noted in another context, gainers typically are smaller in number, more cohesive in political interest, and, consequently, better organized politically.

The converse question is the political power of those who bear the cost, as "the productivity of the dollars to a politician lies in mitigation of opposition".[83] Who then, benefits from the privilege of the discretionary trust?

In 2015 a fifth of home-owning households in New Zealand held their home in a trust.[84] Current transaction data shows that approximately one in seven real estate transactions have had a trust as a purchaser.[85] As noted at section I above, a greater

80 Sam Peltzman "Toward a more general theory of regulation" (1976) 19 The Journal of Law and Economics 211 at 214.

81 Katharina Pistor *The Code of Capital* (Princeton University Press, Princeton, 2019) at 3.

82 Barry R Weingast, Kenneth A Shepsle and Christopher Johnsen "The political economy of benefits and costs: A neoclassical approach to distributive politics" (1981) 89 Journal of Political Economy 642 at 648–649, referring to Peltzman, above n 80.

83 Peltzman, above n 80, at 214.

84 Law Commission *Relationships and Families in Contemporary New Zealand* (NZLC SP22, 2017), at 48: specifically, 19 per cent of households lived in a home held on trust, in addition to 51 per cent that owned the home. There are challenges in providing precise statistics, but that multiple independent sources provide comparable numbers provides comfort that the rough quantum has been captured: see Statistics New Zealand "Comparison of household net worth statistics" (3 December 2018) Stats NZ <www.stats.govt.nz>.

85 Each of the years ended 31 March 2018, 2019, 2020, and 2021 has been in the range 15–17 per cent, calculated from Statistics New Zealand "Property transfer statistics: June 2021 quarter" (28 July 2021) Stats NZ <www.stats.govt.nz> (excluding corporate purchasers such as "companies, corporate entities, government authorities, and other non-individuals"); and "Overdue request for statistical information–a Official Information Act request to Inland Revenue Department" (20 August 2021) FYI <https://fyi.org.nz>.

value of real estate is owned by trusts than directly by families.[86] A contextual factor is general residential housing stock value growth, which has grown approximately eight-fold over the last 18 years.[87]

What sort of households live in the homes held on trust? Unsurprisingly, these are wealthy households, with both median and mean net worth values 2.3 times higher than for the set of all households.[88] Reinforcing the general idea that these wealthy households are likely to be politically influential, perusing the Register of Interests shows that Members of Parliament are often involved with several trusts, and their homes and business interests are regularly held in trust.[89] It is more common than not for a Member of Parliament to be a trustee of at least one trust, and also be a beneficiary of either the same or a distinct trust.[90] While comparable interest registers are not available for the senior public servants with strong influence on policy, given their demographic profile it would be surprising if they did not also commonly make use of discretionary trusts.

A common motivation for settling a trust is to opt out of the relationship property regime when starting a relationship later in life. As retired judge John Priestley observes:[91]

> Trust mechanisms have, since 1976, proved to be a popular way of ensuring that assets which would otherwise be relationship property fall outside the pool to be equally divided should the relationship fail. This is unsurprising. Survivors of a failed relationship who have shared equally in the core assets are not attracted to the proposition that, should they repartner, failure of a second or subsequent relationship would automatically mean a further depletion of assets by 50%.

86 Statistics New Zealand, above n 1.

87 Reserve Bank of New Zealand "House prices and values" <www.rbnz.govt.nz> (data to September 2022).

88 Consistent in both Statistics New Zealand "Household net worth statistics: Year ended June 2015" (28 June 2016) Stats NZ <www.stats.govt.nz>; and Statistics New Zealand, above n 1; in these statistics 30 per cent of households are shown as having their home held on trust.

89 NZ House of Representatives "Register of Pecuniary and Other Specified Interests of Members of Parliament: Summary of annual returns as at 31 January 2021" (2021) New Zealand Parliament <www.parliament.nz>.

90 NZ House of Representatives, above n 88; "Summary of Amendments to Annual Returns, June 2021" New Zealand Parliament <www.parliament.nz>; NZ House of Representatives "Further amendments to 2020–21 Register made after June 2021" New Zealand Parliament <www.parliament.nz> as at 28 September 2021. The 120 Members had beneficiary roles in 91 trusts, trustee roles in 94, and in total were involved in 128 trusts, with a median of 1 for each of trustee and beneficiary roles, and a median involvement in 1 trust in any role.

91 Priestley, above n 12, at 82; supported by Law Commission, above n 55, at [57].

Trusts are also a vehicle for intergenerational support for housing purchases.[92] International research suggests that where high house price growth is present, encouraging intergenerational transfers within families supports higher household net wealth by encouraging younger households to buy rather than rent homes.[93]

The routine presence of discretionary trusts within the wealth-holdings of policymakers provides context for why the ends served by trusts are seen as legitimate, and law reform proposals to allow 'trust busting' have not been implemented.[94]

This brief political economy analysis suggests that the discretionary trust is unassailably entrenched in New Zealand. However, there is a natural impetus to develop policies that recognise that those who are likely to have access to trust resources are less in need than those without, and that in some cases they should be required to disgorge those resources, or at least have their likely access to trust resources brought into account. The intrusiveness of such policies needs to be calibrated in each domain, considering the statutory context, the benefits of certainty, and the property rights of beneficiaries and third parties. I catalogue current statutory approaches in the next section.

VI. Current Statutory Approaches to Trusts

A. Statutory Introduction

Extrajudicially, Heath J has observed that:[95]

> The notion of "trust-busting" is captured in various pieces of legislation directed to differing factual situations. The policy drivers are legislative in nature; not judicial. Parliament has made a policy choice that, in certain areas of

92 Colleen Hawkes "How to help your children get their first home in a tough market" (7 March 2020) Stuff <www.stuff.co.nz>; Turner Hopkins "Parental Support for First Home Buyers in Auckland" <www.turnerhopkins.co.nz>.

93 Thomas Y Mathä, Alessandro Porpiglia and Michael Ziegelmeyer "Household wealth in the euro area: The importance of intergenerational transfers, homeownership and house price dynamics" (2017) 35 Journal of Housing Economics 1 at 11.

94 Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (NZLC R130, 2013), at [19.9]; *Report of the Working Group on Matrimonial Property and Family Protection* (Department of Justice, Wellington, 1988); and Matrimonial Property Amendment Bill (109–2) (select committee report) at xii explaining why the Working Group recommendation to allow access to trust capital was rejected.

95 Paul Heath "Some Thoughts on a (New Zealand) Judicial Approach to Trust Law" (paper presented to Society of Trust and Estate Practitioners New Zealand Conference, Auckland, 29 March 2012) at 4–5.

> the law, the protection of assets otherwise available through use of an orthodox trust structure is unjustifiable, when measured against countervailing considerations. In each of these areas the question is: Why should the advantages of a trust structure prevail over the rights of others?

A "value pluralism" approach to property allows robust analysis of the meaning that the law is choosing for "property" in a given context, and analysis of what those domains of the law regard as important.[96] On the one hand, certainty of endowment for the beneficiaries of trusts is important;[97] while on the other hand, robust protections for creditors facilitate cost-effective access to finance,[98] and it is legitimate to ask whether trusts should allow people to thwart important legal obligations, leaving others to bear the costs.[99]

The different ends valued by different facets of the law are not commensurate on a single scale,[100] and some values are given a lower weight in some contexts. For example, in the matrimonial context, Alexander argues that "values of community and sharing, rather than personal liberty, should be paramount".[101] These values are subject to contestation over time: for example, the Law Commission's recent review on relationship property has recommended that children's interests are given a more prominent role in determining relationship property awards.[102] The Law Commission's review of trusts,[103] which led to the Trusts Act 2019, did not provide courts with a general 'trust-busting' power for courts to look beyond the form of trusts to their economic substance.[104] As a result, the value contestation inherent in such 'trust-busting' provisions needs to be freshly considered in each policy domain.[105]

96 Gregory S Alexander "Pluralism and property" (2011) 80 Fordham L Rev 1017 at 1051.
97 Palmer, above n 79, at 192.
98 Rafael La Porta and others "Legal determinants of external finance" (1997) 52(3) Journal of Finance 1131.
99 Kent D Schenkel "Trust Law and the Title-Split: a Beneficial Perspective" (2009) 78 UMKC L Rev 181 at 212–213; and Law Commission *Some Issues with the Use of Trusts in New Zealand* (NZLC IP20, 2010) at [2.29].
100 Alexander, above n 96, at 1019.
101 At 1025.
102 Law Commission, above n 55, at ch 12.
103 Law Commission, above n 94.
104 At [4.15].
105 "... within individual legislative schemes": at [4.15]. The Commission did however make some specific recommendations about relationship property at ch 19, but these were not adopted.

B. Insolvency and General Property Law: Insolvency Act and Property Law Act

Section III above describes how the law of bankruptcy deals with trust powers and entitlements. As noted there, the orthodox (or 'strict') view is that neither the settlor nor a discretionary beneficiary has a property interest in the trust assets. However, in some circumstances assets that a settlor has disposed of to such a trust may be subject to 'clawback' under the anti-deprivation provisions of the Insolvency Act 2006 or the Property Law Act 2007. These provisions under the general law are an important baseline to have in mind when considering the specific anti-deprivation provisions that occur in the family property context, discussed later in this paper.

The starting point under the Insolvency Act 2006 is that property that is held by a bankrupt as a trustee is not affected by the bankruptcy.[106] However, a series of provisions in subpt 7 of pt 3, commencing at s 204, allow for transactions to be reversed in various circumstances. Section 204 allows any gift made in the two years before bankruptcy to be cancelled. Section 205 extends this period to five years, but only if the bankrupt was insolvent at the time. The remaining provisions of the subpart fill in the provisions to deal with matters such as transactions at under-value.

Addition clawback provisions are found in the Property Law Act 2007 pt 6 subpt 6, which functions "to ensure that a person's creditors would not be prejudiced by a debtor's alienation of property with intent to defraud them".[107] Unusually for a New Zealand statute, this subpart has its own purpose clause, to:[108]

> … enable a court to order that property acquired or received under or through certain prejudicial dispositions made by a debtor (or its value) be restored for the benefit of creditors (but without the order having effect so as to increase the value of securities held by creditors over the debtor's property).

The provisions allow transactions to be set aside by a person who is owed money, and do not have a time limit.[109] They are triggered if the transaction was made when the person owing the money:[110]

106 Insolvency Act 2006, s 104.
107 Heath, above n 95, at [13] citing *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [86] per Tipping J.
108 Property Law Act 2007, s 344.
109 Law Commission, above n 99, at 19.
110 Property Law Act, s 346.

(a) was insolvent at the time, or became insolvent as a result, of making the disposition; or
(b) was engaged, or was about to engage, in a business or transaction for which the remaining assets of the debtor were, given the nature of the business or transaction, unreasonably small; or
(c) intended to incur, or believed, or reasonably should have believed, that the debtor would incur, debts beyond the debtor's ability to pay.

The provisions apply to gifts, under-value transactions, and transactions made "with intent to prejudice a creditor",[111] and do not apply to bona fide transactions.[112] While the language of intention is used, in this context it has a meaning more akin to recklessness, in that no particular creditor has to be in mind and there simply needs to be knowledge of the likely consequence.[113] Compensation can be awarded instead of the property itself being returned.[114]

The principle for each of these provisions is to balance "the principles of autonomy and security of receipt that are so important to property doctrine",[115] on the one hand, with the fact that the interests of those who receive property free or under-value are outweighed by those who would have had the benefit of the property had the transfer not occurred. The premise is that a full retrospective view of the obligations of the transferor reveals that this was not property they ought to have disposed of.

C. Trust Assets in Social Welfare Policy: Social Security Act

In the context of income support, the Ministry for Social Development (MSD) has a broad discretion to take into account any assets that have been disposed of to a trust.[116] The relevant values to be balanced are set out in s 3 of the Social Security Act 2018 (emphasis added):

111 Section 346 (1)(b).
112 Section 349; for discussion of s 349 see *McIntosh v Fisk* [2017] NZSC 78, [2017] 1 NZLR 863 at [80] and following.
113 Law Commission, above n 99, at [3.8]; and *Regal Castings Ltd v Lightbody*, above n 107, at [53]–[56].
114 Property Law Act, s 348 (2)(b); as in *Commissioner of Inland Revenue v Clooney Restaurant Ltd* [2020] NZHC 451.
115 Palmer, above n 79, at 192.
116 Law Commission, above n 99, at [3.60]; Social Security Act 2018, sch 3 cl 16.

> (a) to enable the provision of financial and other support as appropriate—
>
> (i) to help people to support themselves and their dependants while not in paid employment; and
>
> (ii) to help people to find or retain paid employment; and
>
> (iii) to help people for whom work is not currently appropriate—because of sickness, injury, disability, or caring responsibilities—to support themselves and their dependants:
>
> (b) to enable in certain circumstances the provision of financial support to people to help alleviate hardship:
>
> (c) to ensure that the financial support referred to in paragraphs (a) and (b) is provided to people **taking into account**—
>
> (i) that, where appropriate, they should use the resources available to them before seeking financial support under this Act; and
>
> (ii) any financial support that they are eligible for or already receive, otherwise than under this Act, from publicly funded sources:
>
> …

The discretion applies where the applicant for a benefit, or their spouse, has deprived themselves of property and the result of the transaction is that they qualify for a benefit at a certain level.[117] MSD may then assess eligibility for that criterion a counterfactual basis: that is, as if the transaction had not occurred.[118]

In summary, the relevant goal is to prevent giving to those that should be able to look after themselves, had they not undertaken a transaction akin to the voidable transactions discussed at B above; but on an altogether more discretionary basis.

D. Breadth to Recognise Financial Resources: Legal Aid

Peart points out that when a person applies for Legal Aid, their relationship to trusts is taken into account to assess their "ability … to fund their legal

117 Social Security Act, sch 3 cl 16.

118 Schedule 3 cl 16; the counterfactual is bounded by the criteria, however, in *Chief Executive of Ministry of Social Development v Broadbent*, above n 4, MSD included nominal income from gifted assets in the assessment, and the Court of Appeal rejected that.

proceedings".[119] The provisions that she refers to are now found in cl 8 of the Legal Services Regulations 2011 (the Regulations) made under the Legal Services Act 2011, which capture the following interests of the applicant and their spouse:[120]

> (4) Any interest in any trust or other fund (whether the applicant's interest is held solely, jointly, or in common, and whether it is vested or contingent), or any benefit that the applicant might receive in connection with any trust (for example, a discretionary trust), must be assessed with regard to—
>
> (a) how the trust arose or was created; and
> (b) the terms and conditions of the trust; and
> (c) the person or persons who have power to appoint and remove trustees or beneficiaries; and
> (d) the history of the trust's transactions (for example, distributions); and
> (e) any changes in the membership of the trustees; and
> (f) any changes in the class of beneficiaries; and
> (g) the source of income or capital that the trust receives.
>
> (5) For the purposes of subclause (4), the Commissioner may treat all or part of the assets and income of a trust as assets and income of the applicant regardless of the interest of any other person in the trust.

The context for the Regulations is that the Legal Services Act (the Act) sets maximum income and 'disposable capital' levels when defining eligibility for legal aid. The Act's purpose is:

> … to promote access to justice by establishing a system that—
>
> (a) provides legal services to people of insufficient means; and
> (b) delivers those services in the most effective and efficient manner.

It follows that it is clearly "contrary to the purpose of the Act for a person who has sufficient means to pay for legal services to nevertheless get Government aid".[121]

119 Peart, above n 75, at 584.
120 For the inclusion of spousal resources, see Legal Services Act 2011, sch 1 cl 4.
121 *Legal Services Commissioner v Roest* [2015] NZHC 252, [2015] 3 NZLR 273 at [49].

Perhaps because of the link to criminal legal aid, the Act and Regulations are drafted broadly enough to capture the "unprincipled and avaricious",[122] who may seek to conceal true ownership: thus, the breadth of the definitions, and the inclusion of spousal financial resources.[123]

In *BN (Criminal)*,[124] the Legal Aid Tribunal emphasised the discretionary nature of decision-making under cl 8.[125] In this case an important factor was the pattern of distributions under subclause (4)(d).[126] The discretion at subs (5) was held to require consideration of the needs of other beneficiaries, in this case an apparently disabled son about whom insufficient information was before the Tribunal.[127] An unlawful condition imposed by the Commissioner that required a caveat to be lodged on a property owned by the trust was rejected by the Tribunal.[128] After this course correction, this decision brings the Legal Aid regime back in line with Peart's 2010 summary of the previous legislation. It does not:[129]

> … give rise to a power to remove assets from the trust. No orders are made against the trustees. The person assessed is merely prevented from asserting that they have no property, when in reality they can access property as and when they choose to do so.

Looking at the stringent criteria of the Legal Aid regime in light of current litigation costs, with the Access to Justice project noting that "it is often not costeffective to bring a claim worth less than $100,000 in the District Court",[130] reinforces the impression that when weighing values, the Legal Aid regime prefers cost containment over access to justice. That is, the financial interests of the state are preferred to those of the beneficiaries of the trust. Nonetheless, the policy choices made in treatment of trust assets maintain the integrity of the trust, by keeping to orthodox remedies. The approach taken by the Legal Aid regime affirms

122 *Petricevic v Legal Services Agency* [2011] 2 NZLR 802 (HC) at [50].
123 At [52]. This case dealt with the Legal Services Act 2000 and associated regulations, but the current provisions reflect the same policy.
124 *BN (Criminal)* [2011] NZLAT 053.
125 At [41].
126 At [45].
127 At [48].
128 At [95].
129 Peart, above n 75, at 584–585.
130 Courts of New Zealand "Improving Access to Civil Justice" <www.courtsofnz.govt.nz> at "What is the concern?".

the approach of allowing for the financial reality of possible access to trust assets, without expropriating those assets.[131]

E. Breadth as a Precautionary Approach: Financial Markets Conduct Act

Part 8 of the Financial Markets Conduct Act 2013 (FMCA) deals with enforcement, liability, and appeals. Subpart 7 of that Part then provides for orders to ensure that assets are not dissipated during an investigation or proceeding. The equivalent provisions were found in sections 60G to 60K of the Securities Act 1978.

In *KA No 4 Trustee Ltd v Financial Markets Authority,*[132] the Court of Appeal considered whether despite the beneficiaries of the discretionary trust in question having no "present proprietary interest" in the trust property,[133] it could nonetheless be said to be arguable that the property was held on their behalf for the purpose of s 60H(1)(f) of the Securities Act.[134] The Court's conclusion was that the property was arguably held on the behalf of the beneficiaries, and the issue should proceed to a substantive hearing.[135]

The values that were important to the Court when creating this interpretation of the law are drawn from the purposes of the Securities Act:[136]

> ... to ensure that the rights of aggrieved persons to damages, compensation or restitution were not frustrated by the assets of a liable person being dealt with in a way that rendered them unavailable to meet claims.

For example, the Court felt that it would be unjust for funds to be free to flow to a wrong-doer's minor children, and thereby essentially into the wrong-doer's hands, if an "aggrieved person" might benefit from those funds.[137]

This judgment shows the benefit of explicitly utilising a new and broader concept and layering this on top of strict property law concepts. The judgment was able to affirm Australian authorities which took an orthodox view,[138] and respect the integrity of the trust, while still giving effect to the important values for this area of the law. This statutory regime shows that when trusts are associated with

131 This was also the result in *Legal Services Commissioner v Roest*, above n 121, which concerned the obligation to repay.
132 *KA No 4 Trustee Ltd v Financial Markets Authority*, above n 5.
133 At [15]–[17].
134 At [18].
135 At [28].
136 At [19]; approving the reasoning of Winkelmann J in the High Court.
137 At [26].
138 *Re Richstar Enterprises Pty Ltd: ASIC v Carey (No 6)* [2006] FCA 814, (2006) 233 ALR 475.

people who may have been unscrupulous, greater robustness will be applied and the interests of beneficiaries will have less weight.

F. True Unscrupulous Persons: Criminal Proceeds (Recovery) Act

Birss J in *Pugachev* (discussed at IV above) described how discretionary trusts could be used by unscrupulous persons to conceal assets' true ownership.[139] How would a statutory regime approach trusts, were the settlors assumed to be unscrupulous? The Criminal Proceeds (Recovery) Act 2009 provides an answer.

The Act's purpose is to:

> (1) … establish a regime for the forfeiture of property—
> (a) that has been derived directly or indirectly from significant criminal activity; or
> (b) that represents the value of a person's unlawfully derived income.
> (2) The criminal proceeds and instruments forfeiture regime established under this Act proposes to—
> (a) eliminate the chance for persons to profit from undertaking or being associated with significant criminal activity; and
> (b) deter significant criminal activity; and
> (c) reduce the ability of criminals and persons associated with crime or significant criminal activity to continue or expand criminal enterprise; …

It is understandable that in this context, the law's normal approach of treating documents as establishing the legal structures that they appear to create is swept aside. The evidence accepted and rejected in leading cases suggests routine dishonesty.[140] Matching that context, we find a remarkably flexible definition of property, truly focused on the substantive rather than formal nature of arrangements:[141]

139 *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*, above n 35, at [174] and following.
140 *Solicitor-General v Bartlett* [2008] 1 NZLR 87 (HC) at [43]; *Brazendale v R* [2011] NZCA 494 at [21]; and *Snowdon v Commissioner of Police* [2021] NZCA 336 at [50].
141 Dichotomy per Bennett, above n 6; and Criminal Proceeds (Recovery) Act 2009, s 58.

58 Court may treat effective control over property as interest in property

(1) If the High Court is satisfied that a respondent has effective control over property, the Court may, on an application made by the Commissioner, order that the property is to be treated as though the respondent had an interest in the property specified by the Court.

(2) An order under subsection (1) may—

(a) be made even if the respondent has no interest in the property; and

(b) specify an interest that differs from the interest that the respondent has in the property.

(3) Without limiting the generality of subsections (1) and (2), the Court may have regard to—

(a) shareholdings in, debentures over, or directorships of, any company that has an interest (whether direct or indirect) in the property; and

(b) any trust that has a relationship to the property; and

(c) family, domestic, and business relationships between persons having an interest in the property or in companies of the kind referred to in paragraph (a) or in trusts of the kind referred to in paragraph (b), and any other persons.

(4) Property that is subject to an order under subsection (1) may be included in any profit forfeiture order and in any restraining order that is made against the respondent.

(5) If the Commissioner applies for an order under subsection (1),—

(a) the Commissioner must, so far as it is practicable to do so, serve notice of the application on the respondent and on any person who, to the knowledge of the Commissioner, has an interest in the property; and

(b) the respondent and any other person who claims an interest in the property are entitled to appear and to adduce evidence at the hearing of the application.

This statutory regime, on the face of it, treats a power to control an asset owned by a trust as having a value equal to that asset; and control of a trust may give control over the asset. This is in sharp distinction from usual legal reasoning about the

value of rights and interests relating to trusts.[142] Turning to typical cases, effective control is dealt with expeditiously: for example, in five brief paragraphs in *Clifford,*[143] and in one paragraph in *Filer.*[144] Despite the brevity of treatment, familiar indicia are used to identify control of the trust: in *Filer,* Gilbert J, contemplating a specific property, notes the respondent settled the property on to the trust as a gift; that he was one of three trustees; that he was one of the beneficiaries and had a "preferred" status along with another person meaning that his wishes could be given priority over those of other beneficiaries; and that he had the power to appoint and remove trustees. He also noted that the respondent had renovated the property.

The statutory regime clearly represents the extreme end of the spectrum of remedies. Trustees are unlikely to defend the proceedings because legal fees cannot be met out of restrained property.[145] The practical result is that, in a case like *Filer*, the beneficiaries of a trust with sufficient connection to criminal offending may have their rights defeated. In a political economy sense, this outcome is not unexpected: New Zealanders are fortunate to live in a polity where those with criminal connections are not influential with policymakers. The beneficiaries do have the right to apply if such a result would cause them undue hardship, under s 61 of the Act: although they do not have an interest in the property in the usual legal or equitable sense, interest is defined broadly in the Act to include "a right, power, or privilege in connection with the property",[146] and so status as a discretionary beneficiary would be adequate as it comes with enforceable rights as set out in II above. However, their interest would be likely to be non-severable and so only subject to compensation on s 69, and as observed by Ellis J in *Briggs*:[147]

> … it is difficult to see how (in many cases) the beneficiaries' interest would be valued for the purposes of paying them "an amount equal to the value of" their interest in the trust property.

This is because, Barkley's valiant efforts notwithstanding,[148] there is not an established method for providing a valuation of discretionary interests relating to trusts. Nonetheless, the Court "must direct the Crown to pay the applicant" if a

142 Tobias Barkley "Valuing Discretionary Interests and Accompanying Rights" [2013] NZFLJ 223 at 225.
143 *Commissioner of Police v Clifford* [2014] NZHC 181 at [13]–[17].
144 *Commissioner of Police v Filer* [2013] NZHC 3111 at [43].
145 Criminal Proceeds (Recovery) Act, s 28.
146 Section 5.
147 *Commissioner of Police v Briggs* [2012] NZHC 2324, n 20.
148 Barkley, above n 142.

non-severable interest is established,[149] provided the applicant has not unlawfully benefited.[150] Valuing the "mere expectancy" (*spes*) at zero would not comply with the statute, and so I submit that an award calculated using Barkley's nine criteria,[151] plus an additional criterion noted below, would be the best available method.[152] Collectively the beneficiaries' interests are worth the same as the trust corpus.[153] However, I note that Berkley did not explicitly include the need of each applicant: this would also be a relevant factor.[154] The approach used should be to notionally determine a s 69 application from each of the entire beneficiary class, and apportion the value of the trust corpus amongst those applications using the factors. Only the applicant's share would be awarded.

G. Current Spousal and Property (Relationships) Act Remedies

Domain-specific remedies are required for relationship property law because New Zealand operates a deferred community of property model. Selected property is retrospectively made "relationship" property by the application of the Property (Relationships) Act 1976 (PRA). Until a court order or settlement agreement under the PRA, title does not change and liabilities under the general law do not accrue.[155]

Relationship property remedies relating to assets in trusts fall into three categories. The first category involves using a relaxed view of property, to include rights and powers relating to trusts as property – at least if, in aggregate, they amount to a general power of appointment.[156] The second category of remedies are the powers to amend or re-settle a trust in s 182 of the Family Proceedings Act 1980 and s 33 (3)(m) of the Property (Relationships) Act 1976 (PRA). The third category comprises clawback and compensation provisions, found in s 44 and s 44C of the PRA.

149 Criminal Proceeds (Recovery) Act, s 69.
150 Section 66.
151 Barkley, above n 142, at 225.
152 Barkley's criteria are: (1) The intentions of the settlor; (2) the fiduciary duties of the trustees; (3) the number of beneficiaries; (4) The manner in which the power has been exercised in the past; (5) the size of trust fund; (6) any criteria, including a letter of wishes, provided by the settlor in relation to the exercise of discretion by the trustees; (7) the number and identity of default beneficiaries; (8) the existence of any other powers such as a power to reduce or enlarge the class of discretionary beneficiaries; and (9) the relationship of the beneficiaries to the settlor and the trustees. I add (10) the need of each beneficiary.
153 Section II above discusses collective ownership of the trust by the beneficiaries, and n 9 above sets out the authority for the proposition that collectively the beneficiaries own the trust corpus.
154 As in *B,N (Criminal)*, above n 124.
155 Bill Atkin "What Kind of Property Is Relationship Property" (2016) 47 VUWLR 345 at 351.
156 *Clayton*, above n 13; Mark J Bennett "Competing Views on Illusory Trusts: The *Clayton v Clayton* Litigation in Its Wider Context" (2017) 11 J Eq 48 at 52.

Section 182 of the Family Proceedings Act 1980 applies only to married couples and civil union partners, where there has been a trust settlement with sufficient connection to the relationship (a "nuptial settlement").[157] Similar provisions occur overseas.[158] The Court has broad powers to resettle the trust so as to "remedy the consequences of the failure of the premise on which the nuptial settlement was made, that is, a continuing marriage".[159] There is no presumption of equality.[160] The section has a strong concern with the support of children after dissolution.[161]

The resettlement power in s 33(3)(m) of the PRA is a much narrower power that may be used in ancillary fashion to effect the Court's orders, and it is further limited by the fact that it does not bind trustees who are not parties to the proceeding.[162]

The remaining provisions are the clawback and compensation remedies. Section 44 is broadly equivalent to the Property Law Act provisions discussed above: it requires a transfer made "in order to defeat the claim or rights" of the partner; it has an exception for bona fide receipt for value; and it allows for the property to be returned or compensation to be awarded. As with *Regal Castings*,[163] for s 44:[164]

> ... the inquiry is directed to the disposing party's knowledge of the effect the disposal will have on the other party's rights, from which intention may be inferred, rather than to whether that party was motivated by a desire to bring about that consequence.

In *Regal Castings*, the "critical factors" included Mr Lightbody disposing of his "only substantial asset", in secrecy, at a time when it was "doubtful" whether he was solvent.[165] The approach to intention taken in applying s 44 is very different, despite the test of intention having lineage to *Regal Castings*. The partner disposing of property does not need to understand that the property they are disposing of is relationship property.[166] Because of the entitlement to share equally in relationship

157 *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] 1 NZLR 590 at [114].
158 Palmer, above n 79, at 196 gives as examples the Matrimonial Causes Act 1973 (Eng&W), s 24(1)(c); and the Matrimonial Proceedings and Property Ordinance (HK), s 6(1)(c).
159 *Preston v Preston* [2021] NZSC 154, 1 NZLR 651 at [1]; and *Clayton v Clayton [Claymark Trust]*, above n 157.
160 *Preston v Preston* (SC), above n 159, at [38]; and *Clayton v Clayton [Claymark Trust]*, above n 157.
161 *Clayton v Clayton [Claymark Trust]*, above n 157, at [129].
162 Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at [9.3.5]. Throughout ch 9 anomalous uses of this provision are highlighted.
163 *Regal Castings Ltd v Lightbody*, above n 107.
164 *Potter v Horsfall* [2016] NZCA 514, [2016] NZFLR 974 at [41].
165 *Regal Castings Ltd v Lightbody*, above n 107, at [14].
166 *Kwok v Rainey*, above n 66, at [109].

property, restraints on the doctrine such as "the court [being] concerned with practical risk" do not appear to apply.[167]

Before the intention standard changed, the need to show "intention to defeat" made s 44 difficult to satisfy.[168] A consensus therefore emerged that it was an inadequate remedy.[169] However, this is not borne out by recent case law.[170] The assumption that s 44 is inadequate and requires reform is therefore increasingly invalid.

Section 44C may apply when s 44 does not. It applies when relationship property has been disposed of to a trust since the start of the relationship, and the effect of the transfer was to defeat the other partner's rights. The provision does not allow capital to be removed from the trust, instead preferring that compensation be awarded from property beneficially owned by the partners. Only if that is not possible may the trust be subject to an order, and then only for income and not capital.[171] As noted at section V above, many discretionary family trusts passively hold a family home, and so this may not provide meaningful relief.[172] The limitation of s 44C to provide recourse only to trust income rather than capital was a specific legislative choice, made contrary to the recommendation of the working group that prepared the policy,[173] and so should be seen as an legitimate expression of the preference of policymakers based on the political economy of that time.

Despite Alexander's avowal of the specific collective values relevant in the relationship property domain noted at subsection A of this section VI,[174] the values discernible in the PRA provisions appear to be largely equivalent to those in the Insolvency Act and Property Law Act provisions set out at subsection B of this section VI. Section 182 of the Family Proceedings Act, by contrast, has an explicit focus on the needs of children,[175] and remedying "the consequences of the failure of the premise (a continuing marriage) on which the settlement was made".[176] Section 182 is recommended for repeal by the Law Commission's relationship property review, discussed in the next section.

167 *Regal Castings Ltd v Lightbody*, above n 107, at [6] per Elias CJ.
168 Nicola Peart "The Property (Relationships) Act 1976 and Trusts: Proposals for reform" (2016) 47 VUWLR 443 at 450.
169 As reflected in Law Commission, above n 55, at [6.22].
170 For example, *Kwok v Rainey*, above n 66; and *Potter v Horsfall*, above n 164.
171 Property (Relationships) Act 1976, s 44C (2)(c).
172 Atkin, above n 162, at [9.4.1](d).
173 Law Commission, above n 55, at [19.9]; *Report of the Working Group on Matrimonial Property and Family Protection*, above n 94; and Matrimonial Property Amendment Bill (109–2) (select committee report), above n 94, at xii explaining why the Working Group recommendation to allow access to trust capital was rejected.
174 Alexander, above n 96.
175 Family Proceedings Act 1980, s 182 (1).
176 *Clayton v Clayton [Claymark Trust]*, above n 157, at [51].

VII. Law Commission Relationship Property Review

A. Outline of the Reform Project

The current version of the Property (Relationships) Act 1976 (PRA) dates from a 2001 reform. Commencing in 2016, the Law Commission undertook a review of the PRA, and related provisions such as s 182 of the Family Proceedings Act 1980. After extensive consultation, and with insights from two research reports,[177] a final report was published in 2019.[178] In June 2022, the Government stated that it expected action on the findings, in conjunction with the Law Commission's review of succession law, would take "a period of years".[179]

While the reform proposed is substantial, for the purposes of this paper only five aspects need to be outlined. The definition of property would remain unchanged,[180] continuing to allow use of the "relaxed view" of property but without taking an expansive view of "wider economic resources".[181] Section 182 of the Family Proceedings Act would be abolished.[182] Section 44 of the PRA would remain unchanged.[183] The approach to categorising property as separate or relationship property would change,[184] in general towards greater communalisation but excluding any pre-relationship value of a separate property family home.[185] And a new remedy would be added, which would seek to provide a "single comprehensive remedy" for situations involving trusts.[186]

B. Changes to Categorisation of Property

The categorisation of property as separate or joint property in the proposed law, which the Commission refers to as the Relationship Property Act (RPA),[187] is

177 Ian Binnie and others *Relationship property division in New Zealand: Public attitudes and values A general population survey* (Michael and Suzanne Borrin Foundation, Wellington, 2018); and Law Commission *Relationships and Families in Contemporary New Zealand*, above n 84.

178 Law Commission, above n 55.

179 *Government response to the Law Commission report 'Review of Succession Law: rights to a person's property on death'* (Ministry of Justice, June 2022).

180 At recommendation 8.

181 At [3.10].

182 At recommendation 66.

183 At recommendation 64.

184 The draft classification clause is set out in Appendix 2 of Law Commission, above n 55, at 496.

185 At [3.73].

186 At recommendation 58.

187 Clause references to the RPA are to the draft provisions found in Law Commission, above n 55, at 496 and following.

primarily based on the "joint venture" approach.[188] That is, the value generated by either party during a qualifying relationship must be accounted for as "fruits of the family joint venture" and will be relationship property.[189] Family acquisitions are also treated as relationship property, including property acquired in contemplation of the relationship.[190] For example, this would include a family home acquired from separate property "while the partners were dating".[191] Unlike under the PRA,[192] the family home will no longer be subject to equal sharing if it was separate property before the relationship was contemplated;[193] however, any increase in its value will be shared,[194] although a decrease would not be.

Aside from the family home, any increase in value in separate property of a partner will stay separate,[195] unless it is attributable to the actions of either partner in the relationship.[196] Where the value of separate property is sustained by the actions of one of the partners, that will only affect property division if the partner is the non-owning partner.[197]

C. The Proposed "Comprehensive" Trust Remedy

The proposed cl 44C of the RPA shares its numbering with s 44C of the PRA, but it has a very different ambit. As noted at IV above, s 44C applies to dispositions of relationship property, during the relationship, that defeat the rights of one partner; and provides either for non-trust property to be allocated unequally to compensate for the existence of trust property, or, failing that, for the income of the trust to be allocated to a partner. The proposed cl 44C of the RPA (attached as an appendix at X below) applies in three situations, of which only the first has similarities to the old provision:[198]

> … where either or both partners have disposed of property to a trust at a time when the qualifying relationship was reasonably contemplated or since the qualifying relationship began and that disposition has had the effect of defeating the claim or rights of either or both of the partners under any other provision of the new Act[.]

188 At 61.
189 At [2.46].
190 RPA, cl 10(a) and (b).
191 Law Commission, above n 55, at [3.80].
192 Property (Relationships) Act 1976, s 8.
193 Law Commission, above n 55, at [3.69].
194 RPA, cl 10(d).
195 RPA, cl 9(2); as with Property (Relationships) Act 1976, s 9 (3).
196 RPA, cl 10(e); compare with Property (Relationships) Act 1976, s 9A (2), where to be communalised, the increase must be due to the actions of the other partner.
197 Law Commission, above n 55, at 219; as with Property (Relationships) Act 1976, s 17.
198 At recommendation 59.

The first change is that the starting date for a disposition has been moved back to when the qualifying relationship is "reasonably contemplated".[199] Taking into account the recent Court of Appeal judgment in *M v H*,[200] a relationship serious enough to become a qualifying relationship would need to be "actually intended" rather than "no more than a distant prospect".[201] Most obviously, this would be through plans to start living together.[202] If the partners had no plan to live together, then their qualifying relationship would not be contemplated, as in *M v H* marriage was not in contemplation because they had "no plan to marry".[203] Given this, the result of the drafting of cl 44C tabled by the Commission would fail to achieve the inclusiveness contemplated by the Commission's report.[204] This infringes less on settlor autonomy and reduces uncertainty, but increases the likelihood of strategic behaviour.[205] Given the validity of concerns about uncertainty and restraining pre-relationship settlor autonomy expressed by practitioners,[206] I do not advocate for further temporal expansion of the "reasonably contemplated" wording in cl 44C.

The second change is that the disposition may be of separate property, if that disposition had the effect of defeating a right. For example, a separate property family home that was settled on a trust while a qualifying relationship was contemplated, and which then increased in value, would defeat the other party's entitlement to half the home's increase in value. By contrast, the current s 44C applies only to dispositions of relationship property.

Absent from the provision, as with the current s 44C, is a requirement that the partner disposing of the asset is a beneficiary of the trust which was the subject of the disposition. It would be entirely inappropriate if a disposition was captured by cl 44C that was made to a charitable trust, or to a trust for a child's benefit where the parent was not a beneficiary.[207] There are three reasons why such situations are more likely to occur. The first is that because house prices have risen so sharply (see V above), intergenerational transfers will become more important as a source of funds.[208] The second is that dispositions of separate property, not just relationship property, are now caught by the provision (although in these situations a claim by

199 RPA, cl 44C(1)(a).
200 *M v H* [2018] NZCA 525, [2018] NZFLR 918.
201 At [51]; and Xin Y Lau "Busting Trusts When a Relationship Breaks Down?" (Unpublished LLB(Hons) dissertation, University of Otago, 2019) at 19.
202 *M v H*, above n 200, at [55].
203 At [55].
204 Law Commission, above n 55, at 285.
205 At [11.78].
206 At [11.61].
207 A risk recognised by Law Commission *Review of Succession Law* (NZLC R145, 2021) at [8.71] in the context of claw-back of dispositions made prior to death.
208 "Many homeowners couldn't afford to buy their houses if purchasing now" (7 September 2021) RNZ <www.rnz.co.nz>; Mathä, Porpiglia and Ziegelmeyer, above n 93.

the other party may not be defeated). The third is that the 'trigger date' has moved to prior to the relationship. Accordingly, I recommend that a subsection (4) be added to cl 44C, stating:

> (4) This section does not apply unless, at the hearing date, a partner has benefited from the trust or is capable of being a beneficiary of the trust.

This wording is designed to avoid capturing theoretical beneficiaries with no real prospect of receiving a distribution, provided they are excluded from the beneficiary class by the hearing date and have never received a benefit from the trust.

The second two situations in which the proposed cl 44C applies are:[209]

> ... where trust property has been sustained by the application of relationship property or the actions of either or both partners; or
>
> where any increase in the value of trust property, or any income or gains derived from the trust property, is attributable directly or indirectly to the application of relationship property or the actions of either or both partners.

What is notable about these provisions is that jurisdiction is granted to interfere with trusts where the trust property is sustained by a partner, even if that trust property would otherwise be the sustaining partner's separate property. For example, imagine that a partner, Bob, owned a scale-model diesel locomotive that was housed on a club track at the local park. Later, he starts a relationship with Joe. During the relationship, Bob spends a lot of time maintaining the locomotive, and it therefore maintains its value. Without the maintenance the locomotive would have fallen into disrepair and become valueless. At the end of the relationship the locomotive had the same value as at the start. Here, despite the fact that Bob has spent a lot of his time 'sustaining' his separate property, he does not need to account for that time for PRA or RPA purposes, and the locomotive continues to be owned entirely by Bob.[210]

209 Law Commission, above n 55, recommendation 59.
210 Property (Relationships) Act 1976, s 17; and RPA, cl 10 (e).

Let us now imagine that the locomotive was owned by a trust that Bob controlled in a *Kain v Hutton* sense.[211] In this case, Bob's actions maintaining the locomotive would bring the trust within the scope of cl 44C.[212] This applies even though but for the trust, the locomotive would be separate property. This anomaly should be resolved by moving the requirement in cl 44C (1)(a) that an "effect [be caused] of defeating a claim or right of either or both of the partners under this Act" to the introductory part of cl 44C (1), so that cl 44C (1) provided that:

> This section applies if the court is satisfied that one of the following actions had the effect of defeating a claim or right of either or both of the partners under this Act—

This change also avoids the possibility of granting relief in the situation that "but for" the trust, no relationship property entitlement would have arisen: for example, a trust settled by a third party. It is not within the ambit of the RPA to capture imputed value donated by partners to third parties.[213]

The foregoing deals with cl 44C (1). Clause 44C (2) provides comprehensive amendment and resettlement power relating to the trust, which the court may use if it considers it just in the circumstances. The Auckland District Law Society submitted that:[214]

> … any remedies should be limited to the extent of the relationship property within the trust that the partner would have been entitled to had the disposition of property not occurred.

Providing such a cap on remedies would provide certainty and is desirable.[215] Implementing this submission, with adjustments to reflect the structure of cl 44C as amended above, could be achieved by appending to subs (2):

> provided, however, that the orders made may not go beyond restoring a partner to the position they would have been in had the disposition of property, application of

211 *Kain v Hutton* [2008] NZSC 61, [2008] 3 NZLR 589 at [22].
212 RPA, s 44C (1)(b).
213 Lau, above n 201, at 28.
214 Law Commission, above n 55, at [11.60].
215 Atkin, above n 162: ch 9 is replete with examples of the Family Court overstepping principled bounds when intervening in trusts.

> relationship property, or action of a partner that defeated their rights referred to in subsection (1) not occurred.

Clause 44C (3) deals with the matters that must be considered when deciding how to use the power at (2). The matters listed to be considered are appropriate, but insufficient. I propose that the following additions be made as factors that must always be considered at cl 44C (3):

> (c) the relative value of each partner's rights and interests in the trust, along with the value of each other beneficiary's interest, valued using the principle that in aggregate the value of all beneficiaries' interests (even if merely the value of the 'hope' of a discretionary beneficiary, which shall be valued) equal the value of the trust; and
> (d) the purpose of the trust, and all other matters that would be relevant considerations for the trustees were they to be deciding whether to make a distribution to each partner at the date of separation.

The reason that I believe these additions are needed is that it is important to prevent the court from removing value from the trust that has, in practice, been alienated. The remedy at cl 44C is cumulative with the remedy at s 44, which will be preserved. Accordingly, any dispositions of relationship property that are made with knowledge that they would defeat the other partner's interests are already recoverable. This is a supplementary provision, and it is important that the provision respects the interests of third-party beneficiaries. This would address Professor Peart's reservation that the interests of all beneficiaries need to be considered.[216]

A methodology that a court could use to value the interests of discretionary beneficiaries, which of course have a nil value under traditional approaches, is set out at VI above when discussing the Criminal Proceeds (Recovery) Act.

D. Complementary Changes

A final observation on the Commission's proposals is that by repealing s 182 of the Family Proceedings Act 1980, keeping s 44 of the PRA, and implementing the new cl 44C, the Commission has sought to create a comprehensive set of trust remedies. It is also an opportunity to reduce pressure on the interface with trust law. I suggest three further changes that would assist.

216 Law Commission, above n 55, at [11.61].

Firstly, I propose extinguishing the *Lankow v Rose* constructive trust cause of action where the situation giving rise to the claim has a proximate connection to a qualifying relationship under the RPA.[217] This would help to fulfil the principle that "disputes should be resolved as inexpensively, simply, and speedily as is consistent with justice".[218] The High Court judgment in *Preston v Preston* provides a salutatory example of a judge lamenting that related PRA and constructive trust claims have resulted in proceedings being relocated to the High Court from the Family Court, with consequent unnecessary cost and delay.[219] The remedy should be preserved for types of property that will not be subject to the RPA, such as Māori land.[220]

Secondly, because cl 44C of the RPA is a bespoke regime that provides a comprehensive remedy for trusts, the definition of property in the RPA does not require a relaxed lens when looking at trusts. The Commission's report notes that the relaxed lens brought by *Clayton v Clayton* has caused uncertainty in the law, but that recent cases:[221]

> suggest that powers only constitute property under the PRA if they allow unfettered control of trust property, unconstrained by fiduciary duties.

That is consistent with the case law set out at III above. To provide certainty and emphasise the comprehensive nature of the cl 44C remedy, the following should be added to the definition of **property** in the RPA, after the list of six categories of property notoriously concluding with "(e) any other right or interest":[222]

> provided however that no right or interest (including a combination of rights and interests) relating to a trust shall be property for the purposes of this Act unless it is also property for the purposes of the Insolvency Act 2006, except where a combination of rights and interests provides unfettered control of a trust, unconstrained by fiduciary duties.

217 *Lankow v Rose*, above n 71.
218 Property (Relationships) Act 1976, s 1N (d); principle to be retained in the new statute: Law Commission, above n 55, at [2.60](h).
219 *Preston v Preston* (HC), above n 71, at [234]–[235].
220 Law Commission, above n 55, at [70].
221 Law Commission, above n 55, at [11.4].
222 An alternative formulation of the exception could be "except for beneficial powers of appointment that provide a partner the power to appoint trust property to themselves", based on Law Commission *Review of Succession Law* (NZLC IP46, 2021) at [9.45] (e).

Removing the scope for 'bundle of rights' arguments will reduce litigation costs and increase certainty. The breadth of the existing definition will otherwise be retained to preserve the flexibility of the law, allowing for novel items of value such as income-earning YouTube channels to be accommodated.[223]

Finally, I propose strengthening the process for contracting out of the PRA. More robust contracting out provisions will reduce trust-related disputes for two reasons. Firstly, the Law Commission propose that "partners should be able to agree not to make any claim under amended section 44C for the purposes of contracting out of or settling claims under the new Act."[224] Secondly, because trusts and contracting out agreements are alternative ways of opting out of the PRA regime,[225] reducing the scope for contracting out agreements to be set aside will reduce demand for trusts. I have previously proposed a strengthened contracting out process which requires disclosure of trust interests at the time of contracting out.[226] Along with that, I have proposed providing greater certainty by changing the "serious injustice" standard for setting aside agreements to an "exceptional hardship" standard,[227] as applies in the model European spousal property regime.[228] These changes would further reduce pressure on the interface between the family property and trust law domains.

This ends the discussion of the family property regime that applies on separation. I now turn to whether generic solutions to trust abuse should be introduced.

VIII. Should Generic Trust Law be Changed?

As set out at IV above, there will be cases where apparent trust structures can be recharacterised as 'no trust', because the trust property was not truly alienated. However, other situations will arise when a valid trust exists, but the settlor has significant influence. The law will sometimes confront cases like *Vervoort v Forrest*,[229] featuring:[230]

> ... an alpha male trustee who has treated a family trust as being in large measure an extension of himself ... [where

223 Law Commission, above n 55, at [3.9].
224 At recommendation 63.
225 At [57].
226 Peter C Kelly "Contracting Out Rules for Family Income Sharing Arrangements: Providing Certainty and Protecting the Vunerable." (2021) 52 VUWLR 89 at 108.
227 At 97.
228 Property (Relationships) Act 1976, s 21J; Katharina Boele-Woelki and others *Principles of European Family Law Regarding Property Relations Between Spouses* (Intersentia, Cambridge, UK, 2013) at 348.
229 *Vervoort v Forrest*, above n 39.
230 Priestley, above n 12, at 84; citing *Vervoort v Forrest*, above n 39, at [62].

> Asher J acknowledged] … traditional trust principles of unanimity and non-delegation … "must bend to the practical realities when one trustee is in absolute control of all trust activities and the other trustees have effectively abdicated their trustee responsibilities."

What then, is the correct conceptual response to the *behaviour*, as opposed to the existence of the formal powers? It cannot be simply that a settlor who is also a trustee can unilaterally revoke the trust through appointing trustees who will ensure poor administration, as the emerging sham doctrine would suggest (as argued in *Vervoort*). The trust in *Vervoort* had beneficiaries other than Mr Duffy.[231] The trustees' abdication of duty was a breach of the trustees' duties to the beneficiaries. The'remedy' cannot be to nullify the duties and hand the property back to the settlor,[232] from whom (in this case) it could be claimed by Ms Vervoort. As Palmer says, the:[233]

> … introduction of control by the settlor [over a valid trust] does not affect the validity of the trust or the property rights of the trustee and beneficiary … [or] grant the controller title.

In the extreme cases, the beneficiaries can assert themselves. In *Official Assignee v Wilson*, although Mr Reynolds seemed to have factual control, he was not a beneficiary of the trust. Mr Reynold's children and grandchildren, assuming they were all fully competent, could have terminated the trust and taken absolute ownership of the property.[234] Neither Mr Reynolds nor the trustees would have had any legal power to resist.

The state does have an interest in the proper administration of trusts. If a criminal standard is met, it can take action. Section 229 of the Crimes Act 1961 provides:

> **229 Criminal breach of trust**
>
> (1) Every one is guilty of a criminal breach of trust who, as a trustee of any trust, dishonestly and contrary to the terms

231 At [27].

232 *Official Assignee v Wilson*, above n 62, at [70].

233 Jessica Palmer "Dealing with the emerging popularity of sham trusts." (2007) 1 NZ L Rev 81 at 106.

234 *Official Assignee v Wilson*, above n 62, at [3]; Trusts Act, s 121; *Saunders v Vautier*, above n 9; Beynon, above n 9; and Law Commission *Perpetuities and the Revocation and Variation of Trusts,* above n 9, at [4.25].

of that trust, converts anything to any use not authorised by the trust.

(2) Every trustee who commits a criminal breach of trust is liable to imprisonment for a term not exceeding 7 years.

A punitive civil remedy that is enforceable by beneficiaries is conceivable. This could conceivably be introduced by judicial innovation utilising the inherent jurisdiction of the High Court, or, more plausibly, by legislation. For example, the Trusts Act 2019 could be amended to provide that:

130A Powers of court in case of sustained gross negligence

(1) Where a trustee shows sustained dishonesty, wilful misconduct, or gross negligence that has prejudiced beneficiary interests then the court may make one or more of the following orders:
   (a) vary the terms of the trust so that if the trustee was a beneficiary of the trust, they are no longer a beneficiary:
   (b) remove the trustee under section 112:
   (c) remove any rights or powers that the trustee may have in relation to the trust, for example a power to remove trustees.

(3) An application under this section may be made by any beneficiary.

This remedy would have a similar effect to the errant trustee resigning, and unilaterally disclaiming all of their rights and interests in relation to the trust. It could be argued that there would be a principled basis for stopping a person benefiting from a trust after abusing the structure; and the fact that the property continued to be held for the benefit of the other beneficiaries has a sound element that the settlor has made their bed and must lie in it.[235] It seems to me thaa an "emerging sham", that is, a trustee treating the trust property as their own with flagrant disregard for their obligations to the other beneficiaries, would be captured by this provision.

I am not convinced that the addition of this remedy would be better than the status quo. However, it is the best solution that I can offer to the intuition, which has

235 That is, that "choices of legal form have to have consequences": McLay, above n 57, at 328.

proven so corrosive to core trust law principles, that if a person controls property then they should be able to be forfeit the property if they incur liabilities.

IX. Conclusions and Summary of Proposals

The interface between social policy and trust law in New Zealand is not always an easy one. People will use trusts, where the law permits, to structure their property affairs in a way that delivers advantageous outcomes. Highly discretionary family trusts are unassailably entrenched in the political economy of New Zealand wealth-holding, and need to be approached in a principled way by legislation.

A decision must be made in each domain: in that area of policy, is it most important to prevent abuse of trust structures by the "unprincipled and avaricious", as Wylie J suggested in *Petricevic* with respect to legal aid?[236] Or will trusts be treated as structures with integrity, which endow their beneficiaries with meaningful rights coupled with enforceable fiduciary obligations? In the domains of legal aid, financial misconduct, and the proceeds of crime the former approach has a foothold. I have argued that more respect should be accorded to trust integrity and beneficiary rights when new legislation is drafted to reform the regime governing family property on separation.

Unfortunately, while the Law Commission has proposed mitigating the unfairness of the current property division regime by recognising that the initial value of a pre-relationship home should stay as separate property, it has simultaneously eroded the integrity and separate property status of pre-relationship trusts. The new cl 44C it has proposed is over-inclusive and directs the court away from important considerations that are required to deliver just outcomes. In this paper, I have proposed amendments to the remedy to bring it back in line with both trust principles, and with the treatment of separate property within the property sharing regime. I have also proposed complementary changes to extinguish the *Lankow v Rose* cause of action where the situation is covered by the relationship property regime;[237] a stricter definition of property; and improved contracting out provisions to reduce demand for trusts.

After reviewing the principles underlying trusts and the current statutory interventions in trusts in New Zealand, I have proposed a general methodology that can be used to value 'expectation' interests in discretionary trusts, for example where required by the Criminal Proceeds (Recovery) Act regime. This may also have utility in the context of family property dispute resolution.

236 *Petricevic v Legal Services Agency*, above n 122, at [50].
237 *Lankow v Rose*, above n 71.

The common theme in this analysis is that while recognising that, unlike creditors, spouses or partners … do not approach each other at arm's length",[238] there should still be as much alignment as possible between the treatment of trusts in a family property context and under the general law. To avoid bogging down families and the courts in unneeded litigation, certainty and clarity are needed to improve "law's capacity to communicate more directly with its subjects".[239] The unbounded discretionary approach used for social welfare would not provide this, and neither would the over-inclusive scope of the Law Commission's proposed s 44C. If the Commission's proposals are adopted with the amendments proposed in this paper, the result will be both to address the scenarios that lead to unfairness with the current law, while promoting certainty that will encourage families to resolve their relationship property affairs without recourse to the courts.

X. Appendix: Law Commission's Draft s 44C (with Proposed Amendments)

The deletions proposed in section VII above are shown as strikeout, with proposed additions shown in square brackets and bold text.

44C Remedies when property held on trust

(1) This section applies if the court is satisfied that **[one of the following actions had the effect of defeating a claim or right of either or both of the partners under this Act]**—

(a) either or both of the partners to a relationship have, at any time when the relationship was reasonably contemplated, or at any subsequent time during or after the relationship, disposed of separate property or relationship property to a trust, ~~and that disposition has the effect of defeating a claim or right of either or both of the partners under this Act;~~ or

(b) trust property has been sustained by either or both of the following:

(i) the application of relationship property:

238 Peart, above n 75, at 570.

239 Joanna Miles "Should the Regime be Discretionary or Rules-Based?" in Jessica Palmer and others (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge, UK, 2017) at 274.

(ii) the actions of either or both of the partners during the relationship; or

(c) any enhancement of trust property (being an increase in the value of the property, or any income or gains derived from the property) is attributable directly or indirectly to either or both of the following:

(i) the application of relationship property:

(ii) the actions of either or both of the partners during the relationship.

(2) If the court considers it just in the circumstances, having regard to all relevant matters, including the matters in **subsection (3)**, the court may make 1 or more of the following orders **[provided, however, that the orders made may not go beyond restoring a partner to the position they would have been in had the disposition of property, application of relationship property, or action of a partner that defeated their rights referred to in subsection (1) not occurred]**:

(a) an order requiring one of the partners to the relationship (**A**) to pay to the other partner (**B**) a sum of money out of relationship property or separate property:

(b) an order requiring A to transfer to B any relationship property or separate property:

(c) an order requiring the trustees of the trust to pay to A or B, or both A and B, a sum of money:

(d) an order requiring the trustees of the trust to transfer to A or B, or both A and B, any trust property:

(e) an order varying the terms of the trust:

(f) an order resettling some or all of the trust property on 1 or more new trusts.

(3) The matters referred to in **subsection (2)** are,—

(a) if this section applies because of **subsection (1)(a)**,—

(i) the extent to which a claim or right of either or both of the partners under this Act has been defeated by the disposition of the property to the trust; and

(ii) the date of the disposition of the property to the trust; and

(iii) any benefits the partners have received from the trust, including the value of any consideration given for the disposition of the property to the trust; and

(iv) whether the disposition of the property to the trust was made with the informed consent of both partners; and

(v) whether the trust is intended to meet the needs of any minor or dependent beneficiaries; or

(b) if this section applies because of **subsection (1)(b) or (c)**,—

(i) the extent to which the trust property has been sustained or enhanced by the application of relationship property or the actions of either or both of the partners; and

(ii) the date or dates on which the trust property was sustained or enhanced by the application of relationship property, or the actions of either or both of the partners; and

(iii) any benefits the partners have received from the trust property, including the value of any consideration given for sustaining or enhancing the trust property, and

(iv) whether the trust property was sustained or enhanced with the informed consent of both partners; and

(v) whether the trust property is intended to meet the needs of any minor or dependent beneficiaries.

(c) [the relative value of each partners' rights and interests in the trust, along with the value of each other beneficiaries' interest, valued using the principle that in aggregate the value of all beneficiaries' interests (even if merely the value of the 'hope' of a discretionary beneficiary, which shall be valued) equal the value of the trust; and]

(d) [the purpose of the trust, and all other matters that would be relevant considerations for the trustees were they to be deciding whether to make a distribution to each partner at the date of separation.]

(4) [This section does not apply unless, at the hearing date, a partner has benefited from the trust or is capable of being a beneficiary of the trust.]

CROSSING THE ALPS: THE APPLICATION OF THE CRIMINAL PROCEEDS (RECOVERY) ACT 2009 TO REGULATORY OFFENDING

Angus Graham*

Abstract

The Criminal Proceeds (Recovery) Act 2009 is a powerful piece of legislation. It provides the Commissioner of Police with the ability to strip individuals of their wealth and assets by proving, on the balance of probabilities, that some unlawful benefit was obtained from significant criminal activity. The Commissioner of Police has successfully implemented this legislation in the context of organised crime and sophisticated organised criminal groups. Recently, the Commissioner has sought to apply this legislation to regulatory offences committed by businesses. This represents a significant expansion of the original scope of this legislation and presents New Zealand business with the risk of having their assets and profits seized, restrained, and forfeited by the State. This paper addresses the framework of the Criminal Proceeds (Recovery) Act 2009 and how the Commissioner has sought to expand the application of this framework to regulatory offending. This paper shall address the jeopardy such an expansion represents and what can be done to mitigate such a draconian application of the Act.

I. Introduction

The Criminal Proceeds (Recovery) Act 2009 (CPRA) provides the Commissioner of Police (the Commissioner) with a mechanism for confiscating "tainted" assets and "dirty" profit. The purpose of this legislation has been articulated by the Honourable Kiri Allan, the then Minister of Justice, as:

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> "This is about ensuring crime doesn't pay and that there are major consequences for criminal and gang activity".[1]

Rt Hon Christopher Hipkins, the then Prime Minister, also confirmed:[2]

> The steps taken today continue the Government's multi-faceted approach to tackling harm caused by gangs and other organised criminal groups. This is the next step in the Government's work to curb crime and make our communities safer. It will mean that not only do we have more frontline Police than ever before, they also have greater powers to hit gangs where it hurts. This goes hand in hand with the Government's work within communities to stop young people becoming involved in crime and gangs in the first place.

The purpose of the CPRA appears clear. It is a tool to be used by the Commissioner, as part of a wider arsenal, to combat organised crime and organised criminal groups. It is a piece of legislation that can be used to directly attack the profits of sophisticated criminal activity. However, on closer examination, this forfeiture regime presents complex and perplexing issues for practitioners.

This article will examine how the Commissioner has ventured into new "regulatory" areas of criminal activity, namely the areas of environmental, resource management, work health and safety and anti-money laundering / counter terrorism financing (AML/CFT) regulation. The following article shall discuss why the Commissioner's audacious steps into the area of regulatory offending is considered controversial and even dangerous. In particular, this article will consider the application of the CPRA in the context of the *Commissioner of Police v Salter* proceeding.[3]

1 New Zealand Parliament "Police given new powers to seize criminal assets" (New Zealand Parliament, 5 September 2022) <www.beehive.govt.nz>.
2 New Zealand Parliament, above n 1.
3 *Commissioner of Police v* Salter CIV-2019-404-2622.

II. An Overview of the CPRA

A. Criminal Proceeds (Recovery) Act 2009 versus Proceeds of Crime Act 1991

Forfeiture, whether criminal or civil, is focused on the removal by the state (in this case the Commissioner) of some profit or property that has been directedly or indirectly involved in criminal or illegal activity.[4] More specifically, "civil forfeiture", is the appropriation of that profit or property by the state pursuant to a court order, irrespective of whether charges have been filed or a conviction entered.[5]

New Zealand's current civil forfeiture regime came into force on 1 December 2009, with the enactment of the CPRA. The CPRA provides for the restraint and forfeiture of property, and the removal of profits derived from "significant criminal activity" without the need for a conviction. It also sets out certain procedural matters relating to the forfeiture of "instruments of crime", if an "instrument forfeiture order" has been or may be entered under s 142N of the Sentencing Act 2002.[6]

The CRPA replaced the Proceeds of Crime Act 1991. Under that Act, two types of confiscation order could be imposed upon a person who was convicted of a serious offending, defined as an offence punishable by imprisonment for a term of five years or more. The first type of confiscation order was a "forfeiture order", which was directed to "tainted property" that was derived from or used to commit or facilitate the commission of an offence. The second type of confiscation order was a "pecuniary penalty order" that removed from the offender the profits derived from the offence. Although both orders were independent of the sentencing process, they were dependent upon conviction for the offence in respect of which the confiscation order was granted. In other words, property could not be confiscated unless an offender had been convicted of the alleged offending.

The CPRA made four key changes to the regime provided for in the Proceeds of Crime Act 1991.

First, it replaces forfeiture orders and pecuniary penalty orders with three new orders. These are as follows:

a) an "assets forfeiture order" in respect of "tainted property";
b) a "profit forfeiture order" in respect of benefits that have been derived from "significant criminal activity"; and

4 Roger Bowles, Michael Faure and Nuno Garoupa "Forfeiture of Illegal Gain: An Economic Perspective" (2005) 25 OJIL 275 at 276–277.
5 Nikolay Nikolov "General characteristics of civil forfeiture" (2011) 14 JMLC 16 at 17.
6 Sentencing Act 2002, s 142N.

c) an "instrument forfeiture order" in respect of property used to commit, or to facilitate the commission of the offence.

Secondly, neither, the "assets forfeiture order" not the "profit forfeiture order" requires a criminal conviction. Both may be used as an alternative to prosecution and conviction where that would be a more effective response to the offending.

Thirdly, the reverse onus of proof upon a respondent to exclude property from the scope of a "profit forfeiture order" is wider than the reverse onus that applied in the assessment of the amount of a pecuniary penalty order under the Proceeds of Crime Act 1991.

Finally, while applications for "instrument forfeiture orders" are clearly criminal in nature, proceedings for assets forfeiture orders and profit forfeiture orders are in all respects civil. This is a key, and perhaps the most significant difference, between the current regime and the earlier Proceeds of Crime Act 1991, which represented an unusual hybrid between the criminal and civil jurisdictions.[7]

Under the Proceeds of Crime Act 1991, some of the processes were civil in their form, and an application for a forfeiture order was regarded as an application *in rem* (meaning it survived the death of the convicted person).[8] However, the orders were nonetheless clearly regarded as penal in nature. Appeals against orders were dealt with under pt 13 of the Crimes Act 1961, and proceedings under the Proceeds of Crime Act 1991 were viewed by the Courts as part of the criminal justice process.

The CPRA allows for property or profit "tainted" by significant criminal offending to be confiscated by the Commissioner. Parliament, through an explicit provision in the CPRA, has defined these proceedings as civil in nature.[9] Section 10 of the CRPA provides that:

> **10 Nature of Proceedings**
> Proceedings relating to any of the following are civil proceedings:
> ...
> an assets for feature order:
> a profit forfeiture order.

Section 16(1) provides that the commencement, determination, or withdrawal of criminal proceedings in respect of the significant criminal activity in question does not affect the forfeiture application in any way. This is so even if the conviction

7 *Black v R* (1997) 15 CRNZ 278.
8 *Solicitor General v King* (1999) 17 CRNZ 471.
9 Criminal Proceeds (Recovery) Act 2009, s 10.

entered in those proceedings is quashed or set aside.[10] Further, any legal aid granted to the respondent in a forfeiture application proceeding is processed as civil, not criminal, legal aid.[11]

The Commissioner is only required to prove significant criminal activity forming the basis of a forfeiture application on the balance of probabilities and not on the traditional criminal standard.[12] Accordingly, a conviction is not required before property is forfeit.[13]

All such legislative references within the CRPA clearly illustrate that undoubtedly the CRPA provides for a civil regime, not a criminal one. As such, proceedings under the CPRA stand alone and are determined according to the civil standard of proof.

The civil and criminal distinction is a significant one and cannot be overlooked. As recognised by Lord Mansfield in *Atcheson v Everitt*: "Now there is no direction better known, than the distinction between civil and criminal law; or between criminal prosecutions and civil actions."[14]

As shall be developed further, it is this key distinction, the civil nature of the CPRA, which has allowed the Commissioner's foray into seeking forfeiture orders in relation to regulatory breaches of legislative instruments such as the RMA and work health and safety.

B. Purpose of the CPRA

Section 3(1) of the CPRA provides that the purpose of the Act is to enable the forfeiture of property:[15]

> a) that is (directly or indirectly) proceeds of Crime (Asset Forfeiture Order (AFO)); or
> b) that represents the value of a person's proceeds of crime (Profit Forfeiture Order (PFO)).

The CPRA contains a concomitant restraint regime, pending application for forfeiture. Pursuant to this regime, the Commissioner may seek that property is restrained, whilst the substantive forfeiture proceeding is determined.

Both AFO's and PFO's hinge on "significant criminal activity" which is defined by s 6 of the CPRA. Section 6 provides as follows:

10 Section 16(2).
11 Section 209.
12 Sections 50(1) and 55(1).
13 Section 15.
14 *Atchenson v Everitt* (1775) 1 Cowp 382 at 391, 98 ER 1142 (KB) at 1147.
15 Criminal Proceeds (Recovery) Act 2009, s 3.

> 1) In this Act, unless the context otherwise requires, significant criminal activity means an activity engaged in by a person that if proceeded against as a criminal offence would amount to offending
>
> (a) that consists of, or includes, 1 or more offences punishable by a maximum term of imprisonment of 5 years or more; or
> (b) from which property, proceeds, or benefits of a value of $30,000 or more have, directly or indirectly, been acquired or derived.
>
> 2) A person is undertaking an activity of the kind described in subsection (1) whether or not—
>
> (a) the person has been charged with or convicted of an offence in connection with the activity; or
> (b) the person has been acquitted of an offence in connection with the activity; or
> (c) the person's conviction for an offence in connection with the activity has been quashed or set aside.
>
> 3) Any expenses or outgoings used in connection with an activity of the kind described in subsection (1) must be disregarded for the purposes of calculating the value of any property, proceeds, or benefits under subsection (1)(b).

It is immediately apparent that the definition of "significant criminal activity" does not require a criminal prosecution against the alleged conduct. Thus, whilst the particular activity must be capable of being prosecuted as a criminal offence in New Zealand, there is no requirement for a successful prosecution or even the filing of charges.[16] Nor is there a requirement that the activity needs to have taken place

16 *Vincent v Commissioner of Police* [2013] NZCA 412 at [17].

wholly in New Zealand.[17] Further, the Commissioner is not restricted to relying on proceeds received by the respondent in relation to the offending which led to a conviction and can invite the court to infer that the respondent was involved in other significant criminal activities that he or she was not charged with.[18] As stated by Tipping J:[19]

> The Commissioner is not, however, restricted to relying on actual proceeds received by the respondent in relation to the particular offending that he was convicted of. Such convictions provide proof the respondent has engaged in significant criminal offending, but the Commissioner can also seek to prove the benefit extended beyond the profits from the dealing supporting the convictions. The Commissioner can invite the Court to infer, on the balance of probabilities that the respondent was involved in other significant criminal activities that he was not charged with. The Commissioner can also, for instance, rely on the disparity between moneys passing through the respondent's bank account or finding its way into the purchase of assets as compared to his declared legitimate income to prove or establish the benefit the respondent received from his significant criminal activities.

There must still be some basis for the application. As addressed by the High Court in cases such as *Commissioner of Police v Zhu* and *Commissioner of Police v He*, the existence of unexplained income is only the start of the exercise.[20] This was further developed by the Court of Appeal in *Wu v Commissioner of Police*, in which the Court recognised that the presence of "unknown deposits" does not necessarily mean such deposits have been derived from significant criminal activity.[21] More is required.

The Commissioner has the onus of establishing facts which provide the basis for the court to draw the inference as a logical and reasonable conclusion that unexplained bank deposits were the fruits of criminal activity. The Commissioner cannot discharge that onus when the nature of the criminal activity is not identified.

17 *Commissioner of Police v Rodriguez* [2019] NZHC 3265.
18 *Commissioner of Police v Hayward* [2012] NZHC 1097 at [22].
19 At [22].
20 *Commissioner of Police v Zhu* [2015] NZHC 2175 at [66]; and *Commissioner of Police v He* [2015] NZHC 777 at [35] and [43].
21 *Wu v Commissioner of Police* [2022] NZCA 65 at [46].

C. Asset Forfeiture Orders

Section 50 of the CPRA provides that the Court must make an asset forfeiture order if it is satisfied on the balance of probabilities that property is "tainted property". Tainted property:[22]

> a) means any property that has, wholly or in part, been—
>
> (i) acquired as a result of significant criminal activity; or
> (ii) directly or indirectly derived from significant criminal activity; and
>
> b) includes any property that has been acquired as a result of, or directly or indirectly derived from, more than 1 activity if at least 1 of those activities is a significant criminal activity

Legitimate property will become tainted property if money obtained from significant criminal activity is used to meet mortgage payments.[23] There is no requirement that the respondent themselves personally engage in the criminal activity, it is sufficient that the property was derived, wholly or in party, by such activity.[24] However, it is essential that there be some "traceable connection" between the proceeds of crime and the property.[25] Where there is no sound basis to draw that inference, the court cannot be satisfied on the balance of probabilities that the property was acquired by criminal activity.[26]

D. Profit Forfeiture Orders

Section 55 of the CPRA provides that the Court must make a profit forfeiture order if it is satisfied that on the balance of probabilities that the respondent has unlawfully benefited from significant criminal activity within the last seven years and has interests in property.

The phrase "unlawfully benefited from significant criminal activity" is defined as follows:[27]

22 Criminal Proceeds (Recovery) Act 2009, s 5.
23 *Duncan v Commissioner of Police* [2013] NZCA 477, *Doorman v Commissioner of Police* [2013] NZCA 476; and *Wu v Commissioner of Police*, above n 21.
24 *Doorman v Commissioner of Police*, above n 23, at [23].
25 *Commissioner of Police v Drake* [2017] NZHC 2919 at [108]–[110].
26 *Commissioner of Police v Law* [2021] NZHC 9 at [15]–[17].
27 Criminal Proceeds (Recovery) Act 2009, s 7.

> In this Act, unless the context otherwise requires, a person has **unlawfully benefited from significant criminal activity** if the person has knowingly, directly or indirectly, derived a benefit from significant criminal activity (whether or not that person undertook or was involved in the significant criminal activity).

It is not necessary for the Commissioner to prove that the respondent was involved in the significant criminal activity.[28] The section is focused on the benefit derived from a criminal activity, not the criminal activity itself. In these circumstances, wilful blindness is sufficient to satisfy the knowledge element.[29]

Importantly, the profit forfeiture regime includes a reverse onus regarding the quantum of the unlawful benefit. Pursuant to s 53, provided the Commissioner proves on the balance of probabilities that the respondent unlawfully benefited from significant criminal activity, the onus is on the respondent to disprove the level of that benefit. The onus is placed on the respondent to prove a different value from that asserted by the Commissioner.

E. Type 2 Assets Forfeiture Order

On 27 July 2023, a number of amendments to the CRPA came into force. One of these amendments was the creation of a new type of asset forfeiture order. The new order is called a type 2 assets forfeiture order. Pursuant to s 50C of the CPRA, the High Court must make a type 2 assets forfeiture order in respect of specific property if satisfied, on the balance of probabilities that:

> a) when the respondent acquired the specific property, the respondent was an associate of 1 or more members of or participants in an organised criminal group; and
>
> b) all or any of those members or participants in the group, –
>
> (i) been involved in significant criminal activity at any time; or
>
> (ii) unlawfully benefitted from significant criminal activity at any time; and

28 *Commissioner of Police v Vincent* [2016] NZHC 892 at [43].

29 *Commissioner of Police v Irwin* [2020] NZHC 1370 at [32]–[35]; and *Wu v Commissioner of Police*, above n 21, at [44] and [73].

c) the respondent's convertible legitimate property from their acquisition of the specific property would have been insufficient to enable them to acquire the specific property at or near market value; and

d) if the application relates to a single item of specific property, the amount calculated in accordance with the formula is at least the threshold amount; and

e) if the application relates to more than 1 item of specific property, the sum of the amounts calculated in accordance with the formula for each item of property is at least the threshold amount.

This new type of order means that the Commissioner can apply to the High Court for an order to restrain or forfeit the property of a person associating with an organised criminal group, where that person's known legitimate income is likely to have been insufficient to acquire the property in question. This provides an alternative to the traditional asset forfeiture order, which requires the Commissioner to identify that the property was derived from a particular criminal activity.

The type 2 asset forfeiture order creates a presumption of taint by association, unless the respondent can provide evidence that the property was legitimately obtained. This new forfeiture order is specifically targeted at the leaders of organised criminal groups who are able to insulate and distance themselves from any involvement in the criminal activities carried out by the group.

At the time of writing, there are no examples of this new power being implemented. However, it will be fascinating to observe how and in what circumstances the Commissioner will seek to do so.

F. Undertakings as to Damages or Costs in Relation to Restraining Orders

The imposition of restraining orders can impose significant costs on an individual or business whose property has been restrained. Section 29 of the CPRA provides a useful mechanism through which respondents can apply for the Court to order the Commissioner to give an undertaking that he will pay damages or costs, or both, in relation to the making, operation, or extension of the duration of the restraining order.[30]

30 Criminal Proceeds (Recovery) Act 2009, s 29(1).

The Court is vested with a broad and untrammelled discretion to require the Commissioner to give an undertaking as to damages or costs.[31] The discretion should be exercised according to considerations of justice and fairness and to diminish the possibility of oppression and injustice.[32]

The Court of Appeal in *Yan v Commissioner of Police* identified a non-exhaustive list of factors that were considered relevant to determining whether the Court should require an undertaking as to costs or damages. This list was as follows:[33]

(a) The personal circumstances of the respondent;
(b) Delay;
(c) Nature of the assets;
(d) The likelihood of loss being suffered as a result of the restraint;
(e) The extent of any likely loss;
(f) The conduct of the Commissioner;
(g) The strength of the Commissioner's case;
(h) The existence of a meaningful alternative avenue of redress; and
(i) Whether the applicant for an undertaking is an innocent non-party.

The Court of Appeal emphasised that in most cases a global assessment of the merits can be made, although it may be appropriate to undertake the assessment on an asset-by-asset basis.[34]

III. Extension of the Regime to "Regulatory Offending"

In order to bring a successful application pursuant to the CPRA, the Commissioner must first establish his allegation of significant criminal activity. The Commissioner must then prove the proceeds flowed from that activity. The Commissioner can then advance either taint and/or unlawful benefit arguments. All the above is done to the civil threshold of "on the balance of probabilities".

In this manner, the Commissioner will usually litigate in two stages:[35]

31 *Yan v Commissioner of Police* [2015] NZCA 576.
32 *Yan v Commissioner of Police*, above n 31.
33 At [41]–[45].
34 At [47].
35 Mark Harborow and others "Improving Access to Civil Justice" (31 August 2020) Courts of New Zealand (Meredith Connell submission) <www.courtsofnz.govt.nz>.

(a) First, and assumingly following an investigation into the affairs of the respondent, the Commissioner will apply for restraining orders over the respondent's property – either on the basis that the property has been acquired with the proceeds of crime and is therefore tainted, or that the respondent has benefited from criminal activity and therefore their property can be forfeited as a consequence of their unlawful benefit.

(b) Second, the Commissioner will apply for civil forfeiture of the restrained property – either by way of asset forfeiture order in respect of tainted property, or a profit forfeiture order where the evidence is that the respondent has benefited from criminal activity.

The regime and its purpose, on this initial review, appears straightforward. The rationale behind civil asset forfeiture lies in the ability of leaders of organised crime groups to distance themselves from detectable criminal behaviour by delegating the commission of illegal acts to their subordinates and other members of the criminal groups. Accordingly, leaders of sophisticated organised criminal groups are able to insulate themselves from the risk of criminal prosecution while still being able to benefit from the criminal activity.

A recent example which epitomises this structure is that of the Comanchero Motorcycle Club. Mr Duax "Dax" Ngakuru, the "Supreme Commander" of the Comanchero Motorcycle Club is accused of being responsible for some of the world's largest drug deals and is alleged to have been operating out of Turkey.[36] In this manner, it is alleged that Mr Ngakuru was able to direct members and associates of the Comanchero Motorcycle Club in the commission of drug trafficking and money laundering offences whilst being able to avoid prosecution.

Indeed, much of Parliament's language around enactment of the CPRA (and subsequent amendments) adopts similar usage, appearing to target organised and sophisticated criminal groups with are difficult to criminally prosecute. Ostensibly, the clear purpose of the CPRA is to provide the Commissioner with another tool with which to combat sophisticated organised criminal groups.

36 Kurt Bayer "New Zealand-born Comancheros gang boss Duax Ngakuru becomes new global 'Supreme Commander'" *The New Zealand Herald* (online ed, Auckland, 2 January 2023) <www.nzherald.co.nz>.

The CPRA has been used to this effect through several actions against the Head-hunters Motorcycle Club.[37] It was reported in 2019 that, between July 2014 and August 2019, the Commissioner had successfully seized $435.9 million in assets pursuant to the CPRA.[38] At that point, Financial Crime Group national manager, Detective Inspector Craig Hamilton, advised that "about half of all restrained property stems of methamphetamine".[39]

In 2021, the New Zealand Police announced that, in a four-year period, more than $500 million in illegally obtained cash and assets had been seized by Police.[40] This was described as "hitting a key milestone in the ongoing focus on disrupting organised crime and preventing harm in communities".[41] To place this figure into context, in 2021, it cost the taxpayer approximately $41 million annually to fund the Crown Solicitor network.[42]

Two aspects are immediately clear from the above. The first is that the CPRA was effectively implemented consistently with its intended purpose, namely, to target the profits of serious criminal offending and organised criminal groups.[43] The second is that civil actions pursuant to the CPRA represent a lucrative area of litigation for the Commissioner, and legal counsel instructed to act on the Commissioner's behalf. The area is so lucrative, in fact, that asset forfeitures are more than sufficient to fund the entire Crown Solicitor network annually.

In light of this wider context, it is perhaps not surprising to cynics that the Commissioner has recently endeavoured to apply the CPRA regime to new "regulatory" areas of offending – such as the environmental, work health and safety and AML/CFT regimes. However, recent High Court decisions have illustrated that such an expansion is not risk free.

37 Jared Savage "Police seek $10 m of property linked to alleged Head Hunter gang president Wayne Doyle" *The New Zealand Herald* (online ed, Auckland, 2 March 2022) <www.nzherald.co.nz>; and New Zealand Police "The Christchurch headquarters of the Head Hunters Motorcycle Gang has been taken off its hands, following a significant decision released late yesterday" (1 December 2022) <www.police.govt.nz>.

38 Savage, above n 37; and New Zealand Police "The Christchurch headquarters", above n 37.

39 Savage, above n 37; and New Zealand Police "The Christchurch headquarters", above n 37.

40 New Zealand Police "Latest operation nets over $10 m in assets, 44 kg meth, 20 arrests" (press release, 24 June 2021) <www.police.govt.nz>.

41 New Zealand Police, above n 40.

42 Guyon Espiner "$40 m of public money for private law firms" (4 October 2021) RNZ <www.rnz.co.nz>.

43 It is not argued that such actions are unwarranted. Rather, the use of the CPRA against organised criminal groups has proven to be highly effective and the Commissioner's actions in this space should be applauded.

A. A New Battleground

There have been various recent examples of where the Commissioner has sought to apply the CPRA to strict liability offending under the Resource Management Act 1991, Building Act 2004, and the Health and Safety in Employment Act 1992.

One recent example of this new application of the CPRA is provided by the High Court decision of *Commissioner of Police v Farmer*.[44] In May 2022, the High Court granted restraining orders in relation to allegations of strict liability offending under the Resource Management Act 1991 and Building Act 2004 from which benefits in excess of $30,000 were derived.[45] The case related to a former bingo hall operating an unconsented boarding house where dozens of migrant workers lived in indoor cabins found to pose serious fire risks and with no hot water, proper heating or laundry facilities. The defendants faced charges under the Building Act 2004 and the Resource Management Act 1991 for the construction of multiple portable cabins without building consent and the use of a boarding house in contravention of the Auckland Council Unitary Plan.

Lang J heard the Commissioner's application for a restraining order in relation to property owned by some of the respondents. It is important to note that at the restraining order stage the Court does not need to be satisfied that the respondent did in fact unlawfully benefit from significant criminal activity.[46] It must only be satisfied there are reasonable grounds to believe this is the case. The High Court has observed that the threshold for making restraining orders is therefore relatively low, consistent with the function of such orders as temporary or "holding" measures.[47]

In that case, the respondents argued that Parliament did not intend for the CPRA to be applied to strict liability regulatory offences. Lang J rejected this argument. His reasons were as follows:[48]

> [28] This argument faces three difficulties. First, the primary purpose of the Act is to establish a regime for the forfeiture of property and benefits derived directly or indirectly from significant criminal activity or from a person's unlawfully derived income. There is nothing in the Act to suggest this purpose should not apply to benefits

44 *Commissioner of Police v Farmer* [2022] NZHC 965.
45 *Commissioner of Police v Farmer*, above n 44.
46 *Vincent v Commissioner of Police*, above n 16, at [45].
47 *Commissioner of Police v Lee* [2014] NZHC 479 at [8]; and *Commissioner of Police v Antolik* [2016] NZHC 2649 at [33].
48 *Commissioner of Police v Farmer*, above n 44, at [28]–[30].

> derived from significant criminal activity in the public welfare regulatory field.
>
> [29] Secondly, the Act applies to benefits derived from significant criminal activity regardless of whether the respondent is charged with criminal offences.
>
> [30] Thirdly, the definition of "significant criminal activity" extends to any criminal activity that devise benefits exceeding the sum of $30,000 in value. It is not restricted to serious criminal offending that carries a maximum penalty of five years imprisonment. Given the fact that Parliament has seen fit to define the phrase "significant criminal activity" in this way I do not accept Ms Keil's argument that the Act cannot apply to public welfare regulatory offending.

Ultimately, Lang J was satisfied that the Commissioner established sufficient evidence to justify a restraining order being made. His Honour granted the order as sought, and also granted the Commissioner legal costs.

Another example illustrating the Commissioner's application of the CPRA to regulatory offending is that of *Commissioner of Police v Jiang*.[49] In that case, Ms Jiang was convicted of offences against the Resource Management Act 1991 for a breach of restrictions on land use and contravention of an abatement notice (related to her operation of a brothel at 10A England Street, Christchurch). Ms Jiang was also under investigation under the Tax Administration Act 1994 relating to undeclared cash and/or rental income. At the time of the Commissioner's application, she was not charged with any offences under the Tax Administration Act 1994. A suspicious transaction report was also part of the investigation, however, the details of this report was subject to the strict non-disclosure rules under ss 46 and 47 of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.

In relation to the Commissioner's reliance on offences under the RMA, Mander J stated:[50]

> [65] In relation to the Commissioner's reliance on offences committed against the RMA there may be an issue as to whether such breaches constitute "a serious criminal offence" as that term is referred to in the statutory definition of significant criminal activity. However, argument on the issue was extremely limited and I, myself, had to refer to Ms Jiang's

49 *Commissioner of Police v Jiang* [2016] NZHC 2782.
50 At [65]–[68].

counsel to the statutory definition of significant criminal activity for the purpose of the issue he was raising. No research had been undertaken by him regarding Parliament's intention as to the compass of the definition and the issue was only raised in oral argument. My own research tends to support the Commissioner's position.

[66] In *Commissioner of Police v Geddes*, Andrews J considered the argument that unlawfully receiving benefit payments was not the type of criminal activity that the Criminal Proceeds (Recovery) Act 2009 was intended to target. Her Honour observed:

"[33] I accept that there is no ambiguity in the Act. The purposes of the Act are clearly stated in s 3. There is patently no limitation of the Act as to apply only to certain types of criminal activity, and not to others".

[67] In the third reading in Parliament, the Honourable Amy Adams stated:

"When we talk about that sort of significant criminal activity, we note in the provisions of the legislation that we are looking at the sort of offending that is subject to a maximum imprisonable term of five or more years, or from which $30,000 or more in value has been derived. We are not talking about kids who shoplift from the local dairy. We are not talking about minor offending. We are talking about significant offending, for which a serious penalty has been imposed by this house or from which serious money has been made".

[68] In *Commissioner of Police v Dryland*, the Court of Appeal noted in a footnote to its judgment:

> "Tax evasion is significant criminal activity for the purpose of s 6 of the Criminal Proceeds (Recovery) Act 2009 because it is punishable by imprisonment for a term not exceeding five years: Tax Administration Act 1994, s 143B".

Although his Honour was not conclusively decided on the question regarding the ambit of "significant criminal activity" as it applies to breaches of the Resource Management Act 1991, his Honour dismissed Ms Jiang's strike out application. As Ms Jiang was in receipt of legal aid, his Honour deferred any order as to costs until the substantive hearing of the Commissioner's application.

Each of the above examples provides a snapshot into how the Commissioner has sought to expand the scope of the CPRA. However, there is one case, still before the Courts, which provides a more detailed insight into how the Commissioner's approaches this type of litigation and some of the risks associated with it.

IV. Commissioner of Police v Salter

The case of *Commissioner of Police v Salter* concerns the Commissioner's attempt to seek forfeiture orders to recover what he claims are unlawful gains derived from health and safety offending of a commercial business. The case is the first of its kind in New Zealand and will provide the basis for jurisprudence and precedent that could see the Commissioner seeking businesses to forfeit income and assets to the Crown in a manner previously only directed at serious criminal enterprises.

The Commissioner's application arose as a result of the death of Mr James Bowring in September 2015. Mr Bowring was 24 at the time of his death. He died while welding a tank containing highly hazardous substances at the premises of Salters Cartage Ltd (SCL) in Wiri, South Auckland. Following this accident, SCL and its shareholder, director, and chief executive Mr Ron Salter, were convicted of health and safety and hazardous substance offences. Mr Salter and SCL were sentenced in the criminal jurisdiction.[51]

Subsequently, the Commissioner applied pursuant to the CPRA for restraining orders over properties belonging to SCL and to Mr and Mrs Salter. The Commissioner alleged that SCL was systematically non-compliant with health and safety and hazardous substance law, operating blatantly and dangerously for at least seven years. The Commissioner further alleged that, as a result, SCL's revenue was unlawfully derived and hence he will apply for forfeiture orders to recover the unlawful benefits.

In a key dispute, which was heard before the High Court and will be the focus of the following discussion, SCL and the other respondents did not oppose the restraining orders. They merely sought that the Commissioner provide an undertaking to pay any consequential damages and costs. The Commissioner refused to provide such an undertaking.

51 *Worksafe New Zealand v Salters Cartage Ltd* [2017] NZDC 26277.

After a hearing in the High Court, Palmer J, despite the Commissioner's protests, directed that the Commissioner give such an undertaking.[52] Such a decision is hugely significant in the context of civil forfeiture and could place the Commissioner in significant financial liability.

A. Background to the Case

The relevant factual background including the criminal offending has been considered by two courts:[53] Firstly, by McIlraith J in the Manukau District Court when he sentenced Mr Salter in 2017 and secondly, by Palmer J in the Auckland High Court when he considered the application for an undertaking.

Both Judges provide a summary of the relevant offending. Both summaries are similar and are not materially different from one another. Accordingly in this article, I will provide a summary of the offending that is consistent with both judgments and remains objective.

From the outset, it must be acknowledged that the death of Mr James Bowring, who was aged 24, on 15 September 2015 was a tragedy. Further, it was an avoidable tragedy which occurred as the result of numerous failings by Salters Cartage Ltd and its manager director, Mr Salter, who failed to comply with statutory duties under the Health and Safety in Employment Act 1992 and Hazardous Substances and New Organisms Act 1996. Had Mr Salter and Salters Cartage Ltd complied with these statutory obligations then, in all likelihood, Mr Bowring would not have died.

At the time of the relevant offending, SCL processed used waste oil into fuel oil, as well as providing a 24/7 response service to major spills or environmental disasters. SCL was also a specialised transporter of hazardous substances for the timber industry. The business had a fleet of vehicles, employed 25 staff and had over 3,000 customers.

On 15 September 2015, Mr James Bowring, undertook welding, grinding, and sanding on the top of Tank 20 at the direction of Race Works Ltd (a company contracted by SCL to install a catwalk next to Tank 20). Mr Bowring did not have any experience in the use of hot work permits or explosive atmosphere. At the time, Tank 20 contained approximately 2,500 to 3,000 l of diesel, petrol and kerosene oil, with a flashpoint of 17.5 °C. Mr Salter did not know Race Works Ltd was carrying out hot works or that welding work was to be carried out on Tank 20. However, Mr Salter was aware that Tank 20 did not have the legally required stationary container system test certificate, and that it was not legally compliant.

52 *Commissioner of Police v Salter* [2021] NZHC 1531.

53 See generally, *Commissioner of Police v Salter*, above n 52, at [3]–[13]; and *Worksafe New Zealand v Salters Cartage Ltd*, above n 51, at [6]–[30].

At 1.36 pm an explosion occurred. Mr Bowring was blown off the tank and into a neighbouring car yard. He died as a result. The explosion also caused significant property damage to neighbouring businesses.

After Mr Bowring's death and subsequent investigation, SCL was prohibited from operating its recycling oil plant from 16 September 2015 to 15 March 2016. Despite, this prohibition, SCL operated the plant and continued to recycle oil. Mr Salter was aware of this.

SCL and Mr Salter were prosecuted for breaches of the Hazardous Substances and New Organisms Act 1996 and the Health and Safety in Employment Act 1992.[54] They pleaded guilty to the following six criminal charges:

(a) Failing to take all practicable steps to ensure no hazard (ignition of flammable vapours in Tank 20) was present or arose in a place that harmed people, knowing that failure to take action was reasonably likely to cause serious harm to any person.[55] under ss 16(1)(a), 16(1)(b) and 48(2) of the Health and Safety in Employment Act 1992.

(b) Failing to take all practicable steps to ensure that no employee of a contractor was harmed while doing any work the contractor was engaged to do, knowing that failure to take action was reasonably likely to cause serious harm to any person.[56]

(f) Being a person in charge of a stationary container system with a capacity greater than 2,500 l and failing to ensure it was certified.[57]

(g) Being a person in charge of a class 3.1B hazardous substance (the contents of Tank 20) and failing to ensure there was not, on the packaging, information that suggests it belong to a class that it does not in fact belong to.[58]

(h) A representative charge of being a person in charge of in excess of 100 kg of LPG, a class 2.1.1A hazardous substance who failed to comply with the requirement to obtain hazardous substance LTC.[59]

54 *Worksafe New Zealand v Salters Cartage Ltd,* above n 51.
55 Health and Safety in Employment Act 1992, ss 16(1)(a), 16(1)(b) and 48(2).
56 Sections 18(1) and 49(2).
57 Hazardous Substances and New Organisms Act 1996, s 109(1)(e)(vi).
58 Section 109(1)(e)(ii).
59 Section 109(1)(e)(vi).

(i) A representative charge of being a person to whom a prohibition notice was given, failing to ensure that no action was taken in contravention of the notice.[60]

Race Works Ltd was also charged and plead guilty to one charge of being a principal, failing to take all practicable steps to ensure Mr Bowring was not harmed while doing work he was engaged to do.[61]

On 23 November 2017 Mr Salter and SCL were sentenced by McIlraith J in the Manukau District Court.[62] In approaching his sentencing decision, McIlraith J commented:[63]

> [64] It was common ground before me that the primary purposes of sentencing in this situation are to address Salters Cartage, Mr Salter and Race Works' accountability for harm done by their offending, to promote a sense of responsibility for the harm caused by them and deter others from offending in similar fashion and to provide for the interest of the victims of their offending by awarding reparation for harm arising.

His Honour ordered Mr Salter and SCL to pay reparations of $111,000 for emotional harm to Mr Bowring's family and another $17,074.21 in respect of consequential financial loss not covered by insurance.[64]

In relation to the lead charge which related to the offending prior to the explosion, his Honour imposed a fine on SCL of $202,500.[65] For contravening the prohibition notice after the explosion, which his Honour described as "belligerent" and "egregious",[66] a fine of $56,250 was imposed on SCL.[67]

In relation to Mr Salter's offending, the Judge McIlraith sentenced him to four and a half months' home detention in relation to the offending prior to the explosion.[68] In relation to the offending after the explosion, Mr Salter was ordered to pay a fine of $25,000.[69]

McIlraith J was satisfied that those involved in Race Works were victims of the tragedy. Accordingly, Race Works was convicted and discharged.[70]

60 Health and Safety in Employment Act 1992, ss 43 and 50.
61 Sections 18(1)(b) and 50.
62 *Worksafe New Zealand v Salters Cartage Ltd*, above n 51.
63 At [64].
64 At [74].
65 At [108]–[110].
66 At [119].
67 At [120].
68 At [136].
69 At [141].
70 At [80] and [142].

In total, Mr Salter and SCL were ordered to pay $128,074.21 to Mr Bowring's family, SCL was fined $258,750, Mr Salter was fined $25,000 and sentenced to four and a half months' home detention.[71]

B. The Commissioner's Application and Respondent's Request for an Undertaking

On 28 November 2019, just over two years after being sentenced, the Commissioner applied without notice for restraining orders under the CPRA that the following four properties not be disposed of, or dealt with, by any person other than as provided for in the orders:[72]

(a) 5 Bolderwood Place, Wiri, the business premises of SCL, owned by Mr Salter and Akl Trustee Ltd;
(b) 77B Burtt Road, Paerata, Auckland, the Salters' family home, owned by Mr and Mrs Salter and Akl Trustee Ltd;
(c) 269 Burtt Road, Paerata, Auckland, a property owned by Mr and Mrs Salter and Akl Trustee Ltd, rented to their daughter and son in law (both who are employees of SCL); and
(d) Unit 27, 141 The Strand, Onetangi, Waiheke Island, a holiday home owned by Mr and Mrs Salter, and Akl Trustee Ltd.

According to the Commissioner's submissions the value of these properties was $9,675,000 at the time of his application.[73]

The Commissioner's allegation, which in his view justified this action, was that SCL's business was systematically and blatantly non-compliant with both the HSE and HSNO for at least seven years.[74] The Commissioner asserted that SCL's business was carried out unlawfully and is therefore subject to the CPRA.

The Commissioner's focus is on the revenue streams generated from the production and consequent sale of recycled oil and the storage of hazardous substances, both of which used SCL's plant. The basis of the Commissioner's application was to equate a legitimate business, which had admittedly breached some health and safety regulations, with serious organised criminals and criminal groups. Whilst it cannot be disputed that the CPRA was enacted to target the latter, it is less clear whether the former is also a focus of the regime.

71 At [143].
72 *Commissioner of Police v Salter*, above n 52, at [24].
73 At [25].
74 At [1].

On 29 November 2019, Lang J granted the application without notice.[75] On 5 December 2019, the Commissioner filed an application on notice for restraining orders over the four properties.[76]

The respondents opposed the application, only on the basis that the Commissioner had not given an undertaking as to damages and costs. As a result of the Commissioner's refusal, on 24 March 2020 the respondents applied under s 29 of the CPRA for an order that the Commissioner give an undertaking as to damages and costs prior to any restraint. The respondents sought an order that:[77]

> The Commissioner will comply with any order for the payment of damages and costs to compensate the respondents for any damage and costs sustained as a consequence of the restraining orders.

The High Court was not required to determine whether the four properties, or any business income, should be forfeited to the Commissioner. The sole issue which required determination was whether the Commissioner should be compelled to give the above undertaking.

C. Justice Palmer's Decision

In giving his reasons, Palmer J immediately recognised the novel nature of the proceeding. His Honour stated:[78]

> I accept the nature of these proceedings is novel. The proceeds of crime regime has not before been applied to an ordinary commercial business that has committed health and safety or hazardous substances offences. The respondents reserve their position about whether the purpose of the Act extends to this situation until any forfeiture application is considered. I find it difficult to assess the strength of the Commissioner's case for forfeiture of particular assets at this point. That is particularly so given the novel circumstances in which the Act is sought to be applied, the issues still at large in determining what the proceeds of crime are here,

75 At [27].
76 At [28].
77 At [29].
78 At [48].

> and uncertainty about whether a forfeiture application will apply to assets or income. But I accept the Commissioner has an arguable case that could result in some sort of forfeiture orders.

In recognising the novel nature of the proceedings, his Honour also highlighted the various avenues of challenge which may be actioned by the respondents, including that the Commissioner's application falls outside the scope of the CPRA as intended by Parliament.

His Honour went on to consider the negative impact on the respondents' business and whether an undertaking was required. His Honour stated:[79]

> [52] If there is a negative impact on the business in relation to major transactions such as significant borrowing or sale, the impact is likely to be significant. The longer the period of restraint, the more likely it is that there will be a negative impact. I accept that the period of restraint is likely to be at least three years. I also accept that an undertaking as to damages is the most effective means of redress.
>
> …
>
> [54] There is no particular reason to think the Commissioner will delay or unreasonably oppose requests for variations in the restraining orders for good commercial reasons. But that cuts both ways: it makes an undertaking less necessary but opposition to an undertaking less justified. I accept that an undertaking as to damages is likely to act as an additional incentive on the Commissioner to respond to reasonable requests for variations to the orders in a reasonable, and reasonably timely, way. The relative ease of enforcing the undertaking is likely to be more efficient that pursuing a negligence action. Payment on the basis of the undertaking is by way of permanent legislative authority, under s 29(3), rather than by the Commissioner directly. But the system of public financial management and accountability encourages the Commissioner to manage that contingent liability. That incentive effect is likely to be of value when the assets restrained directly impinge on a substantial

79 At [52]–[55].

> commercial business, the operation of which is not predicated on criminal offending. I consider it is valuable here.
>
> [55] I do not consider the Commissioner's actions in pursing and administering the restraining orders in this particular case will be unduly "chilled" by an undertaking. The New Zealand Police are made of sterner and more reasonable stuff. Nor do I consider this judgment sets an undesirable precedent. If another case has materially similar facts, the precedent would be desirable. If it does not, it is not a precent. Each case turns on its own facts.

The novelty of the proceeding, the negative impact a restraining order would have on borrowing and any potential sale of the business, the long period of restraint and the likely incentive on the Commissioner to respond to variation requests in a reasonable and timely manner (if an undertaking was in place), combined to satisfy his Honour that an undertaking should be ordered.[80]

His Honour concluded that it was in the interests of justice and fairness to order the Commissioner to provide an undertaking. His Honour ordered that the Commissioner grant an undertaking that he will comply with any order for payment of damages and costs to compensate the respondents for any damage and costs sustained as a consequence of the restraining orders.[81] On that basis, his Honour granted the application on notice for restraining orders.

D. Importance of the Decision

The Commissioner immediately appealed the decision of Palmer J. Following the decision, the Police Commissioner, Andrew Coster, advised that he would wait for the Court of Appeal ruling, "before he considers whether to provide it [the undertaking] or to end the proceedings".[82]

The Commissioner's appeal was heard in 2022 and the decision is still pending. As such, without knowing the arguments advanced by the Commissioner and the respondents on appeal, it would be inappropriate to comment on the potential outcome. However, despite the ongoing appeal the importance of Palmer J's decision should not be understated.

80 At [55]–[56].
81 At [56].
82 Phil Pennington "High Court rules against police in unprecedented proceeds-of-crime case" (2 December 2021) RNZ <www.rnz.co.nz>.

The combination of civil legal aid and the civil costs regime has a significant chilling effect on respondents seeking relief from restraint or seeking to challenge the Commissioner's forfeiture applications.

Civil legal aid debt attaches to any recovered property. Alternatively, privately-funded cases face the risk of an adverse costs award, the risk of which is high. This is particularly relevant in the context of the CPRA, as the current law does not favour relief being granted from restraint.

One factor in favour of respondents is that the Commissioner is not an ordinary private litigant. Rather, the Commissioner performs a public role using the public purse. In this manner, his role is analogous to that of the Crown and Crown Solicitor offices. For example, imagine the Crown Solicitor's office seeking a costs award after a successful prosecution.

The High Court has recognised the public role performed by the Commissioner in *Commissioner of Police v Kirschberg*, where Brewer J stated:[83]

> I accept that, as a civil plaintiff the Commissioner has an entitlement (albeit substantially diluted) to pursue his claim without excessive delay. However, I do not accept that delay in this case would derogate significantly from his public function under the CPRA.

The public policy consideration at play under the CPRA were considered by the Court of Appeal in *Yan v Commissioner of Police*. In that case, the majority noted:[84]

> The Commissioner is not an ordinary civil litigant. He or she is acting in the public good with a law enforcement purpose designed to combat significant criminal activity, in particular organised crime. In the digital age and in a global economy, those imperatives are arguably more pressing than ever.

This remains an area of evolving jurisprudence. It is also important to recognise that both of the above decisions arose from cases which were not concerned with regulatory offending, such as is the subject of *Commissioner of Police v Salter*. As such, the role and public purpose of the Commissioner has not been directly confronted by the courts in the context of civil forfeiture arising from regulatory breaches.

83 *Commissioner of Police v Kirschberg* [2012] NZHC 3284 at [29].
84 *Yan v Commissioner of Police* [2015] NZCA 576, [2016] 2 NZLR 593 (French and France JJ) at [33].

The immediate consequence of the decision of Palmer J is that the Commissioner will not be able to avoid costs if his application for forfeiture fails. In other words, Palmer J made clear that the Commissioner is not immune from the civil costs faced by all civil litigants. Should the Commissioner's appeal to the Court of Appeal be dismissed, this could have a result of the Commissioner abandoning this proceeding. Should the Commissioner lose the appeal, this may force the Commissioner to reconsider his foray into the expansion of the CPRA.

Businesses should be concerned by the Commissioner's appetite to pursue this form of civil forfeiture. As commented by Mr Matthew Bloomfield, a SCL Spokesperson:[85]

> If a drug dealer owns a house and pays for a new roof with drug money, the police can take the house. The police can also take untainted assets to the value of the benefit they say [the drug dealer has] received as a result of criminal activity.
>
> It's hard for me to draw a parallel between a gang member selling methamphetamine and Salters Cartage collecting and recycling waste oil... The police are saying the income that Salters Cartage received is like drug money. If it is, so too is the income of the hundreds of businesses convicted of health and safety offences in New Zealand every year, let alone other regulatory offences.

This draws us back to the purpose of the CPRA regime. Neither the High Court nor Court of Appeal has yet commented on whether this form of civil forfeiture falls outside of the scope of the CPRA. Indeed, this may be a case where it is appropriate for Parliament to clarify the intended purpose of the CPRA. Until then, businesses, especially those who are convicted for regulatory breaches, should keep a close eye on the *Commissioner of Police v Slater* proceeding, as they too could face similar jeopardy.

V. Conclusion

"Carthago delenda est" (translation: Carthage must be destroyed). These words were the infamous dictum of Cato the Elder, a noted Roman Senator and inveigher against the Carthaginians, who clamoured for the destruction of Rome's great Phoenician challenger. Rome fought three great wars against the Carthaginians

85 Nikki Mandow "Corporate warned their 'quasi-crimes' carry same penalties as drug lords" (15 February 2022) Newsroom <www.newsroom.co.nz>.

between 264 BC and 146 BC. Ultimately, Rome was victorious, and Carthage was destroyed.

This analogy appears fitting as, like the Romans, the Commissioner has every advantage on the CPRA battlefield and shows no indication of halting his advance into the realm regulatory civil forfeiture. Unfortunately, this places businesses and respondents in the unenviable place of Carthage.

In December 2021, the Ministry for the Environment published a guide titled *Recovering the Proceeds of Crime – Referral to the Asset Recovery Units: A guide for environmental enforcement agencies*. The purpose of this guide was described as:[86]

> This is a guide for frontline environmental enforcement agencies. It explains the process of referring environmental offending to Asset Recovery Units (ARUs) within Police under the Criminal Proceeds (Recovery) Act 2009 (CPRA). It explains the referral criteria and process, and what to be aware of when making a referral.

The guide purports to be a step-by-step guide for environmental agencies as to how to refer breaches of "environmental crime" (one example given is polluting the environment) to Asset Recovery Units. The facts of the case of *Commissioner of Police v Farmer* are explicitly referred to as the type of case which can be referred to the Commissioner. The guide is not merely a "how to" for environmental agencies, but goes further, and appears to directly incentivise referrals, stating:[87]

> The current categories do not explicitly include funding for environmental initiatives. However, there may be scope to widen the pool for funding for environmental initiatives once the fund contains criminal proceeds from environmental offending.

The incentive here is clear. Not only is litigation pursuant to the CPRA a means of combating offending by targeting the proceeds of crime, but it is also a valuable and lucrative area of litigation for the Commissioner.

This article does not argue that law enforcement agencies should not take strong action against those who systematically breach, environmental, work health and safety and AML/CFT regimes. It is true that New Zealand does have an alarmingly

86 Ministry for the Environment *Recovering the proceeds of crime – Referral to the Asset Recovery Units: A guide for environmental enforcement agencies* (INFO 1036, December 2021) <https://environment.govt.nz>.

87 Ministry for the Environment, above n 86.

poor health and safety record and that businesses should be incentivised to comply with these regimes. In 2021, WorkSafe reported that, over the last 10 years, 500 people have died in the workplace.[88] WorkSafe estimated that there are between 750–900 work-related health deaths a year, with a further estimated 5,000–6,000 hospitalisations each year due to work-related ill-health.[89] These statistics cannot be ignored, nor should they be. The welfare of workers and the importance of safe and healthy work environments is essential. Regulators, law-enforcement agencies, businesses, worker representatives and politicians, should use every tool available to promote workplace health and safety, along with compliance with various other pieces of regulatory legislation.

This article does argue that the CPRA is not the appropriate legislative tool for this purpose. The purpose of the CPRA was to target organised criminal and criminal groups. This has also been the language used when subsequent amendments have been implemented. Using the CPRA to target businesses or individuals who have breached strict liability regulatory offences falls outside this intended scope.

The reality of the *Commissioner of Police v Slaters* proceeding illustrates that businesses can expect that the Commissioner (and the agencies who can refer cases to the Commissioner) will continue to attempt to expand the scope of the CPRA. The increasing scope of the CPRA should concern all businesses, especially where the alleged "serious criminal activity" are regulatory transgressions, requiring no or negligible culpability on the part of business owners or directors. The CPRA regime, as it currently stands, sets a very low bar for the Commissioner to further seek forfeiture for corporate misconduct and regulatory breaches.

It remains to be seen whether Carthage will be destroyed. In this context, the Commissioner embodies Rome, whilst businesses, like SCL, who are in no way analogous to a serious organised criminal group, Carthage. Counsel must take on the role of Hannibal. Counsel in this field must struggle against the insurmountable odds brought by the Commissioner. As exemplified by the *Commissioner of Police v Salter* litigation, to have any hope of success counsel must be ceaselessly tenacious. They must advance creative arguments and search for those small moments of local advantage which can be leveraged against the absolute advantage of the Commissioner. To adopt the words of Hannibal: "I will either find a way or make one".

88 WorkSafe "There is no reason New Zealand can't lead the world on health and safety" (press release, 28 April 2021) <www.worksafe.govt.nz>.

89 WorkSafe (press release), above n 88.

Canterbury Law Review Student Prize 2022

CLIMATE CHANGE AND THE ROLE OF THE COURTS: LITIGATION AND MITIGATION IN AOTEAROA – NEW ZEALAND

Georgina Lyes*

Mō tātou, ā, mo kā uri a muri ake nei
For us and for those who come after us

Abstract

This paper addresses the role of the courts in climate change governance and considers possible avenues for involving the courts to compel Government towards climate change action in Aotearoa New Zealand. The use of tort arguments in climate change litigation and its applicability in the New Zealand courts is argued as placing untenable strain on longstanding doctrines. Finally, the largely unexplored potential for administrative law as a mechanism for compelling the New Zealand Government to take climate action is explored, suggesting that a public law approach is best placed to accommodate the legally disruptive nature of climate change.

I. Introduction

Global anthropogenic climate change poses a significant risk to the stability and life-supporting capacity of natural systems and habitats on Earth. Human activity has driven a steep increase of greenhouse gas (GHG) emissions, resulting in accelerated and unprecedented warming of earth's climate. This warming has led to many irreversible and rapid changes in the atmosphere,[1] ocean, cryosphere

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1 Intergovernmental Panel on Climate Change (IPCC) *Climate Change 2021: The Physical Science Base (Subject to Final Editing)* (IPCC AR6 WGI 2021) at 27.

and biosphere.[2] The warming climate is causing increased frequency and intensity of severe weather events,[3] food insecurity,[4] the spread of disease,[5] destruction of habitats, and displacement of peoples.[6] The severity of these events and consequences is anticipated to increase as the climate continues to warm.[7] These issues are cumulatively contributing to growing global and local, social, and political tensions.[8]

The predicted consequences of climate change have led to a slow realisation, both internationally and domestically, that legal frameworks and policies must be put in place to mitigate, adapt and build resilience to the effects of anthropogenic climate change. The sluggish progression from the discovery of climate change as an issue to the development of specific targeted international and domestic policy demonstrates the slowness of this realisation.[9]

Despite the growth of international commitments and national laws and policies to address climate change, there is strong scientific evidence that global action to limit GHG emissions is insufficient.[10] Current emission reduction targets will likely result in a global mean temperature of 3 °C by 2100, rather than "well below 2 degrees" as prescribed by the Paris Agreement.[11] Emission reduction targets are not ambitious enough;[12] current measures will not meet commitments for emissions reduction and will not be enough to prevent catastrophic warming.[13]

2 At 7 and 9.
3 Peter Stott "How climate change affects extreme weather events" (2016) 352 Science 1517.
4 Quirin Schiermeier "Quest for climate-proof farms" (2015) 523 Nature 396.
5 Bernadette Ramirez and others "Support for research towards understanding the population health vulnerabilities to vector-borne diseases: increasing resilience under climate change conditions in Africa" (2017) 6 Infectious Diseases of Poverty 164.
6 Benoit Mayer "Who are "climate refugees"?" in Simon Behrman and Avidan Kent (ed) *Climate refugees: beyond the legal impasse?* (Routledge, London, 2018) 89; Colin Sindall, Selina Lo and Tony Capon "Governance for the well-being of future generations" (2021) 57 Journal of Paediatrics and Child Health 1749; and Simon Behrman and Avidan Kent "Who are "climate refugees"?" in Simon Behrman and Avidan Kent (eds) *Climate Refugees: Beyond the Legal Impasse?* (Routledge, London, 2018) 89.
7 IPCC, above n 1.
8 Alice Blondel *Climate Change Fuelling Resource-Bases Conflicts in the Asia-Pacific* (United Nations Development Program 2012); and Jon Barnett and Neil Adger "Climate change, human security and violent conflict" (2007) 26 Political Geography 639.
9 Oliver Milman "Ex-Nasa scientist: 30 years on, world is failing 'miserably' to address climate change" (19 June 2018) the Guardian <www.theguardian.com>.
10 *Global Climate Litigation: 2020 Status Review* (DEL/2333/NA United Nations Environment Program and Sabin Center for Climate Change Law 2020) at 6.
11 Shaikh Eskander, Sam Fankhauser and Joana Setzer "Global Lessons from Climate Change Legislation and Litigation" (2021) 2 Environmental and Energy Policy and the Economy 44 at 45.
12 Yann Robiou du Pont and Malte Meinshausen "Warming assessment of the bottom-up Paris Agreement emissions pledges" (2018) 9 Nature Communications 4810.
13 IPCC *Climate Change 2022: Mitigation of Climate Change* (IPCC AR6 WG III 2022).

The inadequacy of climate change action is reflected at the national scale in Aotearoa New Zealand (Aotearoa).[14] For over 30 years, Aotearoa has portrayed itself as "clean, green" and "100% Pure" in marketing and advertising.[15] Failure to commit in an effective way to address climate change undermines this "clean green" image,[16] and the appearance of Aotearoa as a leader of social and environmental change.[17]

Climate commentators argue that climate action in Aotearoa is inadequate for addressing the global climate crisis and will not meet obligations under international commitments. Climate Action Tracker rates Aotearoa's targets, policies, and finance for climate action as "highly insufficient" and states that action in Aotearoa will not limit warming to 1.5 °C ,[18] but puts the world on track for 3 °C of warming.[19] The New Zealand Climate Change Commission confirmed this finding in their final advice to the Government in 2021, where they confirmed that current Government policies do not place the country on track for meeting 2050 targets.[20]

There is also growing public consensus that government action on climate change is wanting. This consensus can be seen in the ever-increasing prevalence and voracity of climate activism, particularly driven by young people, both globally

14 Between 1990 and 2019, gross emissions in New Zealand increased by 26 per cent and between 2018 and 2019 by 2 per cent, see: Ministry for the Environment "Key findings of the 1990–2019 Inventory" (1 April 2021) <https://environment.govt.nz>; New Zealand is the sixth-highest per capita emitter of CO_2 among the Kyoto annex 1 countries. As of 2015, the Sustainability Council of New Zealand estimated a 42 per cent increase of emissions above 1990 levels by 2030, compared with the Government's gross emission target of 10 per cent below 1990 levels by 2030. The emission trading scheme is only estimated to result in a 0.4 per cent reduction in emissions by 2030 and the agricultural sector, despite contributing 77 per cent of emissions growth in New Zealand, are not part of the emission trading scheme, see: Bryan R Jenkins "Biophysical System Failure Pathways at the Regional Scale" in *Water Management in New Zealand's Canterbury Region: A Sustainability Framework* (Springer Netherlands, Dordrecht, 2018) 205 at 216.

15 Florian Kaefer "Credibility at Stake? News Representations and Discursive Constructions of National Environmental Reputation and Place Brand Image: The Case of Clean, Green New Zealand" (PhD Thesis, University of Waikato, 2014) at 150.

16 Avril Bell and others *A Land of Milk and Honey?* (Auckland University Press, 2017).

17 Aotearoa was the first independent country to give all adult women the vote, the first Western Allied country to become nuclear free, the first country to legally grant a legal personhood to a river, recently banned all further petroleum exploration, and was considered a leader in the handling of the COVID-19 pandemic. See "World suffrage timeline" (10 November 2021) NZ History <https://nzhistory.govt.nz>; "Nuclear Free New Zealand" Museum of New Zealand Te Papa Tongarewa <https://collections.tepapa.govt.nz>; Eleanor Ainge "New Zealand bans all new offshore oil exploration as part of 'carbon-neutral future'" (12 April 2018) The Guardian <www.theguardian.com>; and Suze Wilson "Pandemic leadership: Lessons from New Zealand's approach to COVID-19" (2020) 16 Leadership 279; Matthias Kramm "When a River Becomes a Person" (2020) 21 Journal of Human Development and Capabilities 307.

18 1.5 °C is a target in the Paris Agreement which is described in more detail in section II.

19 Climate Tracker is an NGO comprised of three research organisations that conduct independent scientific analysis to compare countries' carbon emissions with what is required to reach the 1.5 °C or 2 °C targets: "Climate Action Tracker: New Zealand" Climate Action Tracker <https://climateactiontracker.org>.

20 Zane Small and Amelia Wade "Climate Change Commission's final advice" *Newshub* (6 September 2021) <www.newshub.co.nz>.

and in Aotearoa.[21,22] Climate activism has been driven by the perceived duty to protect future generations and the environment, an awareness of environmental issues (such as severe air pollution in Asia and Africa), and the recognition of the threat climate change poses to indigenous people's rights and existence.[23] The rapid growth of the climate activism movement is well illustrated by the fact the student climate strikes, beginning in August 2018, reached a 7.6 million strong global strike by September 2019.[24]

A major feature of climate activism is the increasing global trend of people turning to the judiciary for climate justice, as opposed to taking to the streets.[25] Frustration with the inadequacies of government process and lack of substantive responses to climate change have prompted a number of individuals to take legal action in the courts, in an attempt to create waves and push for more desirable results.[26] The trend of bringing climate issues to the courts may also have been heightened by the COVID-19 pandemic, which reduced people's ability to publicly protest.[27]

Climate change litigation is a growing global phenomenon that plays a direct and indirect role in climate change governance. Plaintiffs have brought climate cases against private entities and states in the areas of civil, administrative, and criminal law. Plaintiffs argue cases under a variety of grounds, against both governments and private entities. The goals and arguments of a climate litigant may also vary, depending on whether the plaintiff is taking a tactical or strategic approach. Regardless of this variation, climate cases share common legal issues due to the legally disruptive nature of climate change.

21 Lilian Von Storch, Lukas Ley and Jing Sun "New climate change activism: before and after the Covid- 19 pandemic" (2021) 29 Social Anthropology/*Anthropologie Sociale* 205; Kelvin Zhanda, Munyaradzi A Dzvimbo and Leonard Chitongo "Children Climate Change Activism and Protests in Africa: Reflections and Lessons From Greta Thunberg" (2021) 41 Bulletin of Science, Technology & Society 87; Zoe Bergmann and Ringo Ossewaarde "Youth climate activists meet environmental governance: ageist depictions of the FFF movement and Greta Thunberg in German newspaper coverage" (2020) 15 Journal of Multicultural Discourses 267; and Naomi J Godden and others "Climate change, activism, and supporting the mental health of children and young people: Perspectives from Western Australia" (2021) 57 Journal of Paediatrics and Child Health 1759.

22 Karen Nairn "Learning from Young People Engaged in Climate Activism: The Potential of Collectivizing Despair and Hope" (2019) 27 YOUNG 435 at 436; and Karen Nairn and others "Living in and out of time: Youth-led activism in Aotearoa New Zealand" (2021) 30 Time & Society 247.

23 IPCC, above n 13, at ch 1, 21.

24 Von Storch, Ley and Sun, above n 21, at 1.

25 Jacqueline Peel and Hari M Osofsky "Climate Change Litigation" (2020) 16 Annu Rev Law Soc Sci 21 at 23; Joana Setzer and Catherine Higham *Global Trends in Climate Change Litigation 2021* (Grantham Research Institute and the Environment and Centre for Climate Change Economics and Policy 2021) at 10; *Michael John Smith v Fonterra Co-operative Group Ltd* [2021] 552 NZCA, [2022] 2 NZLR 284 at [3]; and "Global Climate Litigation: 2020 Status Review", above n 10 at 4.

26 "Global Climate Litigation: 2020 Status Review", above n 10.

27 Setzer and Higham, above n 25, at 16.

In this paper I ask: "What is the role of the courts in climate change governance, and what avenues are there for involving the courts to compel Government to create climate change action in Aotearoa New Zealand?"

I consider this question by critically analysing interdisciplinary literature, news articles, cases, climate databases,[28] and other resources to ascertain trends and legal issues surrounding climate change litigation. These findings were then applied in the context of the New Zealand legal system to determine how they might translate. This research has only considered the research question in respect to mitigation. However, cases involving adaption or resilience were not strictly excluded due to the crossover of climate issues and legal arguments. Cases that are "anti" climate regulation are not included in this research, despite summarising studies and databases generally including both positive and negative cases.[29]

If cases were referred to as climate cases in other literature, or directly dealt with climate change, they were treated as relevant. I have not undertaken analysis to classify and categorise cases and this research is not an exhaustive case base of climate related decisions. I have predominantly focused on domestic cases as I am concerned with domestic application in Aotearoa. However, international court decisions have relevancy, particularly regarding human rights.

In part II of this paper, I establish a conceptual framework and background on the basis of which climate litigation can be examined. In this section, I use international literature to explore the key aspects of international climate law, climate change as an issue, and the definitions and trends of the global movement of climate change litigation. I also examine the trends of existing climate change litigation in Aotearoa.

In part III, I evaluate the use of tort arguments in the context of climate change litigation and the applicability of a tort approach in the New Zealand courts by examining criticisms from academic literature and a recent New Zealand judgment. The application of common law tort doctrines to climate change issues is a rapidly developing and increasingly used approach in climate change litigation. In recent years, this approach has garnered some success in overseas jurisdictions. However, I will argue that the use of tort in climate change litigation places untenable strain on longstanding doctrines which is unlikely to be tolerated by the New Zealand judiciary and is an impractical way of achieving climate change mitigation.

In part IV of the paper, I consider the potential for administrative law as a mechanism for compelling the New Zealand Government to take climate action. Climate change litigation in overseas jurisdictions has been bolstered by

28 The databases used were: "Climate Change Laws of the World" <https://climate-laws.org>; and "Sabin Center for Climate Change Law" <https://climate.law.columbia.edu>.

29 Setzer and Higham, above n 25; and "Global Climate Litigation: 2020 Status Review", above n 10.

constitutional arrangements that foster strong judicial protection of human rights and environmental rights. However, Aotearoa does not have the same constitutional tradition of environmental rights protections, so the same approach does not readily apply here.

Section IV explains that there is, however, a largely unexplored opportunity to use administrative law to pressure governments to make better climate governance decisions and adhere to their mitigation commitments. Using judicial review, aspects of overseas climate litigation strategies that otherwise have contextual application issues, particularly regarding human rights, can be brought under the head of judicial review. This section explains that a public law approach is well placed to accommodate the legally disruptive nature of climate change.

In the fifth and final section, I conclude by synthesising the arguments I have made throughout the paper and highlighting "areas to watch" and areas for future research in climate change litigation.

II. Conceptual Framework

A. The Key Aspects of International Climate Change Commitments

The 1992 United Nations Framework Convention on Climate Change (UNFCCC) has near universal support and contains general legal principles that all 198 signatories agree with, including acceptance that anthropogenic activities are causing climate change.[30] The UNFCCC aims to limit emissions to a level that prevents dangerous anthropogenic climate interference without stifling economic development. The convention places the bulk of the onus of emission reductions on "more developed countries" to support "less developed countries" in the transition to low emission economies.[31]

After a series of summits and agreements (most significantly the Kyoto Protocol 1997),[32] the parties to the UNFCCC reached a landmark agreement in December 2015: The Paris Agreement. The Paris Agreement aims to strengthen the global response to the threat of Climate Change by keeping the global average temperature rise this

30 Ceri Warnock "Global Atmospheric Pollution: Climate Change and Ozone" in Peter Salmon and David Grinlinton (eds) *Environmental Law in New Zealand* (2nd ed, Thomson Reuters New Zealand Ltd, 2018) 837 at [15.3.1].

31 Helen Winkelmann, Susan Glazebrook and Ellen France *Climate Change and the Law* (Paper prepared for Asia Pacific Judicial Colloquium, Singapore, May 2019) at [9–10].

32 Kyoto Protocol to the United Nations Framework Convention on Climate Change, 2303 UNTS 162 (signed 16 March 1998, entered into force 16 February 2005).

century, well below 2 °C above pre-industrial levels, and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels.[33] The agreement also contains provisions on global adaptation and national adaption plans.[34] The agreement includes a robust and transparent accountability system using "nationally determined contributions" (NDCs), which require the preparation, communication and maintenance of successive goals for contributions to emissions that each state intends to achieve.[35]

Meeting the commitments in the Paris Agreement relies heavily on the reduction of fossil fuel dependency, requiring changes in consumer practices regarding transport, food, and energy. Another aspect of meeting these goals is the use of carbon sinks that fix carbon dioxide and reduce the concentration of GHGs in the atmosphere (such as tree planting).[36]

B. Taking Action on Climate Change: A Challenge for Governments

Despite longstanding scientific evidence of the seriousness and wide-reaching impacts of climate change, the issue has remained largely unaddressed by Governments.

The issue of climate change is diffuse, complicated, and fraught with contestation.[37] As put by Dryzek, Norgaard and Scholsberg:

> The stakes are massive, the risks and uncertainties severe, the economics controversial, the science besieged, the politics bitter and complicated, the psychology puzzling, the impacts devastating, the interactions with other environmental and non- environmental issues running in many directions.

Those best placed to address climate change (states with high levels of emissions and wealth) generally lack immediate incentives to do so. They are less likely to reap the rewards of action (as they are less vulnerable to climate impacts) and more likely to suffer economic losses.[38] Globally, there is a prevalent attitude of promoting growth at all costs. This attitude is reinforced by the power of vested interests that benefit from the current global culture of consumption and expansion.[39]

33 United Nations Conference of Parties' Paris Agreement (Paris Agreement), 3156 UNTS (signed 16 February 2016, entered into force 4 November 2016), art 2(1).
34 Article 9.
35 Article 4(2).
36 Helen Winkelmann, Susan Glazebrook and Ellen France, above n 31, at [15].
37 At [3].
38 Helen Winkelmann, Susan Glazebrook and Ellen France, above n 31, at [5].
39 Sindall, Lo and Capon, above n 6, at 1794.

Linked to the prioritisation of vested interests and growth at all costs is "political myopia". Political myopia, in a democratic system, is governmental prioritisation of present outcomes and issues, to the detriment of the future.[40] This practice stems from a desire to secure political support in the present,[41] and avoid the adverse political consequences that taking effective action for longer term issues may bring.[42] The effects of climate change are predicted to be severe but have, so far, largely been unfelt or underappreciated. The perceived lack of imminent and observable consequences of climate change has allowed the issue to fall victim to political myopia.[43]

When governments do attempt to address climate change, they treat it as an externality problem. They treat it at its margins, like they treat other social problems that threaten welfare supporting systems.[44] This treatment leads to the pre-emptive rejection of developing transformative policies to tackle climate issues. Instead of transformative approaches, governments continue to use familiar legal processes and strategies.[45] Climate change is poorly addressed when it is treated as external because it is not an external issue, it effects virtually every aspect of society.[46] Furthermore, the difficulties with addressing climate change issues are compounded by the fact that the longer it takes to find a solution, the harder it becomes to find one, and the harder (and more expensive) the problems are to address.[47]

Another reason for the inadequacy of governmental approach is the fact that climate change cannot be targeted with uniformity because there is no single institution that has legal jurisdiction and authority aligned with the scope of the problem.[48] Climate change will affect all, but disproportionately and at different rates. Furthermore, the adaptive capacity and vulnerability people have to climate change varies greatly.[49] The unequal distribution of effects has resulted in a lack of unity when tackling climate change. The effect unity can have was demonstrated

40 Alessandra Bonfiglioli and Gino Gancia "Uncertainty, Electoral Incentives and Political Myopia" (2013) 123 The Economic Journal 373 at 373.

41 Sindall, Lo and Capon, above n 6, at 1794.

42 Geoffrey Palmer "Can judges make a difference: the scope for judicial decisions on climate change in New Zealand Domestic Law" (2018) 49 VUWLR 191 at 193.

43 Jonathon Boston "Enhancing anticipatory governance: Strategies for mitigating political myopia in environmental planning and policy making" in *The Routledge Companion to Environmental Planning* (Routledge, 2019).

44 Douglas A Kysar "What Climate Change Can Do About Tort Law" (2011) 41 Environmental Law 1 at 9.

45 At 9.

46 L Kajfez-Bogataj "Climate change and agriculture vulnerability" (2005) 85 AGRIS 25 at 25.

47 Helen Winkelmann, Susan Glazebrook and Ellen France, above n 31, at [4–6].

48 At [4–6].

49 IPCC *Climate Change 2022: Impacts, Adaptation and Vulnerability* (IPCC AR6 WG II 2022).

by the world-leading approach the Netherlands has taken against climate change,[50] driven by the fact that the majority of the country is highly vulnerable to flooding and sea level rise.[51] Uniformity of effects is not observable on a global scale,[52] or at a domestic scale in Aotearoa,[53] and may, in part, explain the poor response at these levels.

These conflicts and complexities have led to a failure to address climate change using democratic processes, which has resulted in people turning to the courts for climate justice. Civic engagement and grassroots movements relating to climate change create political pressure for governments to mitigate emissions, and litigation plays an important role in doing so.[54]

C. What Role has Climate Change Litigation Played in Climate Governance?

Research indicates that climate change litigation plays a significant role in climate governance and has, directly and indirectly, led to meaningful policy changes.

Climate change litigation has resulted in direct regulatory impacts and formal legal changes stemming from judicial decisions.[55] Climate litigation has brought about steps for increasing the share of renewable energy in electricity provisioning in the United States.[56] In Australia, litigation has been instrumental in forcing administrative decision makers to consider climate change impacts, including instances where decisions are being made about the approval of large projects.[57] Eskander and others have observed increased judicial participation in climate change governance that has "compelled governments and corporate actors to pursue more ambitious climate change mitigation and adaptation goals".[58]

For governments, cases can result in binding judicial orders requiring new climate goals, more extensive regulation, environmental impact assessment reforms, and investment in infrastructure.[59] For private parties, litigation can

50 International Energy Agency *The Netherlands 2020: Energy Policy Review* (2020).
51 Teake Zuidema "The Dutch Are Building a Barricade Against Climate Change" (10 July 2019) Peril & Promise: The Challenge of Climate Change <www.pbs.org>.
52 Kelly Dorkenoo, Murray Scown and Emily Boyd "A critical review of disproportionality in loss and damage from climate change" (2022) 13 WIREs Climate Change 770.
53 Laura McKim *A systematic review of recent research: Implications for policy and management, and tools to support adaptation decision making in New Zealand* (C01X1225 NIWA 2016).
54 IPCC, above n 13, at ch 1, 21.
55 Kim Bouwer "The Unsexy Future of Climate Change Litigation" (2018) 30 J Envtl L 483 at 487.
56 Hari M Osofsky "Litigation's Role in the Path of US Federal Climate Change Regulation: Implications of *AEP v Connecticut*" (2012) 46 Val UL Rev 447.
57 IPCC, above n 13, at TS-111; and Eskander, Fankhauser and Setzer, above n 11, at 69.
58 "Global Climate Litigation: 2020 Status Review", above n 10, at 5.
59 Maryam Golnaraghi and others *Climate Change Litigation – Insights into the evolving global landscape* (The Geneva Association, April 2021) at 20.

produce altered regulatory environments,[60] project delays or denials, injunctions, or damages awards.[61] These outcomes are important for all defendants as they can lead to significant liability.[62]

To evaluate whether a climate case has played a role in furthering climate governance (by advancing the objective of achieving better climate outcomes), the judgment and orders made by the court could be analysed to determine whether they support better (more ambitious, more stringent) climate regulation. However, the regulatory impacts of climate litigation can stem directly from orders made in a judgment or indirectly, in other ways.[63] So, an analysis of the judgment and orders alone would be overly simplistic and would ignore impacts outside of the judicial process.[64]

Considering the overall impact of a case before, during and after it is decided, gives a more comprehensive and accurate assessment of the role of climate change litigation in climate governance.[65] Such an assessment may include the consideration of case party behaviours, changes in public opinion,[66] financial and reputational consequences, and instances of further litigation.[67] These indirect impacts are arguably just as important as orders made by a court in legal proceedings (though they are much harder to quantify and track).[68]

For example, climate change litigation can lead to political pressure on governments to act by bringing greater public focus and visibility to climate issues

60 At 20.
61 At 4.
62 "Global Climate Litigation: 2020 Status Review", above n 10, at 10.
63 Joana Setzer and Rebecca Byrnes *Global Trends in Climate Change Litigation: 2020 Snapshot* (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy 2020); and Jacqueline Peel and Hari M Osofsky *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, Cambridge, UK, 2015).
64 Setzer and Higham, above n 25, at 18.
65 Setzer and Byrnes, above n 64.
66 Organised by: EUPHA-LAW and others, Chair persons: David Patterson and Vlatka Matkovice Puljic "1A Workshop: Public health, climate change and strategic litigation" (2021) 31(Suppl 3) Eur J Public Health ckab164.
67 The success in *Urgenda Foundation v The Netherlands* [2015] HAZA c/09/00456689 (Supreme Court of the Netherlands) spurred similar claims in Ireland, France, Belgium, Sweden, Switzerland, Germany, the United States, Canada, Peru and South Korea, see: Golnaraghi and others, above n 60, at 20.
68 Setzer and Higham, above n 25, at 19; Anke Wonneberger and Rens Vliegenthart "Agenda-Setting Effects of Climate Change Litigation: Interrelations Across Issue Levels, Media, and Politics in the Case of Urgenda Against the Dutch Government" (2021) 15 Environmental Communication 699; and Susan Glazebrook *The Role of Judges in Climate Governance and Discourse* (Paper based on a presentation given at the Asia Pacific Judicial Conference on Climate Change, November 2020 2020) at 18.

and their urgency.[69] Litigation can encourage internal scrutiny of decision makers (or within companies). And, although those bringing the case may not win, the proceedings could highlight an inadequacy or weakness of law or policy. Drawing attention to an inadequacy of law may lead to legal reform and a case thereby indirectly influencing political decision making.[70]

Cases can fail on substantive claims but contribute to incremental progress by allowing cases that come after them to build on their claim, or some aspect of success in their legal argument. For example, in *Teitiota*, the plaintiff was refused refugee status which they sought on the grounds of climate change related effects. However, the Court still held that states have an obligation to protect the right to life, meaning those facing more imminent threats caused by climate change might seek sanctuary in a country on human rights basis in the future.[71] Similarly, the delivery of a strong dissenting opinion can pave the way for success in a future claim.[72]

Climate change litigation can also encourage further legal action.[73] Instigating further legal action in this way could create a positive feedback loop where: cases further policy, which leads to more cases being brought, which leads to more policy changes. The encouragement effect that litigation can have is demonstrated by the fact that similar cases are often brought in other jurisdictions following important watershed decisions.[74]

Some successful cases have had significant policy implications beyond what was required by the court. For example, in *Milieudefensie v Shell*, a judgment holding one company legally responsible for climate harms led to other high-emitting companies confirming they will also be increasing climate change mitigation efforts.[75] Similarly, in *Neubauer v Germany*, immediately following a judgement in favour of climate plaintiffs, the German Cabinet approved emission reduction targets that went much further than what was ordered in court.[76]

The prospect of litigation can also act as a pre-emptive deterrent of behaviour that would incite litigation, or an incentive to make climate friendly decisions to avoid it.[77] Literature advising companies on how to reduce their risk of climate

69 Paola Villavicencio Calzadilla "Climate Change Litigation: A Powerful Strategy for Enhancing Climate Change Communication" in Walter Leal Filho, Bettina Lackner and Henry McGhie (eds) *Addressing the Challenges in Communicating Climate Change Across Various Audiences* (Springer Nature, Cham, 2019) 231 at 243.

70 Laura Burgers "Should Judges Make Climate Change Law?" (2020) 9 Transnational Environmental Law 55 at 67.

71 Setzer and Higham, above n 25, at 20.

72 Setzer and Byrnes, above n 64.

73 Jolene Lin "Climate change and the courts" (2012) 32 Legal Studies 35 at 38.

74 IPCC, above n 13, at ch 1, 32.

75 Setzer and Higham, above n 25, at 20.

76 At 19.

77 Golnaraghi and others, above n 60; Setzer and Byrnes, above n 64; and Helen Winkelmann, Susan Glazebrook and Ellen France, above n 31, at [37].

change litigation demonstrates the deterrent effect cases can have.[78] Litigation can be costly regardless of its outcome and something that companies and governments aim to avoid.[79] Therefore, the mere threat of climate litigation could itself lead to a reduction in emissions.

D. What is Climate Change Litigation? Definitions and Trends

1. Definitions

Scholars draw different parameters around what is and is not climate change litigation because there is no universal definition.[80] A case may directly relate to climate change by using it as the basis for judicial action,[81] or climate change may make up only one aspect of a case's legal argument. Conversely, a case may be targeting a specific outcome or circumstance that only from an overarching perspective can be seen to relate to climate change. For example, young New Zealanders in the "Make 16 Campaign" argue the voting age of 18 is unjustified discrimination and inconsistent with the New Zealand Bill of Rights Act 1990 (NZBORA).[82] Their campaign seeks to lower the voting age, but a major underlying motivator of the cause is a desire to have the opportunity to influence climate change-related decision-making.[83] This example shows that the fact that climate change was a motivation for bringing a case may not always be obvious.

Markell and Ruhl developed a definition for climate change litigation referred to by Burger and Gundlach, Eskander and others, and Golnaraghi. These academics define climate change litigation as lawsuits brought before administrative, judicial, and other investigatory bodies that raise issues of law or fact regarding the science of climate change and climate change mitigation and adaptation.[84] Setzer and Higham narrowed the definition to cases brought before a judicial body that raise an issue of law or fact regarding the science of climate change and/or climate change

78 Prafula Pearce "Duty to Address Climate Change Litigation Risks for Australian Energy Companies" (2021) 14 Energies 7838.

79 Setzer and Higham, above n 25, at 4; and Golnaraghi and others, above n 60, at 7.

80 Peel and Osofsky, above n 25, at 23; and Bouwer, above n 56, at 487.

81 *Smith v Fonterra Co-operative Group Ltd* [2020] 419 NZHC, [2020] 2 NZLR 394.

82 New Zealand Bill of Rights Act 1990.

83 Anna Bracewell-Worrall "Group of young people push Government to drop voting age to 16" *Newshub* (19 September 2022) <www.newshub.co.nz>.

84 David Markell and JB Ruhl "An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual Climate Change Special Issue" (2012) 64 Fla L Rev 15 at 27; and Michael Burger and Gundlach Justin *The Status of Climate Change Litigation A Global Review* (DEL/2110/NA United Nations Environment Program and Sabin Center for Climate Change Law) at 10; Eskander, Fankhauser and Setzer, above n 11, at 50; and Golnaraghi and others, above n 60, at 11.

mitigation and adaptation policies or efforts as a main or significant issue.[85] Once cases are categorised as climate cases, they are still largely heterogenous,[86] and can be classified in a number of ways.[87]

2. Global Trends

Climate change litigation is a relatively new phenomenon, with the first significant decisions occurring in the early and mid-1990s.[88] Climate change science itself has only been widely recognised for around 30 years and was still being challenged in the courts as recently as 2007.[89] Climate change litigation is regarded to have begun in the United States in the late 1980s but has since become a global trend.[90] The number of cases are ballooning, more than doubling since 2015.[91] The vast majority of climate change litigation has occurred in the United States,[92] which has prompted researchers to separate cases into United States and non-United States jurisdictions.[93]

Overall, climate litigation has aligned with climate goals.[94] The movement has resulted in significant successes, and recent years have brought a run of important cases.[95] The growing phenomenon might, in part, be attributed to global advances in international and domestic commitments to climate action, as well as being spurred

85 Setzer and Higham, above n 25, at 9; Broadly, this is the definition applied to this research but I have focused on mitigation cases.

86 At 11.

87 Meredith Wilensky *Climate Change in the Courts: An Assessment of Non-US Climate Change Litigation* (Sabin Center for Climate Change Law 2015) separated cases into categories: (A) Substantive claims regarding climate change laws and regulations, (B) Procedural cases related to environmental impact assessment (EIA) and permitting, (C) Claims asserting rights relating to climate change, and (D) Claims surrounding climate science; Golnaraghi and others, above n 60, at 6 (categorised by: motivation, litigants, and extent to which case is about climate change); and Helen Winkelmann, Susan Glazebrook and Ellen France, above n 31 used categories from LSE Grantham Research Institute of Climate Change and the Environment: litigation to hold governments to account for policy and legislative commitments, litigation as a form of climate change regulation (indirect and direct regulation), litigation to protect a groups enjoyment of the environment (or to compensate for damages), litigation to enforce good corporate governance (including information disclosure relating to CC) and added the category of litigation by indigenous peoples.

88 Brian J Preston "Climate Change in the Courts" (2010) 36 Mon LR 15 at 16.

89 At 16.

90 Setzer and Higham, above n 25, at 8.

91 Joana Setzer and Catherine Higham *Global Trends in Climate Change Litigation: 2022 Snapshot* (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy 2022) at 1.

92 "Global Climate Litigation: 2020 Status Review", above n 10, at 13; and Eskander, Fankhauser and Setzer, above n 11, at 51 and 69.

93 "Global Climate Litigation: 2020 Status Review", above n 10; Wilensky, above n 88; and "Climate Change Litigation Databases: Sabin Center for Climate Change Law" Climate Change Litigation <http://climatecasechart.com>.

94 Setzer and Higham, above n 25, at 19.

95 At 4 and 5.

on by successes in past climate cases.[96] Growth in volume of climate cases could also be credited to the truly global nature of the movement, categorised by the cross pollination of ideas, strategies, and support across jurisdictions.[97]

National and subnational governments commit to climate mitigation through international agreements, legislation, regulation, and policy statements. However, climate ambition in countries around the world remains inadequate for meeting the challenges of climate change.[98] Actions have been taken to challenge climate commitments themselves, how they are being carried out, or the fact they are not being carried out at all.[99] Challenges are made by seeking the courts' enforcement of existing climate law, the integration of climate action into existing laws, clear definitions for climate rights and obligations, and compensation for climate harms.[100] Cases can also seek to make international and global climate concerns relevant to local action, and to force adaptation action, or recover damages for others' failures to adapt.[101]

Governments are the most common defendants in climate change litigation cases.[102] Cases against governments typically claim that policies or specific decisions (such as national emissions targets, government licenses and permits, or subsidies for fossil fuel production or use) are inconsistent with human rights,[103] constitutional rights and principles,[104] international commitments,[105] legislative commitments,[106] or policy commitments to reduce GHG emissions.[107]

Plaintiffs also bring cases against private entities on a variety of grounds. Key examples include cases seeking to hold emitters responsible for climate harms and arguments that private parties have ignored or misused knowledge about climate risks.[108]

Statutes and national policies have codified climate change obligations for private and public actors. They provide a legal basis for dispute of obligations' legality, applicability, or implementation. Codified obligations such as these are

96 At 10; and Golnaraghi and others, above n 60, at 6.
97 Golnaraghi and others, above n 60, at 9.
98 Eskander, Fankhauser and Setzer, above n 11, at 60.
99 "Global Climate Litigation: 2020 Status Review", above n 10, at 17.
100 At 6.
101 At 10.
102 Setzer and Higham, above n 25, at 5; Eskander, Fankhauser and Setzer, above n 11, at 51; and Setzer and Byrnes, above n 64.
103 *Urgenda Foundation v The Netherlands*, above n 68.
104 *Greenpeace Nordic Assn v Ministry of Petroleum and Energy (People v Arctic Oil)* HR-2020-2472-P, (20-051052SIV-HRET).
105 "*PUSH Sweden, Nature and Youth Sweden and Others v Government of Sweden*" Climate Change Litigation <http://climatecasechart.com>.
106 *Thomson v Minster for Climate Change Issues* [2018] NZLR 160, [2017] NZHC 733.
107 *Friends of The Irish Environment CLG v Ireland* [2020] IESC 49.
108 "Global Climate Litigation: 2020 Status Review", above n 10, at 13.

becoming the most common bases for climate litigation.[109] The two other most cited grounds are cases based on constitutional and human rights or common law tort theories.[110]

Although these grounds are conceptually distinct, cases will often advance multiple grounds or use a hybrid approach.[111] For example, in *Urgenda*, the duty of care claimed was a codified one, but the Supreme Court defined its scope with reference to constitutional and human rights under the European Convention on Human Rights. In *Juliana,* it was argued that the common law doctrine of public trust was informed by, and enforceable because of, constitutional provisions. These cases argue that the violation of statutory mandates requiring climate mitigation is also a violation of human rights.[112]

Setzer, Higham and Golnaraghi and others describe the trends of climate change litigation in three waves.[113] The first wave was primarily administrative cases aimed at raising environmental standards. The second wave, saw 'gap-filler' cases, aimed to compensate for the absence of ambitious international action. The third wave is categorised by a further expansion of claims, volume of cases, types of defendants, and jurisdictions.

In the third, and most recent wave, cases have centred around holding governments and other entities to account for failure to act consistently with their responsibilities to mitigate or adapt to climate change. The third wave can be divided into challenges regarding government action or omission ("systemic cases") and challenges relating to government authorisation of third-party projects (such as the approval of a high emission project). This wave has also brought an expansion of claims against corporate entities using a variety of arguments, particularly common law tort duties. Cases against private entities have also begun to allege fraud, disclosure failures,[114] greenwashing,[115] and have attempted to use corporate governance law to infer climate responsibilities.[116]

Climate change litigation is often divided into strategic and tactical cases. Tactical cases involve issues that concern only the parties to the case or pursue

109 Setzer and Higham, above n 92, at 33.
110 "Global Climate Litigation: 2020 Status Review", above n 10, at 40; and Setzer and Higham, above n 25, at 6, 16, and 26.
111 "Global Climate Litigation: 2020 Status Review", above n 10, at 43; and Setzer and Higham, above n 25, at 6.
112 "Global Climate Litigation: 2020 Status Review", above n 10, at 43.
113 Golnaraghi and others, above n 60, at 13; and Setzer and Higham, above n 25, at 23–30.
114 Helen Winkelmann, Susan Glazebrook and Ellen France, above n 31, at [123].
115 Setzer and Byrnes, above n 64.
116 Wei Qian "Legitimacy in Good Governance: What Drives Carbon Performance in Australia" [2013] Corporate Ownership and Control 39.

narrow interests.[117] These cases are generally private interest cases (including civil and administrative procedures) that may not involve activist intent.[118]

Conversely, strategic cases aim to create a broader societal shift. They use litigation as an advocacy or governance strategy.[119] Strategic litigants often aim to improve climate policies, increase visibility of the issue, or alter the behaviour of government or industry actors.[120] Strategic cases make strategic decisions about who will bring the case, where and when it will be filed, and the legal remedy that will be sought.[121] There is evidence that strategic litigation can strengthen government resolve and stimulate action to address environmental and climate goals.[122]

In the past, non-United States climate litigation cases have been primarily tactical, with strategic litigation rarely being used as a tool for driving climate change policies.[123] However, the number of strategic cases in other jurisdictions is on the rise.[124] As of 2021, there had been 37 "systemic mitigation" cases around the world, challenging government inaction and climate commitments.[125] Strategic cases are also increasingly targeting private entities such as corporations that are considered to be "carbon majors" (major contributors to global GHG emissions).[126]

Despite the wide-reaching variation among climate cases in goal, defendant, motivation, and approach, they commonly share several broad legal issues due to climate change's legally disruptive features.[127] Common legal issues in climate cases are: whether a party can legally bring a case (standing and justiciability),[128] the source of rights or obligations implicated by climate harms (the grounds), whether the forum the grievance is brought to is able to provide relief (remedy), and difficulties with attribution science (causation).[129]

Establishing that a plaintiff has a particular right (or standing) to advance a claim to a court is a common issue in climate change litigation. Failure to establish

117 Setzer and Higham, above n 25, at 13; and Eskander, Fankhauser and Setzer, above n 11, at 51.
118 Golnaraghi and others, above n 60, at 18–19.
119 Setzer and Higham, above n 25, at 13; and Eskander, Fankhauser and Setzer, above n 11, at 51.
120 Setzer and Higham, above n 25, at 12; Eskander, Fankhauser and Setzer, above n 11, at 51; and Golnaraghi and others, above n 60, at 6.
121 Golnaraghi and others, above n 60, at 18–19.
122 Organised by: EUPHA-LAW and others, above n 67.
123 Wilensky, above n 88, at vii; and Eskander, Fankhauser and Setzer, above n 11, at 51.
124 Setzer and Higham, above n 92, at 18.
125 Setzer and Higham, above n 25, at 4.
126 Golnaraghi and others, above n 60, at 21.
127 Elizabeth Fisher, Eloise Scotford and Emily Barritt "The Legally Disruptive Nature of Climate Change" (2017) 80 The Modern Law Review 173.
128 At 39.
129 "Global Climate Litigation: 2020 Status Review", above n 10, at 37.

standing has contributed to an unsuccessful outcome for several promising cases.[130] However, standing is a largely circumstantial hurdle, and therefore must be considered on a case-by-case basis.[131]

3. Trends of climate change litigation in Aotearoa

Aotearoa has a complex nexus of policy and laws that aim to address climate change issues. These policies and laws range from the international level to the local council level.[132]

Almost half of Aotearoa's climate cases relate to renewable energy projects, with claims both for and against approval. Climate cases from Aotearoa generally relate to the 2004 amendment of the New Zealand Resource Management Act that requires decision makers to look at the effects of climate change,[133] and benefits of use and development of renewable energy.[134] The two cases that found in favour of approving renewable energy projects, reasoned that the climate change benefits were relevant despite the small scale of the projects. Cases that found against approval of new projects deemed the aesthetic impacts too severe to warrant approval.[135]

Other cases in Aotearoa have challenged the consideration of emission sources in decision making. Plaintiffs argue emissions should be considered when granting resource consents for projects that will emit GHGs. These cases often centre on determining to what extent climate change considerations are mandatory under the Resource Management Act.[136] The High Court, in *Greenpeace New Zealand v Northland Regional Council,* found that indirect GHG emissions should be considered for direct sources.[137] However, *Greenpeace New Zealand,* has since been overturned in *West Coast v Buller Coal*, where the Supreme Court held that indirect or "downstream" emissions should not be considered by decision makers.[138]

130 *Sabo v Parliament* [2021] Case T-141/19 C-297/20 P (European Court of Justice); "*KlimaSeniorinnen v Switzerland (ECtHR)*" Climate Change Litigation <http://climatecasechart.com>; and *Michael John Smith v Fonterra Co-operative Group Ltd* [2022] NZSC 35. Part of the reasoning that led to the failure of these cases was the inability to show harm suffered beyond that of the general public, therefore, the plaintiffs could not establish standing.

131 Standing will therefore, not be examined in this paper in any in-depth way. Other aspects of justiciability, possible grounds, the adequacy of remedies, and causation implications are analysed throughout the paper.

132 Julia Harker, Prue Taylor and Stephen Knight-Lenihan "Multi-level governance and climate change mitigation in New Zealand: lost opportunities" (2017) 17 Climate Policy 485 at 486.

133 Wilensky, above n 88, at 25.

134 Resource Management (Energy and Climate Change) Amendment Act 2004.

135 Wilensky, above n 88, at 25.

136 Helen Winkelmann, Susan Glazebrook and Ellen France, above n 31, at [81].

137 *Greenpeace New Zealand v Northland Regional Council* [2007] NZRMA 87, (2006) 12 ELRNZ 377; Note that indirect emissions refer to emissions that will eventuate as a result of a project but are unrelated to the processes onsite. For example, the emissions resulting from the burning of coal (by the consumer) mined at a project site.

138 *West Coast v Buller Coal* [2013] NZSC 87, [2014] 1 NZLR 32.

There has only been one case in Aotearoa that has centred around Human Rights. In this case, a Kiribati citizen sought refugee status under the Refugee Convention on the grounds that the impacts of climate change made it economically unviable for him to return to Kiribati.[139] The Court of Appeal (affirmed by the Supreme Court) held that climate change did not warrant refugee status under Refugee convention as it would not appropriately address the issues of climate change.[140]

III. Tort Law as a Means to Compel Government Action on Climate Change

As discussed above, climate change litigants have advanced a number of grounds in targeting private entities. Tort arguments are the most common approach taken in cases with private party defendants, but have also been brought against government defendants.[141] The use of tort doctrines in a climate context has recently been made explicitly relevant to the New Zealand courts in the case of *Smith*, which is awaiting appeal in the Supreme Court. [142] The considerable attention afforded to tort and climate mitigation, and recent introduction to New Zealand's judiciary, forms the basis for consideration of tort as an avenue to advance mitigation in Aotearoa.

Tort has been used extensively in environmental litigation,[143] but should not be the principal avenue for litigation aiming to create better climate change outcomes through mitigation. Climate litigants have attempted to bring climate change under the banner of tort law, but they represent a very small proportion of all climate cases.[144] Tort arguments have mostly occurred in the United States, predominantly under nuisance, negligence, and trespass,[145] with varying levels of success.[146] More recently, tort cases have claimed novel and inchoate tort duties.[147]

There are several issues with using tort law litigation as a means for creating better outcomes for climate change action.[148] The limited number of cases relying on tort could be explained by the hurdles associated with establishing such a claim, particularly in common law jurisdictions,[149] and the limited exportability

139 United Nations Convention relating to the Status of Refugees, 189 UNTS (signed 28 July 1951).
140 *Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107.
141 Wendy Bonython "Tort Law and Climate Change" (2021) 40 UQLJ 421.
142 *Smith v Fonterra Co-operative Group Ltd* [2020] 419 NZHC, [2020] 2 NZLR 394.
143 Burgers, above n 71.
144 Setzer and Higham, above n 25, at 42.
145 Helen Winkelmann, Susan Glazebrook and Ellen France, above n 31, at [101].
146 Martin Spitzer and Bernhard Burtscher "Liability for Climate Change: Cases, Challenges and Concepts Special Issue: Climate Change and Environmental Liability" (2017) 8 JETL 137.
147 *Smith v Fonterra*, above n 82.
148 Kysar, above n 45.
149 Setzer and Higham, above n 25, at 25.

of successful tort cases to new jurisdictions.[150] These challenges can be organised into incompatibilities with long standing tort doctrines and the impractical and ineffective ability of tort law to compel mitigation of GHG emissions. The limitations apply to cases with private and public defendants.[151]

A. The Incompatibilities of Climate Change and Tort Doctrines

The law of torts is relevant where an entity causes harm to another entity or their interests.[152] Tort is concerned with compensating an injured party for the loss they have incurred or with restoring the party to the position they would be in had the interference not occurred.[153] Litigation commonly expands the parameters of existing torts and can even result in the emergence of a new tort. The fact that a claim is novel does not necessarily mean it will fail.[154] In striking out new claims, courts must be certain the claim is so untenable that it could not succeed. The courts must also be cautious in striking out claims in developing areas of law.[155]

Climate litigants, under the umbrella of tort, have attempted to strain the parameters of common law causes of action, in a bid to press for more favourable climate outcomes.[156] Although the motivation in seeking accountability for large scale emitters is understandable,[157] scholars argue it leads to significant straining of the fundamental doctrines of tort law: duty, breach, causation, and harm.[158] In the context of Aotearoa, this straining translate to challenges in establishing a duty of care, breach of said duty, and causation.[159] In order for a court to recognise a claim in tort law for climate related harms, judges must radically alter the fundamental doctrinal features of tort law to allow the claim to fit within its ambit.[160] The need for

150 Both *Urgenda* and *Milieudefensie* were heavily reliant on the contextualities of the Dutch legal system, see: *Urgenda Foundation v The Netherlands*, above n 68; and "*Milieudefensie v Royal Dutch Shell plc*" Climate Change Litigation <http://climatecasechart.com>.

151 Ryan Gunderson and Claiton Fyock "The Political Economy of Climate Change Litigation: Is There a Point to Suing Fossil Fuel Companies?" (2022) 27 New Political Economy 441 at 442.

152 Stephen Todd "Introduction" in *Todd on Torts* (Thomson Reuters New Zealand Wellington, New Zealand, 2019) 1 at [1.1.01].

153 At [1.2.01].

154 At [1.2.03].

155 *Couch v Attorney-General (No 2)* 3 NZLR 149, [2010] NZSC 27, at [33].

156 Bouwer, above n 56, at 489.

157 63 per cent of carbon dioxide and methane emitted between 1751 and 2010 can be attributed to 90 emitters so seeking liability for their contributions is a rational pursuit, see: Richard Heede "Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010" (2014) 122 Climatic Change 229.

158 Kysar, above n 45, at 9; and Bonython, above n 142, at 24.

159 Bonython, above n 142, at 426.

160 Nicola Durrant "Tortious liability for greenhouse gas emissions? Climate change, causation, and public policy considerations" [2007] QUT LR world at 405.

alterations is largely due to the scale and complexity of climate change that makes it unanalogous to established tort claims.

1. Duty and breach

The scope of potential defendants in a tort regarding the emissions of GHGs is indeterminate. Indeterminacy of scope arises because virtually every person on earth is implicated as a contributor to global emissions. The same is true for potential claimants. All are harmed by climate change (though unequally),[161] and could therefore have a claim.[162] The indeterminate nature of such a claim leads to a conflict with several policy issues that courts commonly consider in deciding the extent of tort duties. Namely, the effect on certainty and coherence in the law and the practicality of limiting the ambit of liability.[163]

Another major challenge is meeting the requirement of foreseeability without stretching the concept of limited obligation beyond recognition. This challenge arises because GHGs only indirectly impact ecosystems and human health, which is distinct from other pollutants that tort duties have been founded on.[164] For example, if humans or ecosystems come into contact with arsenic, they can suffer health effects directly caused by exposure to the heavy metal.[165] Contrastingly, the impacts caused by GHG emissions are diffuse and indirect; GHGs accumulate in the atmosphere, trapping more heat in earth's systems, leading to increased temperatures, causing extreme weather and climate events that degrade communities and the environment.[166]

Furthermore, due to the cumulative nature of GHGs, there is difficulty in pinpointing when an alleged duty to avoid emissions arises, and when harm is reasonably foreseeable. It is extremely difficult to pin down the exact point at which a contributor's actions became foreseeably harmful, because the issue of climate change has been building for so long, and there are so many actors.[167]

161 High Commissioner for Human Rights *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights* UN Doc A/HRC/10/61 (15 January 2009).

162 David Bullock "Public Nuisance and Climate Change: The Common Law's Solutions to the Plaintiff, Defendant and Causation Problems" [2022] The Modern Law Review at 1.

163 Stephen Todd, above n 153, at [1.2.03].

164 Kysar, above n 45, at 17.

165 Nygerma L Dangleben, Christine F Skibola and Martyn T Smith "Arsenic immunotoxicity: a review" (2013) 12 Environ Health 73; Saeed Bagherifam and others "Bioavailability of Arsenic and Antimony in Terrestrial Ecosystems: A Review" (2019) 29 Pedosphere 681; and Meng Du and others "The potential risk assessment for different arsenic species in the aquatic environment" (2015) 27 J Environ Sci 1.

166 John FB Mitchell "The 'Greenhouse' effect and climate change" (1989) 27 Reviews of Geophysics 115.

167 Kysar, above n 45, at 41.

2. Causation

Another hurdle for climate cases using tort law is causation. Causation is the requirement that, in order to establish tortious conduct, the complainant's harm must be attributable to the defendant's action (or omission).[168]

Causation remains the most difficult hurdle to overcome in climate change related tort arguments.[169] The courts retain the use of the but-for-test, that being that liability is attached if harm would not have occurred absent the defendant party's breach of duty. Most climate-related issues are naturally occurring (heatwaves, droughts, storms). This fact creates difficulties for a plaintiff aiming to satisfy the but-for-test, because weather events might have occurred regardless of whether there was an increase in GHGs caused by defendant's actions.[170]

Causation issues can be overcome, to some degree, by scientific and statistical evidence that enables the attribution of events or phenomena to climate change (for example, sea level rise, the melting cryosphere and increased frequency and intensity of weather events) but actual causation will be a struggle to prove.[171] This is because of causal diluteness, which remains arguably the most difficult doctrinal barrier to establishing causation.[172] Causal diluteness refers to the fact that the causal effect of any single emitter is watered down by the innumerable contributors to climate change.[173] Various doctrines have been suggested to apply to overcome causal diluteness,[174] but the fact there are so many contributors to climate change greatly limits the ability of a plaintiff to establish a causal nexus. Tort law is fundamentally "designed for addressing discreet harms by discrete actors" and to right wrongs as a whole, not tackle them at their margins.[175]

Even if a causal connection between a defendant's action and a plaintiff's harm is established, a defendant would only be liable for the proportion of harm that they caused. Given the massive number of actors in the issue of climate change, imposing liability for a portion of climate harm would lead to absurdity. For example, a plaintiff may only be able to recover one per cent (or less) of damages.[176] Additional absurdity

168 Stephen Todd, above n 153, at [1.3].
169 Thomas Burman "A New Causal Pathway for Recovery in Climate Change Litigation?" (2022) 52 Envt L Rep 10038; and "Global Climate Litigation: 2020 Status Review", above n 10, at 22.
170 Kysar, above n 45, at 32.
171 At 34.
172 Kysar, above n 45; and Jacqueline Peel, Hari M Osofsky and Anita Foerster "Shaping the Next Generation of Climate Change Litigation in Australia" (2017) 41(2) MULR 793 at 823.
173 Kysar, above n 45, at 30.
174 Some commentators suggest the use of market share liability as applied in the diethylstilbesterol crisis, other suggest joint and several liability as applied in the context of asbestos claims, see: Kysar, above n 45, at 31 and 37.
175 At 38.
176 At 39.

ensues in the determination of contributory negligence, since every person on the planet is implicated as a contributor to climate change.[177]

Another issue Kysar identifies is that much of climate change harms are predicted and yet to be actualised. Therefore, a lack of observable harm might mean the only way to satisfy the element of harm, required in torts, would be through significant expansion in the recognition of future injury or anticipatory harm.[178]

Given the severity of these doctrinal restraints, what is more likely than judges attempting to reconcile doctrinal incompatibilities through judicial creativity, is the classing of defendants' actions as non-tortious.

Seeking a remedy in equity (such as injunction) to prevent future damage occurring could bypass some of the difficulties in establishing breach and damage.[179] Furthermore, the challenges associated with establishing causation are arguably diminishing,[180] due to the progress in climate science (for attribution, contribution, and effects) and development of international and domestic legal policy instruments that acknowledge the threat of climate change and the fact that mitigation measures are needed.[181]

B. The Inability of Tort to Tackle the Overarching Issues of Climate Change

Even if conceptual incompatibilities are seen to be reconcilable, as they have in some cases,[182] the issue remains that tort is an insufficient, ineffective, and inappropriate mechanism for addressing climate change.

Tort law aims to right a civil wrong between parties.[183] Remedies are available in tort to protect plaintiffs from future harm, even if any harm is yet to be suffered. However, entitlement to preventative or anticipatory remedies is significantly more burdensome to obtain than entitlement to reparative tort remedies.[184]

Although a mechanism for righting past wrongs has application in a climate change context where harm has been suffered, it is less useful in compelling mitigation. Achieving emissions reduction requires forward-looking solutions, not reparative ones. Using tort law to compel mitigation either necessitates the indirect influence of major emitters to reduce emissions (by disincentivising behaviour that

177 Glazebrook, above n 69.
178 Kysar, above n 45, at 44.
179 Peel, Osofsky and Foerster, above n 173; and Tim Baxter "Urgenda-Style Climate Litigation Has Promise in Australia" (2017) 32(3) AER 70.
180 Rupert F Stuart-Smith and others "Filling the evidentiary gap in climate litigation" (2021) 11 Nature Climate Change 651.
181 Peel, Osofsky and Foerster, above n 173, at 823.
182 *Urgenda Foundation v The Netherlands*, above n 68.
183 John Murphy "Rethinking Injunctions in Tort Law" (2007) 27 OJLS 509 at 528.
184 Stephen Todd, above n 153, at [1.1.01].

might incite litigation) or asking the courts to create a parallel regulatory framework (which is outside of their role). The impracticality of using the courts as a regulator has been acknowledged in the *Smith* case which I discuss below.

Climate change cases relating to tort have recently culminated in Aotearoa in the *Smith v Fonterra* case. The case has failed on all alleged duties but is awaiting appeal in the Supreme Court.[185] The key issue in *Smith* was to determine the response of tort law to climate change.[186] Smith alleged that the activity of the respondents (a number of corporate emitters) contributes, and will continue to contribute, to dangerous anthropogenic interference with the climate and to the adverse effects of climate change.[187]

Smith further alleged that each respondent knew, or ought to reasonably have known, of the harmful impact of their emissions or enablement of other emissions.[188] The statement of claim plead three causes of action in tort: public nuisance, negligence and proposed new tort "breach of duty". The claimant sought declarations of contribution or breach of duties and injunctions to prevent further emissions.[189]

The defendants filed applications to have the claim stuck out on the grounds it lacked a reasonably arguable cause of action. They argued the matters were non-justiciable and their actions were lawful given the statutory and regulatory requirements.[190]

In the High court, the nuisance and negligence claims were struck out, but Wylie J declined to strike out the proposed new tort.[191] Smith appealed the decision relating to nuisance and negligence and the respondents cross-appealed the decision not to strike out the novel tort claim.[192]

The Court of Appeal held that to allow the stretching of tort claims to encompass the difficulties posed by a climate change case would be:[193]

> ... contrary to the common law tradition which is one of incremental development and not one of radical change, especially when that change would involve such a major departure from fundamental principles as to subvert doctrinal coherence.

185 *Smith v Fonterra*, above n 131.
186 *Smith v Fonterra*, above n 25, at [1].
187 At [4].
188 At [5].
189 At [6].
190 At [9].
191 *Smith v Fonterra*, above n 82.
192 *Smith v Fonterra*, above n 25, at [11].
193 At [15].

The judgment stated that no other recognised tort claim in Aotearoa has involved every person in the country (and arguably the world) as being both responsible for causing the harm and being a victim of that harm.[194] If such a claim were allowed, it would implicate all individuals and entities contributing to net emissions as having committed the tort, which would have sweeping social and economic consequences.[195]

Wylie J identified that, although Smith's claim identifies that emissions cause the harms of climate change, he failed to show that the harm he suffered was causally connected to the defendant's emissions.[196] Failure to prove this connection was a failure to satisfy the but-for-test of causation.[197] The judge also acknowledged the limitations on establishing that the proportion of damages pleaded were caused as a direct result of the defendant's contributions to GHGs.[198]

The applicant agreed that his claim was that net emissions should be stopped, not all emissions. Meaning that if the plaintiff's emissions were offset completely, the plaintiff could continue to emit. If this line of argument was allowed, the resulting tort would be like no other. Concluding an action to be tortious is to conclude that the action is unlawful. In this case, it would imply the actions were unlawful unless other actions offset the harm. An implication of this nature leads to the inference that the actions were lawful provided compliance with conditions. The finding of contingent lawfulness for certain actions, is outside of the scope of tort law.[199]

These statements clearly reflect and correlate with the criticism discussed above, and further elaborate on the doctrinal incompatibilities of common law duties in tort for climate issues in the context of Aotearoa. The case also discussed non-doctrinal issues that make it inappropriate and ineffective for the courts to allow the duty to stand.

The Court stated that the magnitude of the climate crisis cannot be addressed by common law tort claims and that the matter requires a regulatory response at the national level with international co-ordination.[200] Seeking private litigation against a small subset of emitters in order to enforce compliance with measures more stringent than those imposed by statute is costly and inefficient.[201]

Public nuisance requires unlawful actions or omissions (based on statutory, regulatory, or other common law obligations). The Judge held that the defendant's actions in here were within the law, and it could not be argued that their conduct

194 At [18].
195 At [19].
196 At [86].
197 At [84].
198 *Smith v Fonterra*, above n 25.
199 *Smith v Fonterra*, above n 82, at [21]–[24].
200 *Smith v Fonterra*, above n 25, at [16].
201 At [33].

was unlawful on the basis that they were a public nuisance.[202] Allowing a successful action in nuisance would be to state, contrary to legislation, that their conduct was unlawful. A finding that the defendant's behaviour was unlawful would therefore be imposing a parallel common law standard. Such an imposition would be undemocratic as it would amount to a circumvention of majoritarian decisions (manifested in the statuary obligations).[203] Courts are rarely willing to exercise their discretion to require defendants to go beyond legislative and regulatory requirements.[204]

The court stated that the judiciary do have a role in climate change governance to hold government to account and enforce their regulatory schemes. The judiciary's role is not to develop parallel common law regulation that is ineffective, inefficient, and likely to be socially unjust.[205]

The government is best positioned to protect citizens from climate change effects through regulation. Using the common law to impose alternative obligations on actors could undermine the coherence of parliament action.[206] The courts lack the expertise and ability to address the social, economic, and distributional implications of different regulatory design choices. Furthermore, the adversarial court processes in a common law country do not allow all affected parties to be heard. Regulatory schemes derived from common law avenues would therefore result in a lack of democratic participation and accountability.[207]

Litigating can result in a financial incentive to encourage governmental policies. Regulation can be achieved through litigation. However, regulation through litigation can result in a blurring of governmental responsibilities, by making litigation the primary tool for regulatory change rather than democratic executive law making. Policies stemming from litigation result in less public input and reduced accountability when compared with traditional policy making.[208]

Within the context of mitigating climate change, the primary issue is the underlying societal structure that allows the prioritisation of economic growth to the detriment of the environment, not individual companies acting within the bounds of that structure.[209] If the doctrinal strains of tort are overcome, tort will likely play a valuable role in facilitating reparations and restoration for civil

202 Bonython, above n 142, at 431.
203 Burgers, above n 71, at 70.
204 Wilensky, above n 88, at vi.
205 *Smith v Fonterra*, above n 25, at [35].
206 At [98].
207 At [26].
208 W Kip Viscusi *Regulation through Litigation* (Brookings Institution Press, Washington DC, 2002) at 1.
209 Gunderson and Fyock, above n 152.

wrongs caused by climate change effects,[210] but it is unlikely to be transformative for mitigation. Tort claims may move the climate mitigation cause along incrementally, by raising publicity and deterring climate harming behaviour. This movement may in turn aid in changing the societal framework that facilitates reliance on fossil fuels, but it would do so ineffectively and inefficiently.[211,212]

IV. A Public Law Approach: Problems and Possibilities

A. Is a Human Rights Approach Viable in Aotearoa?

The constitutional arrangements of Aotearoa create strong parliamentary sovereignty because there is an absence of constitutional safeguards to restrain executive power. Aotearoa has no written constitution, no judicial review of legislation, no entrenched Bill of Rights, no second chamber, and no federalism.[213] Parliament can to legislate contrary to basic human rights,[214] if they use clear and unambiguous words.[215] Although New Zealand courts can make *Hansen* declarations,[216] and there has been suggestion that formal declarations of inconsistency are available,[217] these declarations have no legal consequences. Declarations leave the decision whether to remediate an inconsistency to the political branches of government.[218] These declarations also do not trigger any "fast-track" amending processes, or appearances in a supranational court (these mechanisms are in place in the United Kingdom, one of the few other states without a written constitution).[219] The supremacy of parliament is further supported by the fact that

210 Andrew Gage "Think globally, sue locally: challenges and opportunities in international climate litigation in domestic courts" [2021] Research Handbook on Climate Change Law and Loss & Damage 369; and Sumudu Atapattu "Loss and damage, climate displacement and international law: addressing the protection gap" in *Research Handbook on Climate Change Law and Loss & Damage* (Edward Elgar Publishing, Cheltenham, 2021) 245.

211 Gunderson and Fyock, above n 152.

212 *Smith v Fonterra*, above n 25, at [35].

213 Bruce Harris "Judicial Activism and New Zealand's Appellate Courts" in Brice Dickson (ed) *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, Oxford (United Kingdom) 2007) 273 at 274.

214 New Zealand Bill of Rights Act 1990, s 4.

215 *R v Secretary of State for the Home Department, ex parte Simms* 2 AC 115 (HL) at 131.

216 *Hansen v R* [2007] 3 NZLR 1, (2007) 8 HRNZ 222.

217 *Taylor v Attorney-General* [2015] NZHC 1706, [2016] 3 NZLR 111.

218 At [133].

219 Philip Joseph "The Courts" in *Constitutional & Administrative Law in New Zealand* (Thomson Reuters New Zealand, Wellington, 2014) 787 at [21.2.5].

Aotearoa is a dualist state, meaning that international treaties and agreements are not directly enforceable unless incorporated into domestic law.[220]

The realities of Aotearoa's legal system place the potential climate litigant in a significantly different position to much of the rest of the world, where human rights provisioning and constitutional protections are much stronger and more readily enforceable in the courts. These differences in constitutional protection limits the applicability of overseas approaches to climate action that are gaining traction overseas, such as the "human rights turn" (discussed below).[221]

A significant amount of jurisprudence has developed around environmental human rights.[222] In the past, these cases have been confined to matters contained within the borders of a state.[223] These cases are based on the idea that states have a duty to protect human rights and should not jeopardise them when making decisions regarding development.[224]

It is difficult to apply such reasoning to climate change issues because environmental human rights jurisprudence is based on the premise that a singular polity will experience "both the benefits of the economic development and the environmental harm it engenders".[225] Therefore, that polity are responsible for striking the correct balance between the benefits and harms of their decisions.[226] Climate change is not easily rationalised into environmental human rights jurisprudence because the causes and consequences of climate change are global and transboundary.[227] However, states are still responsible for protecting those in their jurisdiction from the consequences of climate change.[228]

The link between human rights and climate change issues is relatively new and only acknowledged by the United Nations Human Rights Council in 2008.[229] There has been a recent increase in the arguments of climate cases that inadequate climate mitigation measures amount to a violation of international instruments (such as the International Convention on Civil and Political Rights (ICCPR) and the International Convention on Economic, Social and Cultural Rights (ICESR)) and constitutional

220 *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) 224.
221 Pooja Upadhyay "Climate claimants: The prospects of suing the New Zealand government for climate change inaction" [2019] NZJEL 187 at 197.
222 Dinah Shelton "Human Rights and the Environment" (2002) 32(3–4) EP&L 1.
223 John H Knox "Climate Change and Human Rights Law" 50 Va J Intl L 1 at 30.
224 At 21.
225 At 35.
226 At 6.
227 At 35.
228 At 59.
229 Jacqueline Peel and Hari M Osofsky "A Rights Turn in Climate Change Litigation?" (2018) 7 TEL 37 at 42.

rights (to life, health, food, water, liberty, family life, adequate standard of living, housing, property, self-determination and others).[230]

Recent cases have sought to establish that climate change impacts on an expanding number of international human rights.[231] Other cases seek to enforce climate action through constitutional and fundamental rights under domestic law.[232] Cases such as these have been used to challenge specific government policies.[233]

In monist jurisdictions, international treaties are directly enforceable in domestic law. In dualist jurisdictions, international instruments must be incorporated into statute to be enforceable domestically but "should inform executive action" regardless.[234] Furthermore, many constitutional and non-constitutional bills of rights incorporate the same rights as international instruments. These bills of rights may be directly enforceable in the courts, depending on their scope.[235]

Because human rights treaties do not explicitly recognise a right to a stable climate, early cases in the movement towards linking rights and climate sought to interpret explicitly recognised rights as extending to a right to a stable climate.[236] More recently, there has been a departure from this approach by cases attempting to gain recognition of a standalone right to a stable climate.[237]

Some decisions suggest human rights treaties contain an implicit specific right to a healthy environment that is independent from other rights but derived from them. The Inter-American Court of Human Rights considered the right to a healthy environment as "autonomous" and distinct from the environmental aspects of the rights to health, life, and personal integrity.[238] In *Friends of the Irish Environment,* the

230 "Global Climate Litigation: 2020 Status Review", above n 10, at 13–17; Organised by: EUPHA-LAW and others, above n 67; Setzer and Byrnes, above n 64; and Helen Winkelmann, Susan Glazebrook and Ellen France, above n 31, at [20–23].

231 Ben Doherty "Fearful of losing their homelands, islands are taking Australia to court over climate" (26 October 2021) The Guardian <www.theguardian.com>; and *The Environment and Human Rights (Advisory Opinion)* IACtHR OC-23/17 (2017); James Anaya *Rights Violations of Indigenous Peoples 'Deep, Systemic and Widespread'* UN Doc HR/5016 (22 April 2010).

232 *Urgenda Foundation v The Netherlands*, above n 6; *Future generations v Ministry for the Environment* 11001 22 03 000 2018 00319 00 (Supreme Court); *Juliana v United States* [2020] 947 F3d 1159; *ENvironment JEUnesse v Procureur General du Canada* [2021] QCCA 1871; *PSB v Brazil* ADPF 760 / DF; Hesu Lee Bloomberg "South Korean Teens Sue Government Over Climate Policy" (12 March 2020) Time <https://time.com>; "*Álvarez et al v Peru*" Climate Change Litigation <http://climatecasechart.com>; *Youth Verdict v Waratah Coa* [2020] QLC 33; "KlimaSeniorinnen v Switzerland (ECtHR)", above n 131; and "*Lho'imggin et al v Her Majesty the Queen*" Climate Change Litigation <http://climatecasechart.com>.

233 *Maria Khan v Federation of Pakistan*, No 8960 2019 HCJD/C-121; *Greenpeace v Austria* G 144-145/2020-13, V 332/2020-13; *Victoria Segovia v The Climate Change Commission* GR No 211010 (2017); and *Greenpeace Nordic Assn v Ministry of Petroleum and Energy (People v Arctic Oil)* HR-2020-2472-P, (case no 20-051052SIV-HRET).

234 Helen Winkelmann, Susan Glazebrook and Ellen France, above n 31, at [25].

235 At [26].

236 *Juliana v United States*, above n 233; and "Leghari v Federation of Pakistan" Climate Change Litigation <http://climatecasechart.com>.

237 Helen Winkelmann, Susan Glazebrook and Ellen France, above n 31.

238 *The Environment and Human Rights (Advisory Opinion)* IACtHR OC-23/17 (2017).

Court found that the right to a healthy environment was an essential condition for the fulfilment of all human rights.[239] These cases have led to the recognition that a changing climate can threaten several well-established basic rights.

Many nations have since guaranteed citizens constitutional rights to a healthy or clean environment, which has led to courts determining the implications and scope of these rights.[240] Human rights related decisions in climate change litigation are now considered to be part of a broader movement towards climate constitutionalism.[241]

Scholars point to this change in approach as being a distinct turn in climate change litigation, to the use of human rights as the basis for action, a "rights turn".[242] Just over 100 cases have been based on human rights arguments, but the frequency of the approach is growing.[243] Despite the small number of cases, and although over half have been decided unfavourably, human rights climate cases have had an exceptionally large impact on climate governance. Human rights cases have resulted in potentially game-changing judicial decisions,[244] and have had significant impacts outside of the courtroom that should not be discounted.[245]

Some scholars argue the favouring of pro-regulatory arguments in court goes against the will of the majority and is therefore democratically illegitimate.[246] Proponents of this perspective argue rulings in favour of climate claimants are against the decisions of the majority, because the decisions overruled by the courts are made by democratically elected bodies.[247]

However, judges are able to oppose majority decisions when fundamental rights are at stake, because these fundamental rights guarantee democracy. Therefore, the involvement of the courts is legitimate where cases are based on fundamental rights enshrined in their constitution.[248]

Burger argues that the right to a sound environment is a fundamental right, and therefore protection of it is required to guarantee democracy.[249] Burger's argument provides a plausible explanation for the legitimacy of relying on human rights arguments for climate cases in common law constitutional democracies. In a

239 *Friends of The Irish Environment CLG v Ireland*, above n 108, at [264].
240 David R Boyd "The Constitutional Right to a Healthy Environment" (2012) 54 Environment: Science and Policy for Sustainable Development 3.
241 Setzer and Higham, above n 25, at 33.
242 Peel and Osofsky, above n 230; Julie Fraser and Laura Henderson "The human rights turn in climate change litigation and responsibilities of legal professionals" (2022) 40 NQHR 3 at 6; and Setzer and Higham, above n 25, at 32.
243 Setzer and Higham, above n 92, at 7.
244 "Global Climate Litigation: 2020 Status Review", above n 10, at 41, 42 and 47.
245 Setzer and Higham, above n 25, at 32.
246 Burgers, above n 71, at 70.
247 At 70.
248 At 71.
249 At 60.

constitutional democracy, government power is restrained by a set of overarching rules that cannot be violated (such as fundamental rights).[250] However, Aotearoa is a parliamentary democracy, not a constitutional democracy.[251]

Although both systems recognise that the government is legitimised through the people, a constitutional democracy uses overarching enshrined principles to act as a restraint on unbridled executive power.[252] While parliamentary democracy acknowledges accountability to the people, it does not use the same checks and balances as a written constitution to restrain the government.[253] Therefore the argument that allows the infiltration of judicial action in climate cases cannot apply in quite the same way.

However, there may be an opportunity to bring human rights approaches to climate change litigation in Aotearoa under judicial review claims. There is a recognised cross over between judicial review and NZBORA.[254] This recognition could foster the incorporation of a rights turn in Aotearoa, in addition to providing an opportunity to consider instruments that are also commonly advanced in climate litigation (such as international agreements and treaties, legislation, and constitutional principles and instruments).[255]

In Australia, it has been held that the ratification of an international treaty creates a legitimate expectation of executive adherence with it.[256] This finding is fundamentally at odds with constitutional theory and the dualist approach to international and domestic law,[257] but may present application for the hopeful climate litigant.

Tavita v Minister of Immigration markedly revolutionised the use of international treaties relating to human rights in judicial review of immigration matters.[258] In *Tavita,* the courts ruled that the Minister could not ignore international human rights obligations in making decisions about a removal order. The judgment in *Tavita* was followed by government procedures to give effect to international obligations in immigration cases. After the *Tavita* case, further case law has reaffirmed the applicability of international human rights commitments in judicial review.[259] Decision makers must weigh international human rights obligations as part of

250 Carlson Anyangwe "Parliamentary Democracy and Constitutional Democracy" (1999) 31 Zam LJ 94 at 95.
251 S Levine "Parliamentary Democracy in New Zealand" (2004) 57 ParlAff 646.
252 Anyangwe, above n 251, at 99.
253 Anyangwe, above n 251.
254 *Taylor v Attorney-General*, above n 218.
255 Philip Joseph "Judicial Review" in *Constitutional & Administrative Law in New Zealand* (Thomson Reuters New Zealand, Wellington, 2014) 853 at [22.12].
256 *Minister for Immigration and Ethnic Affairs v Teoh* [1995] 183 CLR 273.
257 Philip Joseph, above n 256, at [22.12.2(1)].
258 *Tavita v Minister of Immigration* 2 NZLR 257 (CA).
259 Philip Joseph, above n 256, at [22.12.2].

exercising their statutory discretion. An argument such as the one in *Tavita*, applied to the international recognition of environmental rights, could foster a human rights approach to climate litigation in Aotearoa under the umbrella of judicial review.

Bouwer and Winkelmann and others argue that public law litigation against governments has the greatest potential to further governmental climate action. Public law litigation has a greater immediate ability to force regulatory action: "Aggressive and strategic administrative law challenges from both 'sides' have unarguably shaped US domestic regulation relating to the production and consumption of energy."[260] Litigation involving governments and statutory interpretation is perceived to offer the greatest potential for advancing government action on climate change. Private litigation may contribute to apportioning responsibility for harms, but it is fraught with doctrinal difficulties (as previously discussed).[261]

These conclusions, coupled with the discussion on tort law opportunities, indicate that a strategic public law administrative approach to climate change litigation in Aotearoa is the most likely approach to provide an avenue for the courts to compel greater government action on mitigation.

Despite the promise of public law action (and the widespread factors that can be considered under judicial review), as discussed in the conceptual framework, there are common legal issues across all climate change litigation approaches.

As with tort approaches, judicial review of climate issues can be disruptive to legal norms, particularly relating to the doctrine of the separation of powers. However, the focus of the disruption of judicial review is different to that in tort. Concerns about creating parallel regulatory frameworks, a major issue with tort approaches, can be overcome through focusing litigation arguments (which will be discussed in more detail below). In considering judicial review, the primary issue is whether adjudication by the courts is appropriate at all, given the nature of climate change and the role of the judiciary in governance.

Given the recent socio-political and legal evolutions regarding climate change and the context of Aotearoa's governance model, the legal issues associated with climate issues are most reconcilable in a public law action when claims are framed correctly. The reconcilability of legal issues, coupled with the benefits of a public law approach, offers a promising opportunity to use administrative law to compel governments to advance climate governance and mitigation.

260 Bouwer, above n 56, at 487.
261 Helen Winkelmann, Susan Glazebrook and Ellen France, above n 31, at [41].

B. Is Climate Change a Non-Justiciable Policy Issue?

Scholars commonly complain that the use of the courts in climate change issues risks undermining democratic norms,[262] and that climate change is ill-suited to judicial resolution.[263] From the outset of climate litigation and throughout its evolution, scholars have been concerned that judicial interference with climate change jeopardises the separation of powers because climate change has been considered a political issue.[264] However, the line where judicial lawmaking becomes democratically illegitimate is contestable.[265]

The separation of powers requires that each branch of government only act within its authority, granted by a constitution or other laws.[266] In the context of litigation, the doctrine of the separation of powers means that a court ought only to adjudicate on issues that they have a principled basis in law or equity to determine which party's claim should prevail, and where the harm caused has a remedy the courts have power to order.[267] In the context of judicial review, the doctrine of the separation of powers requires the consideration of whether it is appropriate for the courts to intervene, this is an aspect of justiciability.

Judges are lawmakers in their own right and make law through interpretation and application of the law in the delivery of their decisions.[268] They implement government policy, interpret climate legislation, and fill enforcement gaps.[269]

However, the courts typically defer to other branches of government over decisions regarding national interest, polycentric issues, macro-economic policy, the allocation of public resources, and the mediation of sectional interests and moral disagreements. This deference is in recognition of the constitutional and institutional limits of judicial review.[270] Whether it is appropriate to defer can be determined by "weighing up competing considerations on each side, and according appropriate weight to the judgment of the mandated decision-maker".[271] The Supreme Court has stated that courts should be reluctant to examine general government policies, priorities, and funding decisions.[272] Historically, courts have deferred on

262 Sara Valaguzza "Climate Change Litigation: Losing the Political Dimension of Sustainable Development" in Sara Valaguzza and Mark Alan Hughes (eds) *Interdisciplinary Approaches to Climate Change for Sustainable Growth* (Springer Nature, Cham, 2022) 333.
263 *Smith v Fonterra*, above n 25, at [26].
264 Kysar, above n 45.
265 Burgers, above n 71, at 60.
266 Philip A Joseph "Separation of Powers in New Zealand" (2018) 5 J Intl & Comp L 485.
267 "Global Climate Litigation: 2020 Status Review", above n 10, at 40.
268 Anthony Mason "The Judge as Law-maker" (1996) 3 JCULR 1.
269 Eskander, Fankhauser and Setzer, above n 11, at 45.
270 Philip Joseph, above n 256, at [22.5.1].
271 At [22.5.1].
272 *Couch v Attorney-General (No 2)* 3 NZLR 149, [2010] NZSC 27, at 161.

challenges to decisions made by democratically elected decision makers.[273] Judges also typically exercise restraint regarding considerations of national security and allocation of national resources.[274]

In the past, all climate-related concerns have been considered as highly political.[275] A significant aspect of the climate change debate, particularly in anglophone countries (Australia, Canada, the United States), is the perception that the appetite for climate action is divided along party-political lines. The perception of political division is characterised by the view that left-of-centre governments are more inclined to legislate to combat climate change and that the political right is associated with climate scepticism.[276] There is a corresponding perception that climate cases may be (or are) leading to judicial creativity that oversteps the boundaries of the separation of powers and is therefore conflicting with democratic norms, something that judges are wary of doing.[277] Some judges have used the risk of transgressing democratic norms as a reason to abstain from adjudicating on climate issues.[278]

However, the consensus and discussion around the polity of climate change is evolving, paving the way for greater public law judiciary intervention. The legal and socio-political understanding of which aspects of climate change are political is shifting.

Analysis by Eskander and others suggests the partisanship of climate change issues is much less pronounced than public debate suggests.[279] In the case of *Friends of The Irish Environment CLG v Ireland,* in the Supreme Court, it was held that the Government's emission plan fell well short of the level of specificity required by the Irish Climate Action and Carbon Development Act 2015. The Court in *Friends of the Irish Environment* rejected the Government's argument that, in making a ruling, the Court was overstepping into the policymaking role of government. The Court stated what once might be considered policy had become law through the enaction

273 *CREEDNZ Inc v Governor General* [1981] 2 NZLR 190 (CA) 181; *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1992] 1 NZLR 172 (CA) 545; *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) 397, at 413 and 414; *Shaw v Attorney-General (No 2)* [2003] NZAR 216 (HC) [95]; and *X v Refugee Status Appeals Authority* [2009] NZCA 488, [2010] 2 NZLR 73 at [275].

274 Philip Joseph, above n 256, at [22.5.1].

275 Barbara Pozzo "Climate Change Litigation in a Comparative Law Perspective" in Francesco Sindico and Makane Moïse Mbengue (eds) *Comparative Climate Change Litigation: Beyond the Usual Suspects* (Springer Nature, Cham, 2021) 593; Michael B Gerrard "Scale and focus of climate litigation outside of United States" (2015) 253(47) NYLJ 1; Keina Yoshida and Joana Setzer "The trends and challenges of climate change litigation and human rights" (2020) 2020 EHRLR 140 at 163; and Joana Setzer and Lisa C Vanhala "Climate change litigation: A review of research on courts and litigants in climate governance" (2019) 10 WIREs Climate Change 1 at 6.

276 Eskander, Fankhauser and Setzer, above n 11, at 62.

277 Katrina Fischer Kuh "The Legitimacy of Judicial Climate Engagement" (2019) 46 Ecology Law Quarterly 731; and Peel, Osofsky and Foerster, above n 173, at 824.

278 Burgers, above n 71, at 58.

279 Eskander, Fankhauser and Setzer, above n 11, at 65.

of the 2015 Act.[280] Therefore, the Court was within their jurisdiction by interpreting and enforcing the law. The approach in *Friends of the Irish Environment* could apply in Aotearoa, given the recent enactment of the Zero Carbon Act that enshrines commitments to emissions reduction in law.[281]

Judicial review is used for intervention "where a decision-maker misconstrues a statutory power, acts unreasonably, commits a procedural error, or encroaches on fundamental rights or values underpinning the rule of law".[282] The principal grounds of review are illegality, irrationality, and procedural unfairness/impropriety,[283] as identified in *Council of Civil Service Unions v Minister for the Civil Service.*[284] These grounds are non-exhaustive and non-mutually exclusive categories.[285] In the context of Aotearoa, the expansion of justiciability in judicial review regarding climate change issues demonstrates a change in judicial treatment of climate change issues.[286] For example, in *Thomson,* the Government argued that because the Paris Agreement was not incorporated into domestic law, the basis for compliance with its obligations was a political matter. The judge rejected this argument and held that the matter was justiciable.[287] Changes in judicial treatment indicates a legal transition around the nature of climate change as an issue.[288]

The shift in socio-political perceptions of climate change in Aotearoa is demonstrated by relative political consensus on the need for emission reduction budgets and climate action,[289] suggesting a shift in the treatment of climate change as an issue. This shift is possibly less pronounced than the judicial shift but relevant, nonetheless. Burger argues the political aspect of climate change is now only *how* to address climate change, not whether it should be addressed.[290]

A transformation in climate change litigation to target compliance rather than provoke action of any kind reflects this shift. In the past, climate litigation has focused on extending existing environmental laws to anthropogenic GHG emissions despite an absence of climate specific legislation. Litigation has stemmed in part, from institutional failures to deal with the issue.[291] Increasingly, a lack of specific

280 *Friends of The Irish Environment CLG v Ireland*, above n 108, at [9.1].
281 Climate Change Response (Zero Carbon) Amendment Act 2019.
282 Philip Joseph, above n 256, at [22.1].
283 At [22.1].
284 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1984] UKHL 9 at [410].
285 Philip Joseph, above n 256, at [22.11].
286 *Hauraki Coromandel Climate Action Incorporated v Thames-Coromandel District Council* [2020] NZHC 3228, [2021] 3 NZLR 280 at [51]; and *Thomson v Minster for Climate Change Issues*, above n 107.
287 *Thomson v Minster for Climate Change Issues*, above n 107, at [103].
288 Burgers, above n 71, at 68.
289 Anneke Smith "NZ's first three emissions budgets guaranteed with non-partisan support–minister" (12 May 2022) RNZ <www.rnz.co.nz>.
290 Burgers, above n 71, at 58 and 68; and Smith, above n 290.
291 Bouwer, above n 56, at 491.

climate laws and policies is no longer the case.[292] However, the changes in regulatory framework do not obviate the need for climate change litigation, they only alter the focus and arguments.[293]

More recently, there has been a shift of focus in climate cases to the adequacy or implementation of climate-specific policies and the achievement of appropriately ambitious targets.[294] This kind of litigation has a higher likelihood of success because it can be focused on specific details and can utilise legal standards to hold government accountable to.[295,296]

Given the change in regulatory framework, litigation can now be used for normative and compliance purposes and to maintain awareness of the 'ambition gap' represented by the yard stick of the Paris Agreement commitments. Elements of national policy, enacted to give effect to international commitments, can now be tested by litigation in domestic systems. In doing so, courts can exercise their role in holding governments to account, in the context of their domestic legal system, by ensuring commitments are given effect.[297]

It could also be seen as contrary to the separation of powers if a climate-related judicial review case targets the merits of a decision rather than the manner it was made. Past criticisms of the role of judicial review in Aotearoa's climate change litigation context have included that climate cases require the courts to adjudicate on the merits of decisions.[298]

Judicial review plays an important constitutional role in Aotearoa and has implications for the separation of powers, parliamentary supremacy, and judicial independence.[299] Judicial review is a mechanism that allows the process by which a government decision was made to be considered by the courts. This mechanism is not a form of appeal and is not considered to be permitted to review the merits of a decision.[300] There is long-standing consensus that review may only examine the manner in which the decision was made.[301] A court reviewing the merits of a decision,

292 Between 1990 and 1999 only 110 laws and policies were passed that addressed climate change. Between 2010 and 2019 this number grew to around 1,100 and by 2021, had expanded to include over 2,200 instruments worldwide with at least one policy or law in every country, see: Setzer and Higham, above n 25, at 20; and Eskander, Fankhauser and Setzer, above n 11, at 45.

293 Bouwer, above n 56, at 486.

294 Setzer and Higham, above n 25, at 22; *Friends of The Irish Environment CLG v Ireland*, above n 108; and Setzer and Higham, above n 92, at 21.

295 Eskander, Fankhauser and Setzer, above n 11, at 45.

296 Setzer and Higham, above n 25, at 21.

297 Bouwer, above n 56, at [2.2].

298 Charles Owen "Climate Change in New Zealand: Constitutional Limitations on Potential Government Liability" (LLB (Hons) Dissertation, University of Otago, 2016) at 36.

299 Philip Joseph, above n 256, at [22.1].

300 *Watson v Chief Executive of the Department of Corrections* [2016] NZAR 1049, [2016] NZHC 1996 at [28].

301 *R v Entry Clearance Office, ex parte Amin* [1983] 2 AC 818 (HL) 829; *R v Sloan* [1990] 1 NZLR 474 (HC) at 479; and *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385 (CA) at 427.

under the pretence of thwarting the exploitation of power, themselves will be guilty of exploitation by that action.[302] Judicial review is concerned with determining if a decision was reached "in accordance with the law, fair and reasonably", not evaluating the substantive value of the decision.[303]

The rationale behind prohibiting the review or merits, is to stop the courts from transgressing the separation of powers by overstepping into the policy making functions of the executive.[304] To import a new decision over one made, by extension, by parliament (through a delegated body, the decision maker being reviewed), could be argued as an attempt to trump a decision made by parliament, and would therefore be contrary to parliamentary supremacy.[305]

However, there is critique that the distinction of merits-based vs procedural-based review is inconsequential, and that the consideration of merits infiltrates all grounds of judicial review.[306] Joseph argues that the ground of unreasonableness focuses on the substantive outcome of a decision and is inherently merits-based, and argues there are degrees of intrusion on the statutory mandate and policy functions of decision makers.[307]

C. How Focusing Litigation Can Reconcile Legal Issues Associated with Judicial Review while Fulfilling the Judiciary's Role in Climate Governance

Judicial independence is an important feature of the doctrine of the separation of powers and a fundamental constitutional principle in Aotearoa. The judiciary must maintain actual and publicly perceived independence to maintain public confidence and legitimacy of the courts. If perceived to be advancing a particular view, and therefore overreaching their jurisdiction, the judiciary's credibility as impartial decision makers could be undermined.[308]

In order to maintain the legitimacy and stability of the courts and the development of the common law, climate change cannot be treated as exceptional or set apart from the rest of the legal system.[309] The danger of imposing requirements beyond statutory ones is that they run the heightened risk of being overturned in a higher court or undone by ministerial action.[310] For example, in New South Wales, the

302 Philip Joseph, above n 256, at [22.3.4].
303 At [22.3.3].
304 *Potaka-Dewes v Attorney-General* [2009] NZAR 248 (HC) at [41].
305 Philip Joseph, above n 256, at [22.3.4].
306 At [22.3.5].
307 At [22.3.5].
308 Harris, above n 214, at 277.
309 Fisher, Scotford and Barritt, above n 128, at 41.
310 Setzer and Byrnes, above n 64.

Environment Court imposed restrictions despite a lack of explicit emission limits. The restrictions were then overturned on appeal and other conditions suspended by the Australian Carbon Tax Enactment.[311]

The merits vs manner difficulty and the political aspects of climate change can be avoided by focusing climate change related judicial review on accountability and compliance, instead of focusing on the prescribed approach for reaching a decision or its merit.

The issue of climate change is no longer political, now only the way in which it is dealt with is. The courts can say, factually, using support from scientific evidence, that the Government is not doing enough to meet the climate goals they are obligated by their own commitments to adhere to. Such an assessment does not require an evaluation of the whether the Government's approach to emission reduction is right (the substantive and political part of the decision), or if the decision was good (its merit). It just looks at the decision made, and the process followed, and determines whether it is consistent with laws and policy on climate change and the duties and rights owed to New Zealanders. In doing so, judges will not be adjudicating on the merits of any political decision but only assessing whether decisions are reasonable and consistent with the law. Assessments such as this, are exactly in line with the purpose of judicial review (as discussed above, to provide accountability and ensure decisions are made in accordance with the law.

The road to mitigation and the choices to be made along the way (the *how)* are still highly political. What is considered the *right* way to achieve emission reduction way will vary greatly depending on differing priorities and perspectives. This sentiment is present in case law from several states.

In *Family Farmers v Germany*, the Court declined to make specific changes to Germany's Climate Protection Program on the grounds that the government had wide discretion in determining *how* to achieve emission goals. But it was agreed that the policy was subject to judicial review.[312]

Similar conclusions were reached in *Victoria Segovia v The Climate Change Commission* and *Urgenda*.[313] In *Urgenda,* it was held that the Court has jurisdiction to determine that the Government had failed to legislate, and that the Government's failure was a violation of duty, and that they must remedy the breach by achieving a

311 *Hunter Environment Lobby Inc v Minister for Planning (No 2)* [2012] NSWLEC 40; *Macquarie Generation v Hodgson* [2011] NSWCA 424; and Wilensky, above n 88, at viii.

312 *Family Farmers v Germany* VG 10 K 41218; and "*Family Farmers and Greenpeace Germany v Germany*" Climate Change Litigation <http://climatecasechart.com>.

313 *Victoria Segovia v The Climate Change Commission* GR No 211010 (2017) held that governments have discretion over how to implement executive orders, and courts cannot generally intervene with this.

certain climate goal. However, the Court could not adjudicate on *how* the Government would reach such a goal.[314]

The *how* is still off bounds for the judiciary, but the fact that action needs to be taken to address climate change is now law, and within their jurisdictional scope. In *Juliana,* the Court of Appeal overturned the finding that young people's constitutional rights were violated by policies that allow the production of GHGs at dangerous levels. The Court found that, despite the need for an adopted scheme to reduce GHGs, the courts lacked the power to "order, design, supervise or implement the requested remedial plan".[315]

The courts cannot dictate policy and their role is not to establish regulatory frameworks.[316] Nor is it for the courts to determine how mitigation should be achieved, but they can ensure policy is "rational and coherent, and consistent with scientific evidence, and that firm policy commitments are honoured".[317] Therefore, in states where climate commitments have been made law, as has occurred in Aotearoa, the door is now open for new challenges.

By using the courts to hold the Government to the commitments they have made to address climate change, the judiciary will be acting as a check on parliamentary supremacy. Taking this approach satisfies the need for top-down solutions as it compels the regulators (the Government) to act.

An administrative law approach to climate change litigation is not devoid of legally disruptive consequences and may be considered as verging on judicial creativity. However, judicial creativity of this nature is likely to be well received in Aotearoa due to the nature of the governance system. Furthermore, I argue the creativity required in a judicial review case is significantly reduced when compared with what would be needed to accommodate tort arguments.

Part of the role of the judiciary is to protect people where the executive strays from lawful province or encroaches on individual liberties,[318] and to protect minority interests that are vulnerable to the democratically elected majority.[319] The courts do so by identifying and publicising violations, acting as a 'fire alarm' to signal to the public to act.

The executive paradise created in Aotearoa strengthens the need for the courts to fulfil their role as a 'fire alarm' and check on the other branches of government. The heightened need for this role makes the approach of using judicial review where

314 *Urgenda Foundation v The Netherlands*, above n 68.
315 *Juliana v United States*, above n 233, at 1171.
316 *Environment Defence Society Inc v Auckland Regional Council* [2002] 11 NZRMA 492, (2002) 9 ELRNZ 1 [92], here the Court declined to require a gas fired power station to offset emissions, pointing to the administrative difficulties of the courts monitoring and enforcing such a condition.
317 Lord Carnwath "Environmental Law in a Global Society" [2015] JPEL 269 at 278.
318 Philip Joseph, above n 220, at [21.2.1].
319 Harris, above n 214, at 276.

democratic processes have failed more legitimate and more applicable than it would be in a state with other constitutional safeguards.[320]

Because the legislature is so disproportionately powerful in Aotearoa, it is arguable that judicial creativity under judicial review will be well received by the public when used as a restraint on executive power.[321] Some argue that decisions of the Court are no less, or possibly more, consistent with public opinion than those of the political branches.[322]

Tension between the principle of majority rule and the guarantee of justice and liberty are a "natural" and healthy aspect of a governmental system committed to the rule of law.[323] The use of the courts in reviewing decisions implicating climate change could be considered on the healthy side of tension between the branches of government, as long as it does not spill over into reviewing *how* the Government ought to achieve climate outcomes.

This sentiment is arguably recognised in Aotearoa in climate case law. In *Thomson,* it was held that the courts do have a role to play in climate governance and that role is to ensure that appropriate action is taken, while leaving policy choices and the content of action to the appropriate state body.[324] Mallon J stated that the importance of climate change warrants scrutiny of public power on top of the accountability achieved through parliament and general elections.[325]

The approach of pursuing accountability through judicial review could also sidestep much of the difficulty associated with establishing causation, because the approach is not harm attribution focused. For example, assessing whether the correct procedure has been followed in making a decision to approve a new coal mine does not require proof of a causative nexus between approval and harm or the attribution of specific emission contributions to specific harms suffered. An assessment such as this is not aimed at determining whether the action caused harm, it seeks only to ascertain whether the action was rational and consistent with what is required by law.

As I have discussed, one of the legal challenges in climate change litigation is whether remedies are available to meet the issue the plaintiff seeks to address. Relief granted under judicial review faces significant limitation. However, I

320 John Caldwell "Judicial Review: The Fading of Remedial Discretion?" (2009) 23 NZULR 489; and James Allan "The Rise of Judicial Activism in New Zealand" (1997) 4 A Journal of Policy Analysis and Reform 465.

321 Harris, above n 214, at 275.

322 Daryl J Levinson "Parchment and Politics: The Positive Puzzle of Constitutional Commitment" (2011) 124 HLR 657 at 739.

323 Lord Steyn "The Case for the Supreme Court" (2002) 113 LQR 382 at 388.

324 *Thomson v Minster for Climate Change Issues*, above n 107, at [133]; similar conclusions were drawn in *Smith v Fonterra*, above n 25, at [35].

325 At [133]–[134].

argue the broadness and flexibility of judicial review remedies, coupled with the socio-political influence judicial review cases can create, points to a potential for significant remedial opportunities for climate change issues.

Remedies under judicial review are wide reaching and flexible. Any judicial remedy in equity, common law, or statute is available in judicial review proceedings.[326] However, an order for the reconsideration of a decision, in light of the judgment and in accordance with the law, is the most common judicial review remedy.[327] Other frequently applied remedies in judicial review are: declarations (of illegality,[328] of inconsistency,[329] or to clarify the law[330]), certiorari,[331] (which often accompanies an order for reconsideration),[332] mandamus,[333] prohibition,[334] and, in some circumstances, the ordering of an injunction.[335,336] Flexibility is also illustrated by the fact that a claimant in judicial review is no longer required to specify the precise remedy they seek, only the nature of the remedy.[337]

However, this flexibility does not make judicial review the panacea of relief – generally, or in a climate change context. There are limitations to the application of these remedies that may call into question whether judicial review can provide relief to a climate change litigant.

326 *Aquaculture Corp v NZ Green Mussel Co Ltd* [1990] 3 NZLR 299 (CA) at 301; however, damages are not generally available see: *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2009] 2 NZLR 56, [2008] NZCA 423 at [61].

327 *Taylor v Chief Executive of the Department of Corrections* [2015] NZAR 1648, [2015] NZCA 477 at [108]; *Wilson v Commissioner of Police* [2012] NZHC 581 at [52]; and Philip A Joseph and J McHerron *The Laws of New Zealand: Administrative Law* (online ed, Lexis Nexis), s 192.

328 *Manga v Attorney General* [2000] 2 NZLR 65 (HC), stated that distinct violations of the law by decision makers must be clearly identified and declared to the public.

329 *Hansen v R* [2007] 3 NZLR 1, (2007) 8 HRNZ 222 at [8], stated that the courts can make declarations of inconsistency in respect of BORA breaches.

330 *O'Neill v Otago Area Health Board* CA167/92, 30 may 1994, at 7, declared the meaning of the statutory requirements for a license.

331 *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513 (CA), *certiorari* (or quashing), is the setting aside of a decision. In this case the council's decision to grant a billboard license was quashed.

332 *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2012] NZHC 177, [2013] 2 NZLR 397 at [15(d)], relief in judicial review normally involves setting aside the decision for reconsideration.

333 *Ng v Minister of Immigration* [1980] 2 NZLR 219 (HC) at 762, *mandamus* is a direction from the Court for a public body to carry out a duty.

334 *Fitzgerald v Commission of Inquiry into Marginal Lands Board* [1980] 3 NZLR 120 (HC) at 371, prohibition prevents an inferior court or public body from exercising a power outside of their jurisdiction.

335 *Greensill v Tainui Maori Trust Board* HC Hamilton M1/956, May 1995 1, at 9.

336 See also, Judicial Review Procedure Act 2016, ss 16–17.

337 Philip A Joseph and J McHerron *The Laws of New Zealand: Applications for Review Under the Judicial Review Procedure Act 2016* (online ed, Lexis Nexis), s 113.

The first limitation of judicial review as a mechanism for relief is that the granting of remedies is discretionary.[338] The discretionary nature of relief means that, even if a claim is successful, a judge may decline to grant a remedy. However, there is a strong presumption that appropriate remedies will be granted where an applicant is successful in their challenge.[339] The presumption renders the discretionary limitation of judicial review as largely inconsequential but worth noting, nonetheless.

The second limitation of judicial review remedies is that, if the Crown is the respondent, the courts do not have the have the power to direct an action, only to indicate that the Crown *should* do something.[340] Therefore, the granting of a remedy in judicial review does not guarantee substantive outcomes. In the case of a declaration, there is no binding force to require action to be taken, only a notification to the public that in exercising a public power or duty, a decision maker acted illegally, unreasonably, or in contravention of fundamental rights or constitutional principles.[341] Similarly, if the remedy ordered is reconsideration of the decision (in light of the judgment and the law), the decision maker could reconsider, following the correct process, and ultimately arrive at their original conclusion.[342,343]

Despite these significant limitations, there is scope for progress to be made in the advancement of a climate litigants' goals within the confines of the judiciary's role in climate governance. I have argued that it is not for the judiciary to create a pathway to net zero and that their role is to hold the government accountable to their commitments. Although remedies granted under judicial review may be non-binding, the role of imposing accountability will still be fulfilled in a climate related judicial review case. Accountability will be achieved by signalling to the public that decision makers are not adhering to their duties and commitments. To fulfil this role, the remedy required is not one that will directly result in emission reductions, but one that will compel the Government to achieve emission reductions from a whole systems approach. In this way, judicial review overcomes the remedies issue associated with climate change litigation.

338 *Wendco (NZ) Ltd v Auckland Council* [2015] NZCA 617 at [59]; and *Martin v Ryan* [1990] 2 NZLR 209 (HC) at 236; Unless there is actual bias, or it is an ultra vires case, see: Mathew Smith *The New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters (New Zealand), Wellington, 2016) at [74.1.3].

339 *Attorney General v Chapman* [2012] 1 NZLR 462, [2011] NZSC 110 at [1]; and *GXL Royalties Ltd v Minister of Energy* [2010] NZAR 518, [2010] BCL 440 at [67].

340 Morgan Watkins "Proceed with caution: Law reform, judicial review and the judicature modernisation bill" (2016) 47 VUWLR 149 at 169.

341 *Taylor v Attorney-General*, above 218, at [133].

342 *Mann v Attorney-general* [1994] NZAR 457 (HC) at [18], here the judge stated that a Minister may reach the same conclusion after reconsideration.

343 Remedies under judicial review are also limited by the fact that Parliament is supreme and can legislate to overrule any judgment. However, this limitation is not specific to judicial review.

Furthermore, as discussed in section II of this paper, cases can have instrumental effects outside of the Court process, even if they fail on their substantive claims. This effect has been demonstrably apparent in judicial review cases outside of the climate context and could readily apply in a climate context.[344] Although this effect cannot strictly be considered a *judicial* remedy, it could provide a significant benefit to bringing a climate case and therefore be rationalised as a remedy.

Additionally, the flexibility of judicial review remedies suggests an adaptability that may align well with the complex nature of climate change and its legally disruptive qualities. The flexible procedural provisions of the current judicial review legislation are intended to have liberal scope and to avoid technical issues that have plagued judicial review proceedings in the past.[345]

These conclusions further demonstrate that judicial review is well placed to accommodate the common legal challenges associated with climate change litigation and provides a viable opportunity for compelling the government to take greater climate action.

Imminent changes in New Zealand law have the potential to strengthen claims and create new litigious "hooks" for the prospective climate claimant using judicial review.

D. Possibilities for the Future Climate Litigant in Aotearoa: New Litigious "Hooks"

Amendments to the Resource Management Act will allow decision makers to consider climate change mitigation (the emission of GHGs) in plan-making and consenting processes.[346] The changes are scheduled to come into force in November 2022,[347] and may result in decision makers being able to consider downstream effects in consenting processes,[348] overruling *West Coast Buller Coal* and opening avenues for judicial challenge where emissions are ignored or improperly considered by decision makers.

The use of the public trust doctrine in the context of climate change litigation is gaining traction overseas and may receive judicial attention in Aotearoa soon.

344 For example, *CREEDNZ Inc v Governor General* [1981] 2 NZLR 190 (CA), despite the failure of the judicial review challenge, was instrumental in causing the demise of an aluminium smelter proposal, due to the level of profile and publicity the case generated; and, similarly, in *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) unsuccessful challenge of the failure to recognise same sex marriages created a pathway to Parliament's Civil Union Act.

345 Joseph and McHerron, above n 338, s 114.

346 Resource Management Amendment Act 2020.

347 Office of the Minister for the Environment *Resource Management Amendment Bill: Climate Change Commencement Dates and Making Technical COVID-19 Amendments Permanent* (21 May 2020).

348 Ministry for the Environment *Impact summary: Linking the Zero Carbon Act 2019 with the Resource Management Act 1991* (13 February 2020).

Cases brought under the public trust doctrine allege a fiduciary duty exists, owed to current and future citizens,[349] that requires the state to protect public trust property against damage or destruction.[350] These cases have used the conception of the atmosphere as a public trust property to seek relief from the government's failure to protect it, based on evidence of harm to health and enjoyment of life.[351] At their heart, public trust doctrine cases ask the courts to determine whether constitutional rights have been breached.[352] Only five cases outside of the United States have advanced public trust doctrine arguments.[353]

The application of the Public Trust Doctrine in Aotearoa has been limited by case law, the limited role of the judiciary, and the fact that the power of the sovereign is derived from status, not the people (the public trust doctrine is said to exist only where a sovereign derives power from the people).[354] However, the public trust doctrine can inform the exercise of statutory duties and may therefore, be incorporated into judicial review claims.[355]

The public trust doctrine arguments in *Juliana*[356] have been referred to as "relevant reasoning" to the claim in *Mataatua District Maori Council v New Zealand*. *Mataatua* alleges a breach of the crowns obligation to Māori by failing to implement policies to address climate change which they allege violates Te Tiriti O Waitangi.[357] *Mataatua* is yet to be decided, but is likely to offer insight into how the public trust doctrine will be treated by the New Zealand judiciary in the context of climate change.

Since 2014, a significant body of cases have been developing the fundamental rights of nature through the granting of legal personhood. Aotearoa has been a leader in the legal personhood movement and has granted Te Urewera and Te Awa Tupua with "all the rights, powers, duties and liabilities of a legal person".[358,359] Legal personhood cases do not always explicitly relate to climate change. However, the granting of legal personhood to a natural object could be rationalised as a basis

349 Mary C Wood "Atmospheric Trust Litigation Across the World" in Ken Coghill, Charles Samford and Tim Smith (eds) *Fiduciary Duty and the Atmospheric Trust* (Ashgate Publishing, Rochester (NY), 2012) 1.

350 Helen Winkelmann, Susan Glazebrook and Ellen France, above n 31, at [60].

351 Bouwer, above n 56, at 490.

352 *Juliana v United States*, above n 233, at [17].

353 Setzer and Higham, above n 25, at 43.

354 Upadhyay, above n 222, at 205–206.

355 At 207.

356 *Juliana v United States*, above n 233.

357 "*Mataatua District Maori Council v New Zealand* – New Zealand – Climate Change Laws of the World" https://climate-laws.org. Note that, after the Zero Carbon Act was passed, the claim was amended to state that the Act fails to adequately guard against climate change, alleging the targets are insufficient and unenforceable.

358 Te Urewera Act 2014, s 11.

359 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 14.

for climate change litigation because climate change very arguably jeopardises the recognised rights of these entities.[360] The implications of legal personhood remain largely untested[361] but could provide a new litigious climate "hook" in the future.

Other aspects of new policy and law that may add to a climate litigants arsenal include: the new emissions reduction plan and emission budgets,[362] the upcoming Natural and Built Environments Act that incorporates reference to preserving the environment for future generations in the Act's purpose,[363] and the 2021 Wellbeing Budget, that includes the priority of supporting a transition to a climate-resilient sustainable and low-emission economy while building back from covid-19.[364]

These commitments could be used to support the inference of a legitimate expectation that the Government will address climate change through mitigation. Legitimate expectation can be used as a basis for challenge in judicial review,[365] and has been discussed in the context of climate change in the case *Hauraki Coromandel Climate Change Action Inc.*

In *Hauraki,* Palmer J stated that decisions relating to climate change require higher levels of scrutiny. He also stated that instruments that are not formally binding (like climate emergency declarations), may still carry legal weight.[366] It is possible that new climate related policies will be treated in a similar manner.

A potential hook that is not foreseeably imminent, is the protection of a specific environmental right in Aotearoa. One hundred and forty-nine countries explicitly recognise the right to a healthy environment in their constitution,[367] but Aotearoa is not one of them. Academics that support the creation of a written constitution for Aotearoa also believe it should include a right to a healthy environment and environmental protections.[368] The inclusion of an environmental human right in Aotearoa could significantly strengthen a climate litigant's claim under judicial review due to the acknowledged crossover between NZBORA and judicial review. Although there is no foreseeable inclusion of such a right, the activist group, Lawyers

360 "Global Climate Litigation: 2020 Status Review", above n 10, at 17.

361 Helen Winkelmann, Susan Glazebrook and Ellen France, above n 31, at [132].

362 New Zealand's first emission reduction details how the Government will re-focus the economy to actively reduce emissions in order to achieve net-zero emissions by 2050. This re-focus will be achieved using a series of incentives or dis-incentives to change behaviours, see: Ministry for the Environment "Aotearoa New Zealand's first emissions reduction plan" (16 May 2022) <https://environment.govt.nz>.

363 Natural and Built Environments Bill 2021 (Exposure Draft), s 5(1)(b).

364 Sindall, Lo and Capon, above n 6, at 1752.

365 Philip A Joseph "Law of Legitimate Expectation in New Zealand" in *Legitimate Expectations in the Common Law World* (Hart Publishing, Oxford (United Kingdom), 2017) 189 at 191.

366 *Hauraki Coromandel Climate Action Inc*, above 287, at [26].

367 Catherine Iorns Magallanes "Using Human Rights Law to Protect New Zealand's Natural Environment" (paper presented to TEDx Talks, Tauranga, 30 October 2015).

368 Geoffrey Palmer, Andrew Butler and Scarlet Roberts *Towards democratic renewal: ideas for constitutional change in New Zealand* (Victoria University Press, Wellington, 2018), see art 26 of the proposed constitution.

for Climate Action New Zealand, have proposed an amendment to the NZBORA to recognise the right to a sustainable environment by delivering an open letter to the Minster for Climate Change Action.[369] The United Nations has, very recently, officially declared that a healthy environment is a human right and this will be highly relevant to any new human rights claims in a climate context.[370]

V. Conclusion

This paper has demonstrated that the Judiciary's role in Aotearoa is not to solve the issues of climate change nor to forge a path to net zero through court regulation. Their role is to provide an accountability mechanism to compel the Government to adhere to climate commitments. A largely unexplored avenue for actualising this role in Aotearoa, is the use of judicial review. Judicial review enables the incorporation of successful overseas approaches, the advancing of multiple grounds and is more resilient to the legally disruptive nature of climate change when compared with other avenues. Furthermore, there are a number of new policy and legislative instruments that have recently been enacted, are to be enacted, or could be enacted that may add to a future climate change litigants' arsenal under a judicial review claim.

There is no denying the fact that the issue of climate change is incredibly complex and multifaceted. This complexity is reflected by governments' continually unsatisfactory attempts to mitigate climate change and the legal difficulties that ensue when judicial remedies are sought. However, the magnitude and seriousness of the effects of climate change warrant continued attention and attempts to gain progress.

Climate litigation has been used extensively overseas. There is evidence that climate litigation is causing transformative change in climate governance and contributing significantly to the furtherance of better climate outcomes. Climate change litigation will not solve the problems of climate change alone, but it is an important tool, particularly in instances where democratic processes are failing. The potential of climate change litigation has been underutilised in Aotearoa.

Mitigation requires forward looking solutions. Tort largely deals with reparations. Applying tort to mitigation cases results in the courts acting as a regulator of emissions. The courts regulating emissions could lead to the development of judicial regulatory frameworks (parallel to those enacted by government), which is outside

369 "NZBORA and the Right to a Sustainable Environment" Lawyers for Climate Action NZ Inc <www.lawyersforclimateaction.nz>.

370 "In historic move, UN declares healthy environment a human right" (28 July 2022) UNEP <www.unep.org>.

of the judiciary's role and would be ineffective for achieving mitigation. It is not a productive strategy (for achieving climate mitigation) to target 'carbon majors' and blame them for behaviour that is legally and socially condoned and reinforced by individual behaviour and global reliance on fossil fuels. Instead, we need to effectively point the finger at our collective selves through our representatives, the Government, and indicate that it is time to approach things differently and alter the framework that condones 'carbon majors'.

The role of the courts in climate governance is evolving due to changes in law relating to climate change and socio-political shifts in the treatment of climate change as an issue. This shift in treatment means that, if focused on compliance, rather than approach, the courts can now be used to compel the other branches of government to honour mitigation commitments.

In this paper, I have considered issues surrounding the mitigation of climate change and placed climate change resilience and adaption to one side. However, as the effects of climate change are beginning to be felt widespread and in earnest, the role that adaption plays,[371] and where the burden is placed for achieving adaption is likely to become more highly litigated.[372]

In academic research and in this paper, there has been a bias towards "pro" climate regulation cases. The increasing relevance of a just transition is likely to see more anti-regulation cases,[373] of which, there has so far been a lack in tracking and analysis of.[374]

The same is true for a prevalence of analysis of cases brought in English-speaking countries and the Global North. So far, the bulk of tracked cases in climate change databases have been in the Global North and much academic research has focused on Global North cases.[375] As this research was high level, it relied heavily on previous work to identify trends and cases so reflects this bias. Acknowledgement of the contribution that Global South cases are making to climate litigation discourse is growing, but still requires more academic attention.[376]

Another bias in this research is the lack of analysis of "Invisible cases". Databases largely exclude cases that only incorporate climate change incidentally,[377] and much of academic literature focuses on high-profile cases.[378] Some scholars argue the poor

371 Setzer and Higham, above n 25, at 7.
372 At 5.
373 Setzer and Higham, above n 92, at 23; and United Nations Environment Programme *Climate Change and Human Rights* (United Nations Environment Programme (UNEP) and the Sabin Center for Climate Change Law, 2015) at 19.
374 Setzer and Higham, above n 25, at 15.
375 At 5; Eskander, Fankhauser and Setzer, above n 11, at 53.
376 Setzer and Higham, above n 92, at 31.
377 Setzer and Higham, above n 25, at 16.
378 Wonneberger and Vliegenthart, above n 69.

representation of peripheral cases may be resulting in a gap of understanding in how they are advancing climate change jurisprudence.[379]

The judicial branch of the Government and litigation play an important role in climate governance. Ongoing evaluation of this role in mitigation and other aspects of climate action will be valuable for informing future climate action and the protection of the environment for those here now, and those to come.

379 Bouwer, above n 56; Setzer and Higham, above n 25, at 16; and Eskander, Fankhauser and Setzer, above n 11, at 50.

BOOK REVIEW:

Review of Elisabeth McDonald's, Prosecuting Intimate Partner Rape: The Impact of Misconceptions on Complainant Experience and Trial Process

(Canterbury University Press, 2023)

Reviewed by Scott Optican*

In my 2020 review of Professor Elisabeth McDonald's *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* [*Rape Myths*],[1] I noted that the author "has long been New Zealand's premiere researcher in – and advocate for – the reform of criminal trial processes involving adult victims of sexual violence".[2] McDonald followed that book with *In the Absence of a Jury: examining judge alone rape trials* [*Judge Alone Rape Trials*][3] – which I described in a 2022 review as "an important and timely follow-up" to the earlier and pivotal examination of jury-based rape cases.[4]

It is now my privilege to write this final review of *Prosecuting Intimate Partner Rape: The impact of misconceptions on complainant experience and trial process* [*Prosecuting*

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1 Elisabeth McDonald *Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) [*Rape Myths*]. A digital edition of the book is freely available from the University of Canterbury Research Repository and can be accessed at <www.canterbury.ac.nz>.

2 Scott Optican "Book Review: Review of *Elisabeth McDonald, Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, 2020)" (2020) 26 Canta LR 229 at 229.

3 Elisabeth McDonald *In the Absence of a Jury: Examining judge alone rape trials* (Canterbury University Press, Christchurch, 2023) [*Judge Alone Rape Trials*]. A digital edition of the book is freely available from the University of Canterbury Research Repository and can be accessed at <www.canterbury.ac.nz>.

4 Scott Optican "Book Review: Review of *Elisabeth McDonald, In the Absence of a Jury: Examining Judge Alone Rape Trials* (Canterbury University Press, 2022)" (2022) 29 Canta LR 193 at 193.

Intimate Partner Rape][5] – the third and last volume of McDonald's ground-breaking, decade-long study which, like its predecessors, describes "what can be observed when the door to the courtroom is metaphorically opened to researchers during adult rape trials".[6] Indeed, as I noted in my review of *Rape Myths*:[7]

> "... the true power and uniqueness of [McDonald's research] stems from the distinctive method of analysis employed. McDonald and her team were able to access the actual audio files of the rape trials investigated. This gives [the three books] a unique insight, not only into the language used and narratives employed during the questioning of complainants by counsel, but also into the moments at which such questioning caused the most distress, upset and heightened emotionality for rape victims on the witness stand".

The *Rape Myths* and *Judge Alone Rape Trials* books focussed on adult rape victims as a more general class of sexual violence complainants caught up in criminal proceedings. However, *Prosecuting Intimate Partner Rape* keys on a more specific subset of female targets of sexual violence: intimate partner rape victims (that is, persons who have suffered sexual violence within the context of an existing intimate partner relationship). The work not only examines intimate partner rape cases on their own terms but compares the jury trials researched to the ones studied in the first *Rape Myths* volume (where the complainant and the defendant were not joined in an intimate partner relationship). It likewise compares the intimate partner rape proceedings conducted before a jury and judge alone – and compares those intimate partner judge alone rape cases to the ones examined in the second *Judge Alone Rape Trials* book.

5 Elisabeth McDonald *Prosecuting Intimate Partner Rape: The impact of misconceptions on complainant experience and trial process* (Canterbury University Press, Christchurch, 2023) [*Prosecuting Intimate Partner Rape*]. A digital edition of the book is freely available from the University of Canterbury Research Repository and can be accessed at <www.canterbury.ac.nz>. As with the earlier *Rape Myths* and *Judge Alone Rape Trials* books, support for McDonald's latest work was provided by the Marsden Fund, the New Zealand Law Foundation and the University of Canterbury School of Law. AUT law lecturer Paulette Benton-Greig, together with researchers Sandra Dickson and Rachel Souness, contributed to the case analyses on which the book is based. Professor Heather Douglass AM, University of Melbourne is singled out for being the primary peer reviewer of the manuscript. McDonald also acknowledges numerous members of the judiciary (particularly the heads of various courts), Ministry of Justice employees and others who assisted her by giving access to needed case file materials and generously providing their time and expertise.

6 At XII.

7 Optican, above n 2, at 231.

As McDonald herself describes it, this third act of her seminal scholarship centres on:[8]

> … a relatively under-researched aspect of trial process – the impact on adult complainants when intersecting misconceptions about rape and family violence are deployed in order to challenge their evidence, in particular their credibility.

The focus on such misconceptions ties the book to its predecessors, as does the fact that *Prosecuting Intimate Partner Rape* examines both judge alone and jury rape trials. Consistent with *Rape Myths* and *Judge Alone Rape Trials*, *Prosecuting Intimate Partner Rape* also makes numerous proposals for legal reform. These are aimed at rationalising court processes, evidence rulings and the questioning of complainants in intimate partner sexual violence cases – "all with the goal of eliminating the distress experienced in court by many adult victims of sexual crimes".[9]

However, while connected in many important and (sadly) predictable ways to McDonald's previous research, *Prosecuting Intimate Partner Rape* reaches its own distinct conclusions about the basic failure of the criminal justice system to properly conceptualise sexual offending committed by and against an intimate partner. Citing studies that characterises sexual violence "not merely as an *incident of violence* in the *context* of an intimate relationship, but rather as a *course of conduct* perpetrated in the *context* of an intimate relationship",[10] McDonald summarises the book's basic insights as follows:[11]

> The understanding that family violence is a "course of conduct" should influence the way that the criminal justice system responds to intimate partner sexual violence. However, this research suggests that rather than treating sexual violence as part of a pattern of coercive control within an intimate relationship, the current trial process appears to overlook the significance of the context in which such rapes occur. The consequence of this approach to prosecuting intimate partner rape means that this offending is presented as an incident occurring during the relationship, as opposed to presenting it as one part of a course of conduct.

8 McDonald, *Prosecuting Intimate Partner Rape*, above n 5, at XII.

9 Optican, above n 4, at 194.

10 McDonald, *Prosecuting Intimate Partner Rape*, above n 5, at 443, citing Victor Tadros "The Distinctiveness of Domestic Abuse: A Freedom-Based Account" in RA Duff and Stuart P Green (eds) *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford University Press, Oxford, 2005) 119 at 126 (emphasis added).

11 At 443.

> … The inquiry into consent or belief in consent is, therefore, separated from the wider dynamic and context, and the failure to complain about the rape at the same time is used to challenge the complainant's credibility. Further, the impact on the complainant of the totality of offending is ignored when assessing her need for support at trial or her ability to fully report the details of what occurred, sometimes over many years.

The influence of overlapping myths attending rape and family violence – combined with a fundamental misunderstanding of the nature of intimate partner sexual offending within the context of coercive control – leads to a great number of the criminal justice process misfires catalogued by McDonald in *Prosecuting Intimate Partner Rape*.

For example, take several of the pernicious and deep-seated untruths about female victims intersecting in cases involving both rape and family violence. These falsehoods manifest themselves in queries such as: (a) why didn't she leave (the 'exit myth'); (b) why didn't she immediately tell someone or call the police (the 'hue and cry myth'); and (c) why did she continue to have contact with the defendant after the alleged rape (the 'on-going contact myth')? Modern social science research has clearly debunked the notion that 'real' victims of sexual and interpersonal violence: (a) immediately complain of rape;[12] (b) are practically and psychologically able to leave an abusive relationship;[13] and (c) find it feasible to cut-off immediately all contact with their abuser.[14] Nonetheless, to one extent or another, all these fallacious narratives featured in the defence questioning of complainants in the intimate partner rape trials studied – much of it not challenged or reacted to, in both the jury and judge alone proceedings, by either prosecuting counsel or the court.[15] The result, as McDonald observes, was to: (a) permit evidence of questionable relevance in the cases that failed to comprehend the lived experience of intimate partner rape victims; (b) skew a jury's ability to reason properly regarding the issues of credibility and consent; and (c) create significant personal and emotional stress for the complainant involved. Indeed, as the author sums up:[16]

> The analysis of the questioning, primarily that focussed on challenges to complainant credibility, in the intimate partner

12 McDonald, *Rape Myths*, above n 1, at 219.
13 McDonald, *Prosecuting Intimate Partner Rape*, above n 5, at 291.
14 At 287–291.
15 At 309, 414.
16 At 323–324.

> rape cases, demonstrates that a range of misconceptions are relied on, and contribute to the difficulties faced by complainants in such cases. Regular challenges to inconsistencies and gaps in the complainants' evidence occurred in both [the adult rape and intimate partner studies], but caused higher levels of emotional reaction in the intimate partner rape cases. …
>
> The dynamic of sex being coerced through the use of psychological abuse was not explored in most of the intimate partner rape trials, although evidence of coercion by the defendant was certainly provided by many of the complainants. In such cases this seemingly amounted to either reluctant consent or providing the defendant with reasonable grounds to believe that she was consenting – meaning that the impact of a pattern of coercive control was not effectively presented to the jury and the defendant was acquitted. …
>
> Reliance on myths and misconceptions about sexual and family violence also caused episodes of heightened emotionality during cross-examination, as in the adult rape study, but different assumptions formed the basis of some lines of questioning while others were rarely invoked. For example, there was little challenge to the complainant's lack of making a "hue and cry" or not resisting more forcefully as a consequence of the factual context of most cases, which did involve an immediate response and physical resistance. The misconceptions that featured more often in the intimate partner rape cases were the fact of on-going contact with the defendant, the failure to leave (the "exit" myth) and the complainants' inability to immediately name the harm as rape or sexual abuse. None of these challenges was exposed through expert evidence or jury directions as having limited forensic value.

Compounding the difficulties above, McDonald flags the generalised lack of effective "expert evidence" or "counter-intuitive directions" to help judges and jurors understand the context in which intimate partner rape takes place,[17] coupled with the parallel failure of prosecutors to "make more effective use of evidence of

17 At 291.

a context of psychological abuse when developing arguments for the lack of freely given consent".[18] As previously mentioned, a similar failure is noted in the:[19]

> ... low levels of judicial intervention and prosecutorial objection in the intimate partner rape trials, despite the annotated Notes of Evidence exposing many points at the trials at which the questioning was unfair, repetitive and needlessly distressing for the complainant – including multiple examples of questions asked in a mocking and belittling manner and tone

Owing to such shortcomings and others described in the research, McDonald paints a picture of a highly unsatisfactory mix of adversarial processes that, whether applied within the framework of judge-alone or jury trials, do little to protect intimate partner rape victims while testifying or to foster any type of "improved experience" for complainants in court (in fact, they promote just the opposite).[20] Nor do such practices serve the value of rational adjudication in sexual violence cases – no matter the decision-maker. Indeed, while conviction rates in the judge alone intimate partner rape proceedings were somewhat higher than for those conducted with juries – a result consistent with the findings in the *Judge Alone Rape Trials* book – McDonald suggests that the perceived differences in both studies were not "statistically significant",[21] and could be "attributable to several factors other than the mode of trial".[22] Of course, the goal of McDonald's research has always been to understand and improve the experience of adult rape complainants in court, rather than to increase the number of convictions for rape.[23] Nonetheless, as has been well documented, overall reporting and conviction rates for sexual violation cases remain stubbornly low.[24] In the intimate partner rape proceedings examined here, a defendant's modest prospect of conviction undoubtedly reflects the impact on such proceedings of overlapping misconceptions/myths attending family violence and sexual violation crimes.

Consistent with the deleterious effects of trial questioning on intimate partner rape complainants – and like the findings of the *Rape Myths* and *Judge Alone Rape Trials* studies – McDonald demonstrates how other aspects of "personal and trial management practice, within the law and the adversarial trial process as it

18 At 323.
19 At 324.
20 At 442.
21 At 442.
22 At 67.
23 McDonald, *Rape Myths*, above n 1, at 5.
24 At 419.

currently [stands]", contribute to the negative and/or re-traumatising experiences of intimate partner rape victims who testify in court.[25] Interestingly, none of the deficits identified by McDonald were abated by the mode of trial – the author concluding (consistent with her findings in the *Judge Alone Rape Trials* book) "that merely changing the fact-finder does not result in an improved experience for the complainant".[26] Indeed, on many measures of assessment relevant to complainant experience, the research suggests that intimate partner rape victims were "worse off" in judge alone proceedings than in jury trials.[27] McDonald does acknowledge that "good practice in care and assistance to complainants while they give their evidence exists and is developing",[28] some as simple as the judge being sure to thank the complainant for showing up and participating in the case.[29] Nonetheless, *Prosecuting Intimate Partner Rape* concludes:[30]

> Many women who are victims/survivors of family violence are living with the effects of head injuries, addictions and socio-economic disadvantage and yet are often held to account for their role in the offending in ways that overlook their vulnerabilities … In the 20 intimate partner rape cases in this research, … it was apparent that all of the complainants experienced the impacts of these intersecting vulnerabilities and/or social and cultural isolation. However, there are very few trial process responses currently in place which were implemented in order to address their particular situation and subjectivity.

With respect to intimate partner rape complainants, specific trial management problems identified by McDonald include: (a) the underutilisation of communication assistance during court proceedings (as provided for in s 80 of the Evidence Act 2006);[31] (b) a lack of "pre-trial assessment, support and preparation" for giving evidence;[32] (c) unfamiliarity with "the terminology used in court to describe the offending";[33] (d) a lack of personal acknowledgement of – or interpersonal communication/interaction

25 McDonald, *Prosecuting Intimate Partner Rape*, above n 5, at 127.
26 At 442.
27 At 442.
28 At 129.
29 At 75–76.
30 At 443 (citations omitted).
31 At 444.
32 At 444.
33 At 444.

with – judges and prosecutors;[34] (e) unnecessarily long waits for trial, frequent court postponements, excessive waits to give evidence on the day and having to give evidence over multiple days;[35] and (f) judges failing to remind complainants (either before or during trial) that they can "ask for a question to be re-asked or re-worded, or to ask to take a break".[36] In the intimate partner rape cases studied, complainants also seemed "to be unprepared for viewing exhibits, reading out text messages or extracts from their diaries, and navigating documents".[37] Finally, and perhaps most strikingly, McDonald notes one prosecution in which "the complainant became extremely distraught and talked of many of *the distressing aspects of giving evidence* that have been *highlighted* by *decades of research*".[38] This is *precisely* the kind of empirical observation that, when it comes to the treatment/experience of testifying rape victims in court, makes us realise how much reform to criminal trial processes still needs to take place.

So, how should we progress matters from here? *Prosecuting Intimate Partner Rape* handily determines that "more could, and should, be done – especially for complainants with multiple and intersecting vulnerabilities".[39] Indeed, one of the great strengths of McDonald's research has been to put forward granular and practical recommendations for change. As occurred in the concluding chapters of the *Rape Myths* and *Judge Alone Rape Trials* book, this volume sets out specific suggestions to improve the courtroom experience of intimate partner rape complainants and create better decision making in intimate partner rape trials. These reform proposals include:

(a) "judges … adopting personal interaction with very vulnerable complainants early in the process of them giving evidence (if not prior) at trial";[40]

(b) explaining trial processes to complainants, including the role of counsel, coupled with "[p]olite, respectful and professional introductions (and interaction)";[41]

34 At 445–446. See also ch 3.
35 At 122–127.
36 At 445.
37 At 444 (citation omitted).
38 At 445 (emphasis added).
39 At 129.
40 At 445.
41 At 445.

(c) "proper pre-trial preparation" of complainants, joined with the "provision of appropriate support during the trial process" and "regular inquiry" into the potential benefits of providing communication assistance while testifying;[42]

(d) "more considered, informed and effective pre-trial processes and case management, as well as more judicial control of questioning at trial";[43]

(e) more "robust pre-trial case management" specifically designed to identify any support needed by the complainant and to weed out "potentially irrelevant and distressing evidence" under various provisions of the Evidence Act 2006;[44]

(f) providing for greater reliance – pursuant to s 9 of the Evidence Act – on agreed upon statements of fact "to ameliorate the impact on the complainant" of having to give distressing evidence at trial;[45] and

(g) responding to jury misconceptions about intimate partner rape cases through "expert counterintuitive evidence" and judicial directions designed "to assist jurors to understand the dynamics of family violence, as established by social science research".[46]

On this last point, McDonald notes that, in its 2019 review of the Evidence Act, the Law Commission specifically recommended that the Act be amended "to provide an express power to give a judicial direction to address any misconceptions jurors may have about sexual or family violence."[47] As regards sexual abuse cases, that advice was implemented by the Sexual Violence Legislation Act 2021, which added s 126A to the Evidence Act ("Judicial directions about misconceptions arising in sexual cases") in December 2022. However, with respect "to directions to respond to misconceptions in cases involving allegations of family violence, the Government is

42 At 445–447.

43 At 447.

44 At 448. In this regard, McDonald likewise observes: "Crown counsel also need to be better prepared to respond to admissibility arguments both prior to and at trial, and to understand and try to avoid the negative impact on the complainant of offering such evidence. Education on the dynamics of family violence and the particular ways in which sexual abuse occurs in such a context is also recommended (for counsel and the judiciary)" (at 451).

45 At 451.

46 At 453.

47 At 242 (citing New Zealand Law Commission *The Second Review of the Evidence Act 2006: Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at Executive Summary).

still considering whether to implement [the Law Commission's] recommendation".[48] Helpfully, in Chapter 9, *Prosecuting Intimate Partner Rape* provides a good model for such jury directions – codified in s 39F of the Evidence Act 1906 (Western Australia).[49] Moreover, when it come to the jury's assessment of a complainant's consent and credibility in an intimate partner rape trial, McDonald concludes:[50]

> [The] research [in this book] establishes a clear and pressing need for the provision of evidence or information (in the form of a section 9 [Evidence Act] statement or judicial direction) about the impact of social entrapment and coercive control.

Along these lines, and as referenced above, *Prosecuting Intimate Partner Rape* recommends finally that prosecutors in intimate partner rape trials "make more effective use of evidence of a context of psychological abuse when developing arguments for the lack of freely given consent".[51] Likewise, McDonald concludes by observing that, in both judge alone and jury trial proceedings generally:[52]

> Employing trauma-responsive practices and procedures, a number of which are currently possible in Aotearoa New Zealand, would be of special significance to the highly vulnerable complainants in intimate partner rape trials.

In my 2020 review of McDonald's *Rape Myths* book, I observed:[53]

> In a fraught and controversial area of study, this singular book is a capstone to McDonald's long research career in the areas of sexual and family violence, evidence and criminal justice processes.

48 At 242 (citing *Government Response to the Law Commission Report: The Second Review of the Evidence Act 2006 – Te Arotake i te Evidence Act 2006* at 9). However, as McDonald notes: [D]espite the lack of any legislative reform, and in the absence of expert evidence being offered, … judges have been directing juries, or themselves in judge-alone trials, regarding assumptions and misconceptions in cases involving sexual and family violence" (at 242–243). See, for example, *Williams v R* [2021] NZCA 335; *Keats v R* [2021] NZHC 3155.

49 At 453–455.

50 At 455.

51 At 456.

52 At 456.

53 Optican, above n 2, at 234.

Likewise, in my 2022 review of the *Judge Alone Rape Trials* book, I noted that both volumes were "an essential read for any judge, lawyer, law student, legislator, academic or policymaker interested in fair trial processes for rape victims".[54] Previewing the upcoming publication of *Prosecuting Intimate Partner Rape*, I also forecast:[55]

> If her past work is any guide, this final volume will ensure that McDonald's three-book series … will take its rightful place as one of the most significant pieces of New Zealand legal scholarship ever penned.

As should be clear from this review, my prognostication has unquestionably come true. Like its predecessors, *Prosecuting Intimate Partner Rape* is a book whose "depth of scholarship … is matched only by the moral clarity of [its] vision for reform".[56] While owing a good deal to McDonald's first two studies, the research clarifies the particular context of intersecting sexual and family violence in which intimate partner rape takes place. Indeed, by conceptualising the experiences of intimate partner rape complainants within the dynamic of coercive control, *Prosecuting Intimate Partner Rape* elaborates the particular needs of such persons in the face of trial processes, together with the particular challenges posed for trial processes in responding to those needs. McDonald seems to believe that real and required changes can take place – and that current practices can be reformed to improve the experience of all rape complainants giving evidence in court. Nonetheless, *Prosecuting Intimate Partner Rape* ends with some reflective and sobering counsel:[57]

> These three rape trial research projects were aimed at demonstrating why complainants report significant negative impacts from participating in the criminal justice system, particularly the questioning process at trial. The recommendations made in *Rape Myths as Barriers to Fair Trial Process* presumed no change to the existing adversarial trial model.... The concluding suggestion made in the second book, *In the Absence of a Jury*, was for a re-examination of the New Zealand Law Commission's proposed alternatives to the existing trial model....

54 Optican, above n 4, at 202 (citing Optican, above n 2, at 233).
55 At 201–202.
56 Optican, above n 2, at 234.
57 McDonald, *Prosecuting Intimate Partner Rape*, above n 5, at 457–458 (emphasis in original).

> In this final book, *Prosecuting Intimate Partner Rape*, the inexorable conclusion must be, as elsewhere, that the law and legal processes cannot of themselves prevent harm occurring in our communities. However, the law and legal processes should not, and must not, exacerbate that harm. Opening the courtroom door has provided our communities with knowledge about when harm *is* exacerbated. It is hoped that this knowledge provides a further reason to creatively, and with shared concern and empathy, contemplate and deliver real change which will mean such harm does not occur behind the courtroom door.

Time will tell whether the real, creative and empathetic change contemplated by these three books eventuates in the criminal justice system. Likewise, McDonald is undoubtedly correct that much of the real work of minimising sexual and family violence must take place in our wider communities and social groups. Nonetheless, we are deeply indebted to the author – and to her fellow researchers, funders, supporters and helpers – for opening New Zealand's courtroom doors with these pioneering pieces of research. Moreover, I am sure we can all agree, as noted in my review of McDonald's first *Rape Myths* book, that these outstanding works remind us:[58]

> ... first and foremost of our obligations towards adult rape victims testifying in court – that women courageous and trusting enough to tell their stories deserve all the backing available from just and fair processes of law.

58 Optican, above n 2, at 234.